

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 June 2011

CASE NO.: 2009-AIR-00022

In the Matter of:

ROGER BENNINGER,
Complainant,

vs.

FLIGHT SAFETY INTERNATIONAL,
Respondent.

Appearances: James A. Fein, Esquire
For the Complainant

Paul E. Hash, Esquire
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This case arises out of a retaliation complaint filed by Roger Benninger (“Complainant”), who alleges that his former employer, Flight Safety International (“Respondent” or “Flight Safety”), violated the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), 49 U.S.C. § 42121, by terminating his employment in retaliation for complaints he made to management concerning violations of pilot training regulations. It was initiated with the Office of Administrative Law Judges (“OALJ”) on July 9, 2009, when the Complainant submitted timely objections to the Occupational Safety and Health Administration’s (“OSHA”) dismissal of his complaint.

For the reasons set forth below, the Complainant’s claim under AIR 21 is DENIED.

PROCEDURAL BACKGROUND

The Complainant filed his initial complaint with OSHA on February 1, 2008, alleging retaliatory discharge and disparate treatment after engaging in protected activity. (ALJX 1.) On June 19, 2009, OSHA completed its investigation and the Secretary of Labor, through her agent the Regional Administrator of OSHA, issued findings dismissing the complaint on the basis that the Complainant’s protected activity was not a contributing factor in his termination. (ALJX 1,

pp. 5-6.) On July 9, 2009, the Complainant timely appealed the Secretary's findings, requesting a hearing before an administrative law judge. (ALJX 2.) On July 30, 2009, the matter was set for hearing, to commence November 16, 2009.

On November 6, 2009, I conducted a pre-hearing conference call during which the parties agreed to a series of issues and stipulations in this case (set forth below).

The hearing took place over four days, from November 16 through 18, 2009, and concluding on December 1, 2009, in Tucson, Arizona. The Complainant, his counsel, counsel for the Respondent, and Randy Lewis and Charles Milhiser — the Center Manager and Assistant Center Manager, respectively, of the Respondent's Tucson, Arizona training center, acting as corporate representatives for the Respondent — all appeared and participated at the hearing, and all parties were afforded a full opportunity to present testimony and offer documentary evidence. At the initiation of the hearing I admitted into the record Complainant's Exhibits ("CX") 1 through 53 and 60 through 64;¹ Respondent's Exhibits ("RX") A through Z, AA through FF;² and ALJ Exhibits ("ALJX") 1 and 2. During the remainder of the hearing, I admitted Complainant's additional Exhibits 65 through 71, and Respondent's Exhibit HH.

The Complainant's and Respondent's Closing Briefs were timely received March 12 and 15, 2010, respectively. Both parties' Final Reply Briefs were received March 30, 2010.

ISSUES

The issues in to be resolved in this case are:

1. Did the Complainant engage in activity protected by AIR 21?
2. If so, was the Complainant's protected activity a factor in his termination?
3. If the Complainant's termination was a violation of AIR 21, to what relief is he entitled?

(Order Summarizing Pre-Hearing Conference (Nov. 6, 2009); *see also* Hearing Transcript ("HT"), p. 14.)

STIPULATIONS

During the November 6, 2009, pre-hearing conference, the parties agreed to the following stipulations:

1. Flight Safety International ("Respondent") is an employer subject to the provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 43 U.S.C. § 42121, known as AIR 21.
2. The Complainant was employed by the Respondent beginning in July 1998 as a Ground/Simulator Instructor at its Training Center in Tucson, Arizona.

¹ Complainant's Exhibits 54 through 59 were intentionally left blank. (Hearing Transcript ("HT"), p. 18.)

² Respondent's Exhibit GG was excluded from the record.

3. The Complainant was employed as an instructor in the Respondent's Challenger 601 and Lear Jet 60 programs.
4. Both the Respondent and the Complainant are certified by the Federal Aviation Administration ("FAA") to perform certain functions in training pilots pursuant to an extensive set of FAA regulations and requirements.
5. In November 2007, the Center Manager of the Respondent's Tucson Learning Center was Randy Lewis.
6. In November 2007, Chuck Milhiser was the Center Assistant Manager for the Respondent's Tucson Learning Center.
7. In November 2007, Todd Bitgood was the Director of Training for the Respondent's Tucson Learning Center.
8. In November 2007, Mickey Duke, the Program Manager for the Challenger 601 Program at the Respondent's Tucson Learning Center was the Complainant's immediate supervisor for the Challenger 601 program.
9. On or about August 23, 2007, the Complainant was at a meeting being conducted by the Director of Training Todd Bitgood. During the meeting, the Complainant questioned whether the Respondent was in total compliance with 14 C.F.R. § 142.49(c)(1) whereby it was alleged by the Complainant that the Respondent had allowed employees to exceed allowable training time of 8 hours during a recent 24 hour period. The Complainant's statements were protected activity pursuant to the Wendell H. Ford Whistleblower Act (49 U.S.C. § 42121).
10. On August 28, 2007, Chuck Milhiser sent an e-mail memo to all personnel present at the August 23, 2007, meeting stating that there had been no violation of the 8 in 24 Rule.
11. On November 26, 2007, the Complainant was assigned to conduct recurrent training for FAR 135 certification for pilots Edward Gore and Erik Roodman beginning November 26, 2007.
12. The Complainant was terminated from his employment at the Respondent's Tucson Learning Center on November 30, 2007.

(Order Summarizing Pre-Hearing Conference (Nov. 6, 2009); *see also* HT, p. 14.)

FACTUAL BACKGROUND

The Complainant entered initial flight training with the United States Air Force in 1974, after receiving an Air Force Reserve Officers' Training Corps ("ROTC") scholarship to attend the University of Wisconsin. (HT, p. 118.) He eventually became a jet fighter pilot for the Air Force, and served for 20 years in various cities and foreign countries, retiring as a Major in 1994. (HT, pp. 119, 865.) He also served as a flight instructor for the Air Force. (CX 60, p. 127.) He possesses three Bachelor's Degrees and a Masters Degree in Human Relations.³ (HT, p. 235; CX 60, pp. 135, 141.)

³ At the hearing, the Complainant represented that he possesses two Masters degrees, however a copy of his résumé included in the record indicates that he possesses one B.A., two "B.A.+", and one M.A. (HT, p. 235; CX 60, p. 141.)

The Complainant was relocated by the Air Force to Tucson, Arizona in approximately 1993. (HT, pp. 117, 428.) He is married with two grown children. (HT, pp. 117, 428.) His wife of approximately 30 years is self-employed in Tucson as a fitness professional. (HT, pp. 117, 428.)

The Complainant's Work for Flight Safety

The Respondent is an international aviation training company with approximately 43 "Learning Centers" located across the U.S. and internationally, with an emphasis on commercial or business aircraft. (CX 62, p. 231; HT, pp. 121-22.) The Tucson Learning Center ("Tucson Center"), which has been in business since the 1950s, trains students on the Bombardier fleet of aircraft, principally Lear Jets and Challengers. (HT, pp. 122, 316, 425.)

The Tucson Center employs approximately 40 full-time instructors and 15 part-time instructors (CX 62, p. 231), and an estimated 2,000 to 4,000 students train there each year. (HT, pp. 508, 615.) The cost of pilot trainings at the Tucson Center range from approximately \$13,000 to \$25,000 per week. (HT, p. 316; CX 62, p. 230.) Customers of the Tucson Center are primarily aviation companies in possession of Bombardier aircraft who retain Flight Safety to train, certify, and re-certify their pilot employees. The Tucson Center negotiates service contracts with the companies, typically lasting between one and four years and specifying the number of pilots to be trained and the total number and type of trainings to be performed. (HT, pp. 442-43.)

The Complainant began working for the Tucson Center in July 1998. He obtained the position after initiating contact with Dan Howe, then Assistant Center Manager. (HT, p. 120; CX 60, p. 127.) After interviewing the Complainant in March 1998, Mr. Howe recommended hiring the Complainant as a ground/simulator instructor because he spoke fluent Spanish and Mr. Howe deemed him either "outstanding" or "above average" in the four evaluation areas of experience, capability, education/skills, and goals/ambition. (CX 60, pp. 127, 129; HT, pp. 119-20.)

The Types of Training Conducted by the Complainant at Flight Safety

When the Complainant began working for Flight Safety, he was initially trained and certified as an instructor in the Lear Jet Model 60 ("Lear 60"), a mid-size business jet, but later competed and was promoted to train in the Challenger Model 601 ("Challenger 601"), a slightly larger, "more sophisticated" business jet. (HT, p. 122.) Instructors must be separately certified by the Federal Aviation Administration ("FAA") to fly and instruct in the different aircraft, and can be cross-certified to conduct trainings on up to two types of aircraft. (HT, p. 456; CX 62, pp. 228-29.) By the time of the events at issue in this case, the Complainant still conducted trainings for students seeking training and certification in both the Lear 60 and Challenger 601.

Trainings at the Tucson Center consist of two primary components: "ground school" or "academics," generally taught during the mornings, and full flight simulation activities, generally taught by a different instructor during the afternoons and evenings.

The Tucson Center has 10 flight simulators. (CX 62, p. 228.) Simulators are designated by the FAA at levels A, B, C, or D. (HT, p. 124.) Level D simulators are "full-motion" and

“full-visual” simulators, recreating “virtually every element of actual flight that’s possible.” (HT, p. 124.) Certification in a Level D simulator affords trainees the qualification to fly an actual jet immediately upon exiting the simulator with the certification. (HT, p. 124.) The Complainant trained students in a Level D simulator for both the Lear 60 and Challenger 601 programs. (HT, p. 124.) Chuck Milhiser, Assistant Center Manager of the Tucson Center, described simulator training as “intense” and distinct from “routine flying:” “It’s numerous take-offs and landings. . . . numerous approaches. . . . numerous emergencies, electrical failures, hydraulic failures, pneumatic failures, terrible weather, thunder storms.” (HT, p. 492.)

The simulators at the Tucson Center are located in a large rectangular room approximately 100 feet long, with a ceiling 30 feet high. (HT, p. 646.) The simulators are raised from the ground with a gangplank for entry, and the simulators move and shake physically during flight simulation. (HT, p. 646.) When a simulator is in operation, its doors are closed, and the instructor and pilots within are shielded from view. (HT, p. 647.) The briefing rooms in which students receive ground training, academics, oral examinations, and pre- and post-simulator briefings, are located directly across from the simulators along a long hallway, with windows into the briefing rooms. (HT, pp. 646-47.)

During flight simulation activities, students split their time between the pilot and co-pilot seats. Students may be provided either an “initial” training for first-time training and certification in a particular aircraft, or a “recurrent” training and certification, which the FAA requires pilots to complete on an annual or semi-annual basis. Instructors for Flight Safety are also required to undergo multiple recurrent trainings and certifications each year, including instrument proficiency qualifications, aircraft proficiency qualifications for each aircraft they are certified to teach in, and examiner evaluations. (HT, pp. 124-25.) The requirements imposed by the FAA for instructor recertification are “identical” to those imposed for student pilot recertification, and instructors at the Tucson Center are trained and recertified by their peers on Flight Safety’s instructor staff. (HT, pp. 125, 854.)

Students training at the Tucson Center principally seek training and certification under one of two circumstances, either seeking to fly under the “general aviation” rules set forth in 14 C.F.R. § 91 *et seq.* (with training rules under § 61 *et seq.*) or under the “on-demand charter or air taxi” service rules set forth in 14 C.F.R. § 135 *et seq.* (HT, p. 425.) Under Section 135, air taxi companies can qualify to obtain a “135 certificate” from the FAA, which sets forth the services the company is authorized under the certificate to perform, including a list of the specific airports in and out of which the company is authorized to fly its aircraft. (HT, p. 425.) Mr. Milhiser described the Section 135 training and certification rules for air taxi pilots as “very, very close” to the rules governing common air carriers, such as Delta Airlines, rendering the Section 135 training and certification process “more regulatory-intense” than the less-restrictive, general aviation training and certification process set forth in Section 61 (referred to as a “61.58 training”). (HT, pp. 425, 488.)

At the conclusion of certain trainings, a separate “check ride” or “flight check” must be performed in order to certify or re-certify the pilot trainee. During a 61.58 training, once the pilot trainee completes a task to a satisfactory level during a training session, the task need not be independently recreated later during a separate check ride. (HT, p. 150.) In contrast, Section 135 trainings require an independent check ride examination, following the training sessions.

(HT, p. 277.) The 135 check ride takes no account of successful performance of tasks during the training sessions, and a poor check ride will result in failure despite successful performance during the training sessions. (HT, pp. 150, 282.) For this reason, the Complainant believed, 135 trainings cause students “a little more stress” than the 61.58 trainings. (HT, p. 150.) An oral examination must also be successfully completed before a 135 check is deemed complete. (HT, pp. 277, 726.)

Not all simulator instructors are certified to conduct check rides in addition to performing ordinary flight instruction, but the Complainant was certified to perform both roles for students seeking licensure by the FAA, the European equivalent Joint Aviation Authority (“JAA”), or the United Kingdom equivalent Civil Aviation Authority (“CAA”). (HT, pp. 121, 276.) When an instructor performs a check ride, he operates as an agent of the government entity issuing or renewing the pilot license. (HT, pp. 321-22.)

Each company in possession of a Section 135 certificate must maintain an FAA-approved pilot training curriculum specific to each aircraft it operates, which is then used by the instructor as a syllabus for training the company’s pilots. (HT, pp. 171-72, 369, 425.) Mr. Milhiser explained at the hearing that when the Tucson Center negotiates its service contracts with Section 135 customers, it offers the customer an FAA-compliant “generic training program” produced by Flight Safety. (HT, p. 435.) The customer can then choose to republish the training program materials using the customer’s own company header. (HT, p. 436.) When Mr. Milhiser was first hired as Director of Training for the Tucson Center, he personally drafted the five generic training manuals used for Section 61 trainings, and states that these materials were then used to develop the Tucson Center’s generic curricula for Section 135 trainings. (HT, p. 437.) He states that each training program curriculum “specifically outline[s]” the list of tasks that need to be accomplished during the training sessions, including “the hours that are required to accomplish them in, [and] what the check ride involves.” (HT, p. 436.) The Tucson Center now maintains a library of approximately 200 generic training program curricula that it uses to train clients for air taxi and charter operators under Section 135. (HT, pp. 442-43.)

The Tucson Center is required under FAA regulations to maintain a “Flight Training Record” for each pilot, documenting the training leading up to a check ride examination and culminating in the instructor’s recommendation as to whether or not the pilot trainee is prepared to undergo a final check ride. (HT, p. 331; *see, e.g.*, RX I.) After performing the check, the instructor/examiner must fill out FAA Form 8410, identifying the date of the check ride and the number of hours in which the check was performed, and certifying to the FAA that the pilot examined is proficient. (HT, p. 321; *see, e.g.*, RX J.)

The Complainant’s Positive Work History While Instructing for the Respondent

After trainings are completed, clients are encouraged to fill out critiques of their instructors’ performance. (HT, pp. 129-30; CX 17.) Completed performance critiques are then circulated through the hierarchy of management and reviewed by the Center Manager, the Director of Training, the Director of Standards, and the Customer Support team, before being returned to the instructor. (HT, p. 130; CX 17, p. 3.)

The Complainant received a significant number of extremely positive critiques in his years of instructing for the Respondent, and was provided approximately nine “Excellence Awards” between 2001 and 2007 in recognition of some of the strongest critiques, as well as one “Beyond the Call Award.”⁴ (CX 19-20, 22-28, 30.) The Complainant testified that Excellence Awards were “pretty rare. You had to do something pretty outstanding to receive an excellence award.” (HT, pp. 131-32.) Mr. Milhiser testified, in contrast, that the Respondent awarded these commendations “with frequency,” because each instructor sees between 30 and 50 sets of clients per year, and “[m]ost clients who provide critiques provide positive critiques. So when we get a positive critique, we like to make sure the instructor is aware of it,” in an attempt to “provide positive feedback to our instructors.”⁵ (HT, pp. 562-63.) Excellence Awards were issued in the form of a letter sent to the instructor’s home, signed by the instructor’s Program Manager, the Director of Training, and the Center Manager,⁶ praising the instructor for a specific service or client critique, and entitling the instructor to two movie theater tickets. (HT, pp. 460-61; *see, e.g.*, CX 19.) The Complainant’s Beyond the Call Award entitled him to a dinner for two at a restaurant of his choice. (CX 30.)

Clients occasionally contacted Flight Safety President Bruce Whitman to commend the Complainant’s teaching skills. In December 2005, Bruce Whitman replied to a letter he had received from client Bruce O’Brien. Mr. Whitman wrote, “It is a great compliment to say, ‘Roger is one of the best, if not the best instructor I have ever had.’” (CX 18, p. 2.) Mr. Whitman forwarded a copy of this letter and the attached client evaluation to the Tucson Center Manager Randy Lewis, requesting that he share the information with the Complainant. (CX 18, p. 1.) In July 2006, client Sandy Sanford also wrote to Mr. Whitman and recounted his experience training in the Challenger 601 simulator with the Complainant:

The sessions were organized to the nth degree, maximizing the available hours. The result was a confident student . . . and another satisfied customer. . . . I would like you to know, and be proud of, the wonderful job your employees are doing in Tucson.

(CX 21.)

In February 2007, the Complainant underwent an instructor evaluation by Director of Standards Rudy Rostash, who regularly evaluates all instructors in the center. (HT, pp. 134-35; CX 29.) Mr. Rostash identified the Complainant as meeting “Best Practices.” The Complainant states he was “most proud of” this commendation by Mr. Rostash, as it signified that he considered the Complainant’s trainings demonstrated “the very best technique and a certain

⁴ The Complainant received awards in April 2001 (CX 28), May 2001 (CX 27), April 2002 (CX 26), September 2003 (CX 30; HT, pp. 35-36), April 2004 (CX 25), August 2004 (CX 24), November 2004 (CX 23), July 2005 (CX 22), February 2007 (CX 20), and April 2007 (CX 19).

⁵ Instructor Mike Giron also testified that he had received multiple Excellence Awards as an instructor at Flight Safety. (HT, pp. 470-71.)

⁶ Of the nine Excellence Awards admitted into evidence, each one was signed by Randy Lewis as Manager; seven were signed by Chuck Milhiser as Director of Training; and four were signed by Todd Bitgood as Program Manager and later Director of Training. (CX 19-20, 22-28.) Additional Program Managers to sign the Complainant’s Excellence Awards included Jimmy Jensen, Nora Ann Mishler, Mike Giron, and Howard Rasmussen.

approach to training,” and that the Complainant would then be invited in the future to share his training techniques with other instructors to help them develop their abilities. (HT, pp. 134-35.)

In June of every year, the Complainant received strong performance appraisals with no individual mark falling below 4 out of 5, and positive comments from management, including Mr. Lewis, Mr. Milhiser, and Director of Training Todd Bitgood. (CX 60, pp. 33-118.) On his 2006 performance appraisal, he was scored 85.8 out of 100. (CX 60, pp. 35-39.) On his June 2007 appraisal, he was scored 86.4 out of 100. (CX 60, pp. 31, 33.) Mr. Bitgood provided the following comments:

Roger, you continue to be among the top most-requested instructors in the building. Your client oriented training style and natural instructing talent always leaves (sic) them wanting more. You are shared between the [Challenger] and [Lear]-60 programs, which requires you to be flexible and keep up on the two significantly different airplanes. You also have extensive knowledge on both FMS systems, and avionics focus in your training is one of your strong suits. Your ability to conduct training in Spanish is particularly helpful when training crew members from foreign countries. Thank you for your extra efforts in this area. You continue to be very useful as a type-check airman and TRE which is important to the center’s capabilities. I look forward to another year of your fine contributions.

(CX 60, p. 34.) Mr. Lewis also provided comments:

Roger, your performance in your ninth year with FSI continues to be strong. You are a highly requested instructor serving in two programs; you are dedicated to our customers and always try to exceed their expectations. Your ability to teach in Spanish significantly adds to the center’s capacity. You were awarded two center “Excellence Awards” based upon client comments that included “I have been training at FSI since 1979 and have never worked with a better instructor.” WOW! . . . Thanks for your hard work and dedication.

(CX 60, p. 34.)

Many clients were so pleased with the Complainant’s teaching that they refused to train with any other simulator instructor. Client Brian McArthur testified at the hearing that his company had a “standing order” requiring that the Complainant be assigned as their simulator instructor because they felt he “provide[d] training in an efficient manner,” while still leaving them with the feeling that they “always got more training than was prescribed by the program.”⁷ (HT, pp. 87-89.) Client Ed Drennan also testified that his company required the Complainant as their simulator instructor. (HT, p. 102.) Client Brett Despain also testified that his company requested the Complainant for every simulator training they received at the Tucson Center, based on their belief that he was “the most superior individual at Flight Safety,” and a “very efficient”

⁷ Lear Instructor Mike Giron testified that when he later trained Mr. McArthur, they did not “get along,” and that Mr. McArthur accused Mr. Giron of “being chicken-shit” because Mr. Giron required him to wear a shoulder harness during the flight simulation, per FAA rules. (HT, pp. 474-75.)

trainer. (HT, pp. 362, 365.) These three students all testified that in their experience, the Complainant “[n]ever” “cut corners in order to get [them] certified.” (HT, pp. 87-89, 102, 362-65.)

The Complainant became concerned that his popularity as an instructor had become a frustration for his superiors, after he was informed by Mr. Jensen that “it was becoming problematic” for scheduling purposes, because “a special category” had to be created for the clients who would only train with the Complainant.⁸ (HT, p. 261.) On October 11, 2006, Mr. Milhiser wrote the Complainant a note instructing him not to train or check three Eurojet Italia pilots who had called the Complainant directly to schedule a training with him during a specific week in October.⁹ (CX 60, p. 147.)

The Complainant also received merit pay increases in July of every year of his employment, including his final year of employment in 2007. (CX 60, pp. 7-10, 13-17, 24.) The personnel forms marking these increases were signed by Mr. Lewis, and many were also either signed or stamped “approved” by Greg McGowan, Flight Safety’s Vice President of Operations located in the company’s Hurst, Texas office. When the Complainant was hired in 1998, his annual salary was \$45,000. (CX 60, p. 26.) By the time of his termination 9 years later, his salary was \$85,687. (CX 60, p. 1.)

The Complainant states that prior to his November 2007 termination, he had never been disciplined by the Respondent or given a negative review. (HT, p. 160.) Mr. Milhiser and Rudy Rostash both confirmed that between 1998 and August 2007, no one had ever accused the Complainant of falsifying records, or of any records “error violation.” (HT, pp. 561-62, 767.) Mr. Milhiser testified at the hearing that the Complainant was considered an “exemplary employee,” an “excellent instructor,” and was “[c]learly . . . among the most requested instructors in the building.” (HT, pp. 562-63, 602.) Mr. Lewis similarly testified that he was a “talented individual,” “an excellent instructor,” “highly qualified,” and that he performed “many key roles” for Flight Safety, including serving as an FAA and European check airman. (HT, p. 639.) Mr. Bitgood considered the Complainant an “experienced pilot” and a “[v]ery client-oriented” instructor with “very good communication skills [and] excellent presentation skills in both the classroom and in the simulator breaking room.” (HT, p. 717.)

The Complainant’s instructor colleagues at the Tucson Center also had positive opinions of him. Hector Alvarez, an instructor in the Challenger program, testified that the Complainant was “a positive influence for all of us,” and that he did not believe the Complainant was a person who would intentionally falsify records. (HT, p. 63.) Former Lear instructor Dick Embry testified that he considered the Complainant “one of the best” instructors he had worked with.

⁸ Mr. McArthur recounted one occasion when his company was bumped to another instructor because a larger client had also requested the Complainant’s services during a scheduled training period. (HT, pp. 88-89.) Mr. McArthur complained to Howard Rasmussen, and later elevated the matter to Randy Lewis. Mr. McArthur believed that his raising the matter above Mr. Rasmussen’s head angered Mr. Rasmussen, as thereafter Mr. Rasmussen “would barely look at” Mr. McArthur, and refused to shake his hand. (HT, pp. 88-89.)

⁹ The Respondent noted in its pleadings that the Complainant’s popularity as an instructor caused the Tucson Center scheduling difficulties when the Complainant accepted requests from students to schedule trainings with him directly, rather than going through the company’s Scheduling Department. (Respondent’s Closing Brief, p. 7.)

(HT, p. 417.) Lear 60 instructor Mike Giron provided the more moderate praise that the Complainant was a “good” instructor. (HT, p. 470.)

The Complainant’s record also contains some negative critiques. A typed summary of the Complainant’s training of a client in January 2006 contains handwritten comments by Mr. Bitgood, indicating that he felt some of the Complainant’s training techniques and maneuvers were “unacceptable,” “incorrect,” or not in accordance with federal aviation regulations. (CX 60, pp. 148-49.) The record also contains a letter sent to the Complainant, and copied to Mr. Lewis, by client Ed Drennan in December 2004, expressing his frustration and dissatisfaction with what he perceived to be the Complainant’s emphasis on “technique” versus “results” when he commended a pilot who demonstrated certain excellent techniques, even though the pilot had engaged in dangerous piloting behaviors during the simulation that would have killed the flight’s passengers in real life. (CX 60, pp. 150-52.) Mr. Drennan was angered by the comment and stated in his letter,

If it is FSI [Tucson’s] position that ‘technique’ is preferable over ‘result’ then I do not think we are getting the best training or value for our dollar. I think it is time for us to pursue a better philosophy for our training. I respectfully request that you remove us from the December 2005 schedule so that I may research where our training dollar might be spent. I will not be renewing any of our FSI contracts for the coming year until I find a training provider that I feel has the correct attitude toward safety.

(CX 60, p. 151.) Despite this expression of discontent, Mr. Drennan and his company continued to train with Flight Safety and continued to request the Complainant as an instructor, and Mr. Drennan testified at the hearing on the Complainant’s behalf. (HT, pp. 113-16.)

The Tucson Center’s Computer System

In an effort to “go paperless,” in 2003 or 2004 the Tucson Center instituted the Orion software system for scheduling trainings. (HT, pp. 149, 407.) The Orion system is intended to ensure that instructors are not double-booked for multiple trainings, and it also has a system of alerts as to “compliance problems,” such as if an instructor is scheduled for training in excess of the maximum permissible hours under the “8 in 24” rule (discussed at length below). (HT, p. 617.)

The Tucson Center limits the number of individuals who are permitted to input information to Orion and make changes to training schedules. (HT, p. 618.) The primary inputters of information to Orion are the secretarial Customer Support Representatives (“CSRs”), but Program Managers and the Director of Training also have “Level 2 access” and can input necessary scheduling changes. (HT, pp. 712-13.) Instructors cannot input information or make changes to Orion, and must request assistance for any needed changes. (HT, pp. 151-52, 714.) Instructors receive pre-printed schedules which are posted on a bulletin board in the training center. (HT, p. 151.) The Orion system also has no “transaction log,” so if a scheduling change is made, the system does not document when or by whom the change was made. (HT, p. 715.)

A subsystem of Orion is the Logbook system, which instructors use to maintain records of trainings completed. After completing trainings, instructors at the Tucson Center are required to log into a computer — either from a computer port in the training center, or remotely from home using a “code key” — to complete a “Logbook” entry for the trainings completed. (HT, pp. 311, 318.) Mr. Milhiser explained that scheduling information seen in Logbook is “fed from the Orion system,” and appears in Logbook as a template. (HT, pp. 485-86.) After training and checking events take place, the instructors are required to enter the information into an Instructor Daily Activity Log, print the log, and sign it. (HT, p. 706; *see, e.g.*, RX G.) For students seeking certification under Section 135, instructors also input information into a Flight Training Record (*see, e.g.*, RX I), which is also generated by Logbook with information fed from Orion. (HT, p. 486.)

There was dispute among some witnesses as to what information can be manually input by instructors into Logbook, versus what information is fed automatically and irreversibly into Logbook by the Orion system. Mr. Milhiser testified that although the “template” for the Instructor Daily Activity Log comes from Orion, it was his “recollection” that when an instructor enters Logbook to complete the Instructor Daily Activity Log, the instructor manually enters the time information that appears in the left margin, showing how long the training sessions lasted. (HT, p. 485.) He believed that the Orion system did not automatically feed this scheduling information into the template. (HT, p. 485.) He also stated that once logged into the Instructor Daily Activity Log, “[t]here’s certain things [an instructor] can do within that page on the screen,” such as “review[ing] his activities,” “put[ting in] the time that the activities actually occurred,” and either “ensur[ing] the client was there [or] tak[ing] the client out.” (HT, p. 485.) After filling in this information, the instructor clicks the “confirm” button. (HT, p. 485.) Instructor Mike Giron also testified that instructors have the ability to “make slight adjustments in the time” on given training dates in the Logbook system, although he agreed that they cannot “re-arrang[e]” full days of training in the system without seeking help from the Program Manager or Director of Training. (HT, pp. 466-67.) Mr. Milhiser stated that the purpose of the Instructor Daily Activity Log document is to “identify[y] what training, in fact, took place.” (HT, p. 484.) He similarly testified that the Flight Training Record is also created as a template by Orion, but the instructor “inputs the times” and the number of hours the pilot was flying versus nonflying, and identifies which tasks were completed to proficiency, marked with a “1.” (HT, pp. 486-87.)

The Complainant, in contrast, testified that instructors did not have the ability to “make any input” to the schedule that appeared in Logbook, which was “all pre-programmed.” (HT, pp. 151-52.) He testified that the only input he could make to Logbook was to “log the tasks that were accomplished.” (HT, p. 152.) Moreover, he testified that if the Orion system has multiple training sessions scheduled for a given day, then the instructor is required by Logbook’s “program logic” to confirm each session in order to confirm *any* activities for that day. (HT, p. 383.) He explained, for example, that if he attempted to leave a simulator session blank without confirming it, the program logic of Logbook would not allow him to confirm any other training sessions for the same day: “the program logic of the computer would have not (sic) accepted that . . . It would have not (sic) allowed me to confirm any activity for that date.” (HT, pp. 383-84.) To make the computer accept the trainings he did perform, the Complainant relates, he would have had to confirm all scheduled activities.

Witnesses at the hearing agreed that the Orion/Logbook system is imperfect. Mr. Milhiser agreed that “there are certain issues associated with the Orion system that make it difficult to get things done.” (HT, p. 599.) Instructor Hector Alvarez testified that the Logbook system is “not very flexible,” and sometimes “structurally” restricted him from inputting what actually took place during trainings, such as occurred when he needed to make scheduling changes for students who were “paired” with another training group in the Orion system. (HT, pp. 74, 80-81) Mr. Alvarez explained that if, for example, a crew of two pilots was scheduled for training from 1:00 p.m. until 4:30 p.m. and the computer system had “paired” them with another set of students, it was impossible for him to make changes to their schedule in Logbook to reflect actual events: “The software won’t let you have two groups – It shows a conflict and it just doesn’t let me complete that. And so, technically they weren’t with me on that Thursday after 2:30, but they were with me in the hours that I needed to be with them.” (HT, pp. 74-75.) Mr. Alvarez testified that in such a case, he would confirm the Orion training schedule, even though the schedule did not represent the actual times the training was conducted. (HT, pp. 74-75.)

The Complainant stated that calling the Logbook system “inflexible” was “putting it mildly. It was extremely difficult to get it to represent actual events.” (HT, p. 149.) He testified that it was “pretty common” in his experience at the Tucson Center for the time allotted on the computer to not agree with the actual training times conducted. (HT, p. 181.) On February 21, 2006, the Complainant wrote a memorandum entitled “135/61.58 Logbook Incompatibility” and sent it to Howard Rasmussen, Director of the Quality Management System, outlining problems he observed in logging training into the Logbook system, which “continue[d] to repeat as a source of error/incompleteness regarding the scheduling and training of students at the Tucson Center.” (CX 13.) The Complainant explained in this memorandum that the customary practice at the Tucson Center of scheduling students together under a recurrent syllabus where one student was being trained and checked under 135 while the other was trained and checked under 61.58 resulted in “a number of errors and/or omissions occur[ing] as a result of data entry or internal conflicts within Orion that preclude accurate accounting of actual training/checking accomplished.” (CX 13.) The Complainant outlined four distinct manners in which this practice created errors preventing accurate documentation of trainings, and concluded:

[A]dditional coding appears necessary to more accurately reflect actual training and checking accomplished, the hours accumulated by the respective students and the actual times that such training/checking occurred. Administrative action to code Orion and Center data entry procedures must be reviewed to resolve these errors which seem to be self-inflicted upon training documentation.

