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Issue Date: 26 August 2015

CASE NO.: 2011-AIR-12

In the Matter of:

CLAUDIO OCCHIONE,
Complainant

v.

PSA AIRLINES, INC.,
Respondent

Appearances:

Christopher A. Hudson, Esq.
Angelina Maletto, Esq.
For Complainant

Thomas C. French, Esq.
Sarah Aufdenkampe, Esq.
Leanne Mehrman, Esq.
For Respondent

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER ON REMAND DENYING RELIEF

The above-captioned case arises under the employee protection provision of Section 519 of the Wendell J. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. §42121 (hereinafter "AIR 21" or "the Act"), as implemented by 29 C.F.R. §1979.100-114 (2003). This statutory provision, in part, prohibits an air carrier from discharging or otherwise discriminating against any 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 ("FAA") or any other provision of federal law relating to air carrier safety. 49 U.S.C. §42121(a).

This case is before the undersigned on remand from the Administrative Review Board (“ARB” or “Board”) pursuant to its Decision and Order of Remand dated November 26, 2014 (“Board D and O”), ARB No. 13-061 pertaining to the Complainant’s appeal of Administrative Law Judge Michael P. Lesniak’s Decision and Order Denying Relief in this case (2011-AIR-12) issued on May 9, 2013. Due to Judge Lesniak’s retirement, this case was reassigned to the undersigned on February 2, 2015.

BOARD’S DECISION AND ORDER REMANDING

The Board’s November 26, 2014 Decision and Order on Remand affirms in part, reverses in part, and remands for further proceedings consistent with their opinion. As noted by the Board, in order for the Complainant (Occhione), to prevail in his AIR 21 whistleblower action he must prove by a preponderance of the evidence that: 1) he engaged in activity protected by AIR 21; 2) the Respondent (PSA) took unfavorable personnel action against him; and 3) the protected activity was a contributing factor in the unfavorable personnel action PSA took. *See* Board D and O at 5.

The Board affirmed Judge Lesniak’s finding that Occhione engaged in protected activity in the following instances:

- 1) Occhione’s November 8, 2007 letter to Tom Arline, Chief Pilot of PSA Airlines with copies to David Glenn (PSA Director of Human Resources), FAA Chief Inspector William Best and FAA administrator Fanny Rivera, claiming that Occhione’s October 2007 check rides had been improperly administered in violation of FAA standards (CX 3);
- 2) Occhione’s June 3, 2008 complaint to the FAA Safety Hotline alleging that the Aircrew Program Designees, (“APDs” or “check airmen”) who are approved by the FAA to act for the FAA during check rides, did not administer his first and second check rides in accordance with practical test standards (“PTS”);
- 3) May 26, 2009 letter from Occhione’s attorney to Gary Dybdal (PSA’s Director of Training) arguing that Occhione’s performance during check ride three met PTS standards.

The Board determined that the following were also protected activity, reversing Judge Lesniak’s finding that they lacked sufficient specificity to be deemed protected activity under AIR 21:

- 4) Occhione’s statement to APD Gillam on October 12, 2007 that he intended to contact the FAA because he failed the check ride that day; and
- 5) Occhione’s phone call to Randy Fusi, PSA’s Director of Flight Standards, on October 13, 2007 notifying him that he intended to contact the FAA because the check ride did not conform to practical test standards.

The Board noted that the AIR 21 whistleblower provision provides protection to employees “about to provide or cause to be provided to... the Federal government information

relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration.” 49 U.S.C.A. §42121(a)(1). The Board pointed out that the “about to provide” language in other DOL whistleblower cases has been interpreted as protecting employees who threaten to file complaints regardless of whether the employee has actually filed a complaint, citing, *Romanek v. Deutsche Asset Mgmt.*, No. C-05-2473, 2006 WL 2385237 *5(N.D. Cal., Aug. 17, 2006) (plaintiff’s comments about anticipated testimony before the SEC might be protected activity under the Sarbanes-Oxley (“SOX”) whistleblower statute even if the nature of testimony was not disclosed). The Board noted that Judge Lesniak had relied on prior ARB decisions requiring specificity in these complaints, but determined that more recent ARB and Fourth Circuit precedent “leads us to conclude that this specificity standard is inappropriate and inconsistent with the AIR 21 whistleblower statute.”¹ The Board citing *Sylvester v. Paraxel Int’l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039,-042; slip op. at 17-19 (ARB May 25, 2011) “ and numerous subsequent decisions,” pointed out that the “definitive and specific” standard was inconsistent with SOX’s statutory language which prohibits retaliation against employees for reporting information that they “reasonably” believe violates SOX. The Board indicated that it has repeatedly held that AIR 21 also contains a “reasonable belief” standard stating, “[a]s a matter of law, an employee engages in protected activity any time he or she provides or attempts to provide information related to a violation or alleged violation of an FAA requirement of any federal law related to air carrier safety, so long as the employee’s belief of a violation is subjectively and objectively reasonable.”²

In this regard, the Board noted that the relevant question in the current case is “whether Occhione reasonably believed that the check ride Gilliam administered violated an FAA standard when he told both Gilliam and Fusi that he was ‘going to the FAA.’” See ARB - D. and O slip op at 9. As noted by the Board, Judge Lesniak found, in regard to the November 8, 2007 letter to the FAA and PSA, “Occhione’s belief...[was] objectively reasonable, as he apparently did not receive a pre-flight briefing on check rides one and two, contrary to the requirements set forth in the federal standards.” Therefore, the Board reasoned if Occhione’s belief was objectively reasonable on November 8, 2007 when he wrote the FAA, it would have to be reasonable a month earlier when he informed his supervisors that he was going to the FAA. Therefore, the Board determined, as a matter of law, that Occhione also engaged in protected activity on October 12, 2007 when he informed Gilliam that he was going to the FAA, as well as on October 13, 2007 when he called Fusi and notified him that he intended to go to the FAA, since he reasonably believed violations had occurred despite the lack of specificity of his complaints.

The Board also reversed Judge Lesniak’s determination that the only adverse employment action was PSA’s termination of Occhione. Although the Board agreed with Judge Lesniak that the termination was an adverse action, the Board also concluded that each of Occhione’s failed check rides were adverse actions in that they were unfavorable to Occhione, noting that the actions did not have to be deemed unfair, retaliatory or illegal. The Board found

¹ The Board noted that AIR 21’s protected activity clause, 49 U.S.C.A. §421219(a), does not contain the word “specific” and uses instead broad phrasing referring to “any violation” of the FAA or “any other provision of Federal law relating to air carrier safety.” (emphasis added by the Board). Board D and O at 7, fn 36.

² Quoting *Benjamin v. Citationshares Mgmt., LLC* ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 5-6 (ARB Nov. 5, 2013); see also *Blount v. Northwest Airlines, Inc.*, ARB No. 09-120, ALJ No. 2007-AIR-009, slip op. at 10 (ARB Oct. 24, 2011) (a complainant must show that he “subjectively believed that his employer was engaged in unlawful practices and his belief must be objectively reasonable in light of the facts and record presented.”)

that the ALJ had improperly imported the question of fairness into his analysis of whether an adverse action had occurred. The Board further concluded that the four single check rides, standing alone constituted discrete adverse actions, but also should be considered as part and parcel of a single actionable act resulting in termination, in light of PSA's automatic termination policy whereby two failures to upgrade to captain would lead to automatic discharge.

The Board agreed with the ALJ's conclusion that due to the 90-day statutory filing deadline under AIR 21, Occhione's only actionable adverse actions were those that occurred on or after May 1, 2009 (90 days before Occhione filed his AIR 21 complaint).³ However, as mentioned above, the first two check rides would still have to be analyzed as part of the series of events leading to the adverse action of termination and also could supply background evidence in support of the timely AIR 21 claim.

The Board also reversed Judge Lesniak's determination that Occhione's protected activity was not a contributing factor to the adverse action of termination. Judge Lesniak had noted the temporal proximity between Occhione's May 26, 2009 protected activity in complaining about check ride three and his termination six days later on June 1, 2009. However, the ALJ determined that the fourth failed check ride was an intervening act which severed the inference of retaliation, since PSA had historically terminated pilots who failed both check rides on their second attempt to upgrade. The Board reversed this finding explaining that the fourth failed check ride was itself an adverse action that should have been analyzed as such and was also the last in the series of four adverse actions/check ride failures that automatically led to Occhione's employment termination. Therefore, the ALJ's finding that the fourth check ride failure was an intervening event, negating Occhione's protected activity as a contributing factor in his employment termination, was reversible error.

The Board directed on remand, that a redetermination be made in regard to whether Occhione's protected activity contributed to his employment termination. In addition, the Board directed that a determination be made on whether Occhione's protected activity was a contributing factor in either or both of his last two check ride failures. As previously noted by the Board, both of the last two failed check rides should be reviewed as distinct actionable adverse actions, in addition to their role, as part of a series of events, leading to termination.

The Board also requested clarification from the Judge regarding whether he had considered two Exhibits, CX 6 and CX 7 offered in regard to the Decision and Order Denying Summary Decision on October 18, 2012, in light of the fact that these exhibits appear to conflict with the Judge's finding that Occhione had failed to establish knowledge of his protected activity by either APD Christner or Harris. The Board noted that it was unclear whether the ALJ had inadvertently failed to consider these exhibits in his ultimate decision, although they were considered at the time of his denial of the request for summary decision.

³ In *National R.R. Passenger Cop. V. Morgan*, 536 U.S. 101, 114 (2002), the Supreme Court held that discrete adverse actions that occur outside the statutory filing period are not actionable but may be used as background evidence in support of the timely filed claim.

PROCEDURAL HISTORY

The full procedural history of this case is set forth in Judge Lesniak's May 9, 2013 Decision and Order. The following summarizes the most pertinent procedural matters. Complainant (Occhione) filed the present AIR 21 claim with the U.S. Department of Labor by letter dated July 30, 2009. RX-47.⁴ Following investigation of this matter, the Occupational Safety and Health Administration ("OSHA") dismissed this case by letter dated August 3, 2011. RX-48. By letter dated September 6, 2011, Complainant rejected OSHA's findings and requested a formal hearing before an Administrative Law Judge ("ALJ"). Prior to the first hearing Respondent filed a Motion for Summary Decision which Judge Lesniak denied on October 18, 2012. A *de novo* hearing of the case was held beginning on December 17, 2012 in Charlotte, North Carolina. On the fourth day of trial, before the hearing had concluded, the parties represented to Judge Lesniak, on the record, that they had reached a settlement. On that basis, Judge Lesniak concluded the hearing before its completion. After the hearing, the parties were unable to reach a final settlement agreement. Therefore, the parties were required to reconvene for the remainder of the hearing, which was held on March 20, 2013 in Pittsburgh, Pennsylvania. A Decision and Order Denying Relief was issued by Judge Lesniak on May 9, 2013. The case was appealed to the Administrative Review Board, U.S. Department of Labor ("ARB" or "Board"). The Board issued a Decision and Order of Remand on November 26, 2014 affirming in part, reversing in part, and remanding the matter for further consideration. (ARB Case No. 13-061).

