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Issue Date: 09 May 2013

CASE NO: 2011-AIR-12

In the Matter of:

CLAUDIO OCCHIONE,
Complainant,

v.

PSA AIRLINES, INC.,
Respondent,

Appearances:

Christopher Hudson, Esq.
Angelina Maletto, Esq.¹
For Complainant

Thomas French, Esq.
Sarah Aufdenkampe, Esq.²
Leanne Mehrman, Esq.³
For Respondent

Before: MICHAEL P. LESNIAK
Administrative Law Judge

DECISION AND ORDER—DENYING RELIEF

The above-captioned case arises under the employee protection provision of Section 519 of the Wendell H. 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).

¹ Attorney Maletto was present for the December 2012 hearing only.

² Attorney Aufdenkampe was present for the December 2012 hearing only.

³ Attorney Mehrman was present for the March 2013 hearing only.

PROCEDURAL HISTORY

As the procedural history of this case is complex, I summarize only the most salient facts. Complainant filed the present AIR21 claim with the U.S. Department of Labor by letter dated July 30, 2009. *See* RX-47.⁴ Following investigation of this matter, the Occupational Safety and Health Administration (“OHSa”) dismissed this case by letter dated August 3, 2011. RX-48. On September 6, 2011, Complainant rejected OHSa’s findings and requested a formal hearing before an Administrative Law Judge (“ALJ”). On September 17, 2012, prior to the first hearing, Respondent filed a Motion for Summary Decision, which I denied on October 18, 2012. I held a *de novo* hearing beginning on December 17, 2012 in Charlotte, North Carolina. On the fourth day of trial, before the hearing had concluded, the parties represented to me, on the record, that they had reached a settlement. On that basis, I concluded the hearing before its completion. After the hearing, the parties were unable to reach a final settlement agreement. On January 31, 2013, Respondent submitted a Motion requesting that I approve the settlement agreement entered into on the fourth day of trial, dismiss the case, and award sanctions against Complainant. After a further exchange of briefs by the parties, I issued an Order on February 25, 2013 denying Respondent’s Motion because I did not find the preliminary agreement entered into on the fourth day of trial to be enforceable. Therefore, the parties were required to reconvene for the remainder of the hearing, which I held on March 20, 2013 in Pittsburgh, Pennsylvania. I received closing briefs from the parties on April 12, 2013, which I have considered in rendering my decision.

STIPULATIONS

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. *Id.*
4. Captain/APD Darren Harris administered a second check ride on October 18, 2007 and reported that Complainant had failed the test. *Id.* 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

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. I noted that RX-47 was not admitted during the hearing, but a copy of the complaint is contained in the administrative file; therefore, it is already part of the record.

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. *Id.* On May 16, 2009, Captain/APD Matthew Christner administered another check ride and reported that Complainant had failed. *Id.*
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. *Id.*
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.
12. Complainant filed the present AIR21 claim with the U.S. Department of Labor on July 30, 2009 regarding his June 1, 2009 termination, and I have jurisdiction to hear this complaint. *Id.* at 23.
13. PSA Airlines is subject to the AIR21 Act. *Id.*

ISSUES

1. Whether Respondent is an air carrier subject to AIR21;
2. Whether Complainant engaged in activities protected by AIR 21;
3. Whether Respondent actually or constructively knew of, or suspected, such activity;
4. Whether Complainant suffered an unfavorable personnel action;
5. Whether Complainant’s activity was a contributing factor in the unfavorable personnel action; and, if so,

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

6. Whether Respondent would have taken the unfavorable personnel action irrespective of Complainant's having engaged in protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FACTUAL BACKGROUND

PSA is 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. *Id.* PSA recommends its best pilots to become APDs, but the FAA makes the final selection. *Id.* 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 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.

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.

1. History of Complainant's Attempts to Upgrade

In October of 2007, Complainant requested 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. *Id.* Captain Darren Harris, functioning as APD, administered a second check ride on October 18, 2007. *Id.* What happened during this check ride is also disputed; again, however, the parties agree that APD Harris reported that Complainant had failed. *Id.*⁷ 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 21.⁸ APD Christner reported that Complainant had failed. *Id.* 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 22.⁹ APD Harris, who administered the ride, concluded that he had failed. *Id.*

2. Complainant's Termination and Re-qualification Testing

As a result of his 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". *See* Dec. Tr. 44-46; RX-32.¹⁰ 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

⁷ For reasons addressed later in this Decision and Order, it is not necessary for me to make an explicit finding as to whether check rides one and two were administered fairly or whether the APDs properly determined that Complainant had failed them. *See* n. 42, *infra*.