(CX 13.) The Complainant testified that his purpose in writing this memorandum was to point out to management that “it’s virtually impossible to create a document that represents actual events,” given the confines of the Orion system, and that it forced instructors to “kind of put[] [themselves] at liability for the records not being correct. Because if I log . . . 1:00 to 4:00 for the 135 client, when the 61.58 client has got to go longer time, they’re not going to represent the same event. And it makes it look like the instructor is not documenting the actual training properly.” (HT, p. 151.) No testimony was elicited at the hearing concerning the Tucson Center’s actions after Mr. Rasmussen received this memorandum from the Complainant.

The Tucson Center's System of Verifying Records

After a check ride is performed, the instructor fills out by hand FAA form 8410 to verify completion of the flight check. (CX 62, p. 231; *see, e.g.*, RX J.) The pilots are provided a copy of the form, a copy goes into the mailroom box, the form is faxed to the pilots' employer the following day, and the original is ultimately mailed to the employer. (CX 62, p. 231.)

The Respondent submitted into evidence excerpts from its Learning Center Operations Manual and Instructor Handbook, both of which emphasize the importance of document accuracy and place the burden of ensuring accuracy on the individual instructors. The Operations Manual states,

It is important that training records be accurate and complete. Training records must provide a clear written picture of the training that was conducted and the client's ability to achieve proficiency. . . . It is the responsibility of the Instructor to properly complete all applicable . . . forms as soon as possible after the completion of each training session.

(RX B, pp. 6, 10.) The Instructor Handbook more narrowly provides:

[B]efore leaving the building, the Instructor of record shall ensure that all required Client information . . . attesting to the delivered training shall be free of defects and errors. . . . [and] complete. If documentation cannot be completed at the appropriate time, the Instructor shall ensure that the Program Manager is advised of any missing or incomplete documentation, the reason for its being incomplete, and what will be done to complete the documentation.

(RX C, p. 3.)

The Complainant testified that ordinary procedure at the Tucson Center involved a "normal process" of quality control and record verification. (HT, p. 860.) First, the instructor confirms the training and checking in Logbook. (HT, p. 860.) Next, the records "go to a records completion section or records completion person. That individual looks to make sure that all of the tasks have been completed, the dates are correct, the times are correct, et cetera." (HT, pp. 860-61.) Finally, the records completion person "prepare[s] a final training audit." (HT, p. 861.) The Complainant explained that if a record is found to contain a discrepancy or error,

[T]hen that record normally would be returned by the records quality control person . . . to the Program Manager. The Program Manager, then, would return it to the instructor and ask him what the nature of the discrepancies were . . . why there was (sic) discrepancies and they'd adjudicate it, and the instructor would then be required to make the necessary adjustments to the record.

(HT, p. 861.) Director of Standards Rudy Rostash likewise testified that training records are initially sent to the Program Manager "for review,"

[F]irst of all, for accuracy, to make sure all of the items were complied with before it went there. . . . When the instructor completes the file, he places it in a

holding bin for the Program Manager. The Program Manager picks it up at his next opportunity and he reviews the file. He reviews that all of the items were completed, all of the signatures are in place, and then he signs it as being accurate and passes it on.

(HT, p. 739.)

The Complainant testified that in his experience at the Tucson Center, if an instructor made an error on a record, he would be penalized by being asked to come in on his day off to correct the error:

[I]f an instructor didn't fill out a document correctly, if there were omissions or errors, by way of kind of punishing us to make sure we would avoid these errors, we'd have to come in on a day off and fix the errors.

(HT, pp. 193-94.)

The Tucson Center's Instructor Workload in the Summer of 2007

By the summer of 2007 the Tucson Center had developed a problem of instructor understaffing which imposed heavy workloads on the available instructor pool. The Complainant called his work for Flight Safety "a 24/7 job," and that because of understaffing in the Challenger program, he was doing double simulator sessions daily, working a great number of nights and most weekends."¹⁰ (HT, pp. 144, 854.) During this time, the Complainant states that the "work schedules became oppressive to the point where a lot of the instructors were leaving," and by the summer of 2007 these resignations had become a "trend" because of instructors' "distress with the . . . work load." (HT, p. 145.) The Complainant states that in 2007, the Tucson Center lost 12 instructors, and a number of others shifted from full-time status to independent contractor status, in order to "relieve themselves of undesirable schedules." (HT, p. 853.) Instructors on contractor status enjoyed fewer employee benefits, but could turn down assignments they did not wish to undertake. (HT, pp. 143-44.)

Mr. Milhiser confirmed that during the summer of 2007, 3 or 4 pilots retired, several others changed their hours to part-time, and then 3 more instructors resigned with 2 weeks notice. (CX 62, p. 228.) He agreed that in August 2007, "[c]ertainly we were . . . working everybody hard," and "[s]ome programs were stretch[ed] pretty thin." (HT, pp. 523, 570; CX 62, p. 229.) Mr. Bitgood also agreed that he had received complaints from instructors based on "our overall summer of rather heavy workload, and fatigue, perhaps, setting over weeks or months." (HT, p. 685.) Mr. Bitgood stated that he "identified with" the instructors who complained, noting that he had been called upon that summer to conduct two entire programs of initial simulator training, which was "very unusual for a Director of Training" to have to undertake on top of his other duties. (HT, p. 685.) Evidence also shows that on Saturday, August 18, 2007, Program Manager Jim Jensen was called upon to conduct four initial check

¹⁰ The Complainant theorized that one reason for this understaffing was Flight Safety's purchase by a new owner, since after the new corporation took control of Flight Safety and set new profit and cost reduction goals, Flight Safety's center managers increased instructors' hourly expectations rather than hiring new instructors to spread out the work. (HT, p. 145.)

rides in a single day, which Mr. Lewis called “unusual.”¹¹ (HT, pp. 153, 625; RX EE.) Mr. Bitgood concluded, “So we were all busy.” (HT, p. 685.) Mr. Milhiser was aware that some of the instructors had complained about the workload, and noted that the Complainant had not complained more than anyone else and was not known to be a big complainer. (HT, p. 524.)

In September or October 2007, as a way of compensating instructors for working long hours and preventing further “instructor attrition,” the Tucson Center introduced an incentive pay system, giving monthly incentive stipends to instructors who had worked over a thousand hours of training time in the previous 12 months. (HT, pp. 206-07, 854.) The Complainant was informed that the program would continue for 24 months, or until the instructor retention problem was resolved. (HT, p. 207.)

The Complainant’s Allegation of an “8 in 24” Violation

In late August 2007, the Complainant went to Jim Jensen, his Program Manager in the Challenger program, to complain about the “impossible” workloads he felt the instructors were facing, and that he was having to work 14-hour days. (HT, p. 153.) He states that Mr. Jensen replied to him, “You think you’ve got it bad? I just did four check rides on Saturday.” (HT, p. 153.) Mr. Jensen’s training schedule is included in the record for the date in question, Saturday August 18, 2007, showing four check rides, totaling 10 hours scheduled between the simulator and the briefing room. (RX EE.) The Complainant states that because these were initial check rides for new pilots (as opposed to recurrent checks for experienced pilots), they would each have been allotted for 2½ hours in the simulator, and could not reasonably have been completed in fewer than 2 hours each, which suggested that Mr. Jensen had spent more than 8 hours in the simulator on a single day. (HT, pp. 153-54.) The Complainant believed, based on his conversation with Mr. Jensen, that each of the four check rides had actually taken a full 2½ hours, totaling 10 hours in the simulator. (HT, p. 154.) In his view, this constituted a violation of the FAA’s “8 in 24” rule, prohibiting flight instructors from spending more than 8 hours in any 24 period instructing in a flight simulator.¹²

At 2:00 p.m. on Thursday, August 23, 2007, the Complainant attended an instructor meeting conducted by Mr. Bitgood. (RX DD.) Approximately 12 to 15 instructors attended the meeting. (HT, pp. 63-64, 157, 690.) The Complainant states that Mr. Bitgood attempted to give a “pep talk” to the instructors, and spoke to them about teamwork. (HT, p. 158.) After Mr. Bitgood announced that a committee had been selected to prepare the company Christmas party, the Complainant states that instructor Tom Fehseke “jumped to his feet and angrily” asked Mr. Bitgood, “How is it relevant to be talking about the Christmas party . . . when you have a bigger

¹¹ Although conceding the abnormality of Mr. Jensen’s schedule in this instance, Mr. Lewis denied that the summer of 2007 was a “particularly busy time” at the Tucson Center, that it was under-staffed, or that its instructors were overworked. (HT, p. 625.) The weight of testimony by Mr. Milhiser and Bitgood, however, persuades me that Mr. Lewis’s perspective of this issue was unrealistic.

¹² Witness testimony differed as to what forms of instruction were included within the “8 in 24” rule’s prohibition — *i.e.*, whether the rule only prohibited excessive simulator instruction time or whether the prohibition also incorporated the briefing time that followed simulation exercises, or time spent conducting oral examinations. This matter will be addressed in further detail below.

problem?” (HT, p. 158.) Mr. Fehseke began voicing his concerns as to the heavy instructor workload, and the Complainant states that Mr. Fehseke walked out of the meeting. (HT, p. 158.)

Instructor Hector Alvarez, who testified at the hearing, recalled this meeting as not being a “real positive” or “smooth” session, and recounted Mr. Fehseke’s complaints: “[I]t was not a warm, fuzzy meeting. But it wasn’t contentious. It was simply an item that needed to be followed up with, I think, [to which Mr. Fehseke] would have liked a better answer.” (HT, pp. 64, 76.) Mr. Bitgood confirmed that during this meeting some instructors had commented on the summer’s very heavy workloads, but denied the meeting was hostile: “I would term it as spirited.” (HT, pp. 685-86.)

After Mr. Fehseke began voicing his concerns, the Complainant also spoke up to voice his concern that Mr. Jensen’s August 18, 2007, training schedule had violated the “8 in 24” rule. The Complainant states he asked Mr. Bitgood, “Are you even aware that you’ve violated 8-in-24?” (HT, p. 159.) He states that Mr. Bitgood became “kind of speechless and kind of quiet, and then said, ‘Well, I’ll look into it,’ or something to that effect.” (HT, p. 159.) The Complainant felt motivated to raise this issue because he did not feel that the instructors were “being heard” when they complained to management about their difficult schedules. (HT, p. 159.)

In recounting what took place at the meeting, Mr. Bitgood states that the Complainant raised the “8 in 24” issue by asking whom he could “contact outside the center to address issues that [he was] concerned with [that] [he] th[ought] . . . [we]re not being responded to, as far as management.” (HT, p. 687.) Mr. Bitgood states that he then asked the Complainant what his specific concerns were, and that the Complainant then

[B]egan to describe what he believed were incidents of exceedences of the Federal Aviation Regulations in regards to the maximum allowable time you can perform duties in the simulator per day, which is eight in any 24-hour period.

(HT, p. 688.) Mr. Bitgood testified that he was “a little surprised” by the Complainant’s comments, because the Complainant was voicing his interest in speaking with someone outside of the Tucson Center, even though Mr. Bitgood was not even aware that the concern had been voiced to management within the center. (HT, p. 688.) Mr. Bitgood states that he told the Complainant that this was the first he had heard of it, that he would “certainly look into it,” and that he would like to get more specific information from the Complainant. (HT, p. 688.) Mr. Bitgood also informed the Complainant that if he wanted to bring up the issue at a higher level he could contact Mr. Lewis, Regional Manager Douglas Ware (Mr. Lewis’s supervisor who worked out of a different office), or Greg McGowan, Flight Safety’s Vice President of Operations. (HT, p. 688.)

The Complainant states that the meeting then “broke up kind of quietly and uncomfortably,” and that after leaving the meeting room, Hector Alvarez looked at him “right in the eye” and said, “Guap[o], . . . [y]ou have to be careful.”¹³ (HT, p. 162.) Mr. Alvarez did not

¹³ The Complainant explained that “guapo,” the Spanish word for “handsome,” was a nickname Mr. Alvarez used for the Complainant. (HT, p. 162.) The court reporter mistranscribed the term as “guapple.” (HT, p. 162.)

recall telling the Complainant to be “careful,” but he did recall that he “had a concern” about what had taken place, and that he spoke to the Complainant after the meeting. Mr. Alvarez testified,

[The Complainant] voiced an issue that I thought would be probably better handled in private, because of the way the meeting kind of went . . . I thought he would have got (sic) a better hearing had he just brought it up in somebody’s office. . . . it would probably be more valid in a private session [than in] a meeting that didn’t go quite as well as other meetings.

(HT, pp. 65-66.) Mr. Bitgood, Mr. Milhiser, and Mr. Lewis all testified that in their view it was appropriate for the Complainant to raise the “8 in 24” complaint during an open meeting. (HT, pp. 517, 620, 710.)

After the meeting concluded, Mr. Bitgood went to Mr. Milhiser’s office to report on how the meeting had gone. (HT, p. 689.) He told Mr. Milhiser he “had a successful meeting with the instructors” and “a pretty good turnout” of 12 to 15, and then described to Mr. Milhiser “the sentiment of several different instructors feeling fatigued and overworked, and then the comments by Roger that indicated somehow there may have been or there was a violation of a Federal Aviation Regulation.” (HT, pp. 516, 690.) He informed Mr. Milhiser that he had told the Complainant that “[he] would look into it and investigate it as soon as we could.” (HT, p. 690.) Mr. Milhiser instructed Mr. Bitgood not to pursue the matter further, and told him that someone else would look into the allegation. (HT, p. 691.) Mr. Bitgood did not have any further discussions with the Complainant concerning the allegation. (HT, p. 692.)

On the same day, Mr. Milhiser contacted Mr. Lewis to inform him of the Complainant’s allegation. (HT, pp. 556, 620.) Mr. Lewis instructed him to conduct an investigation and report the results back to him.¹⁴ (HT, p. 620.)

Mr. Milhiser then requested that the Complainant come to his office to explain the details of the “8 in 24” incident. He states that the Complainant said to him, “Mr. Jensen gave four check rides. Do the math.”¹⁵ (HT, p. 571.) Mr. Milhiser then investigated the date in question, pulling Mr. Jensen’s electronic records (RX EE; RX FF) and requesting a meeting with Mr. Jensen to learn what had happened. (HT, pp. 517-18.) The electronic records show a print date

¹⁴ Although no record evidence clearly indicates when Mr. Milhiser informed Mr. Lewis of the Complainant’s allegation, the print date and time exhibited on Mr. Jensen’s training records do indicate that Mr. Milhiser had begun investigating the matter by 4:15 p.m. on August 23, 2007, the date the allegation was made. (RX EE.) If Mr. Milhiser waited to print this document until after receiving Mr. Lewis’s instruction, then he must have contacted Mr. Lewis on August 23 before 4:15 p.m. to discuss the allegation, while Mr. Lewis was away from the office at a convention.

¹⁵ The Complainant testified that Mr. Milhiser never asked him to explain the details of the allegation. The Complainant states that his only meeting with Mr. Milhiser concerning the allegation involved Mr. Milhiser’s statement to him that he had looked into the allegation and determined that an “8 in 24” violation did not occur. (HT, p. 354.) I am persuaded, however, that Mr. Milhiser did have at least a brief conversation with the Complainant to inquire concerning the details of his allegation, because the unique phrase allegedly employed by the Complainant during this conversation, “do the math,” clearly made an impression on Mr. Milhiser, as evidenced by his repetition of this phrase at the hearing as well as in his memorandum of the inquiry he conducted, completed soon after the inquiry was completed. (HT, p. 571; RX CC.)

of August 23, 2007, at 4:15 p.m., the same date as the instructor meeting when the issue was raised. (RX EE.) Mr. Jensen's instructor schedule shows 10 scheduled hours for the date in question, which included time spent in the briefing room as well as in the simulator. (RX EE; HT, pp. 518-19.) His Instructor Logbook shows that he logged a total of 8 hours of simulation time with the four clients, including 4 hours from 6:00 a.m. until 10:00 a.m. and an additional 4 hours from 11:00 a.m. until 3:00 p.m. (RX FF.) Based on this schedule and Logbook entry, Mr. Milhiser believed there had not been an "8 in 24" violation. (HT, p. 520.) Mr. Jensen also told Mr. Milhiser during a meeting to discuss the allegation that he had only worked a total of 8 hours in the simulator on the date in question. (HT, p. 521.) He explained to Mr. Milhiser that even though they were each initial check rides (which take longer than recurrent check rides) he had kept them within the 8 hours because the FAA checks each lasted 2.5 hours (5 hours total), and his JAA checks lasted only 1.5 hours each (3 hours total), totaling 8 hours in the simulator. (RX CC; HT, p. 522.) Mr. Milhiser testified that although it is "unusual for one instructor to do four initials in one day," he nonetheless felt confident after speaking to Mr. Jensen and reviewing his records that there had not been an "8 in 24" violation. (HT, pp. 523, 569.) Mr. Milhiser explained that if the "8 in 24" allegation had been true, Mr. Jensen would have been disciplined for committing the violation. (HT, p. 573.)

The Complainant states that on the following day, Mr. Milhiser called him into Mr. Lewis's office during Mr. Lewis's absence at a national conference, closed the office door, and informed him, "I've investigated your eight-in-24 allegation and it did not happen." (HT, pp. 166, 354; ALJX 1, p. 2.) The Complainant interpreted this statement to mean that because the records would not show any violation, the Complainant would not be able to prove that a violation had occurred. (HT, p. 166.)

The Complainant states that after Mr. Lewis returned from the national conference the following week, he took the Complainant into his office, closed the door, and said, "It's okay to call someone an [asshole] in private, but don't call them an [asshole] in public."¹⁶ (HT, pp. 198-99, 355, 862.) The Complainant believed that Mr. Lewis was referring to the "8 in 24" allegation he had made to Mr. Bitgood during the instructor meeting. (HT, pp. 199, 356.) The Complainant states that this was the first time in his nine years at the Tucson Center that he saw Mr. Lewis become angry. (HT, p. 198.) Mr. Lewis, in contrast, denies making this statement or ever having a conversation with the Complainant in his office with the door closed concerning the "8 in 24" allegation. (HT, pp. 624-25.) He conceded that it was possible he had a conversation with the Complainant about the "8 in 24" allegation, although he did not recall doing so: "I may have. I had frequent conversations with Mr. Benninger." (HT, p. 665.) If there was a conversation, Mr. Lewis states, "it was a casual one," along the lines of, "Thanks for bringing that up." (HT, p. 665.)

On Tuesday, August 28, 2007, Mr. Milhiser drafted a "Memorandum for Record" documenting his investigation of the "8 in 24" allegation, and his determination that no violation had occurred. (RX CC; HT, p. 524.) The Memorandum stated, "In Roger's assessment," a comment by Mr. Jensen that he had done four check rides in one day "meant he was in the simulator for 10 hours. Roger's exact words were: 'Do the math.'" (RX CC.) The

¹⁶ The Complainant initially provided this quotation with the word "explicative" in place of the word "asshole," but he provided the actual term upon request of Respondent's counsel. (HT, pp. 199, 355.)

Memorandum noted that Mr. Milhiser had reviewed Logbook and Orion printouts for the day in question — which showed exactly 8 hours in the simulator — as well as other client records “which corroborated the logbook entry,” and that he had also interviewed Mr. Jensen, who explained that his FAA checks each lasted 2.5 hours (5 hours total), and his JAA checks lasted only 1.5 hours each (3 hours total), totaling only 8 hours in the simulator. (RX CC.) Mr. Milhiser testified that he regularly keeps records of this nature when he investigates issues that arise, noting that “the most trouble we could ever get in [as] a training center is hiding something from the FAA.” (HT, p. 571-72.) He explained, “Everybody makes mistakes and we can self-disclose those mistakes. And we may be punished, but nothing like what would happen if we try to cover something – some error. So that is our attempt at maintaining records.” (HT, p. 572.)

On August 28, 2007, Mr. Milhiser also sent an e-mail to several of the instructors present at the August 23, 2007, meeting,¹⁷ denying the Complainant’s “8 in 24” allegation. (CX 12; RX DD.) Mr. Lewis was copied on the e-mail. (RX DD.) The e-mail stated,

I am sending this to attendees at the 23 August, 1400 Instructor meeting.

During a center wide pilot instructors meeting on 23 August 2007, an allegation was made regarding an 8 in 24 hour violation of FAR Part 142.49(c)(1). A review of the facts and circumstances surrounding the alleged violation was conducted. Based on interviews, client records, and electronic records, no violation occurred.

We take all comments that could indicate noncompliance or wrongdoing very seriously. We encourage anyone who believes that such noncompliance or wrongdoing has occurred to report it to their supervisors or any level of management.

(RX DD.) Mr. Milhiser states that his intent in sending this e-mail was to “stress” that the complaint had been investigated, “that we do take these things seriously and that I do appreciate people bringing it forward.” (HT, p. 525.) He felt that the alternative to writing the e-mail “would be to do nothing and appear as though either management didn’t care or we didn’t care enough to communicate.” (HT, p. 572.) Mr. Milhiser denied being “mad” at the Complainant for raising the issue, nor that the issue caused Mr. Milhiser any problems or delays in his work, or caused him to have to take instructors off-line or reduce their work hours. (HT, p. 525.)

The Complainant states that he had never observed an e-mail like this in his previous experience with the Respondent, and that one of the other instructors who also received the e-mail told him that he needed to “take it easy.” (HT, p. 161.)

The Complainant’s Work Interactions After Raising the “8 in 24” Allegation

The Complainant testified at the hearing that, “[a]t the risk of sounding paranoid,” after he made the “8 in 24” allegation, he noticed more members of the administrative staff passing by

¹⁷ This e-mail was not sent to every instructor present at the meeting. Testimony from the Complainant, Mr. Alvarez, and Mr. Bitgood indicates that approximately 12 to 15 instructors were present at the meeting, including Mr. Alvarez. (HT, pp. 63-64, 157, 690.) However, this e-mail was sent to only 9 individuals, excluding Mr. Alvarez. (RX DD.)

the briefing rooms when he was instructing: “Normally, administrative people don’t traverse that part of the building, and it seemed like they were kind of regularly going by when I was training after that point in time.” (HT, pp. 166-67.)

Soon after the Complainant’s “8 in 24” allegation, Mr. Jensen resigned as Program Manager of the Challenger program. He left the company on September 20, 2007, less than one month after the “8 in 24” allegation was raised. (HT, pp. 162-63, 626.) The Complainant and Mickey Duke, then-Program Manager of the Lear 20 and 35 programs, were the sole applicants to fill Mr. Jensen’s position. (HT, p. 627.) The Complainant sought the position, as he saw it as “an opportunity for advancement into the most prestigious aircraft trained at the center,” the Challenger 604. (HT, p. 876.)

In October 2007, Mr. Lewis and Mr. Milhiser made the decision to hire Mr. Duke for the position. (HT, pp. 588-89, 629.) Mr. Lewis conceded that the Complainant “had the qualifications for [the] position,” and that they were both “good candidates.” (HT, pp. 629, 669.) Both Mr. Lewis and Mr. Milhiser explained, however, that they chose Mr. Duke because of his demonstrated success during 2 years as a Program Manager of a different program, and their belief that administrative and managerial skills were more important for the position than flying and instructing skills, even though Program Managers spent approximately half of their time instructing. (HT, pp. 589-591, 628-30, 669.) Mr. Lewis explained that the Program Manager position was primarily an “administrative position and we’re looking for good organizational skills, good experience, leadership, and Mr. Duke had demonstrated that in the Lear Jet program.” (HT, p. 628.) Mr. Milhiser likewise summarized, “Mr. Duke had demonstrated an excellent ability to manage programs. When we want someone to manage programs, we want someone to manage programs.” (HT, p. 589.)

The Complainant felt that he was more qualified for the position than Mr. Duke, since the Complainant “held every qualification available in the center, plus five years in the Challenger program,” while Mr. Duke was coming from the Lear 35 program, “one of the less-sophisticated aircraft in the center,”¹⁸ and did not even have the qualifications required to conduct trainings in either of the Challenger models.¹⁹ (HT, pp. 163-64, 588.)

¹⁸ Corroborating the Complainant’s statement that the Tucson Center considered the Lear program less sophisticated than the Challenger program, Mr. Lewis testified that the Program Manager position for the Lear program paid a salary grade lower than the Challenger program. (HT, p. 628.)

¹⁹ There is ambiguity in the record as to whether or not the Complainant was qualified to train in both Challenger aircraft when he was under consideration as a candidate to replace Mr. Jensen. Mr. Milhiser testified that the Complainant was unqualified during this time to train on the Challenger 604 (HT, p. 589), but the Complainant testified that when he applied for Mr. Jensen’s position, he already possessed “every qualification available in the center” (HT, p. 163), and the Complainant’s counsel represented at the hearing that the Complainant was qualified in both Challenger aircraft when he applied for the position. (HT, p. 669.) Because the Complainant had never been promoted to perform trainings in the Challenger 604, I find it unlikely that he already possessed the qualifications to conduct trainings in that aircraft, and I accept Mr. Milhiser’s testimony that the Complainant was only qualified to train in one of the two Challenger aircraft.

On November 6, 2007, Mr. Lewis²⁰ held a meeting with the Complainant concerning his interest in advancing into the Challenger 604. (CX 60, p. 146.) Mr. Lewis took notes of the meeting on a Flight Safety memo pad, which included the following comments:

I said need you in [Challenger] 601, so do you want [Lear] 60 or [Challenger] 604. He wants 604, but wants 60 PR in Nov[ember] or Dec[ember] so he can fly in next y[ea]r. Will do Publix²¹ in Dec[ember] with Pat as farewell. FSI advantage to keep him current in 60 for TRE,²² etc. I'll see if we can do 60 PR. I said we are committed to him in [Challenger] 604 – not sure when cause we're in crisis and need DAL procedures. He said OK he understood.

(CX 60, p. 146.)

The Complainant's Training of Two Pilots During the Week of November 26, 2007

In late November 2007, the Complainant was assigned to train Edward Gore and Erik Roodman (“the Trainees”), two pilots employed by Air Orange — a 135 Certificate holder affiliated with Air Rutter International — for their Section 135 air taxi license renewals in the Challenger 601. (HT, p. 170.) The Trainees had previously completed recurrent trainings at the Tucson Center, and the Complainant believed he had trained them in the past. (HT, pp. 171, 560.) The training of the two pilots was scheduled to take place over four days, with three days of simulator trainings beginning Monday, November 26, 2007 — 4 hours per day for three days, totaling 12 hours of training (anticipating 2 hours of flying time per pilot per day, totaling 6 hours of flying time for each pilot) — and completing with a 4-hour FAA check ride (2 hours per pilot) on Thursday, November 29, 2007. (HT, pp. 171, 265-66.) The cost to Air Rutter for the training of the two individuals was approximately \$26,000. (HT, p. 514.)

A number of factors came into play during the week which prevented the Complainant from completing the training according to the original schedule. The Complainant described the week's events as “a perfect storm in that virtually everything that could go wrong, did go wrong, and created a very – a very significant challenge to completing the training.” (HT, p. 843.)

Monday, November 26, 2007

The Trainees began their training on Monday, November 26 at 8:00 a.m. with a “ground school” session taught by Jim Hostetter. (RX P; RX Q.) When the Complainant met the Trainees after their morning session concluded, he first verified with them that they were there to

²⁰ Although no name or signature appears on these handwritten notes to identify Mr. Lewis as the individual who conducted this meeting, comparison of the handwriting with other examples of Mr. Lewis's handwriting raises a strong inference that this meeting was conducted by Mr. Lewis. (*Compare* CX 60, p. 146 *with* CX 17, p. 3, *and* CX 60, pp. 76, 122, 153.) The remaining individuals in management who might have conducted this meeting include Mr. Milhiser and Mr. Bitgood, but examples of their handwriting bear no resemblance to the handwriting on the notes in question. (*Compare* CX 60, p. 146 *with* CX 60, p. 147 (Mr. Milhiser's handwriting), *and* CX 60, pp. 148-49 (Mr. Bitgood's handwriting).)

²¹ Publix Supermarkets, Inc., is a customer of Flight Safety. (CX 60, p. 150.)

²² Given this context, the acronym “TRE” reasonably appears to refer to a “Training Readiness Evaluation” to determine the Tucson Center's readiness to conduct trainings in the Lear 60.

complete a Section 61.58 training. (HT, p. 172.) He believed they required a 61.58 training based on the fact that they had been scheduled for 4-hour training sessions on each day (2 hours per pilot per day), totaling 16 hours in the simulator. (HT, p. 172.) They informed the Complainant that they had actually come for a Section 135 recurrent training. (HT, p. 172.) The Complainant told them he would attempt to change the schedule to reflect the 135 training requirements, which would involve only 3 hour simulator sessions on each day (1½ hours per pilot per day, totaling 9 hours of simulator training) and a 3 hour check ride on the final day (1½ hours per pilot),²³ totaling 12 hours in the simulator. (HT, pp. 172, 267-68, 283, 334.)

After learning of this scheduling error, the Complainant contacted Mr. Duke, the newly hired Challenger Program Manager, to request a change to the schedule in the Orion system. (HT, p. 173.) Because the Complainant did not have access to the Orion scheduling system to make this change himself, he asked Mr. Duke to have his CSR, Ms. Medina, make the change in the computer system “to reflect what we actually intended to do and what complied with the customer’s needs.” (HT, p. 173.)

The Complainant was then informed that he would not be able to enter the simulator with the Trainees on Monday because the simulator’s navigation and avionics systems were being upgraded, rendering the simulator unavailable. (HT, p. 174.) The upgrades had begun during the previous weekend, and Mr. Bitgood had believed that they would be completed by Monday at 1:00 p.m., in time for the Complainant to begin training the two pilots. (HT, pp. 692-93.) On Monday morning, Mr. Bitgood learned that the simulator would not become available by 1:00 p.m., so he asked the Complainant and the Trainees to “stand by as it may become available a little bit later.” (HT, p. 693.) The Complainant suggested to the Trainees that they could “make use of [the] time that [they] were effectively losing on Monday” by completing some of the academic briefing and de-briefing items, as well as completing the 135 oral examination, and that they “could make better, more efficient, use of [their] time on subsequent days.” (HT, p. 175.) The Complainant states that on Monday he and the Trainees successfully completed “all of the briefing that [they] needed to do for the simulator sessions . . . such that there would be no need for any briefing on Tuesday,” and that they also completed the oral examination. (HT, p. 305; RX M, pp. 3-4.) Mr. Bitgood testified that the Complainant’s decision to shift the scheduled activities to get extra briefings done on Monday was a proper decision, and the type of thing that was “frequently” done at the Tucson Center to accommodate schedule changes. (HT, pp. 701-02.)

As it became clear on Monday that the upgrades were still far from complete, and after the Complainant had completed the scheduled Monday and Tuesday pre-simulation briefings with the Trainees, Mr. Bitgood felt that it was “inappropriate to hold the crew into the late afternoon or early evening hours” to await the possible availability of the simulator, “[s]o, the decision was made to release the crew” for the day. (HT, p. 693.) Mr. Bitgood states he was “pretty sure” he was involved with the decision to release the Trainees on Monday afternoon,

²³ The record reveals disagreement among the witnesses as to the standard number of hours required for the Trainees’ check rides. Although the Complainant repeatedly asserted that a recurrent 135 check ride required a standard 1½ hours per pilot (HT, p. 154), relevant testimony from several other witnesses indicates that the standard was, in fact, 2 hours per pilot, per check ride. I will discuss below the evidence supporting this finding.

and that it was “an appropriate action,” but he does not recall if it was his decision or the Complainant’s. (HT, p. 693.)