On February 2, 2015 this case was assigned to the undersigned administrative law judge due to Judge Lesniak's retirement. I issued a Preliminary Order on February 6, 2015 requesting that the parties address certain legal issues and whether it was necessary to reopen the record for additional evidence. Both parties submitted briefs which addressed the pertinent legal issues. Both parties agreed that the record was sufficient for a remand decision on the merits and that additional evidence would only be necessary in regard to the bifurcated issue of damages. I issued a Second Order on Remand on June 18, 2015 indicating that the case would be decided on remand upon the existing record and briefs and ordering that the case remain bifurcated for purposes of determining potential damages. On July 27, 2015, the undersigned received Complainant's Motion to Allow Supplementation of Record in which Complainant requested he be allowed to submit evidence regarding his current employment. Respondent submitted a Response opposing the requested supplementation of the record. On August 14, 2015, I issued an Order Denying Motion to Allow Supplementation of Record in light of the fact that both parties had previously agreed that the current record was sufficient for a decision on the merits. It was further ordered that evidence pertaining to Complainant's employment subsequent to his termination from employment with the Respondent on June 1, 2009 could be submitted if the record were reopened for purposes of the bifurcated issue of damages.

⁴ The following abbreviations will be used in this Decision and Order: Dec. Tr. = references to the transcript of the December 2012 hearing; Mar. Tr. = references to the transcript of the March 2013 hearing; CX = Complainant's Exhibit; RX = Respondent's Exhibit; Summary Decision = my previous Summary Decision, issued on October 18, 2012.

STIPULATIONS

The following stipulations of the parties noted in Judge Lesniak's May 9, 2013 Decision and Order are adopted herein:

1. Complainant began working as a First Officer for Respondent, PSA Airlines, Inc. ("PSA") in 2004. Dec. Tr. 18.
2. In October of 2007, Complainant requested to upgrade to a Captain position and successfully completed the ground portion of his testing. *Id.* at 19.
3. Captain/Aircrew Program Designee ("APD") Jeff Gilliam administered Complainant's first check ride on October 12, 2007 and reported that Complainant did not pass this check ride.
4. Captain/APD Darren Harris administered a second check ride on October 18, 2007 and reported that Complainant had failed the test. As a result of failing his second check ride, Complainant returned to his first officer position. *Id.* at 19-20.
5. On November 8, 2007, Complainant sent a letter to Tom Arline, Chief Pilot of PSA Airlines, setting forth concerns that his two October 2007 check rides had been improperly administered and requesting that his letter be considered a "formal notice of grievance." *Id.* at 20; *see also* CX-3.
6. Complainant sent copies of the November 8, 2007 letter to David Glenn, PSA Director of Human Resources. *Id.* at 20-21.
7. Complainant entered an upgrade class in May 2008, but this class was cancelled before its completion. *Id.* at 21.
8. Complainant entered another upgrade class in May of 2009. On May 16, 2009, Captain/APD Matthew Christner administered another check ride and reported that Complainant had failed.
9. Complainant's counsel, Attorney Chris Hudson, sent a letter to Gary Dybdal, PSA Director of Training, on May 26, 2009. *Id.* at 21-22; *see also* CX-14.
10. Complainant undertook his final check ride on May 29, 2009, which Captain/APD Darren Harris administered. *Id.* at 22. APD Harris reported that Complainant had failed.
11. Complainant's employment was terminated effective June 1, 2009. *Id.*⁵ The termination letter was signed by J. Rose, Director of Operations, and was copied to Mark Zweidinger, PSA VP of Flight Operations, and Gary Dybdal, PSA Director of Training, among others. *Id.* at 22-23; *see also* RX-26.

⁵ The termination letter is actually dated June 2, 2009. RX 26.

12. Complainant filed the present AIR 21 claim with the U.S. Department of Labor on July 30, 2009 regarding his June 1, 2009 termination, and the U. S. Department of Labor, Office of Administrative Law Judges have jurisdiction to hear this complaint. *Id.* 23.

13. PSA Airlines is subject to the AIR 21 Act.

ISSUES TO BE DETERMINED ON REMAND

1. Whether Complainant has established by a preponderance of the evidence that any of the instances of protected activity contributed to any of the actionable adverse actions, namely, the failed check rides on May 16, 2009 and May 29, 2009 and the ultimate termination of Complainant's employment by PSA, thereby proving a prima facie case under the whistleblower provision of AIR 21.
2. If Complainant can prove a prima facie case under the whistleblower provision of AIR 21, whether employer has proven by clear and convincing evidence that the adverse personnel actions would have occurred absent the protected activity.

FACTUAL BACKGROUND

I adopt the factual background and factual findings as set forth in Judge Lesniak's May 9, 2013 Decision and Order except insofar as the factual findings are modified or contradicted herein or were vacated by the Board. In particular I note the following:

PSA is a regional airline that is wholly owned by US Airways. Dec. Tr. 592. Complainant began working as a First Officer for PSA in 2004. *Id.* at 18.

Pilots at PSA "hire[] in as a first officer or co-pilot, . . . [whose] job basically is to assist the captain." *Id.* at 595. Such pilots may "bid" for a captain position, although PSA does not require them to do so. *Id.* at 955-96, 1005. Upgrade training consists of a ground component, a simulator component and, following that, a line operational component. *Id.* at 599. The same training is provided to each applicant. *Id.* at 599-600. This training culminates in a "check ride" event. *See Id.* at 602.⁶ Check rides are administered by Aircrew Program Designees ("APDs"), or, in rare cases, by FAA inspectors themselves. *Id.* APDs are "a group of airmen that have been approved by the FAA to act as the FAA during the check ride." *Id.* at 603. PSA does not have any control or influence over what an APD does when he conducts the check ride. PSA recommends its best pilots to become APDs, but the FAA makes the final selection. The FAA also trains the APDs and monitors their performance. *Id.* at 604. The FAA reserves the right to observe inside the simulator during a check ride. *Id.* at 604-05.

Upgrade candidates are given two attempts to pass each upgrade bid. *Id.* at 600. If a pilot fails his first attempt to upgrade, the FAA requires that he be retrained and rechecked before returning to his former duty position as a first officer. *Id.* He may then rebid for an open

⁶ A check ride may also be referred to as a "type ride" or a "type rating ride." *See e.g.* Dec. Tr. 602-03.

captain position after six months. *Id.* at 1006. According to the collective bargaining agreement in effect at PSA, pilots have two attempts to qualify as captain. *Id.* at 1004-05. If they fail the second upgrade attempt, they are dealt with at the company's discretion. *Id.* at 1006. According to company policy, pilots who fail two upgrade attempts are always terminated or permitted to resign in lieu of termination. *Id.* at 1006-07; *see also* Mar. Tr. 10-12.

When an APD performs his duties, he must follow the practical test standards ("PTS"), which are "a published set of directions and guidance that is based upon the Federal Aviation Regulation . . . which directs and provides processes for the conduct of [upgrade check rides]." Dec. Tr. 40-41; *see also Id.* at 612 (describing PTS as "a listing of maneuvers that the applicant must complete to be certified."). There are particular "practical test standard[s] for the airline transport pilot ("ATP") certificate and the aircraft type rating." *Id.* at 612; *see also* RX-1; RX-2. **"Adherence to provisions of the [federal] regulations and the PTS is mandatory for the evaluation of airline transport pilot and type rating applicants."** RX-2 at 91(emphasis in original). Upgrade check rides are also governed by the Flight Standards Information Management System ("FSIMS"), which is also known as the inspector's handbook. *See* Dec. Tr. 41; RX-3.

1. History of Complainant's Attempts to Upgrade

In October of 2007, Complainant made a request to upgrade to a Captain position. Dec. Tr. 19. He successfully completed the ground portion of his testing. *Id.* Captain Jeff Gilliam, who was acting as the APD, administered Complainant's first check ride on October 12, 2007. *Id.* What happened during this check ride is disputed; however, the parties agree that APD Gilliam reported that Complainant had failed. Captain Darren Harris, functioning as APD, administered a second check ride on October 18, 2007. What happened during this check ride is also disputed; again, however, the parties agree that APD Harris reported that Complainant had failed. *Id.* After failing his second check ride, *i.e.* his first upgrade attempt, Complainant was required to re-qualify to return to his prior position as a First Officer, which he did. *See Id.* at 293-94, 481-82.

Complainant entered an upgrade class in May of 2008, but this class was cancelled. *Id.* at 21. He entered another upgrade class in May 2009, passing the oral portion of the testing. *See* Mar. Tr. 130-32. On May 16, 2009, Captain Christner, acting as an APD, administered Complainant's third check ride, *i.e.* his first check ride of his second upgrade attempt. *Id.* at 21. APD Christner reported that Complainant had failed. Under circumstances that will be addressed later, APD Christner issued a Notice of Disapproval on May 16, and then issued a revised Notice several days later. Dec. Tr. 820-24; RX-23. On May 29, 2009, Complainant underwent his fourth and final check ride. *Id.* at 22. APD Harris, who administered the ride, concluded that he had failed.

2. Complainant's Termination and Re-qualification Testing

As a result of failing the two upgrade attempts, *i.e.* all four check rides, Complainant's employment was terminated effective June 1, 2009. *Id.* at 22; RX-26. The termination letter was signed by Joe Rose, Director of Operations, and was copied to Mark Zweidinger, PSA Vice President of Flight Operations, and Gary Dybdal, PSA Director of Training. *Id.* at 22-23; RX-26. Complainant's check ride failure triggered a demand from the FAA that Complainant

undergo a re-examination of his competency, known as a “709 ride.”⁷ See Dec. Tr. 44-46; RX-32. Complainant initially refused to undergo this re-examination; as a result, the FAA issued an emergency order suspending his pilot certificates. Dec. Tr. 505-06; RX-34. Complainant appealed the emergency order before Administrative Law Judge Fowler of the National Transportation Safety Board (“NTSB”). Dec. Tr. 510; RX-36. Complainant appealed ALJ Fowler’s initial Decision and Order, which found in favor of the FAA, but he was unsuccessful at every level of appeal. See RX-39 (denial of Motion for Reconsideration); RX-40 (Opinion and Order by full NTSB affirming ALJ Fowler’s decision); RX-42 (decision by the U.S. Court of Appeals for the Fourth Circuit, denying Complainant’s petition); RX-43 (denial of petition for writ of certiorari by the Supreme Court).

APPLICABLE LAW

The whistleblower provision of AIR-21 prohibits an air carrier from discharging or otherwise discriminating against any 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 FAA or any other provision of federal law relating to air carrier safety. 49 U.S.C. § 42121(a). Under the Act’s implementing regulations, “[a] complaint of alleged violation will be dismissed unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.” 29 C.F.R. §1979.104(b).