⁸ I will refer to the May 16 check ride as "check ride three".

⁹ I will refer to the May 29 check ride as "check ride four".

¹⁰ This is shorthand for 49 U.S.C. § 44709, the relevant section of the United States Code. *See* Dec. Tr. 44-46; RX-32.

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).¹¹

THE AIR21 ACT AND IMPLEMENTING REGULATIONS

As previously stated, AIR21 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). The elements of a prima facie case are 1) the employee engaged in a protected activity or conduct; 2) the named person knew or suspected, actually or constructively, that the employee engaged in the protected activity; 3) the employee suffered an unfavorable personnel action; and 4) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action. *Id.* at (b)(1)(i)-(iv). At the hearing stage of an AIR21 claim, the Complainant must prove these elements by a preponderance of the evidence. *See Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8, slip op. at 13-14 (ARB Jan. 31, 2006)(It is not enough at the hearing phase for a complainant merely to establish a rebuttable presumption that the employer discriminated; rather, a complainant must prove by a preponderance of the evidence protected activity, adverse action and causation). Once a complainant has established the prima facie elements of his claim, the burden shifts to the Respondent to demonstrate by clear and convincing evidence that it would have taken the unfavorable personnel action irrespective of Complainant’s having engaged in protected activity. 29 C.F.R. § 1979.104(c).

In the present case, the parties stipulated that I have jurisdiction over this claim. Dec. Tr. 23. I also find that I have jurisdiction, as “the parties are properly before [me], the proceeding is of a kind or class which this office is authorized to adjudicate, and the claim is not obviously frivolous.” *Broomfield v. Shared Services Aviation*, 2004-AIR-20, elec. op. at 3 (ALJ Aug. 9, 2004)(internal citations omitted).

¹¹ I previously held that collateral estoppel does not apply to the NTSB findings. Summary Decision at 6. Therefore, I do not give preclusive effect to Judge Fowler’s findings regarding the fourth check ride. I will independently consider the NTSB testimony, which has been admitted into evidence at RX-35. *See* Dec. Tr. 946.

RESOLUTION OF LEGAL ISSUES

1. Whether Respondent is an Air Carrier Subject to AIR21

As explained in *Broomfield*:

An employee seeking relief under AIR21 must show that his employer is an “air carrier” under AIR21. The regulations implementing AIR21 state that the definition of “air carrier” under the Federal Aviation Act . . . is applicable to AIR21. The FAA defines “air carrier” as a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

Id. at 3 (internal citations omitted). In the present case, Respondent is a regional airline and a wholly-owned subsidiary of US Airways. Dec. Tr. 592. There is no question that this airline provides air transportation. The parties have also stipulated that Respondent is an air carrier subject to the Act. *Id.* at 23. Therefore, I find that this element of a prima facie claim has been satisfied.

2. Whether Complainant Engaged in Activities Protected by AIR 21

Protected activity under AIR21 has three components: (1) a report or action involving a purported violation of a federal law or FAA regulation, standard, or order relating to air carrier safety, and at least touching on air carrier safety; (2) the Complainant’s objectively reasonable belief about the occurrence of the purported violation; and (3) the Complainant’s communication of his safety concern either to his employer or to the Federal Government. *Weil v. Planet Airways, Inc.* 2003-AIR-18, elec. op. 37 (ALJ Mar. 16, 2004) *aff’d* ARB No. 04-074 (ARB Oct. 31, 2005). “To constitute protected activity under AIR21, a Complainant’s complaints must relate to a regulation or order, must be specific, and must be reasonably believed by the Complainant.” *Simpson v. United Parcel Service*, ARB No. 06-065, ALJ No. 2005-AIR-31, elec. op. at 5 (ARB Mar. 14, 2008). Merely raising the mantra of “safety” is not “protected activity” under AIR 21. *See Stoneking v. Avbase Aviation*, 2002-AIR-7 (ALJ Mar. 17, 2003)(“[t]he whistleblower statutes do not protect every incidental or superficial suggestion that somehow, in some way, may possibly implicate a safety concern.”). For reasons set forth below, I find that the following actions do or do not constitute protected activity:

A. Alleged statements by Complainant to APD Gilliam and Randy Fusi after his October 12, 2007 check ride

APD Gilliam testified that, after completion of the first check ride, Complainant informed him (APD Gilliam) that he (Complainant) was going to the FAA. Dec. Tr. 739-40. Complainant also testified that he told APD Gilliam that he was going to the FAA. *Id.* at 249. However, Complainant’s later testimony suggests that he first told Randy Fusi, who himself called APD Gilliam. *See id.* at 251-53, 265-67, 297.¹² In either case, however, there is no evidence

¹² Randy Fusi was PSA’s Director of Flight Standards. Dec. Tr. 297-98.

substantiating the contents of these communications; in other words, it is not clear if Complainant alleged a specific safety violation or just generally communicated to APD Gilliam and/or Randy Fusi that he intended to call the FAA.¹³ Therefore, I do not find these alleged communications to constitute protected activity. *See Simpson, supra.*

B. Alleged call by Complainant to FAA Inspector Best on November 7, 2007

Complainant testified that he called FAA Inspector Best on November 7, 2007. Dec. Tr. 287, 290, 319. Specifically, he complained that his first check ride was administered in a manner inconsistent with the practical test standards. *Id.* at 300. However, there is no evidence to corroborate that this phone call occurred or what Complainant said to Inspector Best. Therefore, I find the evidence insufficient to establish that this call occurred and that it constituted protected activity.

C. The November 8, 2007 letter

As stated above, the parties stipulated that Complainant sent a letter to Tom Arline on November 8, 2007, raising issues with the administration of his October 2007 check rides. Dec. Tr. 20; CX-3. Complainant asked that this letter be considered a formal notice of grievance. *Id.* Complainant also sent this letter to FAA officials William Best and Fanny Rivera. CX-3. In the letter, Complainant alleged that he had “performed to FAA PTS Captain standards in both situations.” *Id.* By implication, therefore, Complainant alleged that his check rides had been administered in *violation* of FAA standards, which would impute an issue of air carrier safety. I also find Complainant’s belief to be 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. *See* Dec. Tr. 124; RX-3 at 168. Therefore, as Complainant communicated his concerns to both PSA and the FAA, I find that this communication constitutes an instance of protected activity. *See Weil, supra.*¹⁴

D. The June 3, 2008 FAA hotline complaint

Complainant submitted a complaint to the FAA Safety Hotline on June 3, 2008. CX-12. His complaint included allegations that the APDs did not administer his first and second check rides in accordance with PTS. CX-9. I again find that Complainant’s belief was objectively reasonable, that his complaint implicated an issue of air carrier safety, and that he communicated

¹³ Mr. Dybdal testified that he supervised Mr. Fusi and that it was “highly likely” that Mr. Fusi told him that Complainant threatened to contact the FAA. Dec. Tr. 679-680. However, Mr. Dybdal did not remember informing anyone else about this threat. *Id.* at 681. Additionally, Mr. Dybdal’s testimony does not clarify whether Mr. Fusi knew the specific contents of the complaint. Therefore, my previous finding stands.

¹⁴ I do note, however, that to the extent that this letter alleged national origin discrimination (*i.e.* due to Complainant’s Italian heritage), those complaints are outside the scope of protected activity within the meaning of AIR21. *See* CX-3 at 2 (“There is a suggestion in this process that my performance has not been found satisfactory because I project too ‘foreign’ a persona due to my Italian ethnicity.”).

his concerns to the FAA. Therefore, this complaint also constitutes an instance of protected activity.¹⁵

E. The May 26, 2009 fax from Attorney Hudson to Gary Dybdal

The parties stipulated that Attorney Hudson sent a letter to Gary Dybdal on May 26, 2009. Dec. Tr. 21-22. In his letter, Attorney Hudson argued that Complainant's performance during check ride three *did* meet PTS standards, again suggesting by implication that the APD had failed Complainant in violation of federal standards. CX-14. For the reasons set forth above, I also find this communication to constitute protected activity.¹⁶

3. Whether Respondent Actually or Constructively Knew, or Suspected of, Complainant's Protected Activity

Under the Federal Regulations, "knowledge" is established if "[t]he named person knew of suspected, actively 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 mine). 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, elec. op. 18 (Nov. 19, 2012)(citing *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 166 (D.C. Cir. 1982)).