Before leaving the training center on Monday, the Trainees also received a call from their company owner, indicating that he wished to fly out of Tucson early on Thursday, prior to the time the Trainees were scheduled to complete their training and check rides. (HT, p. 176.) They informed the Complainant of this added scheduling issue. At approximately 6:00 p.m. on Monday, the Complainant spoke with Mr. Duke and told him that the Trainees “had effectively lost a day of training.” (HT, p. 176.) Mr. Duke was being trained in the Challenger aircraft himself that week, and as a result he referred the Complainant to Mr. Bitgood, to “[w]ork it out with him.” (HT, pp. 176, 844.)

Tuesday, November 27, 2007

The Complainant telephoned Mr. Bitgood from home on Tuesday morning between 8:15 and 9:00 a.m. to explain the various issues involved with the Trainees’ training: that they had lost a full day of simulator training on Monday, that their Orion schedules were inaccurate for a 135 training and needed to be changed, and that the Trainees had informed him they needed to leave early on Thursday. (HT, pp. 177, 693-94; RX M, p. 3.) Mr. Bitgood confirmed that when the Complainant called him from home Tuesday morning, the Complainant expressed “concern[] about how we’re going to schedule and perform the required training and checking for this crew” given the loss of the Monday session and the students’ wish to cut their week short. (HT, pp. 693-94.) The Complainant asked Mr. Bitgood if he could try to have the simulator available by 11:30 a.m. on Tuesday, so the Trainees could begin their simulator session as soon as they finished ground school, and attempt to complete a full 6 hours of simulator training on Tuesday, thereby making up the full 3 hours they had lost on Monday. (HT, pp. 304, 694-95.) An 11:30 a.m. start time was necessary in order to fit in the full 6 hours before Mr. Aubrey took the simulator at 5:30 p.m. on Tuesday for a scheduled training session.²⁴ (HT, pp. 303, 632.) The Complainant states that he and Mr. Bitgood agreed that “all requirements could be met by . . . programming the center computer to allow for 6 hours of training each day on Tuesday and Wednesday,” including 4½ hours of training for each pilot and a check ride of 1½ hours for each pilot. (RX M, p. 3.)

After speaking with the Complainant Tuesday morning, Mr. Bitgood understood that they needed to condense the 4 days of simulator training into 2 days: “By any standard, a very challenging effort.” (HT, p. 694.) The Complainant considered it “a very doable challenge,” because in the 135 certification context he could “train to proficiency. In other words, it’s a judgment of the instructor, that if they appear ready and prepared for their stand-alone examination,” the Trainees would not need to use all of the allotted hours for simulation exercises.²⁵ (HT, pp. 177-78, 266.) Mr. Milhiser also testified that “this sort of thing is not

²⁴ The Complainant states that Mr. Aubrey’s 5:30 p.m. training session was deemed “very critical” and took priority over the Trainees’ training needs, as the instructor in question was about to lose his qualification at the end of the month of November if he did not complete his training. (HT, p. 843.)

²⁵ Witnesses at the hearing expressed significant disagreement as to the proper application of the “training to proficiency” concept. This matter will be addressed below.

terribly uncommon,” where a pilot needs to have his training fit into fewer days than were previously scheduled. (HT, pp. 515-16.)

Mr. Bitgood successfully persuaded the simulator technicians to make the simulator available by 11:30 a.m. on Tuesday. (HT, p. 527.) However, the Complainant did not begin the training at 11:30 a.m., as the Trainees arrived late to meet him on Tuesday due to a miscommunication from other Flight Safety staff,²⁶ and then getting stuck behind a passing train. (HT, pp. 178, 842; RX M, p. 3.) The Trainees arrived for their session with the Complainant at approximately 12:30 p.m. (HT, p. 178.)

Mr. Bitgood was not aware of the Trainees’ late arrival to the simulator session with the Complainant on Tuesday. (HT, p. 711.) Mr. Bitgood states he decided to monitor the Complainant’s training of the Trainees’ because he was “concerned we met the clients’ expectations.” (HT, p. 716.) When he observed the Complainant in the briefing room with the Trainees at approximately 12:30 or 12:45 p.m. — demonstrating that the Trainees had not yet entered the simulator, despite its early availability — Mr. Bitgood states he felt “surprised” and “a little frustrated” because he had “spent some political capital with the other department in getting that device up and ready and rushed them out of there.” (HT, pp. 527, 701-02; CX 40, p. 1.)

On Tuesday Mr. Bitgood went to Mr. Milhiser to report on the fact that the Complainant had requested that the simulator be made available at 11:30 a.m., but he had seen the Complainant in the briefing room with the Trainees at 12:30 p.m. (HT, pp. 527-28.) Mr. Milhiser testified that when Mr. Bitgood came to him to report this, Mr. Bitgood appeared “irritated” by the Complainant’s delay in starting the training. (HT, p. 528.) Mr. Milhiser instructed Mr. Bitgood to “monitor the situation and . . . ensure that training was accomplished.” (HT, p. 528.) At some point on Tuesday Mr. Milhiser also informed Mr. Lewis that even though the Complainant had requested the simulator be ready early on Tuesday, he didn’t get into the simulator with the Trainees until after 12:40 p.m. on Tuesday. (HT, p. 631.)

The Complainant conducted several hours of simulator training with the Trainees on Tuesday, but available records present an inconsistent picture of how many hours of training actually took place. Despite the Complainant’s testimony that the Trainees arrived for their training session at approximately 12:30 p.m. on Tuesday (HT, p. 178), he hand-wrote on the Simulator Sign-in Log located inside of the Challenger 601 simulator that he was in the simulator with the Trainees from 11:30 a.m. until 5:30 p.m., or 6 hours. (RX F; HT, p. 610.) The Complainant’s Instructor Daily Activity Logs for Tuesday — confirmed using the Logbook computer system — provide a simulator start time consistent with the Complainant’s testimony, showing 4½ hours in the simulator, from 1:00 p.m. until 5:30 p.m., as well as 1½ hours of briefing with both Trainees from 12:00 p.m. until 1:00 p.m. and from 5:30 p.m. until 6:00 p.m. (RX H.) Despite the Daily Activity Logs’ confirmation of simulator trainings continuing until 5:30 p.m., however, the documents showing these events as “confirmed” bears a print date and

²⁶ The Complainant states that although he had instructed the Trainees to arrive early for their simulation training, another staff member told them to arrive at 1:00 p.m. based on their official schedule. (HT, p. 178.)

time stamp showing that the confirmed entries were printed at 4:39 p.m. on Tuesday.²⁷ (RX H.) The Client Training Audits, also computerized by Logbook and confirmed by the Complainant at some time on Tuesday, show the same time entries as the Instructor Daily Activity Logs. (RX P, p. 1; RX Q, p. 1.) An “Affidavit” prepared by the Complainant on December 1, 2007 (“December 1 Affidavit”), provides an account that generally tracks the Instructor Daily Activity Logs and Client Training Audits, stating that he was in the simulator with the Trainees for 4¾ hours on Tuesday, from 12:45 p.m. until 5:30 p.m. (RX M, p. 3; HT, pp. 297-98.)

During his Tuesday evening²⁸ Logbook computer session, the Complainant also confirmed activities taking place on Monday. The Complainant states that upon entry to Logbook, he found that an “entry adjustment had not been made as discussed” with Mr. Bitgood, to delete Monday and apportion the simulator training time between Tuesday and Wednesday. (RX M, p. 3.) He went ahead and “confirmed the original data in the program without change to permit event grading and annotate the training that had occurred to that point.” (RX M, p. 3.) For Monday, he entered 1½ hours with the pilots in the briefing room, from 12:00 until 1:00 p.m. and 5:00 until 5:30 p.m., and — although he did not conduct any simulator trainings on Monday — he also entered 4 hours of time with the Trainees in the simulator, from 1:00 p.m. until 5:00 p.m. (RX G, pp. 1-3; RX P, p. 1; RX Q, p. 1.)

On Tuesday evening Mr. Duke discovered that the Complainant had confirmed simulator time taking place on Monday, and he went to Mr. Milhiser to report the information because he “wanted [Mr. Milhiser] to be aware of it.” (HT, p. 526.) Mr. Milhiser told Mr. Duke “to figure

²⁷ Two witnesses at the hearing, Mr. Bitgood and Rudy Rostash, testified that the date and time stamps in the upper left hand corner of the Instructor Daily Activity Log is a “print date and time.” (HT, pp. 706, 753.)

²⁸ The record does not clearly establish when the Complainant entered the Logbook system to confirm the Monday training activities. Mr. Lewis and Mr. Bitgood both testified that they knew of no way to document the time when an instructor enters the Logbook system to confirm his Instructor Daily Activity Log activities, since Logbook does not contain a transaction log. (HT, pp. 660, 715.) In an Affidavit prepared December 1, 2007, the Complainant stated that he did not enter Logbook to confirm Monday and Tuesday activities until 5:30 p.m. on Tuesday. (RX M, p. 3.) The Client Training Audit establishes that the Complainant did confirm the Monday trainings at some point on Tuesday, based on the column showing the date when the activity was confirmed. (RX P, p. 1 (*see* column showing “Activity Confirmed Date”).) Supporting a Tuesday evening time of entry to Logbook, a memorandum prepared by Mr. Milhiser on December 13, 2007, states that the Complainant’s claiming of 4 hours of Monday simulator training was “noted” by management on Wednesday. (CX 40, p. 1.) However, a handwritten note on Mr. Lewis’s personalized desk stationery notes: “Tues – Todd/Mickey advised of Mon,” indicating that he was informed of the Monday confirmation by Mr. Duke and Mr. Bitgood on Tuesday. (CX 60, p. 153.) Mr. Milhiser also testified at the hearing that on Tuesday Mickey Duke informed him that the Complainant had claimed simulator time for Monday when the simulators were down. (HT, p. 526.) I am therefore persuaded that Mr. Lewis and Mr. Milhiser were informed of this by Mr. Duke and Mr. Bitgood as early as Tuesday. As for the time of day on Tuesday they learned of this, I will accept the Complainant’s claim that he confirmed the activities on Tuesday evening, *after* conducting his Tuesday trainings. Although Mr. Lewis stated on two occasions that he learned this information as early as Tuesday morning (HT, p. 630; CX 62, p. 225), his testimony on this point is inconsistent, as well as being made long after the events in question. In his May 2008 statement to an OSHA investigator, Mr. Lewis stated that he was informed of the issue on Tuesday morning by Mr. Duke, and Mr. Bitgood “may have been with him” as well (CX 62, p. 225), while at the hearing, he stated that he “th[ought] it was Mr. Milhiser” who informed him on Tuesday morning, and he denied ever speaking to Mr. Duke on Tuesday about the situation involving the Complainant. (HT, pp. 630, 654.) Accordingly, I accept the Complainant’s claim that he confirmed his Monday and Tuesday trainings in Logbook on Tuesday after completing simulator sessions. Based on the 4:39 p.m. print time, however, I do not accept the Complainant’s claim that he confirmed the sessions as late in the day as 5:30 p.m.

out how to solve it, such that we got the clients the training that they needed.” (HT, p. 527.) Mr. Lewis also states he was informed by both Mr. Duke and Mr. Bitgood²⁹ on Tuesday that the Complainant had confirmed simulator trainings occurring on Monday, despite the simulator’s unavailability that day.³⁰ (HT, p. 630.) Although Mr. Lewis was aware that the Complainant was “actively working the schedule” to try and fit in the training, as was his “responsibility,” he states that he was nonetheless “concerned” by the Complainant’s confirmation of the Monday training on a date when the simulator was down for maintenance. (HT, pp. 630-31.)

At approximately 6:00 p.m. Tuesday evening, Mr. Duke informed the Complainant that he had been scheduled to conduct a European check ride the following morning with Richard McKinlay, a pilot from the United Kingdom, in the Challenger 601 simulator. (HT, pp. 187-88.) However, Mr. Duke told the Complainant he did not wish him to perform the check ride, and that the Complainant should arrive early the next morning to inform Mr. McKinley that the check ride would not take place. (HT, p. 188.) The Complainant understood Mr. Duke’s instruction to be based on the fact that Mr. McKinlay had not participated in a training program with the Respondent, as it was standard policy to refuse to perform check rides for pilots who were not Flight Safety training clients. (HT, pp. 187-88.)

Wednesday, November 28, 2007

In his December 1 Affidavit, the Complainant states that he arrived to the training center early on Wednesday, and at 8:00 a.m. he looked for both Mr. Duke and Mr. Bitgood “to advise [them] of the discrepancy in Logbook and the actual training conducted to date,” but when he found that neither were available, he addressed his concerns instead to Ms. Medina. (RX M, p. 3.) After “nearly 15 minutes of discussion” with Ms. Medina, the Complainant states that she informed him she had “made all the required adjustments,” but that the Orion system would not permit her to assign the check rides as less than 2 hours each, despite the company’s actual training authorization that provided for 1½ hour check rides.³¹ (RX M, p. 3.) The Complainant testified that he actually “look[ed] over [Ms. Medina’s] shoulder while she made the computer data entry” to adjust the schedules. (HT, p. 191.) He states that the conversation “ended with the understanding that the computer program represented the appropriate time required to complete the remaining events of the training course.” (RX M, p. 3.)

Mr. Milhiser overheard the Complainant talking with Ms. Medina at her desk — which was located a few feet from Mr. Milhiser’s office — and requesting that changes be made to the Orion schedule for the Trainees. (HT, p. 530, 591; CX 40, p. 1.) After overhearing parts of the

²⁹ As noted above, Mr. Lewis took handwritten notes indicating that he learned this information on Tuesday from “Todd/Mickey.” (CX 60, p. 153.) He also informed the OSHA investigator in May 2008 that he was informed of the issue on Tuesday by Mr. Duke, and Mr. Bitgood “may have been with him” as well. (CX 62, p. 225.)

³⁰ As noted above, Mr. Lewis testified that he was informed of this on Tuesday morning, but I am persuaded that the Complainant did not confirm the Monday and Tuesday trainings until Tuesday evening, after he completed his Tuesday simulator sessions. (*See supra.*)

³¹ As noted above, I am not persuaded by the Complainant’s claim that the Trainees’ check rides should have been scheduled for less than 2 hours, and as such, I do not accept his suggestion that Ms. Medina in any way apologized for her inability to schedule the check rides for 3 hours rather than 4. I will discuss below the evidence supporting this finding.

conversation, Mr. Milhiser asked Ms. Medina what she and the Complainant had arranged, and she informed him that the Complainant had arranged to be with the Trainees in the simulator from 1:00 p.m. to 3:00 p.m. that day (Wednesday), and that the Complainant had hoped to then return at 5:00 p.m. Wednesday to complete the check rides. (HT, pp. 530-31.) This was not possible, however, because Mr. Aubrey had again scheduled the simulator from 5:00 p.m. until 7:00 p.m. Wednesday evening (HT, p. 303), so, Ms. Medina recounted, the Complainant had arranged to return at 7:00 p.m. on Wednesday to complete the check rides. (HT, pp. 530-31; CX 40, p. 1.) Mr. Milhiser testified that after his discussion with Ms. Medina he understood that she had not deleted the schedule information for Monday from the Orion computer records, but that she had changed the schedule for Wednesday. (HT, p. 591.) On Wednesday Mr. Milhiser also informed Mr. Bitgood that the Complainant intended to return that evening to complete the check rides. (HT, pp. 531-32.)

On Wednesday morning, the Complainant met Mr. McKinlay and informed him of the Respondent's policy and the instruction that he should not receive the check ride. The Complainant states that Mr. McKinlay became angry, so the Complainant brought in a higher authority to resolve the problem. (HT, p. 188.) Mr. Milhiser, Mr. Bitgood, and Mr. Duke all sat down with Mr. McKinlay, and the group decided to approve a waiver that would permit the Complainant to receive the CAA check without a prior training. (HT, p. 189.) The Complainant was first validated as a qualified examiner for Mr. McKinlay's company, and then he performed the check ride. (HT, p. 190.) Mr. Aubrey, another Challenger instructor, served as Mr. McKinlay's co-pilot during the exam. (HT, p. 310.) The Complainant hand-wrote on the Simulator Sign-in Log that he conducted this check ride for 3 hours, from 8:30 a.m. until 11:30 a.m. (RX F.)

Witnesses at the hearing explained that every other week, the Tucson Center would put on a Client Appreciation Lunch, or "burger day," held on the patio outside the training center, where clients were provided hot dogs and hamburgers for lunch, prepared by Mr. Lewis, Mr. Milhiser, or Mr. Bitgood on outdoor grills. (HT, pp. 532, 704.) Wednesday, November 28, 2007, was a "burger day." (HT, p. 532.) At "sometime between 12:00 and 12:30," Mr. Bitgood states he saw the Complainant with the Trainees on the East patio, eating and having what looked to Mr. Bitgood like "a leisurely chit-chat and lunch." (HT, p. 704.) Mr. Bitgood complained to Mr. Milhiser that the Complainant was "out having . . . hamburgers" with the Trainees at "[a]bout 12:15, 12:20" rather than training them in the simulator, and Mr. Milhiser states that he also saw the Complainant with the Trainees at the lunch at about that time. (HT, pp. 534-35.)

The Complainant entered the simulator with the Trainees on Wednesday afternoon, and he states that by early afternoon he completed their final FAA check rides, completed ahead of schedule based on their proficiency. He testified that he was "[a]bsolutely sure, no question," that the total work that he did with the two Trainees met the requirements of Section 135 training and testing, that the check rides "were absolutely accomplished," and that they were each accomplished in "about an hour." (HT, pp. 190-91, 193, 328, 384.)

Here again, the available records present an inconsistent picture of how many hours of training and/or checking actually took place on Wednesday. On the Simulator Sign-In Log, the Complainant hand-wrote that he was in the simulator with the Trainees on Wednesday from

12:00 p.m. until 5:00 p.m., totaling 5 hours. (RX F.) In his December 1 Affidavit, however, the Complainant stated that he was with the Trainees in the simulator from 12:30 until 3:30 p.m., or 3 hours, and that this session “resulted in the completion of the FAR 135 examination.” (RX M, p. 4.)

On Wednesday the Complainant also entered the Logbook system to confirm the Wednesday trainings in the Client Training Audits. (RX P; RX Q.) On Wednesday the Complainant confirmed Wednesday activities up to 3:30 p.m., including 1½ hours of briefing from 12:00 p.m. to 1:00 p.m. and 3:00 p.m. until 3:30 p.m., and 2 hours in the simulator from 1:00 p.m. until 3:00 p.m. (RX P, p. 1; RX Q, p. 1.)

The Complainant testified that when he entered Logbook “at the end of Wednesday’s training and checking,” however, he found that “the changes that [he and Ms. Medina] had agreed upon to complete – or to reflect what actual training was being conducted, had not been accomplished in accordance with what we had discussed,” as Ms. Medina had scheduled him for additional simulator time on Wednesday evening from 7:00 p.m. until 11:00 p.m. (HT, pp. 318-19, 331, 846; RX M, p. 4.) He states he first learned of this scheduled Wednesday night session on Wednesday evening when he entered Logbook to confirm trainings, but he did not address it with anyone on Wednesday evening because it was already “after hours” when he discovered it.³² (HT, p. 319.) He states he was “frustrated” because he believed that he had already corrected all of the scheduling problems after speaking to Ms. Medina earlier that day. (HT, p. 319.)

On Wednesday afternoon before leaving the training center, the Complainant also completed several other documents required by the FAA to verify the Trainees’ completion of their recurrent training and Section 135 flight checks.

On the Trainees’ Flight Training Records, the Complainant documented simulator tasks completed to proficiency on Monday, Tuesday, and Wednesday, and certified the Trainees as prepared to complete the FAR 135 check ride. (RX I, pp. 1-3.) On Edward Gore’s Flight Training Record, for example, the Complainant entered a total of 10 hours of training in the simulator: 4 hours of simulator time on Monday (consisting of 2 hours pilot flying, 2 hours pilot not flying), 4 hours on Tuesday (2 hours pilot flying, 2 hours pilot not flying), and 2 hours on Wednesday (1 hour pilot flying, 1 hour pilot not flying). (RX I, p. 1.) For Monday, he listed completing 57 tasks to proficiency, as well as 3 daytime takeoffs and 3 daytime landings; for Tuesday, he listed completing 43 tasks to proficiency, as well as 3 nighttime takeoffs and 3 nighttime landings; and for Wednesday, he listed completing 31 tasks to proficiency, as well as 1 daytime takeoff and landing and 3 nighttime takeoffs and landings. (RX I, pp. 1-3.) On page 4 of the document, the Complainant checked the boxes indicating that he recommended Mr. Gore for a “FAR 135 Checkride.” (RX I, p. 4.) The Complainant left blank whether the training was

³² I am not persuaded by the Complainant’s claim that he entered Logbook “after hours,” and was unable to address the matter with management because of the late hour. The Complainant stated in his December 1 Affidavit that he completed the Trainees’ check rides at 3:30 p.m. on Wednesday, and immediately thereafter entered Logbook to confirm their trainings, at which time he made the discovery of the nighttime check ride session. (RX M, p. 4.) Mr. Milhiser also states that he, Mr. Lewis, and Mr. Bitgood were all in the building when they saw the Trainees leaving the building at approximately 3:20 p.m., so if the Complainant had attempted to speak with them on Wednesday afternoon about the scheduled nighttime session, he could have done so. (HT, p. 535; CX 40, p. 1.)

“Completed in Less than Min[imum] H[ou]rs,” checking neither “yes” nor “no.” (RX I, p. 4.) On the final page of the document, the Complainant entered separate sets of comments concerning Mr. Gore’s performances during simulator training sessions on Monday, Tuesday, and Wednesday. (RX I, p. 5.) For the alleged Monday training session, the Complainant wrote,

Above average performance overall during this session. All airwork performed with precise parameters and smoothly flown. Cockpit management was highly effective with positive crew communication and coordination. Excellent training session overall.

(RX I, p. 5.) For the Tuesday training session, the Complainant entered the following separate comments:

Above average performance overall. Strong crew response to systems malfunctions and efficient crew coordination during single engine operations. Low level windshear and CFIT maneuvers performed and procedures effectively followed. Three night takeoffs and landings accomplished IAW training directive. Approach flown to KASE as directed in training authorization. All approaches flown or credited to satisfy all FAR 135 requirements. Excellent training session overall.

(RX I, p. 5.) For the Wednesday training session, the Complainant wrote,

Strong training session overall. Exceptional cockpit management during integrated systems malfunction scenario. All FAR 135 approaches flown or credited upon completion of this training session. Recommend for FAR 135 proficiency check. Excellent training session overall.

(RX I, p. 5.)

On the handwritten 8410 forms documenting both Trainees’ check rides, the Complainant wrote that the Trainees had each separately completed “2.0” hours of “simulator time” for the check rides. (RX J; RX K.) He dated both forms November 29, 2007, the day after he states he completed the check rides. (RX J; RX K.)

On the Pilot Training Record Certifications, the Complainant handwrote training dates from November 26 to 29, 2007, and then signed and dated the forms November 29, 2007. (*See, e.g.,* RX O.)

Finally, the Complainant also made handwritten entries to his own Airman Certification Log, his private log of clients for whom he conducted check rides, indicating that he gave 135 check rides to the Trainees on November 29, 2007. (CX 39.)

At approximately 3:20 p.m. on Wednesday, Mr. Milhiser states he was standing in Mr. Lewis’s office when he saw the Complainant speaking to the Trainees, at which time the Trainees both left the building. (HT, p. 535.) In his memorandum drafted December 13, 2007, Mr. Milhiser reiterated that Mr. Lewis, Mr. Bitgood, and Mr. Milhiser all observed the Trainees leaving the building at 3:20 p.m. on Wednesday. (CX 40, p. 1.)

At approximately 4:00 p.m. on Wednesday, Mr. Milhiser went into the mailroom and looked into the mailbox of Laura Johnson, the individual responsible for faxing 8410 forms to Section 135 client companies, and he saw the Trainees' completed 8410 forms in Ms. Johnson's box. (HT, pp. 536-37, 539.) It was not ordinarily Mr. Milhiser's role to look in the mailroom for completed forms (CX 62, p. 231), but he explained that he was "certainly curious" about what was going on with the Trainees' training, and that Mr. Bitgood "had led [him] to believe" that the Complainant might try and claim the training was completed when it hadn't actually been completed given the challenge of fitting the training and checking into two days: "I guess I had heard enough that I really didn't know what was going on. . . . I was worried about us doing something that was not in compliance." (HT, pp. 537-38.) As of this time, Mr. Milhiser believed that the Complainant had only completed a total of about 6 hours in the simulator with the Trainees. (HT, p. 542.) He photocopied the 8410 forms and put the originals back into the mailroom box. (CX 62, p. 231.)

Mr. Milhiser then went to Mr. Lewis to explain "everything [he] knew . . . including the fact that Mr. Benninger had confirmed four hours on Monday that never happened." (HT, p. 539; CX 62, p. 230.) Mr. Lewis was "sufficiently worried about" the Monday issue that he decided to make a telephone call to Vice President of Operations Greg McGowan, in Flight Safety's Hurst, Texas office. (HT, pp. 539, 785.) Mr. Milhiser states they called Mr. McGowan because they "knew there was a problem and wanted advice about what to do." (CX 62, p. 230.) Mr. Lewis states they made the call in order to receive guidance from Mr. McGowan as to "what actions [they] should take."³³ (HT, p. 633.) Mr. Lewis and Mr. Milhiser explained to Mr. McGowan that, as far as they knew, the Complainant would be coming back to the center that evening at 7:00 p.m. to perform the check rides. (HT, p. 541; CX 62, p. 230.) Mr. Lewis states that by the time they called Mr. McGowan, he believed the Complainant "was still working the issue and could meet the syllabus and requirements," and would be returning to complete the check rides that evening. (HT, pp. 632, 634.)

Mr. McGowan states that he took "very seriously" the allegations of records falsification made by Mr. Lewis and Mr. Milhiser on Wednesday evening — involving the Complainant's confirmation of Monday simulator sessions that never took place, and the completion of 8410 forms in advance of completing the check ride. (HT, pp. 785-87.) He explained,

We have to be able to trust our instructors and check airmen and training center evaluators to do what the curriculum say (sic), record it accurately, and not take any liberties in doing what they think should be done, as opposed to what the curriculum states.

³³ There is disagreement in the record as to how many of the document discrepancies were known by the time this call was placed to Mr. McGowan. Mr. Lewis testified that he was "sure" that by the time he and Mr. Milhiser spoke to Mr. McGowan on Wednesday evening, Mr. Lewis was not yet aware that the Complainant had already completed the Trainees' 8410 forms, and that they called Mr. McGowan to discuss "the Monday incident." (HT, p. 633.) This is in contrast to Mr. Milhiser's testimony that he found the forms in the mailroom at approximately 4:00 p.m. on Wednesday (HT, pp. 536-37, 539), that he went to Mr. Lewis to explain "everything [he] knew" (HT, p. 539), and that they telephoned Mr. McGowan near "close of business." (CX 62, p. 230.) Mr. McGowan likewise testified that on Wednesday evening he was informed of the Monday record issue as well as the 8410 form issue. (HT, p. 786.) On the basis of the agreement between Mr. Milhiser and Mr. McGowan that the 8410 forms had already been discovered by the time Mr. McGowan was first contacted, I am persuaded that Mr. Lewis is in error on this point.

(HT, p. 787.) However, Mr. McGowan “felt like we needed to get more information,” and that it was necessary to wait and “see if he was going to come in and actually conduct the check ride that he had completed the 8410 for.” (HT, p. 787.)

At 5:15 p.m. on Wednesday, Mr. Milhiser entered the Challenger 601 simulator and removed the Instructor Sim Sign-In Log showing the Complainant’s handwritten entries of the simulator time he conducted with the Trainees on Tuesday and Wednesday. (RX F.) Mr. Milhiser wrote at the top of the photocopy, “True copy made at 1715, 11/28/07,” wrote his name, and signed it. (RX F.)

Mr. Milhiser also drafted a “Memo for Record” on Wednesday evening, documenting that he had made photocopies of the 8410 forms for the two trainees at 4:00 p.m. on Wednesday, November 28, 2007, and that he had shown them to Mr. Lewis and Mr. Rasmussen. (RX CC-2.) The Memo indicated,

The checkrides [the 8410 forms] portend to reflect are scheduled for 1900-2300 this evening. The scheduling of the check rides for the above times was a request directly from the instructor . . . to the Challenger scheduler, Genie Medina, earlier today. The crew and instructor in question logged two hours in the sim from 1300 to 1500 today.

(RX CC-2.) Conceding that he did not draft memoranda like this one every day, Mr. Milhiser explained that he did so in this case because:

It seemed significant enough in terms of ensuring compliance. Our biggest concern is to make sure we comply with the FAA. And any time we don’t, we want to make sure that we have adequate records. In this particular case, I thought it was odd enough that it deserved something to be written.

(HT, p. 540.) Before leaving the training center at 6:00 p.m. on Wednesday, Mr. Milhiser asked the two simulator technicians, whom he expected to be there all evening working on the Challenger 601 simulator, to telephone him if anyone came in to use the simulator. (HT, p. 544.) One of the technicians called him later that evening to tell him that no one had come in, and that they were using the time to finish working on the simulator. (HT, p. 544.)

Thursday, November 29

On Thursday morning, the Complainant entered the Logbook computer system remotely from his home to confirm the remaining Wednesday evening training events contained in the Trainees’ schedule: one half hour of oral examinations on Wednesday from 3:30 p.m. until 4:00 p.m.; one half hour of briefing time from 6:30 p.m. until 7:00 p.m.; 4 additional hours in the simulator from 7:00 p.m. until 11:00 p.m.; and an additional half hour of briefing time from 11:00 p.m. until 11:30 p.m. (RX P, p. 1; RX Q, p. 1; RX M, p. 4; HT, pp. 317-18.) In his December 1 Affidavit, the Complainant explained that he re-entered Logbook to confirm these trainings on Thursday because he was unable to do so on Wednesday when he confirmed the earlier Wednesday trainings, since “Logbook is triggered for confirmation by time of day.” (RX M, p. 4.) The Complainant believed that confirming the schedule as presented in the computer

was the appropriate action for him to take, based on his prior experience of being instructed to confirm inaccurate Orion schedules. (*See infra*; *see also* HT, pp. 848-49.)

When Mr. Milhiser arrived to the training center on Thursday morning, he confirmed that no one had come back to use the Challenger 601 simulator. (HT, p. 545.) He then went to speak to Mr. Lewis, as “it appeared as though we had a serious situation.” (HT, p. 545.) They agreed to call Mr. McGowan again, and “ask[] to get HR people involved.” (HT, pp. 545, 635.) They convened a conference call including Mr. McGowan, VP of Teammate Resources Barbara Shea, and Director of Teammate Resources Tom Riffe. (HT, p. 545, 789.) Mr. Milhiser explained to the group that he believed the training of the two pilots had been significantly reduced and that the check rides had not been given. (HT, p. 545.) Mr. Lewis summarized: “[W]e knew the facts at that point. We thought that only six hours of simulator training had occurred. We didn’t think a 135 check had occurred. The 8410s for the 135 check were completed prior to the check . . . And we considered this to be a falsification of records.” (HT, p. 635.) The group concluded to speak to the Complainant, get his side of the story, and then call Mr. McGowan back. (HT, p. 545.)

The Trainees completed their ground school training with Mr. Hostetter on Thursday morning. Mr. Milhiser states that he saw them through the windows of Mr. Lewis’s office departing at approximately 10:20 a.m., ran outside to stop them, brought them back into the training center, and informed them “there was a records issue and . . . they had not fully completed their 135 training and . . . they were not qualified to fly under 135.” (HT, p. 546; CX 40, p. 1.) Mr. Milhiser states that Mr. Roodman “didn’t say a word,” but Mr. Gore was “surprised” and “upset,” and informed Mr. Milhiser, “We came out here. We did the training, and you’re not allowing us to be qualified.”³⁴ (HT, p. 547.)