Thus in order to prove his prima facie case under AIR-21, an employee must initially show, by a preponderance of the evidence three specific elements: (1) that complainant engaged in protected activity; (2) that he suffered an unfavorable personnel action; and, (3) that the protected activity was a “contributing factor” in the unfavorable action. 49 U.S.C. §42121(b)(2)(B)(iii). *Powers v. Union Pacific Railroad Co.* ARB No 13-034, ALJ No. 2010-FRS-30, slip op. at 10-11 (ARB Mar. 20, 2015)(en banc).⁸ See also *Hutton v. Union Pacific R.R. Co.*, ARB No 11-091, ALJ No. 2010-FRS-020, slip op. at 5 (ARB May 31, 2013).

A contributing factor is “any factor which, alone, or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams v. Domino’s Pizza*, ARB 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Araujo v. N.J. Transit Rail operations, Inc.*, 708 F. 3d 152, 157 (3d Cir. 2013). “The complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent’s reason for the unfavorable personnel action was pretext, or that the complainant’s activity was the sole or even predominant cause. The complainant “need only show that his protected activity was a ‘contributing factor’ in the retaliatory discharge or discrimination.” . . . Thus, for example, a complainant may prevail by proving that the

⁷ A “709” ride refers to the applicable statutory provision at 49 U.S.C. §44709. See Dec. Tr. 44-46; RX 32.

⁸ The Board in *Powers* noted that this three part test has at times been identified as requiring four elements which would additionally include the requirement that the Employer have knowledge of the protected activity. Under the three part test, knowledge is not considered a separate element but instead forms part of the causation analysis. *Powers*, slip op. at 11, fn 2. See also *Coates v. Grand Trunk Western Railroad Co.*, ARB No. 14-019, ALJ No. 2013- FRS-003, slip op. at 2, fn 5, (ARB July 17, 2015).

respondent's reason, "while true, is only one of the reasons for its conduct, and another [contributing] factor is [the complainant's] protected activity." Moreover, the complainant can succeed by providing either direct proof of contribution or indirect proof by way of circumstantial evidence. *Beatty v. Inman Trucking Management, Inc.*, ARB No 13-039, ALJ Case No. 2008-STA-021 slip op. at 8-9. (ARB May 13, 2014).

Once a Complainant proves his prima facie case the burden shifts to the Employer to prove by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the complainant's protected acts. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F. 3d 152, 157 (3d Cir. 2013) (referring to the AIR 21 legal burden of proof standard as the "two-part burden-shifting test." This two-step analysis represents a departure from the three-part analysis applied in older cases under the Act. The former three-part analysis derived from Title VII of the Civil Rights Act of 1964, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). The current two-part "contributing-factor" standard "is far more protective of complainant-employees and much easier for a complainant to satisfy than the *McDonnell Douglas* standard." *Beatty, supra*; *see also Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 14-041, ALJ No. 2008-STA-61, pp. 3-4 (ARB May 30, 2014).

The Administrative Review Board addressed the types of evidence which can be considered by an administrative law judge in reaching a determination of whether a complainant has made a prima facie case under the AIR 21 whistleblower provision in the case of *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB October 9, 2014). Subsequently, the Board clarified its position on this issue in its en banc decision in *Powers v. Union Pacific Railroad Company*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB April 21, 2015).

In *Powers v. Union Pacific Railroad Co.*, ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (*en banc*), the Administrative Review Board's *en banc* panel stated that it was affirming, but clarifying the *Fordham* decision:

[T]he ARB in *Fordham* held that legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant's showing of contribution (which must be proven by a preponderance of the evidence). *Fordham*, ARB No. 12-061, slip op. at 20-37. That holding as set forth in *Fordham* is fully adopted herein. Our decision in this case, considered en banc, reaffirms *Fordham's* holding upon revisiting the question of what specific evidence can be weighed by the trier of fact, *i.e.*, the ALJ, in determining whether a complainant has proven that protected activity was a contributing factor in the adverse personnel action at issue and, more pointedly, the extent to which the respondent can disprove a complainant's proof of causation by advancing specific evidence that could also support the respondent's statutorily-prescribed affirmative defense for the adverse action taken. Yet, while the decision in *Fordham* may seem to foreclose consideration of specific evidence that may otherwise support a respondent's affirmative defense, the *Fordham* decision should not be read so narrowly. This decision clarifies *Fordham* on that point.

(*Powers*, slip op. at 14).

Later in the *Powers* decision the Board further addressed the holding in *Fordham* and their clarification in stating as follows in reference to the *Fordham* decision:

The distinction [in regard to evidence relevant to contributing factor] should not however, be interpreted to foreclose the employer from advancing evidence that is relevant to the employee's showing of contribution. It merely recognized that the relevancy of evidence to a complainant's proof of contribution is legally distinguishable from a respondent's evidence in support of the statutory defense that it would have taken the personnel action at issue absent the protected activity, which must be proven by clear and convincing evidence. Certainly, analyzing specific evidence in the context of the AIR 21 burden shifting framework "requires a 'fact intensive' analysis." *Franchini v. Argonne Nat'l Lab*, ARB No 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012). While as Fordham explains, the legal arguments advanced by a respondent in support of proving the statutory affirmative defense are different from defending against a complainant's proof of contributing factor causation, there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor causation as long as the evidence is relevant to that element of proof. 29 C.F.R. §18.401. Thus the Fordham majority properly acknowledged that "an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action as well as the credibility of the complainant's causation evidence." *Fordham*, slip op at 23.

(*Powers*, slip op. at 22).

The ARB's clarification is, essentially, that the employer's evidence must be *relevant* to the elements of the complainant's prima facie case and specifically in regard to the contributory factor stage of the analysis, relevant to the credibility of complainant's evidence in order to be considered in the ALJ's analysis of whether complainant has made a prima facie case. Proof of the respondent's affirmative defense i.e. that respondent would have taken the personnel action at issue absent the protected activity, is legally distinguishable from the complainant's burden to show contributing factor causation by a preponderance of the evidence, especially in light of the fact that employer is statutorily required to prove its affirmative defense by clear and convincing evidence.

Accordingly, I have taken a fact specific approach in regard to which evidence, particularly Employer's evidence, passes "the relevancy test" and therefore can be considered in regard to whether Complainant has proven any "contribution" between Complainant's protected activity, and any or all of the adverse actions taken against him. In so doing I have recognized that evidence specific to whether employer would have taken the adverse actions at issue, absent the protected activity, must be addressed only if the burden shifts to the employer, upon a determination that the Complainant has established a prima facie case. If the burden does shift to the employer under the "shifting burden" analysis, employer must prove by "clear and convincing evidence" that it would have taken the adverse action absent the protected activity.

CONTRIBUTION

In the instant case the initial issue to be addressed on remand is whether complainant has proven the contribution element of his prima facie case. That is to say, whether the complainant can prove, by a preponderance of the evidence whether the five instances of protected activity,

set out earlier herein, contributed to any or all of the adverse actions taken by the employer, and in particular, the final two failed check rides in May of 2009 and the termination of his employment from PSA airlines.⁹ In order to establish his prima facie case Complainant must prove that his protected activity contributed to at least one of the adverse personnel actions taken against him. As noted by the Board in *Powers*, “A contributing factor is ‘any factor which alone or in connection with other factors tends to affect in any way the outcome of the decision.’” *Powers*, slip op. at 11 quoting *Williams v. Domino’s Pizza*, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). The Board also pointed out in *Powers* that the contributing factor standard removes any requirement that a whistleblower prove that protected activity was a significant, motivating substantial, or predominant factor in the adverse personnel action. *Id.* See also, *Araujo v. N.J. Transit Rail Operation, Inc.*, 708 F. 3d 152, 157 (3d Cir. 2013). Contributing factor may be proven by direct evidence or indirectly by circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009- FRS-009, slip op. at 6-7 (ARB Feb. 29, 2012).

In the Board’s November 26, 2014 Decision and Order of Remand, the Board determined that Occhione’s four failed check rides as well as his ultimate termination were each distinct adverse actions. The Board also concluded that the first two failed check rides which took place on October 12, 2007 and October 18, 2007 were no longer actionable, in light of the 90 day statutory filing deadline under AIR 21, and the fact that Occhione’s AIR 21 claim was filed on July 30, 2009. However, the Board noted that the first two check rides should be analyzed for background information and as part of the continuum of events that lead to Occhione’s ultimate termination from PSA. See *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (Discrete adverse actions occurring outside statutory filing period are not actionable but may be used as background evidence in support of a timely claim). Accordingly all four check rides leading to the termination, as well as the actual termination from employment will be considered.

Check Ride 1-October 12, 2007

Based on the stipulation of the parties “Captain/Aircrew Program Designee ‘APD’ Jeff Gilliam administered Complainant’s first check ride on October 12, 2007 and reported that Complainant did not pass this check ride.” See Stipulation 3.

The October 12, 2007 check ride was administered by APD Gilliam. In addition to APD Gilliam and the Complainant, William Debois was present as Occhione’s simulator partner and performed the duties of First Officer on that check ride. Dec. Tr. 230, 687. APD Gilliam determined that the Complainant had performed unsatisfactorily on the check ride. He testified that Complainant failed to diagnose a malfunction of the “stick pusher” on a rejected takeoff maneuver until he was informed of the problem by his First Officer. *Id.* at 690-693. He referred to the practical test standards at RX 1 and testified that Occhione had failed to comply with the Pilot operating handbook in that he failed to evaluate the problem in a timely manner and did not call for the correct QRH (Quick Reference Handbook) checklist. *Id.* at 694-696. APD Gilliam indicated that he gives the same “stick pusher malfunction” on every check ride. *Id.* at 705. Gilliam testified that when he stopped the check ride (and Occhione was told of the

⁹ The May 16, 2009 and May 29, 2009 failed check rides, as well as the termination of employment are independent actionable adverse actions which occurred within the 90 day period prior to the filing of Occhione’s claim.

unsatisfactory) Occhione became verbally abusive, “yelling, cussing, threatening.” *Id.* at 726-727. See also RX 21. APD Gilliam reported the results on FAA Form 8060-5. CX 2. He indicated on that form that Occhione’s performance on the check ride was unsatisfactory and that he would be reexamined upon reapplication on the following: “take-off and landings-rejected take-off and full completion of type ride.” CX 2. Occhione testified at length to his perception that he had performed adequately in regard to this test ride and to his perception that APD Gilliam had not judged him fairly. Dec. Tr. 229-246. Occhione did admit that he made at least two errors on the check ride. *Id.* at 470-474. APD Gilliam testified that to his knowledge, the FAA has never concluded that he improperly conducted any of the type rides he performed, nor that he failed to adhere to the practical test standards when conducting a type ride. Dec. Tr. 686.

Check Ride 2-October 18, 2007

Based on the stipulation of the parties, “Captain/APD Darren Harris administered a second check ride on October 18, 2007 and reported that Complainant had failed the test. As a result of failing his second check ride, Complainant returned to his first officer position. *Id.* at 19-20.” See stipulation #4.