As noted in Respondent's closing brief, I previously found that Complainant's only actionable claims are those that occurred on or after May 1, 2009. Respondent's closing brief at 15, n. 20 (citing Summary Decision at 6-7).¹⁷ For reasons discussed below, there are thus two possible adverse employment decisions to consider: Complainant's failure of check rides three

¹⁵ Complainant apparently followed up to this hotline complaint and to the FAA's response by letters dated September 9, 2008 and November 12, 2008. CX-10; CX-11. (The FAA responded by letters dated August 1, 2008 and January 6, 2010. RX-44; RX-46.) I consider these communications part of the same instance of protected activity.

¹⁶ Mr. Dybdal testified that Mr. Hudson also called him. Dec. Tr. 657. Meanwhile, Mr. Hudson represented that he had called Mr. Dybdal twice. *See* Mar. Tr. 97 ("I followed up with two phone calls that day and spoke to Mr. Dybdal twice in this context."). I find this phone call or calls to constitute part of the same instance of protected activity.

¹⁷ As explained in my Summary Decision, a "Complainant must file an AIR21 claim '[w]ithin 90 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the Complainant).'" Summary Decision at 6 (internal citations omitted). Therefore, I previously found that Complainant was time barred from complaining about alleged retaliatory events that occurred prior to May 1, 2009, which is 90 days before the filing of the this claim. *Id.*

and four in May 2009 and Complainant's termination, effective June 1, 2009. Therefore, I must evaluate whether the decision-makers in those actions had knowledge of Complainant's protected activity.

A. APD Christner

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. *Id.* 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.

B. APD Harris

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. *Id.* 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.

C. Mark Zweidinger

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. *Id.* 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.¹⁸

i. Did Mr. Zweidinger have *constructive* knowledge of the protected activity?

As noted above, however, a complainant need not prove direct personal knowledge on the part of the decision maker. Therefore, I must establish whether Mr. Zweidinger had constructive knowledge of Complainant's protected activity. As such, I will now address whether other key members of PSA management knew of Complainant's protected activity.

a. Joseph Rose

Mr. Rose was Director of Operations at PSA Airlines during the relevant time period. CX-33 at 9-10. He was deposed for discovery purposes, and this deposition was admitted into evidence, as he did not testify during the hearing. Mar. Tr. 87. Mr. Rose testified that he had no knowledge of any complaints that Complainant made to the FAA. CX-33 at 12; *see also id.* at 42 ("I know nothing about complaints to the FAA, and this is the absolute first time I've heard about any complaint to OSHA"). Mr. Rose was "sure [he] was briefed on some of the basics of what happened [with Complainant's check rides]." *Id.* at 21; *see also id.* at 18 ("I was probably briefed on both [check ride failures]. Anytime a pilot had trouble in training the upper management was briefed."). Mr. Rose also agreed that he probably would have been aware "if there were a big complaint from a pilot and he brought the FAA in to investigate." *Id.* at 19-20.

In his closing brief, Complainant suggests that Mr. Rose knew about Complainant's protected activity in part because he was copied on a letter from Captain John Prater, President of the Air Line Pilots Associate (ALPA), dated November 16, 2007, which addressed Complainant's ALPA grievance. Complainant's closing brief at 14-15 (citing CX-6). Addressing this issue, I first note that CX-6 was marked for identification during the hearing, but

¹⁸ Mr. Zweidinger did confer with Mr. Dybdal, Mr. Rose, and APD Harris before he terminated Complainant. Mar. Tr. 70-71; *see also* CX-33 at 51.

it was never actually admitted into evidence. *See* Dec. Tr. 538. Additionally, even if it had been admitted into evidence, this letter names Complainant as the grievant, but it does not refer specifically to the October 12, 2007 check ride, or to APD Gilliam. CX-6. Therefore, I disagree with Complainant's allegation that Mr. Rose's statement during the deposition that "he did not receive notice of specific complaints regarding [Complainant's] October 2007 check ride with Jeff Gilliam" was "a direct and wholesale fabrication based on the November 16, 2007 Prater/ALPA letter showing a carbon copy to him." Complainant's closing brief at 15 (citing CX-33 at 47). At most, Mr. Rose knew that 1) Complainant had alleged that "check rides provided to [him] during his upgrade training were not consistent with applicable [federal regulations]", among other problems and 2) after Grievance Review Committee heard Complainant's grievance, Human Resources denied it. CX-6 at 2.¹⁹