Mr. Milhiser, Mr. Lewis, and Mr. Bitgood each denied ever asking the Trainees for their side of the story, as they each felt the Trainees’ responses would have been unreliable. (HT, pp. 580, 636, 651, 716; CX 62, p. 226.) Mr. Lewis believed it would have been “against their self-interest to acknowledge . . . that the training . . . didn’t meet their air carrier standards,” as it would have signaled their complicity in a violation of FAA regulations. (HT, pp. 580, 651-52.) Moreover, Mr. Lewis and Mr. Bitgood felt that it would have put the Tucson Center in an “awkward” position to have to confront its own clients, and “out of line” with what the clients would expect from a “professional organization.” (HT, pp. 674, 716.) They also believed that they already understood the facts of what had taken place. As Mr. Lewis summarized, “[W]e knew the syllabus. We had the facts . . . that there wasn’t enough time to conduct the required training and the required check, and we saw falsification of records.”³⁵ (HT, p. 651.)

³⁴ In contrast to this account, Mr. Milhiser’s December 13 memorandum states that when the Trainees were informed that their training and checking was invalid, “They told [Mr. Milhiser] that they understood.” (CX 40, p. 1.) In light of Mr. Milhiser’s credible hearing testimony that Mr. Gore expressed anger when told the check was invalid (HT, p. 547), I will interpret this December 13 statement to provide a simplification of the exchange, indicating merely that the Trainees ultimately accepted the authority of Mr. Milhiser’s instruction that they would have to return to the Tucson Center at a later date to complete the training.

³⁵ Mr. McGowan testified, in contrast, that he was informed by Mr. Lewis and Mr. Milhiser “that they had actually stopped the two pilots . . . [a]nd questioned them as to what training they had received and/or what checks they had received. And based on that conversation, they told me that they didn’t believe that the check ride had ever been

On Thursday at 12:43 p.m., someone entered Logbook and printed the Trainees' Client Training Audits, showing all of the training sessions confirmed by the Complainant. (RX P, p. 1; RX Q, p. 1.)

The Complainant's Termination on November 30, 2007

At approximately 3:00 p.m. on Thursday, November 29, 2007, Mr. Milhiser telephoned the Complainant at home, and informed him that "[t]here [was] a problem with the record." (HT, pp. 193, 636.) The Complainant initially thought Mr. Milhiser was indicating that he needed to come to the training center to correct an error in one of the documents he had submitted, but he noticed a serious tone in Mr. Milhiser's voice, and asked, "Is this serious?" (HT, pp. 193-94.) Mr. Milhiser replied, "It can be." (HT, p. 194.) The Complainant asked if he needed to go to the training center to fix the error, and Mr. Milhiser said he thought that would be "a good idea." (HT, p. 194.)

When the Complainant arrived to the training center, he was instructed to go to the conference room, where he was met by Mr. Lewis, Mr. Milhiser, and Les Hansen from HR. (HT, pp. 194, 549.) The Complainant was informed that Mr. Hansen was present because "this meeting may have personnel implications." (HT, p. 195.)

The Complainant states he was shown Mr. Gore's training record and asked if it was correct, that he responded "No," and that he attempted to explain that the record contained discrepancies due to inaccurate computer data entries that he had discussed with Mr. Bitgood and asked Mr. Bitgood to correct for him. (HT, p. 196.) The Complainant states that Mr. Lewis then replied, "Mr. Bitgood doesn't recall that conversation." (HT, p. 196.)

Mr. Milhiser likewise states that the Complainant admitted that the training records were inaccurate, but that he admitted to no wrongdoing and maintained that the Trainees had "received everything that they needed." (HT, p. 550; CX 62, p. 230.) Mr. Milhiser felt that the Complainant was provided an opportunity to speak his piece, but notes that the initial discussion lasted only approximately 5 or 10 minutes. (HT, p. 550.) Mr. Milhiser states that although the Complainant "did not act remorseful [he] could tell [the Complainant] knew that he had done something wrong." (CX 62, p. 230.)

Mr. Lewis recounts that the Complainant was given an opportunity to tell his side of the story and explain "the inconsistency of what we saw and what he confirmed," but that the Complainant "offered no story on what he did. He just simply stood by the training and the check," informing the group "that he met the requirements of the air carriers' training plan and that he conducted the checks." (HT, pp. 637, 654, 667; CX 62, p. 227.) Mr. Lewis did not hear the Complainant concede that the documents did contain inaccuracies, and also denied saying that Mr. Bitgood did not recall speaking to the Complainant on Tuesday morning about the scheduling issues. (HT, pp. 637, 654.)

conducted." (HT, p. 789.) On cross-examination, however, Mr. McGowan clarified that Mr. Milhiser had told him he believed that the Trainees "were intentionally being vague," from which Mr. Milhiser had concluded that the training and check ride had not been adequately performed: "What Chuck told me was that he believed from their answers that they had not completed the check ride or the training." (HT, pp. 820-21.)

After the Complainant spoke, he was asked to leave the room and was told the group had “some deliberations” to undertake. (HT, p. 196.) While the Complainant waited outside the room, he was approached by another instructor, Carl Wilson, who asked him what was happening. The Complainant told him, “I think I’ve just been fired,” explaining that “the record didn’t show the right times, the dates were wrong, et cetera et cetera.” (HT, p. 197.) Mr. Wilson responded, “If you can be fired for that, we can all be fired.” (HT, p. 197.)

While the Complainant waited outside, the group telephoned Mr. McGowan to inform him of the Complainant’s responses and discuss what should be done. Mr. McGowan did not feel a need to question the Complainant personally, believing that Tucson Center management was in a better position to determine what had gone on. (HT, pp. 787, 810.) He states that Mr. Lewis and Mr. Milhiser informed him that they had spoken to the Complainant, and that they “had the detailed information and log book and the other documents,” which they believed provided proof of an intentional falsification. (HT, p. 811.) During the deliberations, Mr. Lewis took down a page of handwritten notes on his personalized stationery listing the factors affecting the termination decision, which were later placed in the Complainant’s personnel file. (CX 60, p. 153.) At the top of the page was handwritten, “Flight Safety Core Value. I’ll always do what is right.” (CX 60, p. 153.) Following this statement, Mr. Lewis included bulleted notes, indicating that the Complainant: (1) “did less than min[imum];” (2) “didn’t do √ [check];” 3) signed the FAA forms as having been completed on Thursday, November 29; (4) confirmed training on Monday when the simulator was down, going so far as to provide grades for maneuvers performed and written comments; and (5) scheduled the check ride for Wednesday night but did not show up to complete it. (CX 60, p. 153.)

Mr. Lewis states that he and Mr. McGowan agreed that “there was no option other than termination,” “because of the seriousness of this and the falsification of records.” (HT, p. 639.) Mr. Milhiser did not recall any discussion of lesser disciplinary actions other than termination. (HT, p. 574.) The decision to terminate was made by Mr. McGowan and Mr. Lewis, and Mr. Milhiser supported the decision. (HT, pp. 550-51, 576, 638; CX 62, pp. 228, 231.)

Mr. Lewis states that he felt it was “an awful situation” because the Complainant was a “talented individual” and “an excellent instructor [who] performed many key roles” for the Tucson Center, and that losing the Complainant put the Tucson Center “in a bind” and “hurt [its] ability to support [international] customers in the coming months.” (HT, p. 639; CX 62, p. 225.) The loss of the Complainant also increased costs for the Tucson Center, because they had to bring in examiners from other training centers when they received foreign clients, which involved difficult scheduling and significant expense. (HT, p. 640.) Mr. McGowan testified that during the conversation about whether to terminate the Complainant, Mr. Lewis and Mr. Milhiser “made it very clear that this was a good instructor and that they – they wanted me to know that this would – would hurt their program.” (HT, p. 792.)

Mr. McGowan testified, however, that the Complainant’s popularity as an instructor did not play any role in his decision to terminate the Complainant:

Absolutely not. No matter how good an instructor is, no matter how good a pilot he might be, if we can’t trust the instructor to do what is required, what the

program says and what the FAA expects us to do as a representative of the FAA, he has to do the right thing.

(HT, p. 792.) Mr. Lewis similarly testified that “in light of the facts and the seriousness of this – of the events and the – in that we lost confidence and trust in Mr. Benninger, it was not a hard decision. It was the right decision.” (HT, pp. 640-41.) At the hearing, Mr. Lewis emphasized that the Complainant is “put into a position of trust and responsibility by the FAA to be a check[] airman for an air carrier.” (HT, p. 638.) He admitted that prior to terminating the Complainant, Mr. Lewis had never before fired an instructor for document falsification, but he noted that he had never been faced with similar behavior by an instructor: “I’ve never seen an instructor confirm training and not do a check. It’s unprecedented and it’s dishonorable and it calls for termination.” (HT, pp. 648, 667.) Mr. Lewis provided consistent testimony during his May 2008 interview by an OSHA investigator:

[The Complainant] was under pressure to satisfy the client but that doesn’t allow him to violate FAA regs. If [he] had fessed up and recognized wrongdoing, things would have taken a different course; there was too much trust violated. There was no other option. . . . We decided at this time to terminate. . . . it was not hard to decide; this situation was way beyond my ethics and company ethics. [The Complainant’s] job requires integrity and honesty. It was embarrassing to our industry. No other possibilities were discussed. . . . One of the company core values is to always “do what is right.”

(CX 62, p. 227.) Mr. Milhiser claims to have had a similar reaction to the Complainant’s conduct. In May 2008 Mr. Milhiser explained to the OSHA investigator:

I cannot imagine a professional instructor of his caliber that wouldn’t have known better. It was intolerable. Egregious. In fact, I have never seen this in 41 years of aviation. Trainers have to document exactly how many hours and what type of training takes place on a specific day. You can’t say you flew Monday if you didn’t. The hours of training he signed off on didn’t even come close to what was actually done.

(CX 62, p. 230.)

Despite the decision to terminate, Flight Safety’s HR representatives advised that the Complainant be given the option to resign. (HT, p. 666.) A letter of resignation was typed up after the conclusion of the phone call with Mr. McGowan. (HT, pp. 597, 642.)

When the Complainant returned to the room, he was given the letter of resignation and instructed to sign it. The Complainant refused to sign the letter, saying, “I need to understand what my options are.” (HT, p. 198.) The Complainant then asked for a private hearing by Mr. Lewis, and Mr. Milhiser and Mr. Hansen left the room. (HT, p. 552.) He asked Mr. Lewis if there was “any way to resolve this,” and Mr. Lewis said “No,” and told him, “[y]ou really need to sign this [resignation letter].” (HT, pp. 198, 205.) The Complainant states that Mr. Lewis informed the Complainant, “You know, we can have your license revoked . . . if we want to, we can pursue revoking your license.” (HT, p. 205.) The Complainant states that he replied, “I’ll

just have to take that chance, if that's the case." (HT, p. 205.) Mr. Lewis denies making this threat. (HT, pp. 642, 665.) The Complainant believed at this time that Mr. Lewis was still personally angry with the Complainant as a result of his "8 in 24" allegation.

Mr. Lewis signed the Complainant's formal termination authorization on Friday, November 30, 2007, effective immediately. (RX S; CX 1.) The "Re-Employ?" bubble on the form was filled out "No." (RX S.) In the "Remarks" section of the form, the Complainant was given an instructor "rating" of 4.32. (RX S.) The form was also signed by Mr. McGowan the following week. On the same day, Mr. Lewis drafted and signed a single-line letter, stating: "Mr. Roger Benninger was terminated on 11/30/2007 for falsification of training records." (RX T; CX 2.)

The Tucson Center's Actions After the Termination

On November 30, 2007, Mr. Milhiser spoke by telephone with Warren Hogan, the Chief Pilot at Air Rutter International, to inform him that the Trainees' instruction had not been completed, and they were not qualified to fly under Section 135. (RX L; HT, pp. 552-54.) On December 5, 2007, Mr. Lewis sent a letter to Mr. Hogan as a follow-up to Mr. Milhiser's call. (RX L; CX 41; HT, p. 552.) The letter indicated that the Trainees "trained from 26-29 November 2007 in the CL-601" and

[C]ompleted ground school training, but did not complete simulator training. This was due to mechanical malfunction, training center oversight, and incorrectly accomplished records. Because of this, training and checking were not completed and Part 135 qualification not accomplished.

(RX L.) The letter offered to cover all of the Trainees' expenses for returning to complete the training, and indicated that the training and checking "can be completed in 1-2 days." (RX L.)

Mr. Milhiser also telephoned Steve Fedynyszyn, Flight Safety's Director of Regulatory Affairs, to find out whether the Tucson Center needed to also notify the FAA of what had happened. (HT, p. 554.) Mr. Milhiser was informed that the Tucson Center's only responsibility was to notify the 135 certificate holder, which had already been done, and that the certificate holder could then choose whether or not it wished to notify the FAA. (HT, pp. 555, 641-42; RX R; CX 44.)

On December 13, 2007, Mr. Milhiser drafted a memorandum detailing the week's events leading up to the Complainant's termination, the contents of which have been included in the discussion above. (CX 40.)

The Complainant's Actions After his Termination

After his termination, the Complainant telephoned some of his previous clients to inform them that he had been terminated, and he states he also received 14 unsolicited calls from clients

who had heard the news independently. (HT, pp. 203-04.) Some of these clients also called members of management at Flight Safety to inquire or complain about his termination.³⁶

The Complainant also drafted two documents memorializing his version of events leading up to his termination. On December 1, 2007, he wrote an “Affidavit” (the contents of which have been included in the discussion above) chronicling his account of the events that took place during the week. (RX M, pp. 3-4.) He additionally drafted a “Mishap Investigation Report,” in which he posited that a series of factors, most of which were outside of his control, had contributed to his termination, including flaws of “administration,” “maintenance,” and “operations.”³⁷ (RX M, p. 2.) He also set forth a series of “findings”³⁸ and “recommendations”³⁹ to prevent similar situations from arising again at the Tucson Center. (RX M, p. 2.)

The Complainant later spoke to his former client Mr. McArthur, who suggested that Regional Manager Doug Ware in the New York office (Mr. Lewis’s supervisor) might be able to “assist the process and maybe reverse the decision of [his] termination.” (HT, pp. 199, 292.) He

³⁶ Client Brian McArthur testified that he telephoned Regional Manager Doug Ware to complain about the Complainant’s termination. (HT, p. 93.)

³⁷ Among the perceived “causes” of the events which gave rise to his termination, the Complainant included, *inter alia*: (1) Ms. Medina made an erroneous original entry of 16 hours for the training into the Orion/Logbook computer system, rather than the 12 hours that should have been entered; (2) Mr. Bitgood failed to coordinate with Ms. Medina to effectuate the necessary changes to the computer system, despite his “concurr[ence]” with the need for a change; (3) Mr. Bitgood and Mr. Duke failed to communicate concerning the necessary changes; (4) the Director of Maintenance did not advise operations in a timely manner the impact the simulator upgrade would have on the scheduled trainings, and when it was eventually provided for training on Tuesday, the simulator still demonstrated “open discrepancies . . . as a result of the upgrade;” (5) neither the Director of Maintenance nor Mr. Bitgood informed Mr. Duke about the inoperability of the simulator until Monday; (6) once Mr. Duke did learn about the problem, he did not adjust the client training schedules; (7) instructor manning at the Tucson Center during the period in question was “[c]ritically low,” resulting in the Complainant’s short notice assignment to perform the CAA check of Mr. McKinlay on Wednesday morning; (8) extended training time with the two trainees was unavailable due to another scheduled check for an instructor who had been forced to train other clients on Wednesday morning, but who would have lost his own training license if he did not receive his own check ride by November 30, 2007; (9) the “limited flexibility of Logbook had produced a common practice of instructors to ‘fly the time’ but then confirm Logbook as programmed, to avoid complex computer conflicts with other scheduled training;” (10) Ms. Medina did not communicate to the Complainant that she had scheduled the final check to occur Wednesday night from 7:30 p.m. until 10:30 p.m.; (11) the Complainant did not “effectively communicate with required supervisory personnel” concerning the variety of scheduling and record-keeping problems he had encountered; and (12) the Complainant neglected to annotate the training records as “‘cleared for early checking based on proficiency’ in accordance with company training policies.” (RX M, p. 2.)

³⁸ The Complainant’s “findings” included: (1) “[c]ritical low instructor manning” at the center created “extreme pressure on available instructors to complete all assigned tasks;” (2) communication among “all involved elements” within the center was “significantly low,” resulting in a situation where changes to the computer scheduling program made by specified authorized personnel were “not effectively coordinated with necessary individuals in the process.” (RX M, p. 2.)

³⁹ The Complainant’s “recommendations” included: (1) reducing client training in the short term, to permit newly hired instructors to become prepared and ready to meet their training obligations; (2) redesigning the Orion/Logbook system to be “more flexible and responsive to schedule changes;” (3) providing automatic advisories to all affected departments whenever changes are made to the schedule; and (4) “[a]ddress[ing] the delicate balance between ‘meeting and exceeding clients’ needs and expectations’ and absolute compliance with company policies and directives for all instructors.” (RX M, p. 2.)

contacted Mr. Ware, and on December 3, 2007, sent him an e-mail attaching his Affidavit and Mishap Investigation Report. (RX M, p. 1.) In his e-mail, the Complainant explained,

I would like to submit that the two documents show “errors” occurred and that an intentional attempt to “falsify” records simply did not occur. Further, the events reveal a process more seriously flawed than the apparent independent action of one individual.

(RX M, p. 1.) He sent this information to Mr. Ware with the hope that Mr. Ware might “intervene on [his] behalf.” (HT, p. 293.) The next day, Mr. Ware forwarded the Complainant’s e-mail and attachments to Mr. McGowan and Mr. Lewis, requesting that they instruct him on how they would like him to respond. (RX M, p. 1.)

Mr. McGowan testified that reading the Complainant’s explanation of events did not change his decision: “in some ways, it confirmed the decision. The amount of time that had been done was less. I felt like he was trying to justify that in this.” (HT, p. 794.) Mr. McGowan was likewise unpersuaded by the Complainant’s claims that multiple forces outside of his control had caused the mishap, as he believed the Complainant had failed to exhaust the assistance available to him at the Tucson Center before taking matters into his own hands. (HT, pp. 794-96.) Mr. McGowan emphasized that it was the Complainant’s “responsibility to ensure that the record reflects what was actually done,” and that if the Logbook still reflected trainings on Monday, then he would have expected the Complainant to do whatever was necessary to make sure that the Logbook “reflect what was actually done. That’s the responsibility of the instructor or the check airman.” (HT, p. 818.)

On December 4, 2007, the Complainant sent Mr. Ware a second e-mail, in which he recounted “the rest of the story” underlying his termination. First, he alleged that the “working conditions and management of the Tucson Center” could “best be described as dysfunctional and at worst . . . intolerable,” and that these conditions had led to the departure of at least six pilots in the four months prior to the Complainant’s termination, all of whom possessed extensive piloting experience and between 8½ and 14 years of employment with Flight Safety. (CX 14, p. 1.) The Complainant wrote,

The Center Manager [Mr. Lewis] can best be characterized as “single-minded and insensitive” and at worst . . . as “dictatorial and vindictive.” The health of the center rests critically on this very point.

(CX 14, p. 1.) The Complainant stated that his purpose in sharing these reflections with Mr. Ware was as “an opportunity to preserve the reputation and prestige of [F]light [S]afety and quite honestly; improve the lives of the employees who remain.” (CX 14, p. 1.) The Complainant urged Mr. Ware to “ask people [he] trust[ed],” “[s]urvey recently departed employees,” and “[i]nquire quietly among current employees (admin and instructors are equally aware).” (CX 14, p. 1.)

The Complainant also alleged in his December 4 letter to Mr. Ware that “non-compliance” with FAA requirements at the Tucson center was “widespread” due to “critically low instructor manning” which “effectively preclude[d] time available to comply with

appropriate standards.” (CX 14, p. 1.) The Complainant alleged three examples of non-compliance occurring within the 14 days prior to his termination, including the following alleged incidents: (1) an unnamed instructor’s recurrent proficiency training was documented as consisting of 4 days of ground school and 4 days of simulator sessions, when in fact the training consisted of only 2 hours at the controls of the simulator; (2) an unnamed Lear 35 client was documented as having completed his training and checking without accomplishing the check ride due to simulator unavailability; and (3) another instructor’s annual proficiency check comprised in total of 45 minutes at the controls of the simulator. (CX 14, p. 1.) The Complainant concluded his letter by noting that, while he was “at peace with what occurred in [his] case,” he felt the remaining instructors “deserve[d] some relief from this situation,” and the company “deserve[d] better representation in its center management” in order to “protect its status and certificate in the aviation training industry.” (CX 14, p. 1.) The Complainant stated that he hoped for an “‘open-air’ approach by individuals who (sic) [he] consider[ed] decent and honorable (yourself and Mr. Whitman),” and that such an approach might “be able to creatively resolve this blemish on FSI’s storied history.” (CX 14, p. 2.)

The following day, on December 5, 2007, the Complainant sent an e-mail to Bruce Whitman, the president of Flight Safety. He decided to contact Mr. Whitman after client Ed Drennan informed him that he had been in contact with Mr. Whitman “several times” with regard to his “outrage” over the Complainant’s termination. (HT, p. 201.) The Complainant hoped to “motivate [Mr. Whitman] to see that something . . . incredibly wrong had been committed and that he would see his way to correcting it,” since clients had previously contacted Mr. Whitman directly to praise the Complainant as an instructor. (HT, pp. 201-03; CX 6, p. 2.) In his e-mail, titled “My Regards,” the Complainant wrote:

Dear Mr. Whitman,

No doubt you have heard my name mentioned a number of times in the past week. Some possibly used my name in conjunction with words like, “rebel,” “menace” or “deviant.” Shortly following that introduction, others contacted you and may have used words like, “foul,” “unfair,” or “travesty.” In either case, the truth invariably lies somewhere between the two.

I owe you my deepest apology for creating any blemish on the prestigious name of Flight Safety by my actions. The guilt is mine. The shame is mine. Shame defined as the painful feeling arising from the awareness of having done something dishonorable or improper. Ten years of dedication were nullified by one stroke of the confirmation button on a computer.

Contrite is an appropriate description of my feelings in the aftermath. The significance is that it is not a word which would normally be used to describe my effusive personality. In this case, no redress or penance was acceptable, so, my focus must be forward. I respect you. You have always impressed me as sincere and genuine. Thank you for your leadership of what I consider ‘my’ company.

Please count me as a zealous advocate of FSI and its reputation.

Highest regards,

Roger H. Benninger.

(RX N.) The Complainant states that his comment about being called a “rebel, menace or deviant” referred to his raising the “8 in 24” issue (HT, p. 241), and that his concern about creating a “blemish on the prestigious name of Flight Safety” was intended to refer to his sense of guilt “that [Mr. Whitman] was being bombarded by calls from clients saying that they were upset about [the] termination.” (HT, p. 203.) The Complainant states that his comment that he felt “shame” referred not to any admission of wrongdoing by the Complainant, but to his sense of guilt about his role in creating the uproar to begin with:

I was just in shame that I even – that this was even created, because I really felt it was unnecessary. The entire episode was unnecessary. It could have been handled differently, it could have been resolved differently, and I – it basically got blown completely up.

(HT, p. 204.) The Complainant testified that by his comment in the letter that his years of dedication were “nullified by one stroke of the confirmation button on a computer,” he referred to failing to mouse-click the box to indicate “Training completed in less than minimum time,” stating that if he had done that, then the Trainees’ records would have been completely valid, “and we wouldn’t be here today.” (HT, p. 204.) He conceded that his letter “could have been worded better” to convey his intended meanings more clearly, but he avers that he “was in, virtually, a state of shock,” and was not thinking clearly when he wrote and sent it. (HT, p. 236.)

Mr. Whitman replied to the Complainant more than a week later, on December 13, 2007, stating, “Thanks, Roger, for your e-mail. Best wishes to you and your family for every future happiness ... Bruce.” (RX N.)

In January 2008 the Complainant obtained piloting work with a charter jet company in Scottsdale, Arizona. (HT, p. 208.) He worked there for three months until the company closed, and in April 2008 he found another charter aircraft pilot job with a company in Los Angeles, California. (HT, pp. 209-10.) He worked for the Los Angeles company until he was laid off in July 2009. By the time of the December 2009 hearing, he had been unemployed since July 2009. (HT, pp. 210, 212.)

On February 1, 2008, the Complainant filed his discrimination complaint with OSHA, alleging that the reasons proffered by Flight Safety for his termination were pretextual and provided evidence of discriminatory disparate treatment. (ALJX 1, p. 2; CX 3, p. 2.) The Complainant sought reinstatement to his former position, with back pay and benefits lost, as well as compensatory damages. (ALJX, pp. 2-3.) In the course of its investigation, an OSHA investigator interviewed Mr. Lewis and Mr. Milhiser in May 2008. (CX 62, pp. 225-31.) On June 19, 2009, OSHA issued the results of its investigation, dismissing the Complainant’s complaint on the basis that he was terminated “for falsifying training documentation, a[n] FAA violation,” and that the Respondent had previously terminated at least three other instructors for falsifying training documentation. (ALJX 1, p. 6.)

The Complainant's Justifications for Reduced Training Time and Records Discrepancies

The Complainant's testimony at the hearing was inconsistent concerning the exact number of simulator hours he completed with the Trainees. On the first day of the hearing, he testified that his handwritten entries to the simulator sign-in log represented the training he had conducted for the Trainees. (HT, pp. 184-85.) These logs showed him completing a total of 11 hours in the simulator — reducing the 12 hours of training and checking time by only a single hour — consisting of 6 hours in the simulator on Tuesday November 27, from 11:30 a.m. until 5:30 p.m., and 5 hours in the simulator on Wednesday, November 28, from 12:00 p.m. until 5:00 p.m. (RX F; HT, pp. 184-85.) He initially testified that of these total 11 hours in the simulator, 9 were spent in training, and 2 were spent in conducting the check rides. (HT, p. 185.)

However, later in his testimony, the Complainant testified that the Affidavit he prepared on December 1, 2007, and sent to Doug Ware represented the training he had conducted for the Trainees. (HT, pp. 168-69, 292-95, 298-99, 319, 328; RX M, pp. 3-4.) This Affidavit reduced the tally to 7¾ total hours in the simulator, including training and both check rides. According to the December 1 Affidavit, he conducted 4¾ hours of training on Tuesday November 27, from 12:45 p.m. to 5:30 p.m., and 1 hour of training and 2 hours of check rides on Wednesday November 28, from 12:30 p.m. to 3:30 p.m. (HT, p. 328; RX M, pp. 3-4.) While each Trainee would ordinarily have been expected to receive 6 hours at the helm of the simulator during the week — including 1½ hours in the pilot seat each day for three days, and a final 1½ hour check ride — the Complainant's 7¾ hour figure provided each pilot a total of approximately 3 hours and 40 minutes in the pilot seat. (HT, pp. 329-30.) The Complainant testified that this was the only instance when he recalled reducing 12 hours of training and checking down to 7¾ hours: “This was a unique situation.” (HT, p. 877.) I will discuss in detail below my findings as to the number of hours the Complainant actually spent in the simulator with the Trainees.

The Complainant provided two primary justifications for his decision to reduce the Trainees' total training and checking time. First, he argued that the applicable FAA training regulations permit an instructor to conduct recurrent 135 trainings “to proficiency,” and that because the Trainees were an experienced crew, he was legally permitted to use his judgment to get through the training syllabus more quickly without violating any FAA standards. (HT, pp. 330, 847-48, 852.) Second, he argued that his many years of experience as an instructor and check airman for both the Respondent and the U.S. Air Force, as well as his experience as a fighter pilot for the Air Force, afforded him a unique skill set that enabled him to conduct trainings and check rides with great speed and efficacy. (See HT, pp. 326-28, 376-79, 864-70, 880-81.) He emphasized that both the training and checking were completed in full, according to FAA standards (HT, pp. 190-91, 193, 384), and that the Trainees “strongly disagreed” with the Respondent's contention that they had not completed their qualification requirements. (CX 6, p. 1.) I will address these theories in greater detail below.

The Complainant also provided a number of justifications for the various “discrepancies” contained in the training documents and records he prepared on behalf of the Trainees.

As for his Logbook confirmation of simulator activities taking place on Monday November 26, he argued at the hearing that this action was justified for the following reasons: (1) the “program logic” of the Orion system made it impossible for him to confirm training and

briefing activities conducted on Monday without also confirming Monday's scheduled simulator activities (HT, p. 383); (2) he made "four separate attempts" with Mr. Duke, Mr. Bitgood, and Ms. Medina to request corrections to the Orion computer system to show simulator sessions on Tuesday and Wednesday only, thereby demonstrating his clear intention of making the Orion system consistent with the trainings he actually conducted and his lack of any intent to falsify documents (HT, pp. 191, 845-46); (3) he waited to confirm his "Monday" simulator activities until he had completed simulator training on Tuesday, such that the trainings confirmed for Monday had already taken place by the time he confirmed them (RX M, p. 3); (4) during previous experiences under the supervision of Mr. Bitgood, where scheduling changes needed to be made due to unforeseen circumstances such as a pilot trainee's illness, he had been expressly instructed by Mr. Bitgood to "adapt the training and log it [as] it was programmed into the computer;" (HT, pp. 388-89, 848-49); and (5) records discrepancies of the kind involved here were "commonplace" and "exist[ed] on a virtually 'daily' basis" at the Tucson Center. (CX 6, p. 1; *see also* ALJX 2, p. 1.) In a May 2008 letter to OSHA, the Complainant emphasized the November 29, 2007, comment of instructor Carl Wilson — "If you can be fired for that, we can all be fired" — and concluded: "The truth is this: any instructor could be found to 'falsify documents' to meet computer-scheduled training documentation and match real-world events on any given day!" (CX 6, p. 2.)

As for his erroneous handwritten entries on the Trainees' 8410 forms, he made the following arguments: (1) he wrote that each check ride lasted 2 hours, rather than the single hour he actually conducted with each Trainee, out of caution for the Tucson Center's "need to make sure that our schedule agrees with our documentation," in anticipation of potential audits by the FAA, and pursuant to information from Ms. Medina that the computer system required 2 hour entries for each check ride (HT, pp. 333-34, 373, 385); (2) he dated the 8410 forms as completed on Thursday November 29, rather than Wednesday November 28, due to a simple "error": "I guess I had it in my mind they were supposed to have it completed on the 29th, but we did it earlier, on the 28th."⁴⁰ (HT, p. 186.) He further explained that the erroneous date made no substantive legal difference to the certification, as either date held identical legal significance, pinning the Trainees' certification expiration to the last day of November.⁴¹ (HT, p. 186.)

I will address the Complainant's record "discrepancy" justifications in greater detail below.

⁴⁰ At his deposition, however, the Complainant made the argument that he dated the 8410 forms November 29 as a result of looking at the Greenwich Mean Time clock located inside of the simulator. (HT, pp. 322-24.) While this argument might have provided a plausible explanation based on the Complainant's handwritten entry to the simulator sign-in logs that he completed the check rides at 5:00 p.m. on Wednesday (which would equate to 12:00 a.m. Thursday in Greenwich Mean Time), the Complainant's hearing testimony and statements in his December 1 Affidavit that he actually completed the check rides at 3:30 p.m. on Wednesday render the Greenwich Mean Time theory impracticable. At 3:30 p.m. Wednesday in Arizona, it would have been 10:30 p.m. of the same day in Greenwich Mean Time.

⁴¹ This was confirmed by Rudy Rostash, who testified that the date of completion on the 8410 form determines whether the client completed the training in "early grace in the month or in late grace," and that any completion date in November would be good enough to satisfy a November renewal obligation. (HT, pp. 728-29.)