The specifics of what occurred on the October 18, 2007 check ride are disputed. Complainant indicated a preflight briefing did not occur but that papers were signed. Matt Christner performed the duties of First Officer on this check ride. Dec. Tr. 280. APD Harris testified that a typical briefing did occur. *Id.* at 894-895. Harris confirmed that his notes regarding the October 18, 2007 check ride were prepared shortly after the check flight. *Id.* at 893, See RX 22. He testified that he routinely prepares a similar record for all check flights he performs. *Id.* Harris testified that Matt Christner was the pilot monitoring the ride. *Id.* at 894. APD Harris stated that near the beginning of the check ride he programmed a malfunction of Generator 1 into the flight simulator system. *Id.* at 895. According to Harris, Occhione failed to recognize and diagnose the malfunction correctly. Harris testified that Occhione performed several responses to the malfunction of Generator 1, including eventually deferring or shutting down Generator 2 which, would have caused a complete shutdown of electrical power to the aircraft if they were in an actual flight situation rather than a simulator. *Id.* at 895 – 900. Harris determined this to be an unsatisfactory response since it placed the plane in an “emergency condition.” *Id.* at 902-903. Shortly thereafter, on the takeoff roll, Harris stopped the check flight, since Occhione had not diagnosed or corrected the problem. Harris testified that he gives the same malfunction maneuver to nearly every applicant he tests. *Id.* at 895, 901. Harris filed a disapproval notice Form on FAA Form 8060 which indicates that applicant could be reexamined on the “entire flight” upon reapplication. CX 2.

Check Ride 3-May 16, 2009

Based on the stipulation of the parties, “APD Matthew Christner administered another check ride and reported that Complainant had failed.” See stipulation #8.

Complainant underwent his second upgrade attempt (check ride three) on May 16, 2009. Dec. Tr. 21. In addition to Complainant, the following individuals were present in the simulator: Matthew Christner (APD), Lewis Sain (FAA inspector), Joseph Connelly (ALPA representative), and Silvin Blackstock (Complainant’s partner for simulator training). Dec. Tr.

796. Complainant disagreed during direct examination that he had unsatisfactorily completed four tasks during this upgrade attempt, conceding only that he made a mistake in his non-precision approach. Dec. Tr. 485-88. He thus argues that he flew check ride three “well and properly to the extent that he passed [it].” Complainant’s closing brief at 31.

APD Christner testified to his observations on the ride and the maneuvers which he found to be unsatisfactory. He also identified handwritten notes which he indicated he prepared at the time of the check ride. Dec. Tr. 794-795. See RX 52. He testified he prepared a typewritten letter addressed to the Director of Training that outlined the third check ride, which was prepared a couple of months after the check ride. *Id.* at 795-796. See RX 24. Christner testified that he was not surprised that FAA Inspector Sain or ALPA Representative Connelly were present during the check ride, as FAA representatives and ALPA representatives are often present at check rides. Dec. Tr. 796-797. He testified that the check ride began with a standard preflight briefing. *Id.* at 798. APD Christner’s testimony is consistent with the two written exhibits which indicated that there were four unsatisfactory items noted on the check ride consisting of Preflight procedures, Steep turns, Landing Stall and Non-precision approach. *Id.* at 798-816. In regard to the steep turns he noted that Occhione had exceeded ATP test standards three times. See RX 24, RX 52. APD Christner testified to the specific requirements in the “airline transport pilot practical test standards” which are found at RX 2 and to the specific altitude and airspeed required on steep turns with which Complainant had not complied. *Id.* at 806-807. In regard to the landing stall Christner’s prepared statement noted “During landing stall recovery, Applicant lowered nose to approximately 5 degrees nose down pitch altitude. At the recognition of a rapid loss of altitude, Applicant very abruptly pitched up to approximately 15 degrees nose up causing a secondary and accelerated stall.” See RX 24. In regard to the unsatisfactory landing stall APD Christner testified as follows:

Q. When Mr. Occhione—you said the applicant very abruptly pitched up to approximately 15 degrees nose-up—

A. Yes.

Q. --did that make the situation better or worse?

A. Made it much worse.

Q. And how did it do that?

A. To get into an accelerated or a deep stall is far worse than even the beginning stall. It can cause—just within the last few years, we’ve had two accidents that have been a result of an inability of the pilots to recover from a stall, and that’s exactly what this was. They got themselves into a situation that was actually worse than the original stall, and that’s what happened here.

Q. So, with regard to what Mr. Occhione did concerning the landing stall, did it affect the safety of the flight?

A. Absolutely.

Q. And can you explain to the Court how you come to that conclusion?

A. To get into that deep or accelerated stall, it is very difficult to recovery [sic] from. Sometimes it can be impossible.

Q. Okay.

A. Could result in a crash, loss of life.

(*Id.* at 809).

Christner also testified that the Complainant failed to recognize that the final maneuver required a timed approach. At that point he discontinued the check ride. *Id.* at 814-816.

APD Christner completed two notices of disapproval of application on FAA Form 8060-5, both of which pertain to the May 16, 2009 check flight. See RX 23. Both completed forms list the following in regard to maneuvers that the applicant would be reexamined upon, after reapplication: II) Preflight procedures, IV) A. Steep turns, IV) B. Approaches to Stall, IV) D. Instrument procedures, non-precision approaches. The second Form 8060-5 also includes the following as incomplete items: III) F; V) C, D, and F; VI) B, C and I; and IX. The Complainant testified that the second slip was presented to the training instructor at the Charlotte training center by Matt Christner on May 28, 2009 (the day before the final check ride). APD Christner testified that after the initial paperwork had been reviewed by a training instructor (Jeremy Swisegood), the instructor pointed out to him that he had not indicated items that were not performed during the check ride. *Id.* at 821, 834. Christner stated that he discussed this with the training supervisor and then in a phone call to Ellen Tom of the FAA, who told him that she would send paperwork back to the airline for him to correct. He testified that she instructed him to correct his error and resubmit the form. *Id.* at 821-822. Therefore, Christner added the “incomplete” items and resubmitted the form to Occhione and the training instructor at the training center. *Id.* at 823. Christner testified that he did not indicate a new date on the form because the only place on the form to include a date pertains to the date of the check ride which was May 16, 2009. *Id.* at 823. Christner also testified that no credit was given to the Complainant for any previously completed items at the time of the May 16, 2009 check ride because over 60 days had passed since his previous check rides in October of 2007. *Id.* at 824. Christner testified that on May 16, 2009 when he administered the check ride to Occhione, he did not have “knowledge of any complaints Mr. Occhione may have made to the FAA concerning his October 2007 upgrade attempts.” *Id.* at 824. He testified that he was not aware of attorney Hudson’s letter to Gary Dybdal. *Id.* at 834-835. He also testified that he was never told by the FAA that he had failed to administer the check ride according to the “practical test standards,” nor did the FAA ever tell him that he “did anything wrong when [he] administered the type ride for Mr. Occhione on May 16th, 2009.” *Id.* at 826.

Check Ride 4-May 29, 2009

The parties stipulated as follows: “Complainant undertook his final check ride on May 29, 2009, which Captain/APD Darren Harris administered. APD Harris reported that Complainant had failed.” See stipulation #10.

Complainant underwent his fourth and final upgrade attempt on May 29, 2009. Dec. Tr. 22. In addition to Complainant, the following individuals were present in the simulator: Darren Harris (APD), William (Woody) Best (FAA inspector), Joseph Connolly (ALPA representative), and Mike Darr (pilot monitoring). Dec. Tr. 906. APD Harris testified that he had not requested the FAA or ALPA representatives to be present but it was not unusual for them to be present on a check ride. Complainant believes that he basically performed all of the maneuvers correctly except for the fact that he did not recognize that the aircraft had sustained structural damage. *Id.* at 493-97. However, APD Harris detailed a number of unsatisfactory items, including

“emergency procedures, instrument procedures, which include non-precision approaches and missed approaches, and then normal and abnormal procedures.” *Id.* at 928; *see also* CX-16, and RX 25. Harris testified to a number of items which Occhione failed to perform correctly until he was prompted by the first officer. *Id.* 907-908. APD Harris also testified that Occhione failed to correctly input the departure procedure resulting in the flight being “off course” as well as failing to do a “full route verification.” He indicated this was a very significant error since it could put the plane in “uncleared airspace” which Harris stated was a “complete violation of our procedures.” *Id.* at 912-913. Harris then testified to errors on takeoff including failing to turn lights on and problems with finding the runway. *Id.* at 917. Harris testified as follows:

After we got engines started, we started to taxi for takeoff. It was a nighttime scenario in DC. The applicant failed to turn the lights on and therefore was having ...issues trying to find the runway because he didn't turn the lights on....So it created an unsafe environment for us because we were not able to see other obstacles on the ground other equipment...an unsafe environment for us as well as other airplanes because if our lights are not lit up, it's hard for other aircraft to see us. So this was a danger, not only to ourselves and our aircraft but it was a danger to other aircraft...so a completely unsafe situation in terms of that.

(*Id.*).

APD Harris also testified that Complainant did not appropriately address a cabin depressurization emergency descent, required due to structural damage to the aircraft, which he indicated was also a standard scenario which is given to all applicants. *Id.* at 918-919. Harris testified that due to Occhione's inability to assess the situation, “to read the synoptic...to read the basic system pages of the aircraft” maintenance incorrectly was led to believe that pressurization was regained which would have been a “safety of flight” issue. Other unsatisfactory items included a missed landing approach, where Occhione was flying 400 feet below where the aircraft had been cleared by air traffic control, and an incorrect response to engine fire. *Id.* at 927. APD Harris stopped the flight due to multiple unsatisfactory events. *Id.* During the NTSB hearing, Inspector Best who was present on this check ride, testified that he had observed the May 29, 2009 check ride and briefings. RX-35 at 177, 183. He agreed with APD Harris's evaluation that Complainant had failed the check ride. *Id.* at 183-84. After the check ride, Inspector Best called his acting supervisor, Ellen Tom, and they “made the decision that [they] needed to reexamine [Complainant] to ensure that he was . . . going to be able to hold an airline transport pilot's certificate because it was definitely in doubt . . . at the time.” *Id.* at 184; *see also* CX-17 (statement from Inspector Best outlining problems arising during the May 29, 2009 check ride and concluding that “a 709 of [Complainant's] ATP [was] appropriate”).

Discussion of Check Rides

As previously noted the Board affirmed Judge Lesniak's finding that the first two check rides are not independently actionable. However, the Board directed that they be reviewed as part of the four check rides leading to termination as well as for background information. The first instance of established protected activity in this case occurred on October 12, 2007, after the completion of the first check ride, when Occhione informed APD Gilliam that he was going to

the FAA because he failed the check ride that day.¹⁰ As no protected activity occurred prior to the initial check ride failure on October 17, 2007, there clearly can be no finding that protected activity contributed to the outcome of this failed check ride or to the actions of APD Gilliam. However, this check ride does provide some valuable background information. In particular this initial check ride, which occurred prior to protected activity, establishes patterns of behavior, especially in regard to the general procedures followed by the FAA certified APDs who performed the check rides, and the Complainant, in regard to his perception of his own performance, as well as his perception of the propriety of the actions and procedures of the APDs performing the check rides. Since this first test ride and the resulting failure occurred prior to any protected activity, it forms a baseline by which the subsequent conduct of the parties involved can be judged.