b. Gary Dybdal

It is not entirely clear from the record what Mr. Dybdal knew about Complainant's protected activities and when he obtained this knowledge. For example, as previously addressed, Mr. Dybdal testified that it was "highly likely" that Mr. Fusi told him about Complainant's threat to go to the FAA. *See* n. 13, *supra*. However, as explained above, it is not clear that Mr. Fusi *himself* knew the specific contents of the complaint, *i.e.* that Complainant was alleging a safety violation within the meaning of the Act. Therefore, Mr. Dybdal did not necessarily learn that information from Mr. Fusi. Furthermore, when asked when he first learned that Complainant *had* in fact complained to the FAA about his first check ride, Mr. Dybdal testified that he wasn't aware of such complaints. Dec. Tr. 641. This statement is not necessarily inconsistent with his prior statement; he may have learned that Complainant had *threatened* to go to the FAA but never learned whether or not Complainant followed through on this threat. This explanation is not unbelievable considering his later testimony that such complaints frequently occur, and they are thus unremarkable. *See* Dec. Tr. 645-46.

That being said, however, Mr. Dybdal's later testimony on this subject is vague and somewhat inconsistent. When later asked when he was "first made aware of [Complainant's] complaints about his check ride and his complaints to the FAA", Mr. Dybdal responded that "[t]here was—internally we knew that—I mean, when we have a check ride problem, manager of flight standards, who directly supervises the check airmen, will let me know. And I had also received a telephone call from [Complainant's] attorney." *Id.* at 655. Furthermore, he could not provide an actual date when he "learned from [his] staff that [Complainant] was going to be complaining to the FAA. *Id.* at 655-56. Mr. Dybdal similarly testified that he did not know when he received the May 26 letter from Mr. Hudson, although he believed it was after May 26. *Id.* at 662-63.²⁰ Considering the vagueness and inconsistencies in Mr. Dybdal's answers, and further considering that he ultimately did learn about the complaints internally and from Mr. Hudson, I

¹⁹ Of course, knowledge of the ALPA letter is not inconsistent with Mr. Rose's testimony that he knew nothing about FAA complaints or a complaint to OSHA.

²⁰ Mr. Dybdal agreed that it was possible that he didn't read the letter until after Complainant's May 27 training. Dec. Tr. 662-63. He also testified that he would not necessarily have been informed if the FAA contacted the APDs directly. *See* Dec. Tr. 658-59. I find this element of his testimony credible, but this fact doesn't negate Mr. Dybdal's other independent knowledge.

find that Mr. Dybdal did know at some point about at least some of Complainant's protected activity, including about the communication from Mr. Hudson.²¹

* * *

Considering my findings in subsection (i) above, 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).²² Therefore, I find that Complainant has established this element of his prima facie claim.

4. Whether Complainant Suffered an Unfavorable Personnel Action ("Adverse Action")

AIR 21 prohibits "discrimination" against an employee with respect to the employee's "compensation, terms, conditions, or privileges of employment." *See Williams v. American Airlines, Inc.*, ARB No. 09-018, 2007-AIR-004, slip op. at 7 (ARB Dec. 29, 2010)(citing 49 U.S.C. § 42121(a)). The implementing regulations further prohibit efforts to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has engaged in protected activity. *Id.* (discussing 29 C.F.R § 1979.102(b)). In *Williams*, the ARB found "the list of prohibited activities in Section 1979.102(b) [to be] quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference to potential discipline." *Id.* at 10. In that case, the Board further clarified "that the term 'adverse actions' refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *Id.* at 15. In the present case, there is no dispute that PSA terminated Complainant's employment effective June 1, 2009. Neither party disputes that this action constitutes an "adverse action" within the meaning of the Act. *See also Williams* at n. 75 (finding some actions, such as terminations, to be "per se" adverse). Therefore, I find that Complainant's termination was an adverse action.

²¹ Oddly, when I asked Complainant's counsel if he could show that either Mr. Rose or Mr. Dybdal knew about the FAA complaint, Mr. Hudson responded, "Well, the effort, of course, is to show that he couldn't help but know about it, but, no, not directly, not that we have." Mar. Tr. 75. Meanwhile, PSA's attorney conceded that Mr. Dybdal "certainly knew about [the protected activity]" but questioned when he received Attorney Hudson's letter. Dec. Tr. 263.