Payroll Actions Taken By the Respondent Pursuant to Other Alleged Document Falsifications

In rebuttal of the Complainant's claim that the Tucson Center's management treated his records "discrepancies" more severely than other instructors' similar conduct, the Respondent submitted evidence concerning six other former Flight Safety instructors from different training centers across the country⁴² who were either terminated or given the option of resigning following incidents involving falsification of records. Payroll change authorization forms for four out of the six employees were signed by Mr. McGowan, who testified concerning his recollection of the details concerning all six cases. (RX U-X; HT, pp. 801-09.)

First, Rudolph Isenberg of the St. Louis Division was "discharged" in December 2003 after an original hire date in October 2000, was given a final rating of 3.15 out of 5, and was deemed not suitable for re-employment. (RX AA.) The "Remarks" section of his payroll change form stated, "Mr. Isenberg is being terminated . . . for violation of FAA regulations and company policy." (RX AA.) The record also contains a "Counseling Statement and or Corrective Action Form" for Mr. Isenberg, stating that he was terminated for "violation of work rules" and "FAA Reg. 61.59," after receiving previous counseling or discipline for the same or similar conduct. (RX BB, p. 1.) An attached sheet of "additional comments" details that in late November 2003, Mr. Isenberg had engaged in behavior including (1) a "[v]iolation of established company policy," when he permitted a liquid beverage into the interior of a simulator, which subsequently spilled in the cockpit area, requiring a 4-hour repair and cleaning of the simulator (RX BB, pp. 1-2); and (2) a "Falsification of Official Document/Record: FAA Regulation 61.59(a)(2)," when he (a) rode as a non-flying pilot during the check ride for his students the night of November 24, 2003, until 2:00 a.m. of November 25, 2003; (b) administered an unauthorized Line Oriented Flight Training ("LOFT") session for the students immediately following the check ride, early in the morning of November 25, 2003, and (c) documented the LOFT training as occurring from 1:00 to 4:00 a.m. on November 26 (rather than November 25), a date when the students were no longer at the training center and at which time the simulator in question was not flying.⁴³ (RX BB, pp. 2.) The additional comments state that Mr. Isenberg's action was a "willful violation of FAA Regulation 61.59(a)(2) regarding falsification of records. Mr. R. D. Isenberg did intentionally falsify an FAA approved training document (PTF-17)." (RX BB, p. 2.)

Second, Francis Tucker of the Toledo Division "resigned" in November 2004 after an original hire date in May 1999, was given a final rating of 4.62, and his resignation form indicated he was suitable for re-employment. (RX Y.) Although his payroll change form indicates that he voluntarily resigned and makes no reference to a falsification of documents, a "Counseling Statement and or Corrective Action Form" for Mr. Tucker, bearing the very same date as his resignation form, indicates that management decided to terminate him for "violation of work rules" and "negligence or carelessness." (RX Z.) The form details:

⁴² Evidence was submitted concerning other employees in training centers in the Respondent's Savannah, Houston, Atlanta, Toledo, and St. Louis Divisions. (RX U-Z; RX AA.) No evidence was submitted concerning other examples coming out of the Tucson Center.

⁴³ At the hearing, Mr. McGowan testified that Mr. Isenberg was terminated for claiming on training records that he completed the LOFT training session when he had not actually done the training. (HT, p. 809.)

During the period October 18-22, 2004, Frank Tucker knowingly falsified training records to show the training items had been completed when in fact, he knew that that (sic) had not. In addition, if only one member of a two-man crew completed a maneuver to proficiency, he would grade both members of the crew instead of grading them individually.

(RX Z.) The form stated that prior to the decision to terminate Mr. Tucker, he had not been provided previous warnings or discipline. (RX Z.) At the hearing, Mr. McGowan testified that Mr. Tucker had claimed to have completed approximately 12 or 14 approaches in a two-hour period, “which is barely a physical impossibility (sic) to do. And we thought he had falsified those records.” (HT, p. 807.) Mr. McGowan states that when Mr. Tucker’s supervisor confronted him, “he admitted that he did not do all of the things that he had checked off,” and “had a pretty cavalier attitude about the whole situation.” (HT, p. 807.) Mr. McGowan states that had Mr. Tucker not accepted the option of resigning, he would have been terminated. (HT, p. 807.)

Third, Eldon Roehl of the Houston Division “resigned” in August 2005 after an original hire date in April 1998, was given a final rating of 4.15 out of 5, and was deemed not suitable for re-employment. (RX W.) The personnel change form was signed by Mr. McGowan. (RX W.) Nothing on the form made any reference to a falsification of records. However, an e-mail dated August 24, 2005, sent to four individuals — including Tom Riffe of the HR Department and Mr. McGowan — explained,

Gentlemen:

We met with Eldon Roehl to tell him of our decision that his employment with Flight Safety was no longer acceptable. This decision is in regards to his not properly preparating (sic) an ATR client for simulator training through Eldon’s failure to comply with published briefing/debriefing times and Eldon’s associated misrepresentation in the client’s training records. (Note: All of the proper training was given, by another instructor, following our discovery. . . .)

...

Thank you for your support and advice.

(CX 62, p. 217.) Mr. McGowan explained that the situation had involved two of Mr. Roehl’s students’ complaints to Flight Safety that they had not received the full training time they were supposed to receive. (HT, p. 803.) When Mr. Roehl was confronted by his supervisor, he admitted to reducing the students’ training time “because of child care issues,” which he had not mentioned to anyone at the training center. “So it was another situation where he was kind of trying to take care of things on his own.” (HT, p. 804.) After being confronted, Mr. Roehl “actually handed [his Director of Training] a letter of resignation,” but Mr. McGowan states that Mr. Roehl would have been terminated had he not voluntarily resigned. (HT, p. 805.)

Fourth, John De Lafosse of the Savannah Division was “discharged” in April 2006 after an original hire date in March 2004, was given a final rating of 3.46, and his payroll form indicated that he should not be re-employed. (RX U.) His discharge form was signed by Mr.

McGowan. (RX U.) Nothing on the form made any reference to a falsification of records. Mr. McGowan testified at the hearing, however, that he was involved in the decision to terminate Mr. De Lafosse, and that the situation had involved a records falsification which came to light when a pilot failed a check ride, and then complained to his employer that he had not been trained on a particular element tested during the check ride. (HT, p. 801.) Mr. McGowan states that when Mr. De Lafosse was confronted by his supervisor, “he basically admitted that he had not done the training. And, as a result of that, he was terminated.” (HT, p. 801.)

Mr. De Lafosse also testified at the hearing. He stated that approximately 120 days before he was terminated, an incident occurred in which he was asked to train students on an aircraft on which he was not formally certified to train, and he refused to conduct the trainings because to do so would have violated FAA regulations. (HT, pp. 479-80.) He was aware that his complaint and refusal to train were forwarded to his training center’s Director of Standards, the Director of Training, and the Center Manager. (HT, p. 481.) He commented at the hearing, “I think Flight Safety identified me as a trouble maker, . . . as someone who was asking questions about Federal Aviation Regulations and why we were not complying with them.” (HT, p. 479.) He conceded, however, that prior to his termination, his training center had received complaints from Net Jets that some of their pilots had not been properly trained by him. He denied stating in the pilots’ records that he had conducted simulator training that he had not actually conducted, stating instead that he had merely included on the training records that the simulator training “had been discussed in an oral debriefing,” which he states was “standard procedure for training on that airplane.” (HT, pp. 480-81.)

Fifth, Arthur Houghtby of the Savannah Division “resigned” in February 2007 after an original hire date in November 2000, was given a final rating of 4.45, and an indication that he was suitable for re-employment. (RX V.) The resignation form was signed by Mr. McGowan. (RX V.) Nothing on the form made any reference to a falsification of records. Mr. McGowan testified that in this case, Mr. Houghtby “had not done training that he was supposed to have done and logged it.” (HT, p. 802.) Mr. McGowan states that when confronted, “he admitted not conducting the training,” and was given the option to resign or be terminated. (HT, p. 803.)

Sixth, Bruce Fielding of the Atlanta Operational Unit “retired” in August 2007 after an original hire date in December 1987, was given a final rating of 3.64, and was deemed suitable for re-employment. (RX X.) The payroll change form was signed by Mr. McGowan.⁴⁴ (RX X.) Nothing on the form made any reference to a falsification of records, but Mr. McGowan testified that the matter had involved Mr. Fielding’s recording of training that he had not conducted: “And when . . . the Center Manager confronted him with the discrepancy, he admitted he had not conducted the training.” (HT, p. 806.) Mr. McGowan states that had Mr. Fielding not voluntarily retired, he would have been terminated. (HT, p. 806.)

Mr. McGowan testified, in conclusion, that although the Flight Safety employee handbook does not mandate termination in cases involving falsification of records, this is because the handbook was written for all employees, not only for instructors and check airmen.

⁴⁴ Mr. McGowan signed only his initial on this form rather than his full signature. The initials can be verified as Mr. McGowan’s by comparison with a different personnel change form in the record on which the same initials appear above the typed name “Greg Mc Gowan.” (RX L.)

(HT, p. 821.) He explained that it is considered a “much more serious matter” when instructors or check airmen are involved in a falsification of records, “because of safety, because of discipline, because of FAA regulations, operators. The public in general relies upon us to maintain the regulations.” (HT, pp. 821-22.) Mr. McGowan testified that he is not aware of a Flight Safety instructor who received a lesser penalty other than termination (or the option to resign) after being found falsifying documents. (HT, p. 832.)

ANALYSIS AND DISCUSSION

Applicable Law

As stipulated by the parties, coverage of Flight Safety under AIR 21 is proper in this case, as it serves as a “contractor . . . of an air carrier,” as such terms are defined by statute. 42 U.S.C. §§ 40102, 42121(a). There is also no dispute that during the events in question in this case, the Complainant was an “employee” of Flight Safety and subject to the employee protection provisions set forth in Section 519 of AIR 21. Section 519, codified at 49 U.S.C. § 42121, provides:

No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee . . . provided . . . to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b)(1). To prevail against Flight Safety in this matter, the Complainant must “demonstrate,” proving by a preponderance of the evidence, that (1) he engaged in a protected activity; (2) Flight Safety knew that he engaged in the protected activity; (3) Flight Safety took an adverse personnel action against him; and (4) the protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. § 42121(b)(2)(B)(i); 29 C.F.R. § 1979.109(a); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. at 6-10 (ARB Jan. 30, 2004) (explaining scope of coverage, procedures, and burdens of proof under AIR 21); *Hoffman v. NetJets Aviation, Inc.*, ARB No. 09-021, ALJ No. 2007-AIR-7, slip op. at 5 (ARB Mar. 24, 2011) (approving and reiterating standards set forth in *Peck*). A preponderance of the evidence is “[t]he greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other.” *Peck*, slip op. at 9 (quoting BLACK’S LAW DICTIONARY 1201 (7th ed. 1999) [hereinafter BLACK’S]).

Even if the Complainant succeeds in proving these four elements, however, he will not be entitled to relief if Flight Safety demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment actions against him even in the absence of the protected activity. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Peck*, slip op. at 9; *see also Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-4, slip op. at 8 (ARB Dec. 29, 2010); *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-

AIR-8 (ARB Jan. 31, 2006); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 6 (ARB Dec. 30, 2004). Clear and convincing evidence is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.” *Peck*, slip op. at 9 (quoting BLACK’S at 577). The Administrative Review Board has emphasized that the employer bears its burden of proof by clear and convincing evidence only after such time as the complainant successfully proves his discrimination case by a preponderance of the evidence. *Brune*, slip op. at 14 (“Thereafter, and only if the complainant has proven discrimination by a preponderance of the evidence . . . does the employer face a burden of proof.”).

1. The Complainant’s “8 in 24” Complaint was a Protected Activity

As introduced above, an employee is protected under Section 516 of the Act for providing information to his employer or to the federal government “relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety.” 49 U.S.C. § 42121(a). Such information may be provided either orally or in writing, but to gain protection the communication must be “specific in relation to a given practice, condition, directive or event” affecting aircraft safety, and a complainant must possess an objectively reasonable belief that a violation in fact occurred. *Peck*, slip op. at 13; *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, 08-074, ALJ No. 2006-AIR-14, slip op. at 8 (ARB Sept. 30, 2009).

Here, there appears to be no reasonable dispute that the Complainant’s “8 in 24” allegation made on August 23, 2007, constituted an activity protected under AIR 21. The parties stipulated as much (*see* Order Summarizing Pre-Hearing Conference, at 3, ¶9 (Nov. 6, 2009)), and I find that the stipulation comports with applicable law. First, the information the Complainant provided to Mr. Bitgood and Mr. Milhiser was specific as to the training schedule of a specific instructor (Jim Jensen) on a particular date (August 18, 2007), and alleged that Mr. Jensen’s training schedule on that date — which had required him to perform four initial check rides back to back — had resulted in a violation of the FAA’s “8 in 24” rule.⁴⁵

Second, the Complainant’s belief that a violation had occurred was subjectively genuine and objectively reasonable. Both Mr. Milhiser and Mr. Bitgood testified that they believed the Complainant was “sincere” when he voiced his complaint (HT, pp. 566, 710), and a variety of record evidence persuades me that his concern was objectively reasonable, including: (1) testimony by instructor Hector Alvarez that a single initial check ride required between 2 and 2½ hours to complete (HT, p. 79), raising a logical inference that 4 initial check rides in one day could have required Mr. Jensen to remain longer than 8 hours in the simulator; (2) testimony by Mr. Milhiser at the hearing that initial check rides “absolutely” take longer than recurrent check rides (HT, pp. 523, 569); (3) Mr. Jensen’s actual training records showing that he was scheduled for four initial check rides to take place during 10 hours on the Saturday in question (RX EE); and (4) Mr. Milhiser’s immediate actions taken to investigate the complaint and to document and disseminate his findings of no violation, demonstrating management’s belief that the allegation was reasonable enough to merit immediate attention. *See* 148 Cong. Rec. S7420 (daily ed. July

⁴⁵ The so-called “8 in 24” rule provides: “A training center may not allow an instructor to— . . . Excluding briefings and debriefings, conduct more than 8 hours of instruction in any 24-consecutive-hour period.” 14 C.F.R. § 142.49(c)(1).

26, 2002) (noting, in the context of the Sarbanes-Oxley whistleblower act, that “any type of corporate or agency action taken based on the information . . . would be strong indicia that [the complaint] could support such a reasonable belief.”)

The Respondent’s claim that the Complainant’s “8 in 24” complaint was rooted in a legally flawed understanding of the rule (*see* HT, p. 49) does not deprive the Complainant’s August 23, 2007, allegation of its protected status. Whether a complainant’s belief is reasonable depends on the knowledge available to a reasonable person in the same circumstances with the employee’s training and experience. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-8, slip op. at 8 (ARB Jul. 2, 2009). Although some witnesses at the hearing testified that they understood the rule to prohibit only *simulator* training in excess of 8 hours in a 24-hour period⁴⁶ — in contrast to the Complainant’s apparent belief that the rule prohibited *any* training in excess of 8 hours⁴⁷ — Mr. McGowan explained at the hearing that the “8 in 24” rule is notorious for being broadly misinterpreted and misunderstood within the flight training industry. (HT, p. 812 (Mr. McGowan’s comment that, after working closely with the FAA “on how that rule is to be interpreted,” he had developed a “pretty intimate knowledge” of the rule and “kn[e]w that there [are] a lot of misconceptions and a lot of misinterpretation about that rule.”).) As such, I am persuaded that the Complainant’s interpretation of the rule to exclude any training in excess of 8 hours was not patently unreasonable for an instructor in his position, despite evidence suggesting that his interpretation was, in fact, flawed.⁴⁸ Moreover, even if the Complainant’s understanding of the rule was legally flawed, his August 23, 2007, allegation was based on his belief that Mr. Jensen had actually been training inside of the simulator for more than 8 hours on the date in question. (*See* HT, pp. 153-54.) As such, his allegation provided reasonable cause for concern even according to the Respondent’s more liberal construction of the “8 in 24” regulation as limiting simulator time only.

The Respondent also argues that the “8 in 24” complaint lost its character as protected activity after being investigated by Mr. Milhiser and found to be inaccurate. (Respondent’s Closing Brief, pp. 35-36.) This argument lacks merit. The ARB decision to which the

⁴⁶ *See, e.g.*, HT, p. 67 (testimony of instructor Hector Alvarez that he “thought” the rule stated that an instructor “can’t teach more than eight hours *in a simulator* within a 24-hour period” (emphasis added)); *see also* HT, p. 568 (testimony of Mr. Milhiser that the “8 in 24” rule did not include the oral examination following a check ride in the “calculation of time”).

⁴⁷ *See* Complainant’s Closing Brief, pp. 17-18 (“FAA regulations state ‘training’ not to exceed 8 hours within a 24-hour period (the 8/24 rule). No distinction is made between academic and simulator training. . . . Flight Safety claimed that training was distinguished between academic and simulator. No evidence was presented that Flight Safety’s definition was the one accepted by the FAA.”)

⁴⁸ For present purposes it is unnecessary for me to determine as a matter of law which party’s interpretation of the “8 in 24” rule is the legally accurate one, since neither party need establish whether or not a violation of the rule ever actually occurred in order to prevail in this matter. However, even a cursory reading of the applicable regulation would appear to support the Respondent’s interpretation. The “8 in 24” regulation expressly provides that the maximum tally of 8 hours of instruction is to be counted “excluding briefings and debriefings.” 14 C.F.R. § 142.49(c)(1). As record evidence in this case clearly separates flight instructor time between two types of instruction — (1) briefings, debriefings, and ground school sessions conducted in the briefing rooms, and (2) simulator sessions conducted in the flight simulator — the logical interpretation of this regulation in context is that the regulation limits simulator instruction time to 8 hours, without regard for additional hours spent in so-called “academic” trainings taking place outside of the flight simulator.

Respondent cites in support of this theory involved a situation where the complainant's *first* complaint was made following resolution of a perceived violation. *See Malmanger*, slip op. at 8 (“Malmanger’s complaint about the flight was not based on a reasonable belief because *his concerns were resolved years before Malmanger complained in the e-mail.*” (emphasis added)). The cases cited in *Malmanger* likewise involve similar chronologies, or efforts by complainants to pin claims of protected activity to complaints raised repeatedly *after* perceived violations had been resolved.⁴⁹ In such cases, the courts’ conclusions that complaints had lost their protected status relied on case-specific findings that, given the complainants’ knowledge that concerns had been previously resolved, it was no longer reasonable for the complainants to continue to believe in the occurrence of a safety violation. Such cases are in contrast to what took place in the present matter, where the Complainant provided information based on a genuine belief that a violation had occurred, and the employer subsequently investigated the complaint and deemed it to be without grounds. The mere fact that an employer conducts an investigation pursuant to an employee’s reasonable complaint, and is satisfied at the conclusion of the investigation that no violation occurred, does nothing to divest the original, reasonable complaint of its protected status. Despite Mr. Milhiser’s investigation and findings, therefore, the Complainant’s August 23, 2007, complaint retained its status as an activity entitling him to protection from subsequent discriminatory conduct by his employer.

2. The Respondent Knew of the Complainant’s Protected Activity

There is also no room for reasonable dispute that at least one of the individuals charged with making personnel decisions affecting the Complainant knew of his protected activity. *See Peck*, slip op. at 14 (“Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint.”) Testimony confirms that Mr. Lewis and Mr. McGowan were the two individuals responsible for making the decision to terminate the Complainant. (HT, pp. 550-51, 576, 638; CX 62, pp. 228, 231.) Although Mr. McGowan testified that he knew nothing of the Complainant’s protected activity until the Complainant filed his complaint with OSHA (HT, pp. 798-99), Mr. Bitgood confirmed that the “8 in 24” complaint was made in his presence, and that he subsequently reported the information to Mr. Milhiser, the Assistant Center Manager. (HT, pp. 687-90) Mr. Milhiser and Mr. Lewis also testified that after Mr. Milhiser learned of the complaint, he reported it directly to Mr. Lewis. (HT, pp. 556, 620.) Mr. Lewis was also copied on Mr. Milhiser’s e-mail disseminating the results of his investigation of the complaint. (RX DD.) As Mr. Lewis was the Tucson Center Manager and shared responsibility for personnel decisions, his knowledge may be imputed to the Respondent, for present purposes.⁵⁰

⁴⁹ *Carter v. Marten Transp., Ltd.*, ARB Nos. 06-101, 06-159, ALJ No. 2005-STA-63, slip op. at 9 (ARB June 30, 2008) (employee’s complaints about previously resolved motor vehicle safety issues not protected); *Williams v. U.S. Dep’t of Labor*, 157 Fed. Appx. 564, 570 (4th Cir. 2005) (teacher’s whistleblowing activities initially protected but later complaints lost their protected status after resolution of her safety complaints); *Patey v. Sinclair Oil Corp.*, ARB No. 96-174, ALJ No. 1996-STA-20, slip op. at 1 (ARB Nov. 12, 1996) (finding that when employer fully responded to his safety concerns, employee’s continued complaints about them not protected).

⁵⁰ In its Closing Brief, the Respondent argues incorrectly that, even if it could be shown that Mr. Milhiser or Mr. Lewis “supplied inaccurate information to McGowan in an attempt to get Benninger fired,” Mr. McGowan’s lack of knowledge of the Complainant’s “8 in 24” complaint served to insulate the Respondent from liability under AIR 21, since Mr. McGowan ultimately made the decision to terminate. (Respondent’s Closing Brief, p. 35.) This argument

3. The Complainant's Termination and Denial of Promotion Constituted Adverse Employment Actions

There is additionally no dispute that the Complainant's termination on November 30, 2007, constituted an adverse employment action taken against him by the Respondent. 42 U.S.C. § 42121(a) (a covered employer may not “*discharge an employee* or otherwise discriminate against [him]” because of his protected activity (emphasis added)); *see also Williams*, slip op. at 15 n.75 (noting that certain employment actions, including termination of employment, are “per se adverse.”).

The Complainant additionally argues that he was also subjected to an earlier adverse employment action when he was denied a promotion to the position of Program Manager of the Challenger Program. (HT, pp. 162-64.) The ARB has considered an employer's “failure to hire or promote” as an example of an unfavorable employment action in the AIR 21 context. *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47, slip op. at 9 (ARB Jan. 31, 2007); *see also Hoffman v. NetJets Aviation, Inc.*, ARB No. 06-141, ALJ No. 2005-AIR-26 (ARB July 22, 2008) (evaluating AIR 21 claim under a “denial of promotion” theory of adverse employment action). Accordingly, the Respondent's failure to promote the Complainant to the position of Challenger Program Manager constituted an adverse employment action recognized under AIR 21.

In its Closing Brief, however, the Respondent argues that the Complainant should be estopped from adding this second theory of adverse employment action to his claim because he did not raise it in his original complaint to OSHA or during the course of OSHA's investigation. (Respondent's Closing Brief, p. 36.) The Respondent avers, “All claims to be resolved by the Administrative Law Judge are to be brought to the attention of the DOL investigators and vetted through the administrative gate-keeping process. (See 29 C.F.R. § 1979.103(d).” (Respondent's Closing Brief, p. 36.) The regulatory provision to which the Respondent cites is OSHA's “time for filing” provision, indicating that a discrimination complaint should be filed within 90 days after the alleged discriminatory act was made or communicated to the Complainant. 29 C.F.R. § 1979.103(d).

The provision the Respondent cites does not prevent my consideration of the Complainant's second theory of adverse employment action. The OALJ procedural rules

is both factually and legally flawed. It is factually in error because Mr. Milhiser and Mr. Lewis both testified that Mr. Lewis, who knew of the “8 in 24” complaint, shared responsibility for the termination decision. (HT, pp. 550-51, 576, 638; CX 62, pp. 228, 231.) It is also legally in error because, under the so-called “cat's paw” theory of discrimination recently approved by the Supreme Court, an employer may be held liable for the discriminatory actions of a lower level supervisor who influences the decision to take adverse action by a higher level supervisor who lacks discriminatory animus. *Staub v. Proctor*, 131 S.Ct. 1186, 1194 (2011); *see also Cafasso, U.S., ex. rel. v. Gen. Dynamics C4 Systems*, 637 F.3d 1047, 1060-61 (9th Cir. 2011); *Poland v. Chertoff*, 494 F.3d 1174, 1182-83 (9th Cir. 2007); *Chen v. Dana-Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-9, slip op. at 17-18 (ARB Mar. 31, 2011) (Royce, J., dissenting). Under this rule, if Tucson Center management, motivated by discriminatory animus toward the Complainant, took actions to encourage Mr. McGowan's decision to terminate, the Respondent would be liable under AIR 21 despite Mr. McGowan's ignorance of the underlying protected activity. However, as will be discussed below, I find insufficient evidence in the record to support the Complainant's theory that Tucson Center management possessed discriminatory animus towards him because of his “8 in 24” complaint, so the “cat's paw” theory of discrimination will not come into play here.

broadly allow amendments to an original complaint when issues “reasonably within the scope of the original complaint” are raised at the hearing and “are tried by express or implied consent of the parties.” 29 C.F.R. § 18.5(e). In such cases, the rules provide that such new issues “shall be treated in all respects as if they had been raised in the pleadings and such amendments may be made as necessary to make them conform to the evidence.” *Id.* Although the Respondent submitted objections to the introduction of this “failure to promote” theory in its Closing Brief, it did not enter any objections when the matter was raised by the Complainant at the hearing. (*See* HT, pp. 162-64.) Further, the Respondent’s counsel examined his own witnesses at the hearing to establish evidence in rebuttal of this theory, thereby providing the Respondent’s “implied consent” to try the issue. (*See, e.g.*, HT, pp. 625-30 (Respondent’s counsel’s direct examination of Mr. Lewis concerning the decision to hire Mr. Duke for the Challenger Program Manager position, beginning with the comment, “An issue has been brought up that I didn’t anticipate, but I think that it needs to be addressed, and that is the situation of Mr. Benninger applying for a Program Manager position. . . .”)) Accordingly, I will consider the “failure to promote” theory as properly included within the Complainant’s claim, having been tried by implied consent of both parties at the hearing.

It turns to me now to examine whether the Complainant’s protected activity contributed in any way to either of these adverse employment actions.

4. The Complainant’s “8 in 24” Complaint Did Not Contribute to his Failure to Receive a Promotion

For the reasons set forth below, I am not persuaded by the Complainant’s theory that his “8 in 24” complaint was a contributing factor in Mr. Lewis and Mr. Milhiser’s decision not to promote him to the position of Challenger Program Manager.

The ARB has repeatedly held in the AIR 21 context that a contributing factor is “any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Hoffman*, slip op. at 7 (quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)); *see also Clark v. Airborne, Inc.*, ARB No. 08-133, ALJ No. 2005-AIR 27, slip op. at 7 (ARB Sept. 30, 2010); *see also Douglas*, slip op. at 11. The contributing factor standard was “intended to overrule existing case law, which required that a complainant prove that his protected activity was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor” in a personnel action. *Hoffman*, slip op. at 7 (quoting *Allen v. Stewart Enter., Inc.*, ARB No. 06-081, ALJ Nos. 2004-SOX-060, -062, slip op. at 17 (ARB July 27, 2006)). Therefore, a complainant need not show that a protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent’s “reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant’s protected” activity. *Hoffman*, slip op. at 7; *Walker v. Am. Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-17, slip op. at 18 (ARB Mar. 30, 2007). A complainant is not required to produce direct proof of discriminatory intent, but may instead satisfy his burden of proof through circumstantial evidence that his employer harbored such intent as a result of his protected activity. *Douglas*, slip op. at 11; *Clark*, slip op. at 12.

Here, the Complainant offers no direct, or “smoking gun” evidence that any causal link existed between his “8 in 24” complaint and his subsequent failure to receive the promotion he

sought. For example, he has not suggested that anyone in management ever made statements to him or anyone else indicating that his protected activity in August had contributed to the decision. Rather, he relies on circumstantial evidence that such a causal link existed. This circumstantial evidence centers around three main theories: (1) the behavior of Tucson Center management after he raised his complaint demonstrated that his complaint had upset them; (2) he was more highly qualified for the Program Manager position than Mickey Duke, the individual selected for the position; and (3) he was denied the promotion not long after raising his “8 in 24” complaint. (*See generally* HT, pp. 162-64; Complainant’s Closing Brief, pp. 12-13; Complainant’s Final Reply Brief, pp. 15-16.) I will address each theory in turn.

a. Management’s Actions in Response to the “8 in 24” Complaint are Insufficient to Invoke an Inference of Discriminatory Animus

The Complainant alleges that, following his “8 in 24” complaint, management demonstrated “hostility and animus” toward him, illustrated by Mr. Milhiser’s actions of calling the Complainant into his office and “dress[ing him] down for making his 8/24 comment,” conducting a “cursory investigation [which] consisted of reviewing a mis-understood computer record and simply asking Mr. Jensen if a violation occurred,” and going so far as to prepare an e-mail and memorandum documenting Mr. Milhiser’s investigation of the “8 in 24” complaint. (Complainant’s Closing Brief, pp. 12-13; Complainant’s Final Reply Brief, pp. 15-17.) Underlying the Complainant’s arguments on this point are two somewhat contradictory interpretations of events: on one hand, that the immediacy of Mr. Milhiser’s response and his efforts to document his findings show that management took the “8 in 24” allegation very seriously; but on the other, that the merely “cursory” investigation Mr. Milhiser conducted — relying only on “mis-understood records” and the unreliable denials of Mr. Jensen — shows that management did not actually take seriously the matter of its compliance with the “8 in 24” rule.

As an initial matter, I agree with the Complainant that available evidence proves that management of the Tucson Center took his “8 in 24” allegation very seriously. As recounted above, after Mr. Milhiser learned of the allegation from Mr. Bitgood, he reported it to Mr. Lewis on the same day and began investigating it immediately. (HT, pp. 556, 620.) The print date and time on Mr. Jensen’s training records for the date in question demonstrate that they were printed at 4:15 p.m. on August 23, 2007, very soon after Mr. Milhiser was first informed of the Complainant’s allegation by Mr. Bitgood. (RX EE.) Mr. Milhiser next interviewed the Complainant (HT, pp. 517, 570-71) and Mr. Jensen (HT, p. 522) concerning the allegation, and took steps during the following week to draft a memorandum documenting his investigation and findings (RX CC; HT, p. 524), to inform the Complainant of his findings (HT, pp. 166, 354, 524), and to e-mail the attendees of the instructor meeting to provide a final follow up. (RX DD.) Mr. Milhiser made no attempt to underrate the extent of his concern; indeed, the e-mail he sent to the instructors informed its recipients that management “take[s] all comments that could indicate noncompliance or wrong doing very seriously.” (RX DD.)

However, I am not persuaded by the Complainant’s assertion that this investigation was merely “cursory.” On the contrary, Mr. Milhiser appears to have exhausted every source of

relevant information available to him, making inquiries of the Complainant⁵¹ and Mr. Jensen, as well as reviewing the actual training records themselves. The Complainant's assertion that Mr. Milhiser — who possessed 10 years of experience with Flight Safety in the roles of instructor, Director of Training, and Assistant Center Manager — did not “understand” the training records is also wholly unfounded and unsupported.⁵² The Complainant's claim that it was unreasonable for Mr. Milhiser to accept Mr. Jensen's explanations of his training time — merely because Mr. Jensen may have possessed a motive to deny an “8 in 24” violation in order “to keep his job” — is additionally unpersuasive.⁵³ (Complainant's Final Reply Brief, pp. 16-17.) Even if Mr. Jensen did lie to Mr. Milhiser about his training time on the date in question, I simply have no evidentiary basis for calling into question Mr. Milhiser's decision to accept Mr. Jensen's denials of wrongdoing.⁵⁴

I am likewise unpersuaded by the Complainant's theory that management's response to his complaint was merely a superficial show of diligent management, made in attempt to “cover their tracks,” while ignoring the evidence of actual, ongoing violations of the “8 in 24” rule at the Tucson Center. (Complainant's Closing Brief, p. 13.) Not only does the record fail to clearly support the Complainant's contention that violations of the “8 in 24” rule were actually taking place at the Tucson Center, the totality of evidence persuades me that the Tucson Center's management genuinely took seriously its responsibility to comply with FAA regulations, including the “8 in 24” rule. Although there is certainly evidence in the record showing that instructors were at least occasionally scheduled to provide more than 8 hours of instruction on specific days, the record does not clearly show that these schedules required more than 8 hours of *simulator* instruction per day.⁵⁵ The only simulator sign-in log in the record, for example,

⁵¹ As noted above, although the Complainant denies ever being asked by Mr. Milhiser to explain the facts surrounding his “8 in 24” allegation, I believe Mr. Milhiser's repetition of the Complainant's unique phrase “Do the math” provides persuasive support for a finding that he did ask the Complainant to explain what he believed had taken place. (*See supra.*)

⁵² Indeed, the Complainant's apparent belief that the training records, when properly “understood,” would have shown a violation of the “8 in 24” rule is possibly based on his own misinterpretation of the rule. Although Mr. Jensen was scheduled for 10 hours of instruction time on the date in question (RX EE), the training records indicate that he spent only 8 of those hours in the simulator, with additional hours spent in the briefing room. (RX FF.) As discussed above, the “8 in 24” rule expressly excludes time spent in “briefings and debriefings” in its accounting of maximum hours of instruction. 14 C.F.R. § 142.49(c)(1).