For example, the procedures followed by APD Gilliam, who performed the first check ride appear to be generally consistent with the procedures followed by the APDs on the other check rides.¹¹ The behavior of APD Gilliam also appears to have been consistent with his own personal manner and style of administering check rides, regardless of who the applicant was. Testimony supports that there had been quite a few complaints regarding Gilliam based on his “bedside manner” which I interpret to mean he had a more gruff approach to administering check rides which a number of applicants found to be undesirable or intimidating. Dec Tr.665-666, 680-681. The propriety of an APD using this type of approach is a matter to be determined by PSA and the FAA who certified him as an APD. What is clear, however, is that APD Gilliam’s administration of the first check ride and his decision to fail Occhione were not motivated in any way by protected activity because there had not even been an allegation of protected activity prior to Check Ride 1.

Secondly, in regard to Occhione’s perception of his own performance on Check Ride 1, it is clear that he was in adamant disagreement with APD Gilliam in regard to whether he had performed the check ride satisfactorily and whether he had exhibited the necessary level of competence to be promoted to the position of captain at PSA. Testimony supports that after he was told of the unsatisfactory grade, Occhione responded to APD Gilliam defiantly and disrespectfully, using profanity and storming out of the debriefing room after being told he would be given an “unsatisfactory grade.” *Id.* at 726-728. See also RX 21. Occhione’s response is consistent with his reaction following each one of the check flight failures, to the extent that he disagreed with the APD who was charged with judging his performance and he believed that his

¹⁰ The ARB also pointed out that the initial check ride failure could not be independently actionable, consistent with Judge Lesniak’s finding that, given the 90 day statutory filing deadline under AIR 21, Occhione’s only actionable adverse actions are those that occurred on or after May 1, 2009 (90 days before Occhione filed his AIR 21 complaint. See ARB D an O at 9.

¹¹ FAA Inspector Anderson testified that Test rides 1 and 2, which occurred in October of 2007, both failed to have pre-flight briefings. He testified that it appeared PSA required signed pre-check flight briefing statements by the time check rides 3 and 4 occurred a year and a half later in May of 2009. Significantly, however, there has been no showing that the FAA issued any formal reprimand to PSA regarding any instances of noncompliance with the FAA practical test standards. As will be discussed further below, it does appear that the FAA took measures to monitor check flight procedures at PSA especially at the time Check rides 3 and 4 occurred. This would appear to be a responsible and appropriate response by the FAA to Occhione’s complaints regardless of whether they were determined by the FAA to be legitimate or not. It does not however, support that protected activity contributed to any adverse action taken by PSA

own self-assessment should override that of the FAA certified APD who was charged with the task of judging his performance. Again, in the case of the first test ride I conclude that Occhione's anger and disagreement were related to his disagreement with the failing grade he received, rather than his belief that he had had been graded unsatisfactorily due to any complaints of protected activity, i.e. complaints of FAA violations, since no complaints of FAA violations or protected activity had occurred up to that point.

Thirdly the first check ride initiated a pattern of complaints by Occhione concerning his disagreement with the APDs who graded him unsatisfactorily on his check rides and dissatisfaction with the administration of his four check rides in general. Although his first complaints were general, (statement to Gilliam and phone calls to Randy Fusi and Tom Arline that he was going to the FAA) his complaints later became more specific. Occhione's November 8, 2007 letter to Tom Arline, chief pilot at PSA, indicated that he believed he "performed to FAA PTS Captain standards" on both October 2007 check rides. In this letter Occhione also, to a large degree, attempts to support his competence as a pilot and requests that a finding of unsatisfactory be removed from his record. He also "suggests" that he may have been judged on the basis of his "foreign persona" due to his Italian ethnicity. Very little, if any, of this complaint letter addresses any specific violation of FAA PTS on the part of the APDs other than Occhione's allegation that he had performed to FAA PTS captain standards. Occhione's June 3, 2008 FAA Hotline complaint did allege that the "check airmen" approved by the FAA did not administer his October check rides in compliance with PTS. The May 26, 2009 letter from Occhione's attorney to Gary Dybdal complained that Occhione's performance on the third check ride met PTS standards. See CX 14. Specifically, that letter states that "Mr. Occhione believes he has generally performed the required maneuvers, demonstrated knowledge of aircraft systems and emergency procedures, and exercised the judgment commensurate with that required of Captain of the CRJ." Again this letter stresses Occhione's belief that he was competent to make the upgrade to Captain, expresses his disagreement with the judgement of the APD, and alleges that he performed maneuvers to practical test standards.

The above listed patterns of behavior, which were established prior to the occurrence of the protected activity did not significantly change subsequent to any of the five instances of protected activity noted above, despite the fact that all four of the check rides which were administered to Complainant, by three different FAA certified APDs, resulted in the same failing grade.

It is important to note that throughout these proceedings many of Occhione's complaints derive from matters unrelated to protected activity such as personal disputes with PSA personnel and complaints of discrimination based on national origin. Although some of these complaints may be addressed in other forums, and may to some extent be peripherally relevant to this case, this court will only specifically address whether there was any contribution from *protected activity* to any adverse action taken by PSA regarding Occhione.

KNOWLEDGE OF PROTECTED ACTIVITY

Important to the determination of whether Inspector Harris, who performed Check rides 2 and 4 and Inspector Christner, who performed Check ride 3, reached their determinations that Complainant had failed these check rides, in part based on any of the five instances of protected activity which have been established, is whether either of these APDs had knowledge of any

instances of protected activity at the time they deemed Occhione's performance as unsatisfactory on check rides they performed. Knowledge on the part of the PSA official, Mark Zweidinger, PSA's Vice President of Flight Operations, who ultimately terminated Occhione's employment with PSA, will also be addressed.

The applicable regulation states that in order for a complainant to make a prima facie case under the whistle blower provision of AIR 21 it must be shown that "[t]he named person knew or suspected, actually or constructively, that the employee engaged in the protected activity. 29 C.F.R. §1979.104(b)(1)(ii). The Administrative Review Board ("ARB") has held that "an AIR21 Complainant must prove by a preponderance of the evidence that *the person making the adverse employment decision* had knowledge of the protected activity." *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38, slip. op. at 6 (ARB Jan. 31, 2006)(emphasis mine); *see also Peck v. Safe Air Int. Inc.*, ARB No. 02-028, 2001-AIR-3, slip op. at 14 (ARB Jan. 30, 2004)("knowledge of protective activity *on the part of the person making the adverse employment decision* is an essential element of a discrimination complaint")(emphasis added). However, a Complainant "is not required to prove direct personal knowledge on the part of the employer's final decision maker [because] [t]he law will not permit an employer to insulate itself from liability by creating 'layers of bureaucratic ignorance' between a whistleblower's direct line of management and the final decision maker." *Zinn v. American Commercial Lines*, 2009-SOX-25, slip. op. 18 (Nov. 19, 2012)(citing *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 166 (D.C. Cir. 1982)). The Board has determined that the element of knowledge should be addressed as part of the causation element of the Complainant's prima facie case. *See Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 29, 2011).

At this point I would note that Judge Lesniak had the opportunity to observe in detail, and personally judge the demeanor of all witnesses who testified during the lengthy five days of trial testimony in this case. I have reviewed and considered Judge Lesniak's credibility determinations regarding witness testimony and other evidentiary matters in this case. I adopt Judge Lesniak's credibility determinations except to the extent that they are specifically addressed and modified or contradicted herein, or to the extent that his findings have been vacated by the Board. Judge Lesniak addressed the question of knowledge of Occhione's complaints and protected activity on the part of the APDs who conducted the failed check rides, as well as the termination of Complainant's employment.

In regard to APD Christner Judge Lesniak wrote as follows:

APD Christner testified that, when he administered the third check ride, he had no "knowledge of any complaints [Complainant] may have made to the FAA concerning his October 2007 upgrade attempts." Dec. Tr. 824-25. However, he agreed that Ellen Tom from the FAA had contacted him sometime around July 2008 regarding Complainant's October 2007 check ride. *Id.* at 825. Specifically, she asked him if he was present during that check ride, if the ATP test standards were adhered to, and if he saw anything unusual about the ride. Later, he testified that he wasn't sure exactly when he became "aware that [Complainant] had made FAA complaints about his October 18, 2007 check ride." *Id.* at 859-60 ("I believe it was in the course of preparing for this trial, but I don't recall, or maybe the NTSB trial."). He further testified that he had not discussed Complainant's case

with Gary Dybdal, not even in casual conversation. *Id.* at 862-63. I find that simply establishing that APD Christner responded to a generic query from Ms. Tom is not enough, standing alone, to establish that he knew about the underlying complaint that motivated that request. Similarly, although Inspector Sain was present in the simulator during the check ride, APD Christner testified that he didn't know the reason for the inspector's presence, and that it was not unusual to have FAA personnel present. *See* Dec. Tr. 797. Considering this testimony, I find that the mere presence of Inspector Sain in the simulator would not have necessarily alerted APD Christner to Complainant's FAA complaint. Therefore, as Complainant has proffered no additional evidence that APD Christner knew of his protected activity, I find that Complainant has not established knowledge on the part of APD Christner.

(ALJ Lesniak D and O at 10).

In reviewing APD Christner's testimony it is important to note that his statement that he was unaware of any complaints to the FAA regarding Occhione's October 2007 check rides would include the additional instances of protected activity occurring on October 12, 2007 and October 13, 2007, as determined by the Board when Occhione informed APD Gilliam, Randy Fusi and Tom Arline that he intended to notify the FAA that his October 12, 2007 check ride was improperly administered.

In regard to potential knowledge on the part of APD Harris who performed Check Rides 3 and 4 Judge Lesniak noted as follows:

Like APD Christner, APD Harris testified that, as of the May 29, 2009 check ride, he had no "knowledge of any complaints [Complainant] may have made concerning any prior type rides." *Id.* at 928. However, the FAA also contacted him about Complainant's October 2007 check ride. *Id.* at 955. Specifically, Ellen Tom called him requesting a statement as to how he had conducted the October of 2007 check ride," which he submitted. Ms. Tom did not give him any background regarding the nature of her inquiry. *Id.* APD Harris didn't know why Inspector Best was present during the fourth check ride, but he also noted that the FAA regularly observes check rides to ensure compliance. *Id.* at 979; *see also* Mar. Tr. 38-39 (additional testimony supporting the proposition that the presence of an FAA inspector in the simulator is unremarkable). For the reasons outlined above, I find that the inquiry from Ellen Tom and the presence of an FAA inspector, without more, are not enough to establish knowledge on the part of APD Harris. Therefore, I find that Complainant has not established knowledge on the part of APD Harris.

(ALJ Lesniak D and O at 10).