²² I do not find that Mr. Zweidinger constructively knew about the November 16, 2007 grievance letter, even if Mr. Rose and Mr. Keuscher (Mr. Zweidinger's predecessor) were copied on it. *See* Mar. Tr. 49 (explaining that this grievance had "long run its course" by the time Mr. Zweidinger assumed his position at PSA). Complainant also argues that "PSA knew or should have known why someone of Ms. Tom's position was coming to Charlotte to sit in on a requalification ride for a First Officer. This was another quite strong indication that PSA had actual and constructive knowledge of this pilot's complaint to the FAA about this check rides in October 2007." Complainant's closing brief at 17. I disagree, considering the ample evidence in the record that the presence of FAA officials in the simulator is not remarkable. *See e.g.*, Mar. Tr. 38-39.

However, I must also determine if check rides three and four were adverse actions as well because failure to upgrade to captain on two occasions leads to automatic discharge.

A. Were check rides three and four adverse employment actions?

As previously explained, PSA employees are aware that, if they fail two upgrade attempts, they will be terminated or permitted to resign in lieu of termination, pursuant to the company's collective bargaining agreement. Dec. Tr. 1004-05 (discussing RX-15); *see also* Mar. Tr. 11-13, 33-34, 119-20. Therefore, if check rides three and four were administered unfairly, these improperly-executed tests could arguably be considered adverse actions, because their failure would necessarily lead to termination. Therefore, the May 2009 check rides, which fall within the permissible timeframe, could themselves constitute adverse actions. As such, I must determine if check rides three and four were administered fairly.²³ I note that—as I explained during the hearing—I am “not in a position to determine whether [Complainant] should have passed the check ride[s] or if he should have failed the check ride[s].” Dec. Tr. 966. However, as the finder-of-fact, I *am* in the position to weigh the testimony of the witnesses and to render credibility determinations, tasks that are in fact required of me. *See e.g., Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 856 (1982)(“Determining the weight and credibility of the evidence is the special province of the trier of fact.”); *Bartlik v. Tennessee Valley Authority*, 1988-ERA-15 (Sec’y Dec 6, 1991)(Remand Order requiring the ALJ to “make specific credibility findings on the testimony of the witnesses or describe the weight given to particular testimony and exhibits which support the ALJ’s inferences and conclusions”).

i. Complainant’s May 16, 2009 check ride (check ride three)

Complainant underwent his third 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 Connolly (ALPA representative), and Silvin Blackstock (Complainant’s partner for simulator training).²⁴ 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. 485-88.²⁵ He thus argues that he flew check ride three “well and properly to the extent that he passed [it].” Complainant’s closing brief at 31.²⁶ Respondent, on

²³ In so doing, I keep in mind two related, but not identical, inquiries: 1) Were the tests administered fairly, *i.e.* in compliance with the Practical Test Standards (PTS) and other governing federal regulations? and 2) Did the APDs properly fail Complainant, *i.e.* were the tests scored correctly and/or terminated at the appropriate time?

²⁴ Mr. Blackstock served as the First Officer during Complainant’s third check ride, and he was also an upgrade candidate himself. Dec. Tr. 143.

²⁵ Complainant does not allege that he was not given a pre-flight briefing, as required by the federal regulations. *See* Dec. Tr. 70 (pre-flight briefing is mandatory under the federal regulations); *id.* at 307 (Complainant agreeing that APD Christner gave him a standard briefing on check ride three).

²⁶ Among other concerns, Complainant takes issue with the administration of the stall series evaluation. Specifically, Complainant argues:

the other hand, argues that there is “no proof that [Complainant] performed that preflight procedures, steep turns or landing stalls properly” during this check ride. Respondent’s closing brief at 20; *see also* Dec. Tr. 798-800 (testimony of APD Christner outlining errors during the pre-flight procedures); *id.* at 806-11 (testimony of APD Christner outlining errors with stall series and steep turns). As explained above, I can only resolve this dispute by addressing the testimony of the other witnesses.²⁷