⁵³ I find it ironic that the Complainant now asserts that it was unreasonable for Mr. Milhiser to accept Mr. Jensen's protestations of innocence on this occasion, simply because the questions put to Mr. Jensen might have carried implications for his professional future with Flight Safety. (*See* Complainant's Final Reply Brief, pp. 16-17 (“Common sense would explain that Jensen would deny the allegation to keep his job.”).) This is an interesting position for the Complainant to take, in light of his contention that Mr. Milhiser *ought* to have accepted the Complainant's own protestations of innocence in late November, even though in that case as well, the discussion carried clear personnel implications, such that the Complainant would have possessed a motive to “deny the allegation to keep his job.”

⁵⁴ As any judge knows from experience, the weighing of an individual's credibility when called to answer for his conduct is a subtle endeavor not always accommodating of subsequent, external scrutiny.

⁵⁵ *See, e.g.,* CX 30 (the Complainant's ‘Beyond the Call’ Award, noting that the Complainant had been instructing 12 hour days, “including both academics and sim”); RX EE (Mr. Jensen's 10-hour training day, including time spent in the simulator and briefing rooms). Testimony from Mr. Bitgood and Mr. Milhiser also confirms that during the summer of 2007 the instructors were being asked to work long hours, but this testimony does not provide proof of simulator training hours in excess of 8 hours per day. (HT, pp. 523, 570, 685; CX 62, p. 229.)

shows most instructors spending between 2 and 3 hours in the Challenger 601 simulator per day, with the exception of the Complainant, who entered a total of 8 hours on a single day.⁵⁶ (RX F) While it is possible that these instructors also spent additional time in a second simulator on the dates in question,⁵⁷ it would be gross speculation to assume that any such additional instruction time may have been so significant as to take them over the 8-hour limitation set up by the “8 in 24” rule.

The record also contains persuasive evidence that Tucson Center management possessed an actual, rather than feigned, commitment to compliance with the “8 in 24” rule. This body of evidence includes the following factors: (1) Mr. Bitgood testified, and the Complainant conceded, that the Tucson Center’s computer system is set up to prevent management from scheduling an instructor for a number of training hours that would violate the “8 in 24” rule: “[I]t comes up on the screen. It disallows you to assign the instructor on the final event that causes it to go over eight hours.” (HT, pp. 346, 691); (2) the Simulator Sign-In Log is maintained inside of the simulators to promote compliance with the “8 in 24” rule (HT, p. 483); (3) Flight Safety employs staff, such as Mr. Fedynyszyn, Director of Regulatory Affairs, whose primary purpose is to keep abreast of regulatory compliance issues (HT, p. 510; RX R); (4) instructor Mike Giron testified that he understood violations of the “8 in 24” rule were considered a “pretty serious matter,” that he had never personally seen it violated, and had never learned of it being violated in his 14 years at the Tucson Center (HT, pp. 446, 467-68); (5) the Complainant testified at his deposition that “one of the principal mandates” before the Director of Training and the Assistant Center Manager is “to make sure that we inadvertently do not violate [the ‘8 in 24’] rule, because it’s considered a fairly important rule.” (HT, p. 348⁵⁸); and (6) Mr. Milhiser testified credibly that his “biggest concern is to make sure we comply with the FAA.” (HT, pp. 540, 571-72.) Mr. Milhiser’s actions following the Complainant’s “8 in 24” complaint — investigating the complaint, preparing a memorandum for the record, and e-mailing the instructor staff to inform them of his findings and encourage them to bring similar issues to management’s attention — were entirely consistent with the actions I would expect of a manager possessing a genuine commitment to monitoring regulatory compliance.

Not only does such evidence indicate that the Tucson Center actually did possess a commitment to preventing and monitoring regulatory violations, additional record evidence explains persuasively that it made reasonable business sense to do so. These additional evidentiary factors include: (1) Mr. Milhiser testified that “the most trouble we could ever get in

⁵⁶ The Simulator Sign-In Log for the period spanning November 14, 2007, through November 28, 2007, shows the following entries by Challenger 601 instructors: 3 hours by Ruskay on November 14; 2½ hours by Cattilini on November 15; 2 hours by Aubrey on November 15; 3 hours by Ruskay on November 15; 2 hours by the Complainant on November 15; 6 hours by the Complainant on November 27; 2 hours by Aubrey on November 27; 2 hours by an unnamed instructor on November 28; and 8 hours by the Complainant on November 28. (RX F.)

⁵⁷ It is worth recalling here that instructors are limited to instructing in a maximum of two simulator aircraft models at a time (CX 62, pp. 228-29), so it is not possible that the instructors who provided flight instruction in the Challenger 601 simulator in November 2007 were also providing simulator instruction in more than one other flight simulator on the days in question.

⁵⁸ As previously noted, the Complainant’s deposition was not entered into the record as an exhibit. This excerpt from his deposition testimony was read into the record during the hearing by Respondent’s counsel. (HT, pp. 347-48.)

[as] a training center is hiding something from the FAA” (HT, pp. 571-72); (2) the Complainant testified that a representative of the FAA appeared at the Tucson Center “regularly . . . “to check the activities of the center.” (HT, p. 317); (3) the Complainant’s testimony repeatedly referenced the importance of consistent record-keeping so as to prevent problems when the FAA arrived to conduct record audits (*see, e.g.*, HT, pp. 373, 385); and (4) the Complainant and Mr. Milhiser both testified that if a training center discovers an inadvertent regulatory violation and reports it voluntarily to the FAA, then no penalties are imposed by the FAA. (HT, pp. 347, 572.) This confluence of considerations — that FAA audits occurred regularly, and that a training center suffers significant penalties for hiding perceived violations from the FAA, but escapes penalties for self-disclosing violations — sets up a clear incentive system in support of active monitoring and prevention, and provides persuasive support for the Respondent’s claims that it possessed a genuine interest in monitoring regulatory compliance at the Tucson Center.

The mere fact that the Complainant had never seen an e-mail like the one Mr. Milhiser sent to the attendees of the instructor meeting (RX DD) also does not provide evidence of hostility toward him for making the complaint, since the record contains no evidence of any similar employee complaints at the Tucson Center upon which to base a comparison. The Complainant himself testified that in his 9 years with Flight Safety, he was not aware of any other instructors who had ever alleged a violation of the “8 in 24” rule (HT, p. 870), and no other evidence was presented concerning other instances where Tucson Center employees complained to management concerning other types of regulatory violations.⁵⁹ Mr. Milhiser’s explanation for his intent in sending the e-mail was credible and reasonable — commenting that the only alternative he saw to writing the e-mail “would be to do nothing and appear as though either management didn’t care or we didn’t care enough to communicate” (HT, p. 572) — and it corroborates my general sense that his actions demonstrate a genuinely conscientious approach to his management duties.

Ultimately, the only evidence the Complainant presents in support of his claim that he experienced hostility after raising the “8 in 24” complaint is his own testimony which is of limited evidentiary value in the absence of other corroborating evidence. Hector Alvarez, who

⁵⁹ The only evidence introduced which could be relevant to this issue relates to John De Lafosse, the former Flight Safety instructor from the Savannah division who alleges he was discharged in 2006 because he complained that he was being asked to train in aircraft for which he was not certified. (*See* HT, pp. 479-80.) Not only does this evidence arise from a different training center under different management personnel — the only common player was Mr. McGowan who, in both cases, was brought in at the last minute to authorize the final termination order — I did not find Mr. De Lafosse’s testimony persuasive or credible enough to raise any inference of systemic hostility toward Flight Safety instructors who raise regulatory concerns. Corroborating Mr. McGowan’s explanation for why he was fired, Mr. De Lafosse conceded on cross-examination that prior to his termination, his training center had received actual complaints from a client company that two of their pilots had been improperly and incompletely trained by him. (HT, pp. 480-81.) He also conceded that when his employer asked him whether he had conducted simulator training on a particular element, he had said “No,” despite the fact that he had included the element on the training records. (HT, p. 481.) Mr. De Lafosse justified his action on the basis that the content had been “discussed in an oral debriefing,” which he claims was “standard procedure for training on” the aircraft in question. (HT, p. 481.) Despite this justification, his concessions on cross-examination provide at least some support for Flight Safety’s decision to terminate him. Moreover, at the time of his termination he had only worked for the company for 2 years, and had an overall performance rating of only 3.46 out of 5 (RX U), both of which factors detract from his assertion that the only valid reason the company had for terminating him related to his raising a regulatory compliance issue.

testified on the Complainant's behalf, rejected the Complainant's assertions that Mr. Bitgood demonstrated hostility during the August 23, 2007, meeting: "[I]t wasn't contentious. It was simply an item that needed to be followed up with, I think." (HT, pp. 64, 76.) Mr. Alvarez also denied telling the Complainant to be "careful" after raising his complaint, noting instead that he recalled simply suggesting to the Complainant that he would have "got (sic) a better hearing had he just brought [the "8 in 24" issue] up in somebody's office." (HT, pp. 65-66.) I am also not persuaded by the Complainant's theory that a statement allegedly made by Mr. Lewis — indicating to the Complainant that if he needed to call someone an "asshole" he should do so in private (HT, pp. 198-99, 355) — provides evidence of hostility from Mr. Lewis because of the Complainant's protected activity. Rather, if such a statement was made by Mr. Lewis, I would interpret it instead to refer to the basic notion also put forth by Mr. Alvarez in his advice to the Complainant: that complaints about a supervisor's management abilities might be better addressed privately, prior to being raised in a public forum.

In summary, without other corroborating evidence, the Complainant's claim that he perceived hostility after raising his "8 in 24" complaint is insufficient to persuade me that the managerial actions taken at the Tucson Center in response to his complaint should be interpreted in the light he suggests. Based on the totality of evidence before me, I am persuaded that Mr. Milhiser's actions — including speaking to the Complainant about his complaint, investigating the complaint, and documenting his investigation and findings in the manner he did — were reasonable actions for an Assistant Center Manager in his position to have taken. Without more evidence than the Complainant provides to support his claims of hostility, I have no basis for finding fault in Mr. Milhiser's manner of responding to the Complainant's concerns.

b. The Complainant Was Not More Highly Qualified for the Program Manager Position than Mr. Duke

The Complainant claims that at the time he was "passed over" for the Program Manager promotion, Mr. Duke "was not even qualified to fly" either of the Challenger models and "had nowhere near the experience as [the Complainant] with the Challenger aircraft." (Complainant's Closing Brief, p. 13.) As such, the Complainant submits, the reason given by management for promoting Mr. Duke — that he possessed management experience the Complainant lacked — was pretextual.

In evaluating whether an AIR 21 complainant has demonstrated by a preponderance of the evidence that a protected activity contributed to his adverse employment action, the ARB has held that the burden-shifting framework established in the Title VII context may be applied. *Peck*, slip op. at 9-10; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 5-8 and nn.12-19 (ARB Sept. 30, 2003). Under this framework, once an employee makes out an inferential case of discrimination using circumstantial evidence, the burden shifts to the employer to produce at least one legitimate, non-discriminatory reason for the adverse employment action. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-03 (1973). After the employer satisfies this burden of production, the burden then shifts back to the complainant to prove that the reason proffered by the employer was pretextual. *Id.* at 804-05 ("In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his [adverse employment action] were in fact a coverup for a . . . discriminatory decision.") The ARB has

held that this burden-shifting approach, whereby the ALJ “examine[s] the legitimacy of the employer’s articulated reasons for the adverse personnel action” properly takes place in the course of evaluating whether the complainant has satisfied the fourth and final element of his discrimination case: whether he has proved by a preponderance of the evidence that his protected activity contributed to the adverse employment action. *Peck*, slip op. at 10 (citing *Kester*, slip op. at 7 n.17.)

I disagree with the Complainant’s theory of pretext. Even though the Complainant began instructing in the Challenger 601 in October 2002 (*see* CX 60, p. 12), and thus possessed approximately five years of experience as a Challenger 601 instructor when he applied for the position, I find the Respondent’s reasons for selecting Mr. Duke for the Program Manager position persuasive. Mr. Lewis and Mr. Milhiser both testified that they chose Mr. Duke on the basis of his management and administrative skills demonstrated in his two years of service as Program Manager of the Lear program, and their feeling that administrative skills were more important to the position than skills as an instructor. (HT, pp. 589-591, 628-30, 669.) As Mr. Milhiser summarized, “Mr. Duke had demonstrated an excellent ability to manage programs. When we want someone to manage programs, we want someone to manage programs.” (HT, p. 589.) This explanation of their reasoning is both credible and reasonable. Moreover, the Complainant’s unsupported claim that Mr. Duke possessed no prior experience as an instructor in Challenger aircraft is essentially irrelevant, as the Complainant has presented no evidence to suggest that Flight Safety ordinarily required Program Managers to have spent time serving as instructors within a program before being promoted into Program Manager positions.

Additionally, Mr. Milhiser testified that Program Managers spend approximately half of their work time instructing, leaving half of their time to fulfilling their administrative obligations. (HT, p. 589.) While the ample evidence of the Complainant’s skills as an instructor demonstrate that he would certainly have been well-qualified for the half of the job involving instruction, he has presented no evidence that he possessed any management or administrative experience, sufficient to persuade me that he would have been more qualified than Mr. Duke for the at least 50 percent of the Program Manager job that involved program administration.⁶⁰

Accordingly, I am not persuaded by the Complainant’s theory that he was more qualified for the position than Mr. Duke, such that his being passed over for the position provides any circumstantial proof of discrimination.

c. The Close Timing of the Failure to Promote the Complainant to Program Manager is Insufficient to Raise an Inference of Discrimination

The Complainant’s third circumstantial evidence-based theory of discrimination, based on the close timing between his “8 in 24” complaint on August 23, 2007, and his being passed

⁶⁰ Evidence would additionally support a finding that the Complainant’s interests in the Program Manager position had less to do with the management aspects of the position than with the opportunity to serve as an instructor in the Challenger 604. The Complainant testified at the hearing that his reason for applying for the position was that he saw it as an opportunity for advancement into “the most prestigious aircraft trained at the center,” noting that he “just wanted to train in a newer aircraft.” (HT, p. 876.) If the Complainant explained his reasoning during the interview process in similar fashion, for example, it would not have been unreasonable for management to believe him to be essentially disinterested in the administrative or management aspects of the position.

over for the promotion in approximately October 2007 (HT, p. 589), is also insufficient to prove by a preponderance of the evidence that his protected activity contributed to the personnel decision.

Temporal proximity is “one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action.” *Clark*, slip op. at 7 n.39; *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, ALJ No. 2004-AIR-11, slip op. at 6 (ARB May 26, 2010). Where an adverse employment action “follows on the heels of protected activity,” this close timing and chronology can suffice to establish the causation element of the complainant’s *prima facie* case at the summary decision phase of a proceeding. *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009) (quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002)). However, at the post-trial phase, when the judge ultimately weighs all of the evidence to decide whether the protected activity contributed to the adverse action, close timing alone is not enough to satisfy this element. In fact, one administrative law judge has commented that at the post-trial phase, “Close timing alone is rather weak evidence. . . . Strong countervailing evidence may lead the judge to conclude that retaliation had nothing to do with the adverse action.” William Dorsey, *An Overview of Whistleblower Protection Claims at the U.S. Dep’t of Labor*, 26 J. NAT’L ASS’N ADMIN. L. JUDGES 43, 87 (Spring 2006). In this case, a significant body of countervailing evidence — including Mr. Duke’s stronger administrative skills and management experience, discussed above — supports the Respondent’s position that the Complainant’s participation in a protected activity had nothing to do with management’s decision to not promote him into the Program Manager position.

Also relevant to the matter of timing, and further undermining the Complainant’s claim that management bore hostility toward him in the months after his protected activity, record evidence demonstrates that in early November 2007, management intended to grant the Complainant his wish for a promotion to instruct in the Challenger 604. As recounted in the statement of facts above, Mr. Lewis held a meeting with the Complainant on November 6, 2007, during which he informed the Complainant that management “need[ed]” him to remain a Challenger 601 instructor, but wanted to give him the option of advancing into the Challenger 604 or continuing to instruct in the Lear 60 in the future. (CX 60, p. 146.) During the meeting, the Complainant expressed his wish to advance into the Challenger 604, and Mr. Lewis told him that management was “committed to” advancing him into that aircraft, although they could not tell him when he would be able to make the transition, given current constraints at the Tucson Center. (CX 60, p. 146.) During the meeting, they also discussed plans to maintain the Complainant’s present ability to train in the Lear 60 in order to enable him to do an assignment for Publix in December 2007, and because it was to Flight Safety’s “advantage to keep him current in [the Lear] 60.” (CX 60, p. 146.) The overall tone of this meeting was forward-looking, evincing Mr. Lewis’s interest in supporting the Complainant’s wish to advance into the Challenger 604, expressing Mr. Lewis’s willingness to look into the Complainant’s future role with the Lear “60 PR,” and generally demonstrating his confidence that the Complainant would be instructing at the Tucson Center going forward into the future.

In addition to undermining the Complainant’s theory as to the hostility of management in the months after his protected activity, this discussion also provides support for my finding that management possessed solid, non-discriminatory reasons for deciding to promote Mr. Duke into

the Challenger Program Manager position. Because flight instructors may only be certified to conduct trainings in up to two aircraft at a time (CX 62, pp. 228-29), and because management felt it was to the Tucson Center's "advantage to keep him current" in the Lear 60 (CX 60, p. 146), this provides an additional explanation for the decision to not promote the Complainant into a position where he would be required to focus entirely on the two Challenger aircraft, rather than continuing to split his efforts between the Challenger and Lear programs.

Accordingly, the Complainant has failed to prove by a preponderance of the evidence that his protected activity contributed to the decision to not promote him into the Program Manager position. It remains only to discuss whether his protected activity contributed to the decision by management to terminate him in late November 2007.

5. The Complainant's "8 in 24" Complaint Did Not Contribute to his Termination

For the reasons set forth below, I also find that the Complainant has failed to prove by a preponderance of the evidence that his "8 in 24" complaint was a contributing factor in his termination on November 30, 2007.

Here again, the Complainant has introduced no direct evidence that a causal link existed between his protected activity and the adverse employment action taken against him. He has not alleged that statements were made by Tucson management expressly or even implicitly correlating their actions toward him in late November 2007 with his earlier protected activity. Rather, to establish the causation element of his claim, the Complainant again relies entirely on circumstantial evidence of discriminatory animus.

I have already addressed and rejected one of the arguments the Complainant submits in support of this theory, as seen in my finding above that management's actions of investigating and documenting the "8 in 24" complaint does not provide evidence of hostility toward the Complainant because of his complaint. Additionally, my rejection above of the timing argument — that the close timing of the August 2007 complaint to his denial of promotion in October 2007 also did not raise any inference of discriminatory animus, in light of stronger countervailing evidence that no such animus existed — may also be reiterated here in the context of his termination. As discussed above, record evidence shows that in early November 2007 — again, *after* the Complainant's August 2007 protected activity — Mr. Lewis held a meeting with the Complainant during which Mr. Lewis arranged for the Complainant to continue serving as a Lear 60 instructor for purposes of completing a Lear instruction assignment in December 2007, and expressed management's "commit[ment]" to promoting the Complainant into an instructor position in the Challenger 604 at some time in the foreseeable future. (CX 60, p. 146.) This evidence provides strong countervailing evidence that by early November 2007, Tucson Center management possessed no plan to have the Complainant terminated following his engagement in a protected activity.

Moreover, if I accept the Respondent's claim that the intervening events of the week of November 26 through 29, 2007, were independently sufficient to trigger the termination — and, as I will explain below, I do accept the Respondent's proofs on this matter — such intervening events would serve to sever the temporal connection between the protected activity and the termination. *See Clark*, slip op. at 12 ("Retaliatory motive may be inferred when an adverse

action closely follows protected activity. . . . But if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.”); *see also Robinson v. Nw. Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-22, slip op. at 9 (ARB Nov. 30, 2005) (“[W]here the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.” (emphasis in original)).

The remaining circumstantial evidence-based theories the Complainant puts forth in his hearing testimony and pre- and post-hearing briefing generally coalesce around a single contention: that the “document falsification” rationale given for his termination was pretextual, factually unsupported, and invented by management in order to support their discriminatory wish to remove him from the Flight Safety staff after he singled himself out as a “troublemaker” willing to question the Tucson Center’s FAA compliance. He submits a great number of arguments in support of his claim of pretext, including the following: (1) record “discrepancies” of the kind committed by the Complainant in this case were commonly committed by other instructors at the Tucson Center, with the knowledge and approval of management; (2) he made his supervisors aware that he was actively trying to have the computer schedule changed to reflect the altered training schedule, so management cannot have genuinely believed he was attempting to engage in an intentional falsification of records; (3) the “discrepancies” contained in his training records were minor, “ministerial” errors which caused “no harm and no foul” and which cannot have been a genuine cause of concern to management; (4) the extent to which management paid attention and tracked his training activities in late November provides evidence of discriminatory animus and disparate treatment, since they did not ordinarily pay close attention to instructor activities or compare them to the training documents instructors produced; (5) the Complainant’s behavior in this case — deciding to train the Trainees “to proficiency” and reduce the overall training hours — was completely in line with his long-instilled training at Flight Safety “to ‘meet and exceed the customer’s expectations.’ . . . by virtually any reasonable means necessary;” and (6) given his history of superior service and the minor quality of his record discrepancies in this case, termination was a “grossly excessive” and unreasonable sanction, evincing management’s discriminatory intent.

After conducting a painstaking review of the full evidence presented in the record by both parties, I am not persuaded by any of the arguments the Complainant raises to prove a causal link between his protected activity and his termination. I will explain below my reasoning for rejecting each argument. Rather, I am persuaded that the record supports a finding that when the decision was made to terminate the Complainant, Mr. Lewis and Mr. Milhiser possessed a genuine, good faith belief that the Complainant had engaged in intentionally fraudulent behavior on a caliber worthy of their significant concern, and worthy of termination.

Before discussing the merits of the Complainant’s theories of pretextual termination, I will first set forth my findings of fact as to the actual training activities conducted by the Complainant during the training week in question, and the actual reasons for his termination.

a. *The Complainant Completed a Maximum of 4½ Hours of Simulator Training and 2 Hours of Check Rides, Rather than the Standard 9 Hours of Training and 3 to 4 Hours of Check Rides*

The combined records of the Complainant's training of the Trainees in late November 2007 show a significant abridgement of overall training and checking time. Although the record does not contain a copy of the training curriculum required by the Trainees' employer, Air Rutter International, the Complainant testified on multiple occasions that he understood the standard training requirements for the Trainees' 135 course to involve 12 hours in the simulator, including 9 hours of training time prior to a 3 hour check ride.⁶¹ (See HT, pp. 170, 267-68, 283, 334.) Despite his belief that the syllabus ordinarily required 12 hours of training and checking, my detailed review of the record persuades me that he can actually have provided no more than approximately 4½ hours of simulator training and 2 hours of checking to the Trainees. My findings as to the total simulator time the Complainant did complete with the Trainees are based on the following record evidence:

Monday, June 26, 2007: It is undisputed that no simulator training was conducted on Monday, June 26, 2007, due to the unavailability of the simulators. (See RX M, p. 3.)

Tuesday, June 27, 2007: The Complainant testified that the Trainees arrived for their training session at approximately 12:30 p.m. (HT, p. 178), and he stated in his December 1 Affidavit that he actually started the simulator training at 12:45 p.m. that day. (RX M.) The records confirming the Complainant's Tuesday simulator training session were printed out at 4:39 p.m. on Tuesday (RX H), by which evidence I determine that the training session cannot have continued beyond approximately 4:30 p.m. on Tuesday.⁶² I find, therefore, that simulator

⁶¹ Although the Respondent has not pushed this issue in its post-hearing briefs, I am additionally persuaded that the Complainant's 3-hour summation of the standard hours required for the Trainees' check rides was likely a misapprehension of the actual checking time required. Although the Complainant repeatedly asserted that a recurrent 135 check ride required a standard 1½ hours per pilot (see, e.g., HT, p. 154), every piece of relevant testimony from other witnesses indicates that the standard requirement was 2 hours per pilot, per check ride. For example, Mr. Milhiser informed the OSHA investigator that the Trainees' employer required "a 9 h[ou]r training minimum and a four hour check ride," or 2 hours per pilot. (CX 62, p. 229.) Instructor Dick Embry also testified that for a recurrent 135 check ride, "the required is two hours," and that he "normally" conducted these rides in 1½ to 2 hours. (HT, p. 415.) Mr. Rostash testified that he didn't recall ever doing a recurrent 135 check ride in less than "about 1.9" hours, and that the Tucson Center had decided to extend the 135 check ride schedule to 2 hours and 15 minutes, because the check rides "frequently d[id] go over" 2 hours. (HT, p. 763.) Instructors Jack Foster, Doug Haywood, and Robert Ruskay also testified by stipulation that the minimum time in which they felt they could complete a 135 check ride was "at least one and one-half hours," which, again, raises an inference that they considered the standard 135 check ride to last 2 hours. (HT, p. 779.) Instructor Mike Giron testified that the minimum time in which he had conducted a recurrent 135 check ride for an experienced pilot was 2 hours. (HT, pp. 450, 460.) Mr. McGowan testified that the Trainees' check rides should have lasted "about three or four hours," resulting in a total simulator schedule of "somewhere around 12 to 14 hours." (HT, p. 790.) Mr. Bitgood testified that the fastest check ride he had performed lasted 1 hour and 45 minutes. (HT, p. 683.) Moreover, the record demonstrates that Ms. Medina was unable to schedule recurrent 135 check rides for a time slot less than 2 hours in the Orion system, which provides additional support for a finding that 2 hours was the ordinary requirement. (RX M, p. 3; RX P; RX Q.)

⁶² This estimated ending time is generous to the Complainant, as he must have required a bare minimum of 9 minutes — if not significantly more time — to dismiss the Trainees after exiting the simulator, walk to a computer console, enter the Logbook system, confirm the training activities conducted with both pilots, and print their completed records.

training was conducted on this date for approximately 3 hours and 45 minutes, from approximately 12:45 p.m. until 4:30 p.m.

Wednesday, June 28, 2007: The Complainant stated in his December 1 Affidavit that he was in the simulator with the Trainees from 12:30 p.m. until 3:30 p.m., at which time the check rides were also completed. (RX M, p. 4.) This start time is generally consistent with testimony from Mr. Bitgood and Mr. Milhiser that the Complainant was seen at the burger lunch at approximately 12:15 or 12:20 p.m., or between 12:00 p.m. and 12:30 p.m. (HT, pp. 534-35, 704.) Accordingly, I will accept the Complainant's contention in his Affidavit that he began the training at 12:30 p.m.

However, I also accept Mr. Milhiser's testimony, reiterated on two occasions — including in his December 13, 2007, affidavit completed soon after the events in question — that he observed the Trainees departing the building at 3:20 p.m. on Wednesday. (HT, p. 535; CX 40, p. 1.) On the basis of this slightly earlier timeframe, the simulator session must have come to its close no later than approximately 3:15 p.m. on Wednesday.⁶³ I find, therefore, that the Wednesday simulator session was conducted for approximately 2 hours and 45 minutes, from approximately 12:30 p.m. until 3:15 p.m.

The Complainant additionally testified that the check rides he claims he conducted on Wednesday afternoon were both accomplished in “about an hour.”⁶⁴ (HT, pp. 193, 328.) Accordingly, he can have completed no more than approximately 45 minutes of simulator training with the Trainees on Wednesday prior to commencing their check rides. I find, therefore, that if the Complainant did perform 2 hours of check rides on Wednesday, he can have completed no more than approximately 45 minutes of simulator training on that date. This reduces the total simulator time to 4 hours and 30 minutes of training,⁶⁵ with an additional 2 hours of check rides to follow. This training time equates to approximately half of the 9 hours of training for which the Trainees should have been scheduled, per their 135 recurrent training requirements.

Thursday, November 29, 2007: It is undisputed that no simulator training was conducted on this date, as the Complainant claims the check rides were completed on the day before. (See RX M, p. 4.)

b. The Complainant Made Numerous Misstatements on Seven Separate Training Records, Including Four Handwritten Records

In addition to significantly abridging the scheduled training time required by the Trainees' 135 curriculum, the Complainant in this case also made misstatements on a total of seven distinct training records, a minority of which were completed in the Logbook computer

⁶³ Again, this ending time is generous to the Complainant.

⁶⁴ As discussed at greater length below, for present purposes I need not determine whether or not the Complainant did, in fact, conduct the check rides. It is sufficient for me to determine the number of hours he conducted in the simulator, in order to evaluate the reasonableness of management's claims to have believed that he dramatically reduced training time and failed to conduct check rides.

⁶⁵ I arrive at this total training time by adding 3 hours and 45 minutes on Tuesday to 45 minutes on Wednesday.

system and subject to the limitations of the Orion system. These erroneous training records include the following:

(1) *Instructor Sim Sign-In Log*: On this handwritten document located within the Challenger 601 simulator, the Complainant entered by hand that he was with the Trainees on Tuesday from 11:30 a.m. until 5:30 p.m. and on Wednesday from 12:00 p.m. until 5:00 p.m., totaling 11 hours in the simulator. (RX F.) These handwritten entries are in direct contrast to the representations the Complainant made the following week in his Affidavit completed on December 1, 2007, and they significantly overstate the time I find he actually spent with the Trainees in the simulator, by approximately 4½ hours.

(2) *Instructor Daily Activity Log*: On this computerized document created through the Logbook system, the Complainant confirmed conducting simulator trainings for 4 hours on Monday November 26, from 1:00 p.m. until 5:00 p.m. (RX G), and on Tuesday November 27 from 1:00 p.m. until 5:30 p.m. (RX H.) The Monday record is clearly inaccurate, as the Complainant did not complete a simulator session on Monday, and the Tuesday record also overstates training time, based on its 4:39 p.m. print time. (RX H.)

(3) *Flight Training Records*: On these computerized documents required by the FAA as part of the pilots' certification, the Complainant confirmed conducting a total of 10 hours of simulator training, including 4 hours on Monday, 4 hours on Tuesday, and 2 hours on Wednesday. (RX I.) With Mr. Gore, for example, the Complainant listed completing 57 tasks to proficiency on Monday, as well as 3 daytime takeoffs and 3 daytime landings; for Tuesday, he listed completing 43 tasks to proficiency, as well as 3 nighttime takeoffs and 3 nighttime landings; and for Wednesday, he listed completing 31 tasks to proficiency, as well as 1 daytime takeoff and landing and 3 nighttime takeoffs and landings. (RX I, pp. 1-3.) The Complainant provided separate comments explaining the quality of Mr. Gore's performance on each day. (RX I, p. 5.) These records provide clear misrepresentations as to the total hours performed, as well as clearly fabricating specific activities conducted on Monday, when no simulator training was conducted, and on Wednesday, when only approximately 45 minutes of simulator training were conducted — leaving only approximately 22½ minutes for each pilot in the pilot seat.⁶⁶

(4) *Pilot Training Record Certifications*: On this handwritten document completed no later than Wednesday, November 28, the Complainant entered by hand that he completed the training from November 26 through November 29, 2007, and he signed the document in four places with the date of November 29, 2007. (RX O.) The dates provided on this document are inaccurate to the actual dates the training was conducted.