In its November 26, 2014 Decision Remanding this case, the Board correctly notes some inconsistency between Judge Lesniak's October 18, 2012 Decision and Order Denying Summary Decision and the findings in his May 9, 2013 Decision and Order Denying Relief regarding knowledge of protected activity on the part of APD Chistner and APD Harris. Further, the Board requested clarification in regard to whether Judge

Lesniak's May 9, 2013 determination considered the significance of CX 6 and CX 7, two exhibits offered at the time of the Decision Denying Summary Decision consisting of emails from Christner and Harris in which they refer to statements made to Ellen Tom concerning the October 18, 2007 check ride of Claudio Occhione. CX 7 specifically indicates in the subject line of the letter "Re: Complaint from Claudio Occhione."

The Board pointed out the need for clarification, "given the significance of knowledge to the question of whether Occhione's protected activity was a contributing factor in any or all of the adverse actions taken against him." See ARB Decision Remanding at 12.

I have reviewed the emails at CX 6 and CX 7 as well as Judge Lesniak's conclusions in both decisions. I find the determination that APD Harris and Christner did not have knowledge of protected activity at the time they administered their check rides, (as determined by Judge Lesniak in the May 9, 2013 D and O) to be supported by the most complete review of the entire record. As noted by Judge Lesniak (in the October 18, 2012 Decision Denying Summary Decision) the conclusions in his Decision Denying Summary Decision were made, as required by law, with all inferences "to be drawn from the underlying facts contained in such materials ... viewed in the light most favorable to the party opposing the motion." ALJ Lesniak's October 18, 2012 Decision and Order Denying Respondent's Motion For Summary Decision at 4-5, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Further, at the time Judge Lesniak issued his Decision Denying Summary Decision he had not yet had the opportunity to review the admitted exhibits, nor the lengthy testimony presented in this case including that of both APD Harris and APD Christner.

Also, although Judge Lesniak did not specifically refer to the emails at CX 6 and CX 7, offered in response to the Motion for Summary Decision, he did discuss the fact that both Harris and Christner testified to their conversations with FAA Inspector Ellen Tom and the fact that they had both prepared statements in regard to the October 18, 2007 check flight ride at her request. See Judge Lesniak's D and O at 10 addressing testimony of Christner and Harris. I have considered the significance of the emails both dated July 2, 2008 at CX 6 and CX 7 (Offered in response to the Motion for Summary Decision) and I do not find them to undermine the testimony of Harris and Christner that they did not have any *specific* knowledge of Occhione's complaints and whether the complaints involved protected activity. The statements of Harris and Christner do confirm that they were aware of general complaints by Occhione regarding the October 18, 2007 check ride and also confirm their belief that the October 18, 2007 check rides had conformed to all applicable practical test standards. Harris's statement also confirms his determination that the test ride was unsatisfactory.

I conclude based on a review of the entire record, including the testimony and exhibits presented in this case, as well as the motion for summary decision exhibits, that Harris and Christner reasonably would have been aware that Occhione disagreed with the unsatisfactory determination given on the check rides, giving rise to a complaint concerning his grade of unsatisfactory, without being aware that the complaint involved a violation of an FAA regulation or procedure which would constitute protected activity. In fact, it appears that Occhione was quite clear in the debriefing after each check ride that he disagreed with the APD's determination of an unsatisfactory grade on the check

ride. The fact that FAA Inspector Ellen Tom requested clarification on a failed upgrade attempt would not necessarily alert the APDs to a complaint regarding a violation of an FAA rule or regulation. It merely shows a disagreement or complaint by Occhione with the APDs determination of “unsatisfactory.”

However, even if I assume through inference, based on the statements made by Christner and Harris to FAA Inspector Ellen Tom and the July 2, 2008 emails regarding the administration of the October 18, 2007 check ride, that Christner and Harris were aware of a complaint by Occhione regarding whether the practical test standards had been adhered to, Complainant still must prove that knowledge on the part of Christner and Harris contributed to their findings of “unsatisfactory” on Check Flights three and four. This will be discussed further below. At any rate, I do not find any basis for a finding that Harris had knowledge at the time of Check Ride 2 on October 18, 2007 since the inquiry concerning the October 18, 2007 check ride and subsequent statements to Ellen Tom (emails were dated July 2, 2008) clearly occurred sometime after the second check ride which was the subject of the inquiry.

Another discrepancy between Judge Lesniak’s findings in the October, 2012 denial of summary decision and his May 9, 2013 Decision and Order is the fact that he found in his Decision denying summary decision, constructive knowledge, on the part of Harris and Christner regarding the May 26, 2009 faxed letter from Complainant’s Counsel Christopher Hudson to Gary Dybdal which stated that Complainant believed his performance on previous check rides was to a satisfactory level in light of the requirements contained in the practical test standards. Judge Lesniak indicated in his October, 2012 denial of motion for summary decision that Christner and Harris “constructively knew about this letter” considering that Mr. Dybdal presumably oversaw the execution of the check rides.” I do not find this determination by Judge Lesniak to be supported by the record as a whole nor should it override Judge Lesniak’s later determination that Christner and Harris did not have knowledge of protected activity at the time they administered their check rides, which was based on a complete review of the record exhibits and hearing testimony by Judge Lesniak. Again, as clearly indicated by Judge Lesniak in the Denial of Summary Decision, he viewed all inferences in favor of the non-moving party in his determinations regarding whether grounds for summary decision had been established. In addition he did not have a full record including exhibits and testimony available to him in reaching his summary decision determinations.

Further I find that Gary Dybdal did not supervise or oversee the APDs in the administration of the check rides. In performing their duties of administering check rides the APDs were acting as representatives of the FAA. Therefore, I do not impute knowledge by Gary Dybdal to Christner and Harris without any evidence that Gary Dybdal actually communicated to them the content of the May 26, 2009 fax from Claimant’s counsel.

In regard to the actual termination of Complainant’s employment from PSA, I confirm and adopt the finding of Judge Lesniak that Mark Zweidinger, PSA’s Vice President of Flight Operations did have constructive knowledge of Occhione’s complaints which included protected activity at the time Occhione’s employment was terminated. In regard to Zweidinger’s role in

the termination, Judge Lesniak previously noted as follows in regard to the fact that Zweidinger was the ultimate decision maker and whether he had direct knowledge of protected activity:

At the time he terminated Complainant, Mr. Zweidinger was not aware of any complaints that Complainant made to the FAA. Mar. Tr. 28; *see also Id.* at 35-36. He also had no direct knowledge of the letter from Attorney Hudson to Gary Dybdal. *Id.* at 39. Mr. Zweidinger further testified that the June 1, 2009 termination letter came from Joe Rose, who was PSA's Director of Operations at the time. *Id.* at 21. Mr. Rose was Mr. Zweidinger's subordinate. When asked why Complainant's termination letter came from Mr. Rose, and not from him, Mr. Zweidinger explained, "Well, Mr. Rose is more in line with a pilot's direct supervision, just as if a flight attendant is terminated, it comes from the director of in-flight, not directly from me. However, I am advised, I am consulted with, and I give the final basically go-ahead in any termination decision of any employee in my department, but I don't personally issue termination letters." *Id.* at 30. However, the authorship of the letter didn't diminish his role as the decision maker in this case, because Mr. Rose didn't "have the authority to make that decision." *Id.* *see also CX 33 at 51.* Considering the above testimony, which is not contradicted, I find that Mr. Zweidinger was the decision-maker with respect to Complainant's termination, and that he had no direct knowledge of the protected activity.

(Judge Lesniak's May 9, 2013 D and O at 11).

In regard to constructive knowledge on the part of Zweidinger, Judge Lesniak noted the following:

...[I] find that Mr. Zweidinger can be imputed with Mr. Rose's general knowledge of Complainant's ALPA grievance. Additionally, considering that Mr. Dybdal was part of the chain of command reporting up to Mr. Zweidinger, I find that Mr. Zweidinger had constructive knowledge of at least some of Complainant's protected activity, including the communication from Mr. Hudson. *See Mar. Tr. 25-26* (Mr. Zweidinger referring to Mr. Dybdal as part of his team, and explaining that Mr. Dybdal reported to him regarding Complainant's performance).

(Judge Lesniak's May 9, 2013 D and O at 13).

This finding by Judge Lesniak has not been questioned by the Board and I find it to be supported by the record. Accordingly I adopt the finding that PSA through Mark Zweidinger had constructive knowledge of protected activity at the time of termination.

Role of Subjectivity in the Adverse Actions taken

As the Board points out in its Remand Decision in this matter "the operative question is whether Occhione's protected activity played *any* role in his failure to satisfactorily complete any or all of the check rides." *See ARB Remand D and O at 10 fn. 48* (emphasis in original). In this regard the Board states as follows:

Evidence that the check rides were fairly administered does not preclude a finding that Occhione's protected activity was a contributing factor in his check ride failures. Moreover, even if the rides were technically "fair" and administered in conformance to practical test standards, the evidence indicates that the evaluators exercised discretion, independent judgment, and had latitude in their evaluations....Subjective assessments like the "leadership qualities" by which Occhione was measured are inherently open to bias....Appellate courts have observed that "subjective criteria can be a ready vehicle for [discrimination]." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005); *see also Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective evaluations provide supervisors with a mechanism to indulge in bias, which cannot be objectively rebutted). Subjective standards are difficult for courts to evaluate and difficult for plaintiffs to prove and their use in employment decisions should be viewed with suspicion. *See Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 808-09(11th Cir. 1989).

The Board's point is well taken and I have considered the role of subjectivity in the evaluations which were conducted at the check rides. I would note in this regard that each one of the APDs noted objective criteria which formed the basis for their unsatisfactory evaluations, in addition to the more subjective elements of their evaluations.¹²

The following errors point out objective criteria used by the APDs in reaching their determinations of unsatisfactory in regard to Complainant's check rides. On Check Ride 2 Harris programmed a generator malfunction into the simulator system which he indicated was a malfunction maneuver which he gives to nearly every applicant he tests. Occhione, who failed to correctly recognize and diagnose the malfunction responded by shutting down the only operating generator which would have caused a complete shutdown of electrical power to the aircraft if they had been in an actual flight situation, thereby placing the aircraft in an "emergency situation."

APD Christner noted on Check ride 3 that Occhione had violated specific criteria in the practical test standards pertaining to steep turns and landing stalls. Specific parameters for carrying out these maneuvers are contained in the practical test standards including specific altitude and airspeed, with which Occhione had not complied. Christner noted that Occhione had exceeded ATP test standards three times on the steep turn maneuver. Occhione had also failed to start the clock on a "non-precision approach" which required a *timed* approach.