a. Testimony of FAA Inspector Sain²⁸

Inspector Sain testified that he was present during the third check ride because he was instructed to observe the APD. Dec. Tr. 334-35. After the check ride, he wrote a report in the FAA records system. *Id.* at 338-39. He also wrote an email to the principal operations inspector of PSA documenting his observations of the check ride. *Id.* at 339. Based on his observations of the check ride, Inspector Sain concluded the APD seemed rushed and should have given a little more latitude for Complainant to ascertain what was taking place. *Id.* at 352. He also believed that Complainant should have been given more latitude on his approach. *Id.* at 353. However, he qualified this statement by explaining, “But, then again, I am not the [principal operations inspector] for PSA, and I don’t have their pilot training record on how they conduct their training. So, if that’s a task that the APD[s] and PSA as a company have decided that’s the best way to test an applicant, then that’s outside of my field.” *Id.* at 353-54. Inspector Sain believed that “the fact that we had two first officers taking the check . . . was already something that was out of the norm.” *Id.* at 365. He did not believe that the APD should have cut the test off after the localizer approach. *Id.* at 367-68. However, he also “did not [previously] realize that [Complainant] had made two errors prior to his failing with this localizer approach.” *Id.* at 366.

On cross-examination, Inspector Sain agreed he could only see part of the captain’s instruments from where he was sitting. *Id.* at 375. He could not see the airspeed indicator or altimeter; therefore, he couldn’t judge whether Complainant had performed the steep turns or stalls properly. *Id.* at 375-76. He again clarified that his purpose for being in the simulator was to observe the APD; therefore, his opinion “had nothing to do with the applicant’s performance

Steep turns and stalls, as it happens, are normally the first maneuvers attempted by the candidate on the [check ride]. The fact that these were ostensibly adjudged slightly outside tolerances (plus or minus 100’ in the case of an ATP rating as here) but the candidate . . . was only advised of their alleged failure after the ride had been terminated, is yet another in the litany of failures to follow FAA PTS or FAA FSIMS mandatory guidance in the conduct of the rides by PSA. The proper methodology would have been to notify [Complainant] that his turns and stalls were outside normal tolerances and that he could continue at his own option or not per FSIMS and PTS requirements, [which was not done in this case].

Complainant’s closing brief at 22 (internal citations omitted)(emphasis in original).

²⁷ I summarize only the testimony relevant to check ride three at this juncture; relevant testimony regarding check ride four will be summarized and discussed below.

²⁸ I note that federal regulations apparently prevent FAA inspectors from rendering opinion testimony in certain proceedings; however, I permitted the testimony of Inspector Sain to the extent he could serve as a fact witness, noting that this rule was between Inspector Sain and his department. *See* Dec. Tr. 332-33.

so much as the APD's." *Id.* at 384. Ultimately, he did not disagree with APD Christner's decision to issue the Notice of Disapproval. *Id.* at 384-85. Furthermore, when I asked Inspector Sain to clarify if APD Christner had complied with PTS, Inspector Sain responded that the only issue he had observed was that PSA had applicants sign a disclaimer statement before they were evaluated; however, he qualified that he doesn't know anything about PSA forms. *Id.* at 385-86.²⁹

b. Stipulated Testimony of ALPA Rep Joseph Connelly

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

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 [Complainant] has 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 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 [Complainant] to perform. Captain Connelly agreed with Captain Christner's assessment that [Complainant] had failed the type ride. . . . Captain Connelly reported back to Captain Stanley at ALPA that the type ride was administered fairly.

Dec. Tr. 980-81.

c. Testimony of Silvin Blackstock

Mr. Blackstock testified that APD Christner changed the order of upgrade candidates at the last minute, instructing Complainant to fly first although Mr. Blackstock had prepared to do so. Dec. Tr. 144-46; *see also* 161-63. His impression was that Complainant "was being hunted and being targeted." *Id.* at 147; *see also* 161-64. Additionally, Mr. Blackstock testified that APD Christner instructed him not to help Complainant during the check ride. *Id.* at 147-48. He did not observe Complainant "making any inappropriate or any errors through the course of that check ride that gave [him] concern." *Id.* at 150; *see also id.* at 154-55. On cross-examination, Mr. Blackstock was unable to recall many specifics about the check ride. *Id.* at 167-69.

d. Testimony of David Anderson

Mr. Anderson was not present in the simulator during check ride three, but he was qualified as an expert at trial, and he testified on behalf of the Complainant. Dec. Tr. 36. He