⁶⁶ The questionable plausibility of Mr. Gore's completion of 4 takeoffs and landings as well as 31 other tasks in 22½ minutes on Wednesday November 28 is underscored by the Complainant's hearing testimony during which he described that the time he required to conduct an approach during simulator training was approximately 4½ to 5 minutes. (HT, pp. 377-78.) Insofar as landing an aircraft necessarily involves a prior approach to the landing strip, the 4 landings Mr. Gore allegedly performed during Wednesday training prior to his check ride would have taken him at least 18 to 20 minutes, if performed in immediate succession without a moment's interruption, leaving between 2½ to 4½ minutes for the remaining 31 tasks the Complainant reported him as completing to proficiency on Wednesday, prior to the check ride. (See generally RX I.)

(5) *Client Training Audits*: On these computerized documents completed through the Logbook system, the Complainant confirmed conducting simulator trainings for 4 hours on Monday from 1:00 p.m. until 5:00 p.m., for 4½ hours on Tuesday from 1:00 p.m. until 5:30 p.m., and for 6 hours on Wednesday from 1:00 p.m. until 3:00 p.m., and from 7:00 p.m. until 11:00 p.m. (RX P, p. 1; RX Q, p. 1.) The entry for Monday is clearly erroneous; the Tuesday entry overstates the amount of time spent by approximately 45 minutes; and the entry for Wednesday overstates the time spent by approximately 3 hours and 15 minutes.

(6) *FAA Form 8410*: On these handwritten documents required by the FAA to certify satisfactorily completed check rides, the Complainant dated the check rides as having been performed on Thursday, November 29, 2007. (RX J; RX K.) He handwrote on both Trainees' forms that he spent 2 hours in the simulator examining each pilot, and he stated that every one of the 30 required maneuvers were completed satisfactorily. (RX J; RX K.) Mr. Milhiser's credible testimony indicates that the Complainant completed and turned these forms in by 4:00 p.m. on Wednesday, the day before the forms stated the check rides were completed. (HT, pp. 536-37, 539.) Not only are the dates on the form inaccurate, the amount of time spent with each pilot is significantly overstated, according to the Complainant's testimony that he spent only one hour checking each pilot.

(7) *Airman Certification Log*: On this handwritten log, the Complainant wrote that he gave the Trainees their flight checks on Thursday, November 29, 2007. (CX 39.) This date is inaccurate, according to the Complainant's testimony and December 1 Affidavit stating that he completed the check rides on Wednesday afternoon.

c. The Respondent Provides Highly Persuasive Evidence That the Complainant's Abridgement of Training Time and Significant Misstatements on Training Records Caused His Termination

As recounted above, Mr. Milhiser, Mr. Lewis, and Mr. McGowan all maintain that the Complainant's actions during the week of November 26, 2007 — including significantly cutting short the Trainees' simulator training time, appearing to have completed 8410 forms without performing their check rides, and committing numerous, significant misstatements on their training records — caused them to believe that he had engaged in a major breach of ethics in his role as a flight instructor and FAA check airman. They state that it was their belief that he certified on formal FAA records having conducted trainings and check rides that he had not, in fact, conducted, and that when questioned directly about it on Thursday, November 30, he lied to them.

I am persuaded that these concerns as to a breach of ethics were reasonable. By the time the Complainant completed the forms on Wednesday afternoon documenting his completion of the training and check ride, Mr. Milhiser and Mr. Lewis had a reasonable basis for believing that he had, by then, completed little more than half of the 12 to 13 hours of curriculum simulator training time; that he had not yet completed the check rides; that he had falsified official FAA forms; and that he had fabricated comments for trainings on Monday when no training was conducted. (See CX 60, p. 153 (Mr. Lewis's handwritten notes of the factors affecting the termination decision).) As Mr. Lewis testified, this set of considerations caused Tucson Center management to believe that the Complainant had violated the "position of trust and

responsibility” in which he was placed “by the FAA” in his role as a check airman. (HT, p. 638.) Mr. Milhiser and Mr. McGowan provided similar comments. In view of the Complainant’s own testimony that in his role as flight check airman he served as an agent of the FAA for certifying the skill and safety of the pilots he examined (HT, pp. 321-22), and Mr. Milhiser’s testimony that Section 135 air taxi pilots such as the Trainees are responsible for piloting the air traveling public and are governed by FAA rules similar to the heightened standards governing common airline carriers (HT, pp. 425, 488), it is easy to appreciate why Mr. Lewis, Mr. Milhiser, and Mr. McGowan would feel that the Complainant’s apparent failure to adequately train and check the Trainees constituted a serious breach of ethics, with potentially grave and life-threatening consequences for the Trainees’ future air taxi passengers.

I am additionally persuaded that these concerns were not only reasonable, but also that they were genuinely felt by Tucson Center management. As recounted above, Mr. Lewis wrote at the top of his page of handwritten notes, “Flight Safety Core Value. I’ll always do what is right.” (CX 60, p. 153.) Mr. Lewis also reiterated this reasoning when interviewed by the OSHA investigator in May 2008, explaining that the “situation was way beyond my ethics and company ethics. [The Complainant’s] job requires integrity and honesty. It was embarrassing to our industry. . . . One of the company core values is to always ‘do what is right.’” (CX 62, p. 227.) Corroborating Mr. Lewis’s consideration of this ethical position as a “core value” of the company, a letter to all Flight Safety employees contained in the record explains the following:

Proper conduct includes, of course, strict compliance with the spirit and the letter of the laws and regulations that apply to our business. But it means more than that. It also means that we are honest and ethical in all of our business practices. . . . The Guidelines do not attempt to provide answers to all questions that arise; for that, *we must ultimately rely on each person’s good sense of what is right*, including a sense of when it is proper to seek guidance from others on the appropriate course of conduct.⁶⁷

(RX A, p. 1 (emphasis added).) Testimony and evidence presented by Mr. McGowan additionally supports the notion that the Respondent required rigid ethics of its flight instructors, as evidenced by the termination of multiple instructors found engaging in document falsifications. (See discussion below.)

The Complainant’s questionable credibility in the course of this litigation provides additional support for statements by Mr. Milhiser and Mr. Lewis that they did not believe the Complainant’s denials of wrongdoing when called to answer for his conduct, prior to being terminated. The Complainant testified at his deposition that he completed a full 6 hours of simulator training with the Trainees on Tuesday, November 27, 2007, as well as 4½ to 5 hours in the simulator on Wednesday, totaling 11 to 11½ hours in the simulator and representing only a half-hour loss of total time. (RX HH.) On the first day of the hearing, he initially attempted to maintain these high numbers, testifying that the handwritten Simulator Sign-In Log — showing 6 hours in the simulator on Tuesday and 5 hours on Wednesday — represented the training he had conducted for the Trainees, and that he had only abridged the standard training and checking

⁶⁷ It is unclear when this letter to Flight Safety employees was produced and disseminated. In November 2007, Flight Safety’s president was Bruce Whitman, while the letter to Flight Safety employees cited here was signed by a different Flight Safety president, A.L. Ueltschi. (RX A, p. 1.)

time by a single hour. (RX F; HT, pp. 184-85.) However, later in his testimony, the Complainant conceded that his December 1 Affidavit more accurately depicted the training he had conducted for the Trainees, and he accordingly reduced his total tally to 7¾ hours in the simulator, showing a 4¼ to 5¼ hour loss of total simulator time. (HT, pp. 168-69, 292-95, 298-99, 319, 328; RX M, pp. 3-4.)

Not only does the inconsistency of these answers, given under oath, considerably undermine the Complainant's credibility, my findings as to the actual times the simulator sessions took place undermines it further, as the record evidence shows that he can actually have completed only 6½ hours in the simulator — a reduction of between 5½ and 6½ hours from the total time. The Complainant's testimony at the hearing was also noticeably evasive at times, leading me to interrupt cross examination at one point to demand of the Complainant, "What I want is a straight answer." (HT, pp. 456-57.) In light of my own first-hand observation of the questionable reliability of the Complainant's statements made under oath, I decline to question the Tucson Center management's statements that they found the Complainant's denials of misconduct on November 29, 2007, to be unworthy of belief.

Accordingly, I find the Respondent's evidence extremely persuasive that the Complainant's termination decision was made in response to his actions the week of November 26, 2007, without any contribution by his protected activity of a few months prior.

d. The Complainant's Theories of Pretext are Inadequate to Prove by a Preponderance of the Evidence that His "8 in 24" Complaint Contributed to his Termination

As introduced above, the Complainant presents a number of theories of pretext, based on circumstantial evidence, to support his claim that his termination was actually motivated by discriminatory animus tied to his "8 in 24" complaint. None of these theories has merit. I will address each theory below.

i. The Complainant Presents Insufficient Evidence to Support a Finding that the Record "Discrepancies" He Committed were of a Quality Routinely Committed by Other Instructors and Accepted by Management at the Tucson Center

In support of his theory of pretextual termination, the Complainant argues that Tucson Center management regularly condoned frequent and significant inaccuracies in training documentation committed by Flight Safety instructors. In his Closing Brief, he dramatically alleges, "The allegations against [the Complainant] pale in comparison to the substandard and deceptive standards that Flight Safety used to maintain records at the company." (Complainant's Closing Brief, p. 21.) At the hearing, the Complainant explained that, due to the rigidity of the computer system, record-keeping at the Tucson Center required instructors to navigate a complex, five-pronged system of accounting for students' training times, including: (1) an "allotted time" for training — which corresponded to the training program's curriculum, requiring 16 hours of training and checking for a 61.58 program, or 12 hours for a 135 program (HT, p. 369); (2) "program time," or the actual "input made into the Orion system," which ought to be identical to the "allotted time" (HT, p. 369); (3) "schedule time," which starts out as identical to the "program time" and "allotted time," but which "changes as the dynamics of

training in the course of the training week occur” (HT, p. 370); (4) ”actual time,” or the exact times the instructor actually conducts training with the client; and (5) ”documented time,” consisting of several documents including the computer Logbook, the Flight Training Audit, and the records of completion. (HT, p. 368-70; CX 71.) The Complainant submits that it was “commonly observed that there are discrepancies between all of those times” in training records confirmed by instructors at the Tucson Center. (HT, p. 373.) The Complainant also states that he believed he was expected to maintain consistency between what was scheduled in the computer system, what he documented in Logbook, and the check ride duration time indicated on the 8410 forms sent to the FAA — even where maintaining consistency would result in inaccurate records — inasmuch as a discrepancy between the scheduled hours and the actual hours in which the check rides were completed could “alert” the FAA to the discrepancy. (HT, pp. 373, 385.)

First, I accept the Complainant’s contention that, when training schedules needed to be rearranged, the Orion computer system posed obstacles for instructors in their ability to accurately document the actual times that trainings took place. For example, although instructor Mike Giron testified that he had not experienced the Orion system as being “inflexible,” and that instructors have the ability to “make slight adjustments in the time” on given training dates in the Logbook system, he agreed that instructors cannot “re-arrang[e]” full days of training in the system without seeking help from the Program Manager or Director of Training. (HT, pp. 461, 466-67.) Mr. Milhiser also agreed that “there are certain issues associated with the Orion system that make it difficult to get things done,” confirmed that the system restricted the individuals who could make “unilateral” changes to the schedule, and noted that in late November 2007 the Complainant had been reliant on the help of Mr. Duke, Mr. Bitgood, or Ms. Medina to input the scheduling changes he needed. (HT, pp. 586-87, 599.) Instructor Hector Alvarez also testified that the Logbook system is “not very flexible” and that it occasionally forced him to confirm inaccurate training times for students who were “paired” in the system with other students on a different curriculum. (HT, pp. 74, 80-81.) In February 2006 the Complainant drafted a memorandum for Tucson Center management in which he pointed out in detail the obstacles instructors faced in documenting trainings when 135 and 61.58 students were paired together in the Orion system. (CX 13.)

I also accept the Complainant’s contention that it was not unheard of for instructors at the Tucson Center to conduct trainings at times other than the times they ultimately confirmed on training records. The Complainant credibly testified as to a specific instance when Mr. Bitgood, during a time when he served in the role of Program Manager of the Lear 60 program,⁶⁸ instructed the Complainant to document a training according to the original schedule, even though the Complainant had been required to adjust the actual time the training was conducted because a client was ill and could not attend a training session. (HT, p. 848.) The Complainant states that he asked Mr. Bitgood,

“Do you want me to change the log book or have you change the log book, or do you want me to just do the training and then log it as it’s programmed in the computer?” And [Mr. Bitgood] concurred that it would be easier . . . rather than

⁶⁸ The record shows that Mr. Bitgood served as the Complainant’s Program Manager in 2004 and 2005. (CX 22-23.)

making a change to the computer program, just adapt the training and log it [as] it was programmed into the computer.

(HT, pp. 389, 848-49.) Mr. Alvarez additionally testified that when his students were “paired” with another training group in the system, he would conduct the trainings and confirm the schedule as it appeared in Logbook, regardless of whether the training times in Logbook matched the actual times he had completed the training. (HT, pp. 74-75, 80-81.) Instructor Dick Embry also testified that in the week before the hearing, he had had a training situation where the training he conducted did not exactly match the times scheduled, and he had been instructed by his Program Manager Rich Hansen to confirm the schedule as it presented in Orion rather than the actual times he conducted the training. (HT, p. 406.)

However, the evidence available on this matter is insufficient to persuade me that the inaccurate schedules confirmed by other instructors were as frequent as the Complainant submits they were, or that the extent of these inaccuracies was on a par with the significant scheduling inaccuracies confirmed by the Complainant in this case. In every other example of inaccurate Logbook records presented in the record, the full number of training hours appears to have been performed without abbreviation, albeit at different times of day than those ultimately documented on the training records. For example, Mr. Alvarez’s testimony raised no suggestion that he had abridged the trainings that he later inaccurately confirmed in Logbook. He explained, for example, that if a crew needed to depart early, he “would arrange with them” and “have a shorter lunch period, so that [he] could fulfill the hours that they were required to be with [him].” (HT, p. 74.) Mr. Embry also noted that the example of the record discrepancy he provided at the hearing involved a unique situation where, after he completed a full training and checking for a set of pilots, the client requested that an *additional* session be added into the curriculum, and Mr. Embry indicates that he provided the students this added session in full. (HT, pp. 405-07.) Likewise, in the anecdote recounted above when Mr. Bitgood gave the Complainant permission to confirm inaccurate training times in the Logbook system, the Complainant had asked Mr. Bitgood, “do you want me to *just do the training* and then log it as it’s programmed in the computer?” (HT, pp. 848-49 (emphasis added).) In that case, the Complainant states that Mr. Bitgood replied to him that he could “adapt the training” and management would “understand that the requirements have been met” despite the inaccurate schedule depicted in the records. (HT, p. 389.) In the examples given, there is no suggestion that the full number of training and checking hours were not completed in their entirety.

Moreover, despite the Complainant’s claims that such inaccuracies were “rampant,” “common,” and “universal” (ALJX 2, p. 1), the Complainant has failed to provide evidence or elicit witness testimony to show that such inaccuracies were anything but infrequent. Mr. Embry noted in his hearing testimony that the example of the record discrepancy he provided at the hearing was “about the only one [he] c[ould] think of.” (HT, pp. 405-07.) Director of Standards Rudy Rostash likewise testified that he discovered inaccuracies in data entered in training records only “on occasion.” (HT, p. 759.) Client Ed Drennan, who had trained with the Respondent every year between 1966 and his retirement in 2007 (HT, pp. 101, 103), only testified concerning two occasions, one of which involved the Complainant, where his client training records did not accurately document the amount of training that he had actually received. (See HT, pp. 104-05.)

The record contains very little evidence of other trainings that were confirmed as being completed in full despite having been abridged in actuality, and the little such evidence the record does contain is inadequate to persuade me that an environment permissive of training syllabus reductions prevailed at the Tucson Center. For example, in his December 4, 2007, letter to Doug Ware, the Complainant asserted that within the 14 days prior to his termination, he had witnessed three separate incidents where trainings were significantly cut short but later documented as completed in full. (CX 14, p. 1.) However, the Complainant neglected to name the instructors or clients in question or provide any other evidence substantiating these anecdotal assertions. The Complainant also claims that his own instructor recertification in July 2007 was documented as completed in full, even though the last two hours of academic ground school with Mr. Hostetter were never completed. (HT, pp. 255-60; CX 61, pp. 154-57.) However, the Complainant's own testimony was ambiguous on this point, noting that it was only according to his "recollection" "going back almost two and a half years ago," that he felt he had not completed the full training in that case, and he referenced an ongoing dispute in the training center concerning whether an instructor qualified to *teach* ground school was also required to *undergo* ground school, which could reasonably explain why his Program Manager Mr. Jensen may have permitted him to forego the final two hours of the ground school training in that case.⁶⁹ (HT, pp. 255, 259, 391.)

Witness testimony providing evidence of other trainings confirmed as completed in full, despite having been abridged in actuality, also presents a mild picture of the extent of training record inaccuracies committed by other Flight Safety instructors, and fails to support the Complainant's claim that his behavior in late November was routine at the Tucson Center. For example, Tucson Center instructors Jack Haywood, Doug Foster, and Robert Ruskay testified by stipulation that "[o]ther than recording time in the log book system that is within 15 minutes of the originally-scheduled time, [they] do not record simulator training they do not actually conduct." (HT, p. 779.) Instructor Mike Giron likewise testified that if he conducted a simulator session in 2 hours and 45 minutes, he would "probably log the three hours," but that he would never confirm a 4-hour simulator session that he did not conduct, nor would he confirm a training on an entirely different day than the day he conducted it. (HT, pp. 461-62.) Mr. Giron noted that if there were "any significant changes" such as these that needed to be made to the Orion schedule, he would not confirm the training until the Program Manager had "change[d] it around so that it reflects what we're actually doing." (HT, p. 462.) Mr. Lewis similarly testified

⁶⁹ With regard to this July 2007 recertification, the Complainant additionally argues that Flight Safety records showed him either receiving or giving instruction during 27 of 31 hours between the days of July 11 and 12, 2007 (HT, pp. 214-15; CX 67), which the Complainant states was not "humanly possible," and which provided evidence of "administrative errors . . . that are virtually identical to the ones that appear[ed] in" the records he completed for the Trainees in late November 2007. (HT, pp. 242-43, 255.) First, the Complainant's arithmetic is faulty; my review of the records shows him either giving or receiving instruction during 23 of 31½ hours during the days in question. (See CX 61, pp. 154-57 (showing the Complainant undergoing training for 15½ hours on Wednesday, July 11, and 4 hours on Thursday July 12, as well as teaching for 3½ hours on Thursday morning).) Second, the Complainant does not claim that the recertification training sessions were actually cut short beyond the loss of his final two hours of ground school, discussed above. Rather, he claims merely that the training sessions were rearranged at times other than those documented on the final training records, in order to permit him to complete the recertification while also conducting some training sessions for other clients during the same week. (HT, pp. 255, 259.) This example is quite distinct from the Complainant's actions in late November 2007 of significantly cutting short a training series and confirming approximately six hours of simulator time that were *never*, in fact, performed.

that a 15-minute documentation inaccuracy would not cause him significant concern, while a 4-hour confirmation of training on a day that the training did not take place would cause him great concern. (HT, p. 619.) Mr. Milhiser likewise testified that he had “observed some . . . inconsistencies before, but the magnitude has always been small,” and gave as an example a 15-minute inaccuracy in documentation.⁷⁰ (HT, p. 505.)

The other examples the Complainant submits of document inaccuracies committed by other Flight Safety instructors are similarly inadequate to provide persuasive support for his claim that the genre of record discrepancy he committed in late November 2007 was commonplace at the Tucson Center. For example, the Complainant points to an 8410 form and Flight Training Record completed by his colleague Robert Ruskay, where Mr. Ruskay left blank the duration of the check ride, failed to sign the Flight Training Record, and wrote that the check ride was completed July 11, 2007, even though other records showed that the check ride was begun on the night of July 11 and completed at 1:30 a.m. of the following morning, July 12, 2007. (CX 61, p. 157; CX 64, pp. 255-59; HT, pp. 223-24, 325.) Although I accept the testimony of Director of Standards Rudy Rostash indicating that Mr. Ruskay’s failure to adequately complete the 8410 form did constitute error (HT, p. 735), I find the comparison unpersuasive. First, the Complainant himself testified that he believed the date on the 8410 form was accurate, and that the check ride had been completed on the night of July 11, 2007. (HT, p. 326.) Second, the comparison is unreasonable to the extent it suggests that Tucson Center management should be expected to view document inaccuracies in a vacuum, devoid of any surrounding context. While the two Trainees’ 8410 forms, complete with false dates and exaggerated examination times, were completed by the Complainant in a context where ample evidence called into question whether the check rides had even been attempted by the time the official forms were filled out, in Mr. Ruskay’s case, no contemporaneous evidence raised any such concern. As Rudy Rostash testified, the “late hour” of the night at which Mr. Ruskay performed the check ride provided a reasonable explanation for what appeared to be “inadvertent” errors or “typo[s],” and as a result such errors did not become a “major concern” for management from a document falsification perspective. (HT, pp. 732, 734.)

The Complainant also highlights the Tucson Center’s loss of Mr. McKinlay’s client file as a proof that management ordinarily paid little attention to record accuracy or maintenance. (HT, pp. 9-10, 213.) While this apparent file loss does provide evidence that the Tucson Center may not be as tightly run an operation as it may intend or purport to be, I find the example of limited utility for purposes of showing that management engaged in disparate treatment of the Complainant when they became concerned about errors in training records he completed. Errors and document losses can inevitably be found to occur in any institution, and the mere occurrence

⁷⁰ Providing another example of instructors confirming more training time than was actually performed, Client Ed Drennan testified that the Complainant and C.J. Hawkins had both previously confirmed him as completing a full 61.58 training despite the simulator time being cut short on the final day of a 4-day training. However, this example also falls short of supporting the Complainant’s case because of the distinct and less stringent requirements of a 61.58 training — in which, unlike in the 135 context, a task is considered complete once it has been carried out satisfactorily a single time (HT, p. 150) — and Mr. Drennan’s testimony that by the time the simulator failed in these cases, the training syllabus had already been completed: “[W]e had filled in all of the squares. We did all of the requirements that [we]re in the curriculum.” (HT, p. 105.)

of an error in one case does not, without a great deal more corroborative evidence, prove that management's attention to detail in another case was motivated by discriminatory animus.⁷¹

Ironically, the Complainant's attempts to have the Orion schedule system changed (*see* HT, pp. 845-46) also undermine his claim that at the Tucson Center, "there was always an understanding that the trainer confirmed entries in the Logbook as published rather than as actually happened to avoid unnecessary cumbersome administrative changes in the computer system." (Complainant's Final Reply Brief, p. 12.) Were that actually the case, the Complainant logically would not have bothered seeking to have the schedule changed.

Accordingly, I find that the record does not support the Complainant's claim that the Tucson Center ordinarily condoned significant record inaccuracies such as those carried out by the Complainant in late November 2007, and his first theory of pretext fails.

ii. The Complainant's Attempts to Alter the Computer Schedule Do Not Insulate Him From Reasonable Suspicions by Management As to His Motivations When He Later Completed Erroneous Records and Dramatically Reduced the Trainees' Training and Checking Time

The Complainant's second theory of pretext relies on management's awareness that he had made attempts, on Tuesday and Wednesday of the training week in question, to have the Orion computer schedule changed for the Trainees. The Complainant essentially argues that this knowledge should have prevented management from having any reasonable basis for suspicion as to his motivations, such that their claim to have believed that he engaged in an intentional document falsification was, necessarily, a pretextual explanation for their wish to terminate him due to his earlier protected activity.

⁷¹ In support of his claim that an environment tolerant of document falsifications ordinarily prevailed at the Tucson Center, the Complainant additionally raises the following examples of alleged document falsifications: (1) He states that on one occasion, he and three other Lear 60 instructors from the Tucson Center boarded a client's aircraft for purposes of fulfilling the FAA's requirement that instructors pilot a real aircraft at least one hour per year with 3 take-offs and 3 landings, but that he and the other pilots merely observed the flight without sitting at the airplane's controls, "and then returned and we all logged one hour of time and three landings without pilot." (HT, pp. 126-27.) Not only does the Complainant fail to provide corroborative evidence or witness testimony to support his belief that this incident constituted an FAA violation, the applicable FAA regulations would appear to indicate that the flight session the Complainant recounts may, depending on the details of what took place during and after the flight, have been entirely permissible as a way of satisfying the actual aircraft flight requirement. *See* 14 C.F.R. § 142.53(b)(3)(i) (providing three possible avenues of satisfying the actual flight requirement, including either "perform[ing] 2 hours in flight, including three takeoffs and three landings as the sole manipulator of the controls of an aircraft," or "participat[ing] in an approved *in-flight observation* training course . . ." and a subsequent flight simulator session (emphasis added)). The Complainant's description of what took place could fall within the category of an "in-flight observation training course." (2) The Complainant also points to the records of his 135 recertification at Flight Safety's Atlanta training center in December 2008, which indicated that he had completed the training in fewer than minimum hours, but nonetheless confirmed him as completing a full 12 hours of flying time. (CX 33; CX 34, pp. 1, 4.) Not only did the Complainant fail to introduce evidence to show that 12 hours was more than the "minimum" expectation according to the 135 syllabus in question — a necessary proof in light of testimony from multiple witnesses indicating that a 135 syllabus often included "specialized requirements" and tasks in addition to the "generic" 135 syllabus (HT, pp. 415, 435-37, 466) — this record was produced at a different training center under different Flight Safety management, significantly lessening its relevance to the Complainant's task of demonstrating that an environment tolerant of document falsifications ordinarily prevailed at the Tucson Center.

First, I agree that the record supports a finding that Mr. Bitgood, Mr. Milhiser, and Mr. Lewis were each aware that the Complainant had made attempts to have the computer schedule changed to adapt the training into two days rather than the original four days on the schedule. Mr. Bitgood openly testified at the hearing concerning the telephone call the Complainant placed to him from his home on Tuesday morning (HT, pp. 693-94), and both Mr. Milhiser and Mr. Lewis testified that they were aware that the Complainant had requested that the simulator be made available early on Tuesday so as to make up some lost training time. (HT, pp. 527-28, 631.) Mr. Lewis additionally testified that by the time he learned that the Complainant had confirmed inaccurate training information for Monday, he knew that the Complainant was still at that time “actively working the schedule” to try and fit in the training. (HT, pp. 630-31.) Mr. Milhiser additionally testified that he observed the Complainant speaking to Ms. Medina on Wednesday morning to rearrange the Trainees’ schedule, and that Ms. Medina had told him about the specific scheduling changes she had input to the system at the Complainant’s request. (HT, p. 530, 591; CX 40, p. 1.)

However, the Complainant’s actions following these attempts did reasonably call into question his motivations with regard to adequate completion of the Trainees’ training and checking. After speaking to Mr. Bitgood on Tuesday morning, he proceeded to confirm trainings for Monday, including fabricated comments as to activities that did not take place. (RX I, p. 4.) After working with Ms. Medina to input changes to the schedule for Wednesday afternoon and evening, he completed the official check ride documents in advance of the scheduled Wednesday night session, and failed to appear to conduct the session. After completing only approximately 6½ hours in the simulator, he completed formal records confirming 10 hours of simulator training time (RX I) as well as 4 hours of check ride time. (RX J; RX K.) These actions, logically suggestive of an intent to falsify, considerably undercut the value of his earlier attempts to rearrange the training schedule.

I also reject the Complainant’s claim that he did not know that Ms. Medina had scheduled him to return to the training center on Wednesday night to perform the check rides. The Complainant testified that he actually “look[ed] over [Ms. Medina’s] shoulder while she made the computer data entry,” (HT, p. 191) and states that his session with her “ended with the understanding that the computer program represented the appropriate time required to complete the remaining events of the training course.” (RX M, p. 3.) Immediately after making the changes to the system, Ms. Medina informed Mr. Milhiser of the content of her discussion with the Complainant, telling him that the Complainant had requested to conduct additional simulator training on Wednesday afternoon, and then to return to conduct the check rides beginning at 5:00 p.m., but that she had informed him that she would have to schedule the check rides to begin at 7:00 p.m. because another instructor had the simulator reserved until then. (HT, pp. 530-31; CX 40, p. 1.) Based on this evidence, I find it implausible that the Complainant genuinely did not know about the scheduled Wednesday evening sessions.

iii. The Discrepancies Contained on the Training Records Were not Merely “Ministerial” or Insignificant Errors, and Management Did Possess a Reasonable Basis for Concern As to the Complainant’s Honesty Based on the Record Discrepancies They Observed

The Complainant argues in his Closing Brief that the “discrepancies” contained in the training records he completed for the Trainees were each minor, “ministerial” errors which

caused “no harm and no foul” to anyone, and which cannot have been a genuine cause of concern to management. (Complainant’s Closing Brief, pp. 9, 24.) In his Final Reply Brief, he submits, “From the facts, all that can be shown is that Roger at worst made innocent non-intentional ministerial errors that in no way effected (sic) the level of training pilots Gore and Roodman were required to obtain.” (Complainant’s Final Reply Brief, pp. 3-4.) With regard to his confirmation of training activities for Monday, the Complainant explains that every activity he confirmed for Monday was based on activities actually performed with the Trainees on Tuesday, and that the Monday Logbook record, “while not exactly accurate as to the time it occurred, was *accurate as to the event it defined*.” (Complainant’s Final Reply Brief, p. 6 (emphasis in original).) With regard to his entry of a Thursday, November 29 date on the 8410 forms, the Complainant argues that the erroneous date was a meaningless error, as it carried no legal impact for the date the Trainees’ certifications would expire. (See HT, p. 186.)

In support of his claim that the errors were understood by management to be unintentional, the Complainant points to Mr. Lewis’s December 5, 2007, letter to Air Rutter International, in which Mr. Lewis informed Air Rutter that there were “incorrectly accomplished records,” and that an “error” occurred preventing the Trainees’ 135 certification. (RX L.) The Complainant argues, “This has been Roger’s position from the onset. Nothing evil was done intentionally. It is submitted if Mr. Lewis . . . does not report to the customer that there was a falsification of records, then why would this Honorable Court believe that Flight Safety offered clear and convincing evidence otherwise.” (Claimant’s Closing Brief, p. 15.)

I find these arguments unpersuasive. Although the Complainant now claims that his actions constituted “innocent errors,” and asserts a variety of *post hoc* justifications for his reduction of training time and for the contents of the training records he produced, I am persuaded that the evidence before management at the time they made the termination decision provided them a reasonable basis for legitimate concern that the Complainant had attempted to engage in a breach of ethics with regard to his responsibility to train and check the Trainees, by dramatically shortening their training time, failing to appear for the scheduled check ride session, and by completing seven separate records — including official FAA documents — containing false information. Moreover, I find it understandable and unsurprising that Mr. Lewis neglected to inform Air Rutter, a valued customer, that a Flight Safety instructor and by collusion Air Rutter’s own pilots, were believed to have engaged in an intentional falsification of training documents, resulting in the need to invalidate a certification for which Air Rutter had paid Flight Safety approximately \$26,000. Such an admission of internal fraud, carrying with it an allegation against Air Rutter’s own employees, would have been undesirable from a business perspective, as well as being unnecessary for the purposes of informing Air Rutter that the 135 certifications were invalid.