On Check Ride 4 the objective criteria for APD Harris's unsatisfactory grade included such errors on the part of Occhione as failing to turn on the aircraft lights on a nighttime departure, as well as Occhione's failure to input departure information and

¹² I would also point out that whether the FAA standards should include any subjective elements in an attempt to judge such necessary attributes as "leadership qualities" would only be a determination for the FAA to make and would clearly be outside this court's jurisdiction. However, the practical test standards do contain objective criteria which are addressed by the FAA certified APDs which provide a basis for objective evaluation in this case. Since the FAA is charged with creating and administering the standards pertaining to whether an individual is competent to hold various pilot certifications, and is presumably taking into consideration the safety of the flying public in setting these standards, it is important that the FAA standards are not undermined.

perform a “full route verification” which would be a “complete violation of procedures” since it could place the plane in “uncleared airspace.” APD Harris also testified that Occhione had caused a “safety of flight” situation by failing to properly address a cabin depressurization emergency descent which was required due to structural damage, a standard scenario which Harris indicated is given to all applicants. Harris also testified that Occhione had performed a missed landing approach where he was flying 400 feet below where the aircraft had been cleared by air traffic control and had also failed to correctly respond to an engine fire. FAA Inspector Best who was present on the fourth check ride found the objective errors to be so egregious that he discussed the flight with his FAA supervisor, Ellen Tom, and they “made the decision that [they] needed to reexamine [Complainant] to ensure that he was... going to be able to hold an airline transport pilot’s certificate because it was definitely in doubt ... at the time.” See RX 35 at 177.

Although it would be impossible to remove all subjectivity from an evaluation of this type, the aforementioned factors represent objective criteria that undermine the Complainant’s testimony which consistently alleges that he performed the four check rides to a level that met the requirements of the practical test standards. Complainant has not offered any credible evidence that protected activity played *any* role in his failure to satisfactorily complete any or all of the check rides.¹³

In addition, Check rides 3 and 4 were both observed by presumably objective representatives of the FAA, Inspector Sain and Inspector Best, as well as Complainant’s ALPA representative, Joseph Connelly. The statements, depositions and testimony of these individuals objectively support that the “unsatisfactory” evaluations made by the APDs at Check Rides 3 and 4 accurately assessed Mr. Occhione’s competency to upgrade to captain and that the “unsatisfactory” was warranted at the time of those evaluations.

At the hearing, the parties stipulated that if called to testify, Captain Connelly, a member of the ALPA training review committee at PSA, would have testified as follows:

Prior to . . . May 16, 2009, Captain Connelly was contacted by Mark Stanley, who was the chairman of ALPA’s master executive committee at PSA. Captain Stanley informed Captain Connelly that Mr. Occhione had requested an ALPA representative to be present on his May 16, 2009 type ride. Captain Stanley asked Captain Connelly to attend the May 16, 2009 type ride as an ALPA representative. Captain Connelly agreed to do so. Captain Connelly observed the

¹³ I have considered the testimony of Silvin Blackstock in regard to his observations of the third check ride. I agree with Judge Lesniak’s credibility determination in regard to this witness. See Judge Lesniak D and O at 19. In particular I agree with his finding that “Mr. Blackstock could not meaningfully address whether Complainant’s performance was technically sufficient or not because he is not an APD and has never trained as one; therefore, he does not possess the requisite knowledge to make this determination.” See Dec. Tr. 165-66). “For the same reason, he is also not in a position to address whether APD Christner administered the test following proper procedures. Finally, Mr. Blackstock’s generalized impression that Complainant “was being hunted and being targeted” is vague and unsubstantiated.. Therefore, I give little weight to Mr. Blackstock’s opinion to the extent that he believed either that the test was administered unfairly or that Complainant should have passed it.” See Judge Lesniak D and O at 19.

May 16, 2009 type ride. In Captain Connelly's opinion, the [check] ride was administered properly and fairly by Captain Matthew Christner, who was the APD on the flight

Captain Connelly saw nothing abnormal about the maneuvers that Captain Christner asked Mr. Occhione to perform. Captain Connelly agreed with Captain Christner's assessment that Mr. Occhione had failed the type ride. Captain Connelly was present for the discussion between FAA Inspector Lewis Sain and Captain Christner.

Captain Connelly heard Mr. Sain state that he understood why Captain Christner had failed Mr. Occhione and that PSA was doing a good job with its training program. Captain Connelly reported back to Captain Stanley at ALPA that the type ride was administered fairly.

Prior to the May 29, 2009 type ride, Captain Stanley again asked Captain Connelly to observe the type ride as an ALPA representative. Captain Connelly agreed to do so. Captain Connelly observed the May 29, 2009 type ride. In Captain Connelly's opinion, the type ride was administered properly and fairly by Captain Darren Harris. Captain Connelly saw nothing abnormal about the maneuvers that Captain Harris asked Mr. Occhione to perform. Captain Connelly agreed with Captain Harris's assessment that Mr. Occhione had failed the type ride.

Captain Connelly also observed the debrief after the May 29, 2009 type ride. Captain Connelly heard FAA Inspector Woody Best tell Mr. Occhione that he had failed the type ride. Inspector Best also said that, if Mr. Occhione were his brother, he would have failed him. Captain Connelly again reported back to Captain Stanley at ALPA that the May 29, 2009 type ride was administered fairly.

(Dec. Tr. 980-82).

I find that the stipulated testimony of Captain Connelly objectively supports that Mr. Occhione had failed Test Rides 3 and 4 which undermines the credibility of the Complainant's testimony that he had performed to the level of competency necessary to upgrade to captain and to the level of performance prescribed by the practical test standards to make the upgrade to captain.

Further, the complaints made to the FAA by the Complainant resulted in more surveillance by the FAA in regard to the latter two check rides which standing alone are distinct adverse actions as well as part of the ultimate adverse action of Complainant's termination from employment at PSA. I find the FAA to be objective in regard to this matter, especially in relation to the official actions of FAA employees who were independent observers of the last two check rides and who were not employees of PSA Airlines. I find the testimony and official actions of Inspector Sain and Inspector Best do pass the "relevancy test" and should be considered in regard to the issue of contribution of protected activity to the third and fourth adverse check rides. In particular, they are relevant to the issue of Complainant's credibility and his ability to accurately assess his own competence and performance on these check rides. I also

find the observations and judgments of FAA Inspectors Sain and Best to be distinguishable from the Employer's "self-serving evidence" supporting or justifying their reasons for the adverse actions, which will only be considered under the clear and convincing standard, should the Complainant establish his prima facie case based on the preponderance of the "relevant" evidence.

The testimony of FAA Inspector Sain who observed the third check ride supports that there may have been some deficiencies in the administration of the third check ride by APD Christener. He initially testified that the APD seemed rushed and that typically the SIC (Second in Command pilot) was not another upgrade candidate as was the case on this ride. Dec. Tr. 344-345, 352-354, 380. However, Inspector Sain admitted that he was not familiar with PSA's training program or PSA's pilot operating handbook. *Id.* at 373. He also admitted he was not aware that PSA's pilot operating handbook prohibits the use of the FMS (flight management system) during a localized approach. *Id.* at 373. Inspector Sain indicated that he had a limited view of the instrument panel and could not see the altimeter or the airspeed monitor and therefore could not judge whether Occhione had performed the steep turns maneuver or the stalls maneuver properly. *Id.* at 375-376. Inspector Sain pointed out that he was tasked with reviewing whether the APD was performing in compliance with FAA practical test standards. *Id.* at 384. He was not tasked with judging whether the Complainant had performed to a sufficient level to pass the third check ride. *Id.* In this regard he testified that he did not disagree with APD Christener's assessment of Occhione's performance. *Id.* at 384-385. He also indicated in regard to whether APD Christner had conducted the check ride within the parameters of practical test standards, "I didn't see that he was outside of those parameters at all." *Id.* at 385. Further, Inspector's Sain's testimony does not offer any support for a contribution between Occhione's complaints to the FAA and the third failed check ride which he observed.¹⁴

I have also considered the actions of FAA Inspector Best who observed Mr. Occhione's fourth and final check rides on May 29, 2009. During the NTSB hearing, Inspector Best testified that he had observed the May 29, 2009 check ride and briefings. RX-35 at 177, 183. He agreed with APD Harris's evaluation that Complainant had failed the check ride. *Id.* at 183-84. After the check ride, Inspector Best called his acting supervisor, Ellen Tom, and they "made the decision that [they] needed to reexamine [Complainant] to ensure that he was . . . going to be able to hold an airline transport pilot's certificate because it was definitely in doubt . . . at the time." *Id.* at 184; *see also* CX-17 (statement from Inspector Best outlining problems arising during the May 29, 2009 check ride and concluding that "a 709 of [Complainant's] ATP [was] appropriate").

It is important to note that this is not the forum to determine whether PSA Airlines is performing its upgrade check rides in accordance with the FAA standards, nor has the undersigned been given the authority or assigned the task of making this determination. Nor is this the appropriate forum to determine whether complainant has reached the level of

¹⁴ Gary Dybdal, PSA's Director of Training testified that he was never given formal notification from the FAA that APD Gilliam Harris or Christner had not performed a type rating ride in accordance with the FAA's practical test standards nor had the FAA ever removed the APD certification for Harris, Christner or Gilliam for any reason. Dec. Tr. 620.

competency to attain the level of captain at PSA or any other airline.¹⁵ These determinations are the purview of the FAA and other administrative bodies which are presumably taking into consideration the safety of the flying public in creating and administering the procedures and standards used in reaching these determinations.¹⁶

The AIR 21 whistleblower provision does grant the undersigned the authority to determine whether protected activity contributed to any adverse personnel actions occurring in this case including the Complainant's failed upgrade attempts and to his ultimate termination from PSA. After reviewing the evidence in this case I find that there is no credible evidence which "tends to support" a relationship between the protected activity and the adverse actions by PSA in the administration of Occhione's four check rides.

In reaching this determination I have looked primarily at the evidence presented by the Complainant including his lengthy trial testimony.¹⁷ This evidence supports that Occhione believed the procedures used by PSA were less than optimal and may have diverged at times from a strict application of the FAA's practical test standards. The record also supports that Occhione believed he was given maneuvers during his test rides for which he was not properly trained. Further Occhione's testimony supports that he assessed his own competence and readiness to upgrade to the position of captain differently than the APDs who were authorized by the FAA to make these determinations. However, I find that the objective evidence undermines Occhione's assessment of these issues. This objective evidence outlined above includes the conclusions of the FAA Inspectors present on the check rides, as well as the observations of Complainant's ALPA representative who observed Check Rides 3 and 4 presumably on the Complainant's behalf. Based on this evidence as a whole I find that Complainant has failed to establish his prima facie case in regard to the failed check rides.

In general, Occhione's complaints do provide some support for his general complaint to the FAA that the practical test standards were not strictly followed. Due to his complaints it appears that the FAA did monitor more closely the procedures followed by the APDs, who are certified by the FAA to perform check rides, and in particular, whether the criteria established by the FAA, namely the practical test standards, were being followed to the FAA's satisfaction. It appears that the FAA took steps to determine whether the APDs were performing within the FAA's specifications in that they sent FAA Inspector Sain and Inspector Best to monitor the check rides that were performed pertaining to Complainant's second upgrade attempt (Check rides 3 and 4) on May 16, 2009 and May 29, 2009. Significantly, the record establishes that no

¹⁵ Although this is not the question to be decided by the undersigned there is objective support for the conclusions of the APDs who performed the Check Flights as indicated above.

¹⁶ It is important to note that there has been no formal discipline or reprimand made by the FAA to PSA Airlines regarding their training program or the procedures used in administering upgrade assessments based on the testimony and evidence presented in the record. In addition there has not been any discipline or decertification of any of the three APDs who performed Complainant's upgrade check rides, according to testimony in the record. See Dec. Tr.619-620.

¹⁷ Although Complainant is not required to prove animus to make a prima facie case under AIR 21, I have reviewed the testimony to determine whether there were any beneficial inferences which could credibly support his prima facie case. I agree with Judge Lesniak's credibility determinations in this regard. See Judge Lesniak's D and O at 25-26. Accordingly I adopt his previous finding that general animus on the part of PSA is not supported by the statements or testimony of Captain Collins, Captain Chris Salistine or Mr. Behzad Rajabi. *Id.*

official reprimands were issued by the FAA in regard to the APDs who performed those check rides or in regard to the airline's training or upgrade procedures.

Temporal Proximity Between Protected Activity and Adverse Actions

There has been no causal connection established by Occhione, between his check ride failures and his complaints to the FAA regarding the practical test standards and whether his performance on the check rides met the required performance levels noted in the practical test standards. There is nothing which tends to support any contribution whatsoever from the protected activity to the failed check rides. The mere fact that Occhione failed a check ride is not on its face circumstantial evidence supporting a finding that protected activity contributed to his failure, especially in light of the fact that he also failed the first check ride prior to protected activity and Complainant has failed to provide other credible support to establish this causal link.

Temporal proximity between the protected activity and the adverse employment action can in some instances support the requisite causal relationship between the protected complaints and the adverse actions. See *Vieques Air Link, Inc. v. USDOL*, No. 05-01278 (1st Cir. Feb. 2, 2006) (per curiam) (available at 2006 WL 247886) (case below ARB No. 04-021, ALJ No. 2003-AIR-10), (the First Circuit court held that the ALJ permissibly treated the temporal proximity between the Complainant's reports and his suspensions by the Respondent as sufficient to show the requisite causal relationship to establish that his protected activity was a contributing factor in the adverse employment action he suffered.)

I have considered whether temporal proximity between any of the instances of protected activity and the check ride determinations tends to support a contribution from Occhione's protected activity to the resulting failures. In regard to the check rides, this does not appear to be the case.

As previously indicated the first check ride occurred prior to protected activity. In regard to the second check ride I have determined that there was no knowledge established on the part of APD Harris who performed the second check ride at the time of that ride (October 18, 2007). Even drawing an inference favorable to Claimant which would support knowledge on the part of Christner and Harris at the time they were contacted by FAA Representative Ellen Tom and provided statements to the FAA about the October 18, 2007 check ride (per the emails at CX 6 and CX 7 in motion for summary decision) this contact was not until 2008 and this clearly postdated the October 18, 2007 ride.

In regard to the third check ride, there is no temporal proximity established between knowledge of protected activity by APD Christner, (assuming knowledge at the time of the July, 2008 emails), and Check Ride 3, which occurred on May 9, 2009, approximately one year after Christner submitted his report to Ellen Tom. Also, in regard to check ride 4, there is no temporal proximity established between knowledge of protected activity by APD Harris who performed the fourth ride, again assuming knowledge at the time of the July, 2008 emails, and the date of the fourth ride. Further, as discussed above, although a fax was sent to Gary Dybdal by Claimant's Counsel on May 26, 2009, there is no knowledge, either actual or constructive, established on the part of APD Harris regarding this fax.

However, I do find temporal proximity between the fax sent to Gary Dybdal by Complainant's Counsel and the actual termination of Complainant's employment by the letter dated June 2, 2009 from Joe Rose, PSA's Director of Operations. As discussed earlier, although this letter was sent by Rose, the ultimate decision maker for purposes of terminations at PSA was Mark Zweidinger, PSA's Vice President of Flight Operations, who I determined had constructive knowledge of protected activity at the time Occhione's employment was terminated.

I find no direct evidence supporting a relationship between Occhione's protected activity and his termination. However, due to the temporal proximity between the May 26, 2009 faxed letter to Gary Dybdal and the date of his termination six days later, effective June 1, 2009, as well as the constructive knowledge of protected activity on the part of Zweidinger, I find that there is circumstantial evidence to support Complainant's prima facie case on this basis. In reaching this determination I have considered that circumstantial evidence is sufficient to support contribution. I have also concluded based on the holding in *Powers v. Union Pacific Railroad, supra.*, that the Employer's evidence supporting a defense of its actions cannot be considered when determining whether Complainant has met his burden of proving his prima facie case by a preponderance of the evidence. Therefore, I conclude that Complainant has met his burden on this basis.

Accordingly, since Complainant has established his prima facie case under the whistleblower provision of AIR 21, the burden will shift to the Employer to prove by clear and convincing evidence that it would have taken the adverse personnel action of termination of Complainant's employment, absent the protected activity.

Once a Complainant proves his prima facie case the burden shifts to the Employer to prove by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the complainant's protected acts. *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013) (referring to the AIR 21 legal burden of proof standard as the "two-part burden-shifting test"). "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'preponderance of the evidence' and 'proof beyond a reasonable doubt.' To meet the burden, the employer must show that 'the truth of its factual contentions is highly probable.'" Clear and convincing evidence is "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Beatty v. Inman Trucking Management, Inc.*, ARB No. 13-039, ALJ Case Nos. 2008-STA-020, 2008-STA-021 (ARB May 13, 2014). In meeting its burden under the clear and convincing standard, evidence must establish what the employer "would have done," not simply what it "could have done," absent the protected activity. *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ no. 2005-ERA-6 (ARB April 25, 2014).

The evidence in this case establishes that PSA has a policy which is applied to all pilot employees who attempt to upgrade from the First Officer position to that of Captain. Dec. Tr. 598-602. Upgrade candidates are given two attempts to pass each upgrade bid. *Id.* at 600. If a pilot fails his first attempt to upgrade, the FAA requires that he be retrained and rechecked before returning to his former duty position as a first officer. *Id.* He may then rebid for an open captain position after six months. *Id.* at 1006. According to the collective bargaining agreement in effect at PSA, pilots have two attempts to qualify as captain. *Id.* at 1004-05. If they fail the second upgrade attempt, they are dealt with at the company's discretion. *Id.* at 1006. *See also Id.* at 601. According to company policy, pilots who fail two upgrade attempts are always

terminated or permitted to resign in lieu of termination. *Id.* at 1006-07; *see also* Mar. Tr. 10-12, Dec Tr. 601.

As previously discussed Complainant failed his fourth check ride, which was the second check ride on his second attempt to upgrade to the Captain position on May 29, 2009. The parties stipulated that “Complainant’s employment was terminated effective June 1, 2009. *Id.* at 22.¹⁸ The termination letter was signed by J. Rose, Director of Operations, and was copied to Mark Zweidinger, PSA VP of Flight Operations, and Gary Dybdal, PSA Director of Training, among others.” *Id.* at 22-23; *see also* RX-26. See stipulation #11.

The evidence establishes that Complainant’s termination was “automatic” once he failed the fourth and final check ride. *See* Mar. Tr. 11-13 (explaining that, according to the collective bargaining agreement between ALPA and PSA, “should the pilot not be successful after two check ride attempts in that second attempt to upgrade, his employment is at the company's discretion, and the company has historically consistently terminated employment of those pilots.”); *see also* RX-15.¹⁹

In addressing the question of whether Employer has proven that it would have terminated the Complainant’s employment even absent his protected activity it is important to note that the four check ride failures constituted the series of events which ultimately lead to the automatic termination. I find, based on the credible and consistent testimony of the Employer’s witnesses which include that of Gary Dybdal, PSA’s Director of Training and David Glenn, PSA’s Director of Human Resources that an employee would be automatically terminated after two failed upgrade attempts regardless of whether there had been any complaints constituting protected activity. Termination would have resulted based on the check ride failures regardless of any other factors.

As discussed previously, the three APDs who conducted the four check rides each determined that the Complainant performed unsatisfactorily. I found each of these check rides to be supported by objective criteria. APDs are experienced pilots who are trained and approved by the FAA to administer upgrade testing. There is no credible evidence that any of the three APDs were reprimanded or disciplined in any way for their performance as APDs or for failing to comply with the practical test standards developed by the FAA for conducting check rides. The final two check rides were observed by objective FAA officials, as well as Joseph Connelly, the ALPA representative of the Complainant, who objectively confirmed that the Complainant had not performed satisfactorily on the last two check rides. As previously discussed I found that Complainant failed to establish by a preponderance of the evidence any contribution from protected activity to the four check ride failures. In light of the fact that I have found that the grades of unsatisfactory on the four check rides are objectively supported, and due to the company policy of automatically terminating employees for two upgrade failures, I find that Employer has met its burden of establishing by clear and convincing evidence that it would have taken the adverse action of terminating the Complainant’s employment absent any protected

¹⁸ The termination letter is actually dated June 2, 2009. RX 26.

¹⁹ Mr. Zweidinger further explained that “[t]he bargaining agreement between the Association and the company is clear. The company has a consistent policy of terminating employees, pilot candidates who are unsuccessful and fail to demonstrate the required proficiency after two attempts to upgrade.” Mar. Tr. 13.

activity. In further support of this conclusion I find the testimony of Mark Zweidinger to be credible in regard to the bases for the termination of the Complainant's employment from PSA. Mr. Zweidinger testified as follows:

Q. If you had been aware of . . . complaints to the FAA at the time you made the decision to terminate his employment, would that have changed your mind in any way?

A. No, sir, not at all.

Q. And why not?

A. Because this is a matter of flying safety. This has nothing to do with, you know, complaints alleging—whatever the complaints alleged. Again, I only know of those things today in the detail I know of them because of these proceedings. When I'm evaluating pilot performance, when I'm evaluating any employee's performance, I'm not interested in whether they're male or female, their ethnic background, their religious preferences. I am not interested in anything except for one thing. That is are they competent to do their job, are they safe, can I trust them, can I release them out into an unsupervised environment and trust them to do the things that they're supposed to do at the highest levels each and every day, each and every hour, each and every minute throughout our performing those duties. That's what it boils down to. This is not about anything except for flying safety, and I can't make that point clear enough.

(Mar. Tr. 28-29; *see also Id.* at 13-15, 19, 28-29 (addressing public safety concerns)).

For the reasons previously stated, I find that the Employer has met its burden by clear and convincing evidence that it would have terminated the Complainant's employment due to the failed upgrade attempts and due to the automatic termination policy, despite any knowledge of protected activity.

CONCLUSION

As the Respondent/Employer, PSA Airlines, has proven by clear and convincing evidence that it would have terminated Complainant's employment absent any instances of protected activity, this claim for benefits must be denied.

ORDER

The claim of Claudio Occhione for relief under AIR 21 is hereby DENIED.

RICHARD A. MORGAN
Administrative Law Judge

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, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; 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). 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).

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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).