Moreover, the record contains no evidence that Mr. Milhiser or Mr. Lewis were presented with the Complainant’s various explanations for his actions — such as the theory that the Trainees had been “trained to proficiency” — prior to the time they made the termination decision. Mr. Milhiser and Mr. Lewis both stated at the hearing and to the OSHA investigator in May 2008 that when they provided the Complainant a chance to explain himself on Thursday, November 29, 2007, he stood by his actions and maintained that the Trainees had “received everything that they needed.” (HT, pp. 550, 637, 654, 667; CX 62, pp. 227, 230.) Corroborating these accounts, the Complainant states that he was “kind of in a daze” during the meeting with

management on November 29, which leads me to accept other witness accounts that the Complainant said very little in his own defense. (HT, p. 196; CX 62, p. 230 (Mr. Milhiser's comment that the Complainant "did not say much at all."))

Accordingly, because the Complainant's various justification theories were not introduced to management before the termination decision was made, unless the Complainant can persuade me that his justifications for his actions were so fundamentally obvious as to be already understood by management without his explaining his rationales, then his variety of exculpatory theories are essentially irrelevant. The determination of whether a protected activity was a contributing factor to an adverse employment action hinges on the employer's frame of mind at the time the employment action was taken. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (holding, in the Title VII gender discrimination context: "[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer *at the moment of the decision* what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." (emphasis added)).

The Complainant has not persuaded me that the variety of arguments he now submits to justify his actions were so basic that management must have, as a matter of common sense or common practice at the Tucson Center, already understood his justifications by the time they made their termination decision.

First, the Complainant has provided insufficient evidence to persuade me that it was ordinarily permissible at the Tucson Center to confirm simulator activities taking place on a day when the simulator was unavailable, even where the activities were ultimately completed on the following day. In his discussions with the OSHA investigator, Mr. Milhiser stated flatly, "You can't say you flew Monday if you didn't" (CX 62, p. 230), and instructor Mike Giron likewise testified that if he needed to rearrange a training schedule, he would never confirm training on a completely different day than when he actually conducted it. (HT, p. 462.) Hector Alvarez also testified that he had never confirmed completing a training on a day he did not do the training. (HT, p. 75.)

Not only was the confirmation of simulator activities on Monday outside of the range of ordinary approaches to training documentation taken at the Tucson Center, the evidence persuades me that this Monday training confirmation was a source of real concern to management. When Mr. Duke discovered that the Complainant had confirmed 4 hours in the simulator on Monday, he reported the information to Mr. Milhiser, because he "wanted [Mr. Milhiser] to be aware of it." (HT, p. 526.) Mr. Duke and Mr. Bitgood also reported the information to Mr. Lewis. (HT, p. 630.) Mr. Lewis's handwritten notes from the Complainant's personnel file make specific reference to the Complainant's confirmation of training activities on Monday, noting that the Complainant had gone so far as to grade maneuvers and provide separate comments for the Monday session. (*See* CX 60, p. 153 (Mr. Lewis's handwritten comments that the Complainant had "confirmed tr[ainin]g on Mon[day] – sim was down, graded maneuvers, wrote comments").) Mr. Lewis also addressed this issue with the OSHA investigator in May 2008, commenting that the Complainant had confirmed training for Monday, and had "wr[it]te[n] training remarks in the sims log and commented on proficiency that day. . . . That was the extent of the problem. We all knew it didn't happen." (CX 62, pp. 225-26.)

Moreover, the Complainant's representation that all of the activities he confirmed for both Monday and Tuesday — including a total of 6 takeoffs and landings with each pilot (both daytime and nighttime) and 100 additional tasks completed to proficiency by each pilot (*see* RX I) — had, in fact, been performed on Tuesday by the time he confirmed them Tuesday afternoon, is a strained interpretation of events that was unlikely to have been taken seriously by management. Mr. Milhiser and Mr. Lewis both knew that by the time the Complainant confirmed these activities on Tuesday, he could have spent only a few hours in the simulator with the two pilots, as the simulator had been unavailable Monday, the Complainant had failed to begin the training early on Tuesday as arranged with Mr. Bitgood (HT, pp. 528, 631), and the simulator was scheduled to be occupied by another instructor beginning late Tuesday afternoon. (RX F.)

The Complainant's explanation as to why the erroneous November 29 date on the 8410 forms were harmless ministerial errors is also unpersuasive for purposes of showing that management cannot have been genuinely concerned that it constituted an intentional falsification at the time they made the termination decision. I do accept the Complainant's contention that a date of November 29 carried no legal difference compared to a date of November 28, for purposes of marking the expiration date of the Trainees' 135 certification. Director of Standards Rudy Rostash confirmed this fact at the hearing. (HT, pp. 727-28.) However, I am persuaded that this erroneous date took on a distinct and important significance for Tucson Center management when they viewed it in the context of the following factors: (1) the Complainant's reduction of overall training time; (2) his failure to appear for the scheduled check ride session Wednesday night; and (3) his completion of the two 8410 forms on Wednesday afternoon — prior to the scheduled check rides — which he dated for the following day and filled in as showing 4 hours of check rides, on a day when it was known that the Complainant had spent little more than 2 hours in the simulator. (HT, pp. 530-31.)

Moreover, the Complainant's shifting explanations for why he dated the forms November 29 — stating at his deposition that he made the mistake based on the time shown on the Greenwich Mean Time clock in the simulator at the time he completed the check ride (HT, pp. 322-24), and stating at the hearing that it was a simple "error" based on the fact that the check ride was originally scheduled for Thursday, November 29, 2007 (HT, p. 186) — further undermines his credibility as to what his intentions actually were when he dated the 8410 forms as he did. These shifting explanations also undermine his claim that it should have been clear to management that the erroneous date was an innocent mistake.

The Complainant has also not persuaded me that the "training to proficiency" concept ought to have prevented management from becoming concerned that his reduction of training and checking time was improper. I do accept the Complainant's basic assertion that Tucson Center policy permitted him to train recurrent pilots such as the Trainees "to proficiency." Mr. Rostash agreed at the hearing that a 135 training is valid "if all of the training is completed to proficiency" (HT, p. 766), and Mr. Bitgood also testified that it could have been reasonable to shave some time off of each Trainee's overall training time, "[a]s long as he covered all of the modules required by the training curriculum and they were all performed *to Level One proficiency*, and he deemed them ready for the check ride, all areas graded." (HT, p. 697 (emphasis added).)

However, in light of a multitude of record evidence before me, I am persuaded that the Complainant's implementation of the "training to proficiency" concept in this case was a radical departure from the ordinary expectations at the Tucson Center as to how much overall training time could permissibly be reduced from the standard syllabus without undermining the validity of the training. The testimony persuading me thus includes the following:

- *Mr. Bitgood* testified that it could have been reasonable to cut 15 or 30 minutes off of each pilot's training time, resulting in an overall reduction of 30 minutes to an hour across the training week, but testified that it was "simply impossible" that the Trainees could have received adequate training and check rides in as few as 7¾ hours. (HT, pp. 697-98, 705.)

- *Mr. Rostash* testified that, although there was no "hard number" "stated in writing" as to the permissible minimum number of hours for conducting a 135 training in less than minimum time, he explained that it involved "a standard of reasonableness in what it would take to go through that number of items" in the recurrent 135 syllabus. (HT, pp. 760-61.) Like *Mr. Bitgood*, *Mr. Rostash* stated he would not have had a problem with a 9-hour training completed in 8 hours, but he stated he would have "a big issue with" a 9 hour training completed in approximately half the time: "In my opinion, I don't see how that would be possible to complete the entire training program in that amount of time." (HT, pp. 761, 765.)

- Instructors *Jack Foster*, *Doug Haywood*, and *Robert Ruskay* — two of whom conducted simulator instruction in the Challenger 601 (HT, p. 780) — testified by stipulation that they "d[id] not believe they could thoroughly conduct all of their simulator training modules for FAR-135 recurrent training for experienced pilots in 50 percent of the time allotted for that training and the course materials, and have never done so." (HT, p. 779.)

- *Mr. Lewis* testified that he expects instructors to use "essentially all – and sometimes more than the required hours" in completing a training, explaining that because the required maneuvers in a simulator training are not things that are "routinely done in a flight," even experienced pilots may not have done these maneuvers since the last time they were in training, so they wind up requiring the full time. (HT, pp. 616-17.)

- *Mr. Milhiser* similarly denied the Complainant's claim that the Tucson Center had "buil[t] a lot of fat into" the simulator training times provided in 135 syllabi, maintaining that the requirement of 4½ hours per recurrent pilot in the simulator prior to the check ride was a standard established for what a "competent recurrent pilot" would require to successfully complete the course. (HT, pp. 490, 492.) He added that, in view of ordinary scheduling challenges with only one Challenger simulator, it would have made little sense from a business perspective for the Tucson Center to schedule pilots for an excess of time over and above what was actually required to complete a training and check ride: "We never schedule on our schedule . . . an amount of hours less than what's required." (HT,

pp. 491, 585.) Mr. Milhiser also explained that during the three years (between approximately 1999 and 2002) when he performed recurrent 135 simulator trainings in the Challenger 601 at the Tucson Center, he found he was “challenged to do it in nine and a half hours.” (HT, p. 497.)

- Finally, *Mr. McGowan* also testified that instructors “have very little latitude in determining how much time” can be shaved off of the curriculum time parameters, that he had “never, ever, seen a program that would permit training with half the time of the programmed hours,” and that an appropriate time reduction would be “generally something in the neighborhood of . . . less than an hour” reduction. (HT, p. 791.)

Additionally, the Complainant himself admitted at the hearing that this was the only instance when he recalled reducing a crew’s training and checking time to the extent he did in this case: “This was a unique situation.” (HT, p. 877.) As such, his claim that he had, on previous occasions, also exercised his judgment to reduce overall training time based on the crew’s proficiency does nothing to prove that on this occasion, management could not have been reasonably and genuinely concerned that his significant reduction of training time constituted misconduct by the Complainant.⁷²

Moreover, as the Respondent argues in its Final Reply Brief, the Complainant’s significant reduction of training time appears to suggest his belief that the “training to proficiency” concept “absolve[d] him of the responsibility to follow any training regimen” in adapting the Trainees’ training schedules. (Respondent’s Final Reply Brief, p. 5.) However, as the Respondent points out, applicable FAA regulations require training centers to obtain “initial

⁷² Although I have focused here primarily on the reasonableness of management’s stated concerns over the Complainant’s reduction of the Trainees’ training time *prior* to the check rides, ample witness testimony also disputes the Complainant’s claim that he was able to adequately conduct the Trainees’ recurrent 135 check rides within a single hour per pilot. (*See, e.g.*, HT, p. 683 (Mr. Bitgood’s testimony that his fastest check ride was completed in 1 hour and 45 minutes, and that he could not complete a check ride in one hour); pp. 763-64 (Mr. Rostash’s testimony that recurrent Section 135 check rides were now scheduled for 2 hours and 15 minutes, because the check rides “frequently” required more than 2 hours, and that he felt it would be “impossible to cover it adequately, to do all of the required maneuvers” in an hour); p. 778 (stipulated testimony of Mr. Foster, Mr. Haywood, and Mr. Ruskay that they “do not believe it is possible to conduct a thorough check ride for FAR-135 certification with an experienced pilot in one hour and have never done so.”) At the hearing, the Complainant explained that he has developed strategies for reducing the check ride time using “alternate techniques” to artificially gain a time edge. These included “using the wind module input on the instructor’s console” to create 200 knot headwinds — which the Complainant admitted the pilots would never encounter in real life (HT, pp. 880-81) — rendering the “aircraft effectively . . . frozen in space,” or “slow[ing] the aircraft down when I want to slow it down, to allow them to perform checks, feed it closer to the airport and make the . . . performance of the four pilot approaches more efficient,” or “creat[ing] tail wind to accelerate their closure back to the airport.” (HT, pp. 867-68.) Although the Complainant represented that “a number of instructors,” also employed time reduction techniques such as these, he presented no witness testimony or other evidence to support this claim. In light of Mr. Milhiser’s credible testimony that the purpose of simulator time is to simulate a realistic flight experience from beginning to end and “duplicate what happens on an actual flight” (HT, p. 497), as well as the Complainant’s own admission that use of certain “temporal distortion” techniques such as the “freeze/reset” button were prohibited by the FAA during check rides because they “impacted realism” (HT, pp. 867, 880-81), I am persuaded that the Complainant’s explanation for how he managed to accomplish the check rides in a single hour would not have been obvious to management as a permissible means of reducing the check ride time to the extent the Complainant claims he did in this case.

and final FAA approval” of training curricula and to then adhere to the requirements set forth within the curricula, which provides support for management’s stated concerns that the Complainant had too radically diverged from the Trainees’ approved Section 135 curriculum. (Respondent’s Final Reply Brief, p. 5 (citing 14 C.F.R. § 142.65(d) (“The holder of a training center certificate may not graduate a student from a course unless the student has satisfactorily completed the curriculum requirements of that course.”))).)

Further undermining the Complainant’s claim that his reduction of training time and document discrepancies were clearly harmless, “ministerial” errors, the Complainant’s own e-mail to Flight Safety President Bruce Whitman confirms that the Complainant himself believed he had engaged in “dishonorable or improper” behavior with regard to his training of the Trainees. (RX N.) The Complainant stated in that e-mail, “The guilt is mine. The shame is mine. Shame defined as the painful feeling arising from the awareness of having done something dishonorable or improper.” (RX N.) The Complainant now argues that his intention in writing this e-mail was not to admit to any misconduct but to “apologize on behalf of the dozens of phone calls to him by clients who felt an injustice had been perpetrated on [him],” and that his writing of the e-mail was “a noble gesture . . . that Flight Safety has misinterpreted to be an admission of wrongdoing” in a “‘cheap’ attempt to suggest culpability.” (Complainant’s Closing Brief, p. 21; CX 6, p. 2.) However, this attempted rationalization of the e-mail is unconvincing. The Complainant’s hearing testimony and written submissions in this case provide clear evidence that he is an educated, well-spoken individual who speaks clearly and concisely. I am persuaded that when he speaks, he says what he intends to. Although I can easily accept his claim that he wrote the e-mail in hopes of persuading Mr. Whitman to reverse the termination decision, it is nonetheless patently apparent on the face of the e-mail that he was admitting to wrongdoing. His attempts to now deny that he ever intended to make such an admission are not unworthy of belief.

The Complainant’s argument that his only real error in this case was failing to check the box on page 4 of the Trainees’ Flight Training Records indicating that he performed the training in “less than minimum time” is also unpersuasive. (*See* RX I, p. 4.) The Complainant submits in his Closing Brief that if he had checked the box in question, “then the issue of falsification of a record would be of no import and there would be no claim against Roger for falsifying any record. . . . This was a strictly ministerial oversight and should not be a basis for termination under a claim of falsification of a record.” (Complainant’s Closing Brief, p. 16.) At the hearing, the Complainant likewise argued that checking the “less than minimum time” box would have made the Flight Training Record “a completely legal record.” (HT, p. 184.) Not only does this argument ignore the fact that a total of *seven* different documents contained discrepancies and apparent falsifications in this case, it also ignores management’s fundamental concern over the Complainant’s dramatic reduction of training hours despite claiming fully completed hours on the Trainees’ records. As Mr. Milhiser and Mr. McGowan both testified, because evidence available to management demonstrated to them that far too few hours of training had been completed, the Complainant’s checking of the box in question on the Flight Training Record would not have excused his reduction of training time: “the total training time that would have

been conducted would not have been enough, even if the program did permit training in less than the curriculum hours.”⁷³ (HT, pp. 610-11, 798.)

Ironically, the Complainant argues in his Closing Brief that management should have spent more time “simply inquir[ing] from” the Complainant how he managed to accomplish the training and check ride in the reduced time, “instead of attempting to build a case for termination.” (Complainant’s Closing Brief, p. 23.) In suggesting that management would not have automatically understood how it was possible to adequately accomplish the training and checking in the reduced time, without “inquiring” from the Complainant as to his time-reduction techniques, the Complainant unwittingly supports the Respondent’s claim that the Complainant’s reduction of time was a radical departure from the norm of instructor conduct.

iv. Management’s Close Attention to the Details of the Complainant’s Training of the Trainees Does Not Provide Evidence of Discriminatory Animus, Since the Complainant Himself Drew Management’s Attention to the Loss of Available Training Time and Requested Their Assistance in Rescheduling the Trainings

The Complainant argues that management’s close attention to the details of his training of the Trainees provides evidence that, following his “8 in 24” complaint, management was regularly monitoring his activities and “scrutinizing his work” in the hopes of eventually “catch[ing] him doing something wrong.” (Complainant’s Closing Brief, p. 13.) I see no evidence in the record to support this theory. Rather, the chronology of events recounted above shows that the Complainant contacted Mr. Duke and Mr. Bitgood to discuss the obstacles to completing the Trainees’ simulator sessions and to request their help with rescheduling the trainings. After drawing the attention of two of his supervisors to the problems he was facing and openly requesting their help, it would be natural for both Mr. Duke and Mr. Bitgood to feel professionally obligated to monitor the Complainant’s progress in making the adjustments they had discussed. As Mr. Bitgood testified, after the Complainant involved him in the process of rescheduling the Trainees’ simulator sessions, he decided to monitor the training activities that were achieved because he was “concerned we met the clients’ expectations.” (HT, p. 716.) Additionally, after Mr. Bitgood informed Mr. Milhiser on Tuesday of some of the problems involved in the Trainees’ scheduling situation, Mr. Milhiser instructed Mr. Bitgood to “monitor the situation and . . . ensure that training was accomplished.” (HT, p. 528.) As of that time, therefore, Mr. Bitgood was under direct instructions to monitor the trainings. Moreover, in light of the obvious challenges involved with condensing four days of trainings into two days during a time when the flight simulator was questionably operational, I find management’s wish to monitor the Complainant’s training activities unsurprising.

The Complainant has also presented no evidence to indicate that management’s attention to his trainings during the week in question was in any way excessive compared to their ordinary level of involvement in monitoring other instructors’ training activities. Mr. Milhiser provided uncontroverted testimony that in his role as Assistant Center Manager, he regularly “walk[ed]

⁷³ Mr. Milhiser additionally noted that, in light of the fact that the Complainant completed the Flight Training Record to show that he had conducted a full 10 hours of training with the Trainees, which exceeded the 9 hours of training time formally required, it would have been internally inconsistent for him to have checked the “less than minimum time” box. (HT, pp. 610-11.)

around” the training center “in an attempt to talk to every instructor virtually every day” and “take a temperature of the center” which he could report back to Mr. Lewis. (HT, p. 424.) I see no evidence in the record to suggest that Mr. Bitgood or Mr. Milhiser ordinarily ignored the activities of Flight Safety instructors, or that their behavior on this occasion was excessive in comparison to their ordinary conduct as managers of a flight training center.

v. *The Tucson Center’s Instruction to “Meet and Exceed Customer Expectations” Did Not Justify the Complainant’s Behavior in Dramatically Reducing the Trainees’ Training Time*

The Complainant additionally argues that because he had been instructed in his years at Flight Safety “to ‘meet and exceed the customer’s expectations.’ . . . by virtually any reasonable means necessary,” management possessed no reasonable basis for being concerned about the Complainant’s decision to train the Trainees to proficiency to meet their scheduling needs. (Complainant’s Closing Brief, p. 18.) This argument is a superficial one. In his Closing Brief, the Complainant himself concedes that the instruction to exceed customer expectations was subject to the proviso, “so long as training and certification was (sic) not compromised.” (Complainant’s Closing Brief, p. 18.) As discussed above, management possessed a reasonable basis for concern, as well as subjectively felt concerns, that the training and certification of the Trainees had been severely “compromised” by the Complainant’s reduction of simulator time and his failure to appear for the scheduled Wednesday night check ride session. For this reason, they required the Trainees to return to the Tucson Center to complete their 135 certification at a later date, after the Complainant’s termination.

Moreover, I consider the Complainant’s comments on this matter shed light on his intentions in reducing the Trainees’ training and checking time. In his Mishap Investigation Report completed after his termination, the Complainant recommended that the Tucson Center needed to “[a]ddress the delicate balance between ‘meeting and exceeding clients’ needs and expectations’ and absolute compliance with company policies and directives for all instructors.” (RX M, p. 2.) This comment clearly suggests that when the Complainant decided to dramatically reduce the Trainees’ simulator time to fit within two days rather than four, he was deciding that it was more important to meet their expectations and keep them happy at any cost, even though it meant falling short of “absolute compliance with company policies and directives.” (RX M, p. 2.) This admission — that his actions in this case fell short of company policy — also provides support for statements by management that their concern over his actions had nothing to do with his “8 in 24” complaint.

vi. *The Complainant’s History of Strong Performance at the Tucson Center Did Not Render Termination an Unreasonable Sanction After Perceived Unethical Conduct*

The Complainant also argues that his termination despite his record of superior performance provides evidence that management was “out to get him and to send a message to the other employees to keep their mouth (sic) shut or they too, would suffer a similar consequence.” (Complainant’s Closing Brief, p. 25.) In light of the Complainant’s strong record of performance and the “minor” quality of his misconduct in this case, he argues a “less severe sanction[] . . . [such as] verbal warning, written reprimand or suspension,” would have been “more appropriate.” (Complainant’s Closing Brief, pp. 2, 9-10.) He additionally contends that

because Flight Safety's employment manual made termination a discretionary option rather than a mandatory sanction, it "used a sledgehammer to kill a fly and punished [him] excessively instead of using a more rational sanction, in one was needed at all." (Complainant's Closing Brief, pp. 9-10.)

I find these arguments unconvincing. First of all, I reject the notion that his history of strong service or popularity as an instructor left termination out of the range of reasonable responses to perceived unethical conduct. If the Complainant had persuaded me that his conduct in this case could not have been perceived by management as anything but truly minor, non-intentional, ministerial errors, then in such a case termination could reasonably appear an excessive response, providing circumstantial evidence of discriminatory intent. However, as recounted at length above, in this case the evidence amply demonstrates that management had a reasonable basis for believing that the Complainant's conduct involved a significant breach of ethics in his role as an FAA-certified instructor and check airman. Mr. Lewis, Mr. Milhiser, and Mr. McGowan each testified that the Complainant's popularity as an instructor became irrelevant to the decision, in view of the ethical breach they believed had taken place. (HT, p. 639-41, 792; CX 62, pp. 227, 230.)

The evidence provided by the Respondent of other cases of document falsifications by Flight Safety instructors that resulted in their termination adds further support to the Respondent's claim that termination was considered within the company to be a reasonable response to a perceived ethical violation by a Flight Safety instructor. The Complainant's attempts to deny the relevance of these examples are unpersuasive. First, the Complainant argues that in two of the six other cases, available evidence indicated that the instructors were terminated for reasons other than document falsifications, since John De Lafosse testified at the hearing that he was actually terminated because he had engaged in a protected activity, and Rudolph Isenberg's personnel file contained a letter providing a favorable employment reference after his alleged termination. (Complainant's Closing Brief, p. 10.) However, Mr. De Lafosse's theory of pretextual termination is unpersuasive, since on cross-examination he essentially admitted to the incident he was fired for (HT, pp. 480-81, 801), and Mr. Isenberg's employment reference letter was written pursuant to a settlement (HT, p. 823) and was, in any event, noticeably conservative in tone and not the shining recommendation the Complainant makes it out to be. (*See* CX 50.)

Second, the Complainant argues that these six examples of employees being terminated after being found falsifying documents were "'cherry picked' examples that were not a proper representation of what occurred at the company in years past," and that many other individuals must have been "accused of similar conduct" in the past, and a more complete record would surely have shown that in many other cases employees received lesser sanctions or no sanctions at all. (Complainant's Closing Brief, p. 11.) In addition to being entirely speculative, this argument ironically undermines the Complainant's theory of the Respondent as a company that cares little for documentary accuracy or regulatory compliance. If, as the Complainant suggests, a full record would show that many other employees had been accused of document falsifications, then it would logically follow that the Respondent is a company where documentary ethics and regulatory compliance matter to management.

In conclusion, although the Complainant argues that management's decision to terminate him despite his history of excellent performance signaled the great extent to which his "8 in 24" complaint displeased them, I find it far more credible that their decision signaled the great extent to which his perceived breach of ethics distressed them.

Accordingly, on the basis of the evidence and arguments discussed above, I find that the Complainant has failed to prove by a preponderance of the evidence that his "8 in 24" complaint contributed in any way to his termination on November 30, 2007. Moreover, I am also persuaded that the Respondent has presented clear and convincing evidence that it would have terminated the Complainant based on his reduction of training and checking time and his submission of multiple documents containing numerous misstatements of the activities he performed with the Trainees, irrespective of the Complainant's protected activity several months prior. Accordingly, the Complainant's retaliation claim under Section 519 of AIR 21 is DENIED. 49 U.S.C.A. § 42121(b)(2)(B)(iv).

6. The Respondent is Not Required to Prove the Elements of Fraud

Finally, in his Closing and Final Reply Briefs the Complainant argues repeatedly that the Respondent has failed to affirmatively prove the elements of a formal claim of fraud with regard to the Complainant's reduction of the Trainees' training and checking time or his completion of inaccurate training records. He submits that the Respondent is required to prove, by clear and convincing evidence, that the Complainant did, in fact, perpetrate a legal fraud with regard to his training and checking of the Trainees, such that the Respondent's decision to terminate him was based on a "strictly . . . justified cause" for termination, per applicable FAA regulations, and not based on a mere suspicion of misconduct. (Complainant's Closing Brief, pp. 2, 6-8; Complainant's Final Reply Brief, pp. 8, 11.) Because the Respondent failed to affirmatively "prove[] that the check ride could not have been accomplished" in the time the Complainant spent with the Trainees, and because the Respondent also failed to provide documentary evidence of the specific minimum training hours required by the Trainees' employer in this case, the Complainant submits, "there is no proof that [the Complainant] violated any Air Rutter standard that could give rise to his termination," and the Respondent's defense should, therefore, "be summarily dismissed." (Complainant's Closing Brief, pp. 2, 23.) The Complainant concludes, "[h]ad this case been a full-fledged court or jury trial, failure by Flight Safety to introduce a specific standard required by Air Rutter would be a sufficient basis to summarily dismiss Flight Safety's defense, as a matter of law." (Complainant's Closing Brief, pp. 6-7.)

In making these arguments, the Complainant has confused the burdens of proof and persuasion involved in an AIR 21 whistleblower discrimination case. First, as the ARB has repeatedly made clear in recent years, the respondent in an AIR 21 employment discrimination case faces no burden of proof or persuasion until such time as the complainant has proven by a preponderance of the evidence that his protected activity did contribute to the adverse action taken against him. *See Brune*, slip op. at 14 ("Thereafter, and only if the complainant has proven discrimination by a preponderance of the evidence . . . does the employer face a burden of proof."); *Peck*, slip op. at 18-19 n.7 ("It is not necessary for the Respondent to produce clear and convincing evidence of a legitimate non-discriminatory reason to rebut the Complainant's prima facie case. . . . That heightened burden of proof does not come into play until the Complainant has demonstrated that protected activity was a contributing factor in the termination."); *see also*

Kester, slip op. at 8. Because the Complainant has failed to persuade me by a preponderance of the evidence that his protected activity contributed to either of the two adverse employment actions taken against him, he has failed to make out his basic case of discrimination. As such, the Respondent in this case faces no burden of proof whatsoever.⁷⁴

Second, even if the Complainant had proven his case of discrimination, and the burden of proof had shifted to the Respondent, it would not be Flight Safety's burden to affirmatively prove that the Complainant did, in fact, intentionally falsify documents, or to prove the elements of a legal fraud. Such would be the burden the Respondent would bear if it had initiated, in a state or Article III court, a tort suit against the Complainant, alleging that he had perpetrated a fraud causing harm to Flight Safety, and seeking recompense for damages suffered. In such a case, the Respondent would indeed be required to affirmatively prove the elements of fraud required by the jurisdiction or applicable statute, in order to escape dismissal. In the present proceeding initiated by the Complainant against the Respondent, in contrast, the Respondent need only present evidence showing that the termination decision was made based on its good faith belief — for a set of reasons not impacted by the Complainant's earlier protected activity — that the Complainant had engaged in terminable behavior. Even if the Complainant could establish after the fact that management was actually in error in believing that he had engaged in illegal or unethical behavior, this would not necessarily serve to undermine their good faith belief at the time the termination decision was made. *See Price Waterhouse*, 490 U.S. at 250 (explaining that the relevant inquiry relies upon the employer's subjective reasons for the adverse action “at the moment of the decision.”)

Moreover, the Complainant is in error when he argues that the Respondent was subject to a requirement to submit documentary proof of Air Rutter's minimum standards for completion of a 135 syllabus, or to prove that it was not humanly possible for the Complainant to have completed the check rides in one hour each. While such evidence could certainly have added to my review of this case, it was not essential. The Respondent submitted ample, mutually corroborative witness testimony concerning the number of hours an instructor could permissibly reduce from a crew's training and checking time, and testimony from several of the Complainant's own witnesses — including the Complainant's own testimony that this was the first time he had ever reduced training and checking time to the extent he did in this case — added further fuel to my findings that the Respondent's concerns were genuine.

7. Possible Witness Bias Alone is Insufficient to Undermine the Respondent's Proof By Clear and Convincing Evidence

The Complainant argues in his Closing Brief that, because each witness who testified on behalf of the Respondent was at the time of the hearing a “salaried employee” of the Respondent, their testimony was unworthy of belief, as each witness “had reason to testify as they did to preserve their employment. Standing over the heads of each employee was Roger's termination for not toeing the company line.” (Complainant's Closing Brief, p. 14.) The Complainant

⁷⁴ An employer's burden of *proof* must be distinguished from the simple burden of *production* the employer faces under the *McDonnell Douglas* burden-shifting framework, discussed above, to produce legitimate, non-discriminatory reasons for taking an adverse employment action in order to rebut the complainant's claim that the protected activity contributed to the adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802-05.

suggests that this lack of unbiased witness testimony prevents the Respondent from meeting the clear and convincing standard of proof.

I find this argument unconvincing, in light of the Complainant's own failure to provide any unbiased witness testimony to support his theories. The Complainant has argued in this case that conditions at the Tucson Center were so egregious — in terms of working conditions, regulatory violations, pressures on flight instructors, and “dictatorial and vindictive” management by Mr. Lewis — that large numbers of experienced flight instructors at the Tucson Center were voluntarily resigning from Flight Safety prior to the Complainant's termination. (CX 14, p. 1.) In his December 4, 2007, letter to Doug Ware, the Complainant suggested that with a small amount of effort, including “survey[ing] recently departed employees,” and “[i]nquir[ing] quietly among current employees (admin and instructors are equally aware),” it should not be difficult for Mr. Ware to confirm the Complainant's allegations. (CX 14, p. 1.) Nevertheless, the Complainant failed to produce any of these recently departed employees of the Tucson Center to testify in his defense, despite his knowledge of their identities and their lack of any remaining incentive to perjure themselves under oath to protect Flight Safety. I find this lack of corroborative testimony by former Tucson Center instructors notably absent from the body of evidence the Complainant presented to support his claim. The only former instructor the Complainant produced to testify in his defense was Mr. De Lafosse, who had instructed at a different training center, and whose testimony alleging a regulatory violation was, in my view, undermined by credible testimony that he was terminated for inadequately training clients and then padding their training documents.

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, the Complainant did demonstrate by a preponderance of the evidence that: (1) he engaged in protected activity on August 23, 2007, when he raised his “8 in 24” complaint; (2) the Respondent knew of his protected activity; and (3) the Complainant was subsequently subjected to two adverse employment actions when he was denied a promotion and later terminated. However, the Complainant has failed to prove by a preponderance of the evidence that his protected activity contributed in any way to either of the adverse actions taken against him, so his discrimination claim fails. Moreover, the Respondent has persuaded me by clear and convincing evidence that it would have taken the same adverse actions against the Complainant, even in the absence of his protected activity. Accordingly, the Complainant's employment retaliation claim under Section 519 of AIR 21 is DENIED.

SO ORDERED.

A

JENNIFER GEE

Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS

To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of issuance of the administrative law judge’s decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party’s supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party’s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).