²⁹ I also note that Inspector Sian believes that "even though [a captain upgrade is] covered, it follows the PTS, there is no PTS for captain upgrade." Dec. Tr. 388; *see also id.* at 389-90. This belief is inconsistent with the other evidence of record. *See p. 4, supra.*

noted that APD Christner's Notice of Disapproval was not provided within the requisite seven days, and that Inspector Sain had found check ride three to have been unfair. *Id.* at 78-80. He also suggested that the presence of FAA inspectors on check rides three and four would have negatively impacted the candidate. *Id.* at 86. However, he nevertheless opined that check ride "[n]umber three was conducted . . . in accordance with the practical test standards." *Id.* at 80.

e. Testimony of Mark Zweidinger

Mr. Zweidinger was not present in the simulator during check ride three; however, Complainant's counsel asked Mr. Zweidinger what weight he would give the testimony of an FAA inspector who *was* present during the check ride. Mar. Tr. 41. Mr. Zweidinger explained that the observations of such a person "may not carry a lot of weight . . . unless that inspector is . . . familiar with our programs and intimately familiar with our checklist procedures or standardization procedures and so on and so forth . . ." *Id.* at 41-42. He opined "that an inspector that comes into our simulators during the course of a checking or qualification event that is not intimately familiar with our standards, our procedures, our checklist operations, and so on is not going to be qualified to make a determination to the level my APDs are." *Id.* at 43. "There is a difference between the evaluation of an APD and the evaluation of a candidate." *Id.* at 44. Specifically, the evaluation of an APD concerns his "adherence to the test standards guide [and] the methodology by which [he] is administrating the check ride [which] doesn't go to whether the candidate is satisfactorily completing the task." *Id.*³⁰

* * *

Considering the evidence at (i)(a)-(e) above, I find that Complainant cannot establish that check ride three was unfair. At first blush, the testimony of Inspector Sain appears to be entitled to significant weight; he is presumably an impartial witness, and he possesses significant flying experience. *See* Dec. Tr. 330-32. As explained above, Inspector Sain initially testified that he believed check ride three to have been administered unfairly. However, Inspector Sain qualified this conclusion to the extent whereby it cannot in fact support Complainant's position. Firstly, as I previously detailed, Inspector Sain testified he was present during the third check ride because he was instructed to observe the APD, not the upgrade candidate. Therefore, his report was written for the purpose of *educating the APD*, not for evaluating the candidate's performance. Additionally, as Inspector Sain himself pointed out, he was unfamiliar with PSA's training program and was not in a position to comment on its procedures.³¹ This limitation was further

³⁰ Mr. Zweidinger elaborated:

Again, you know, everybody is entitled to their opinion, but Mr. Sain is not on a certificate, he's not qualified under this program, he does not fly the CL65, from what I recall. He has no familiarity with the equipment, procedures, standardization process, checklist procedures, or otherwise. So he is, at the end of the day . . . it's an opinion, but I'm going to defer to the opinion of an APD who is qualified under our certificate and under the auspices of our certificate holding office.

Mar. Tr. 116.

³¹ Respondent illustrates this point as follows:

underscored by Mr. Zweidinger, who testified that because Inspector Sain was not familiar with PSA's policies and procedures, he was not qualified to make any conclusions about the fairness of the check ride. Furthermore, as Respondent has pointed out, "Inspector Sain has never overseen PSA's training department, nor had he ever observed any other check ride at PSA." Respondent's closing brief at 21, n. 28 (citing Dec. Tr. 372-73, 383).

Mr. Sain's ability to evaluate Complainant's technical abilities was also limited; he agreed on cross-examination that he couldn't actually see some of the instruments. Thus, he couldn't judge whether Complainant had performed the steep turns or stalls properly. Tellingly, Inspector Sain did not disagree with APD Christner's decision to issue the Notice of Disapproval, and he ultimately testified that the check ride was administered in general compliance with PTS. Therefore, even if I give significant weight to this opinion, it does not actually support Complainant's contention that check ride three was administered improperly and that he should have passed it; in fact, Inspector Sain's testimony supports the opposite conclusion. This conclusion is further supported by the opinion of Captain Connelly, who agreed that check ride three was administered fairly and that APD Christner properly failed Complainant. I give substantial weight to this stipulated testimony, as Captain Connelly was investigating on behalf of ALPA, the pilot's union, whose presumed purpose is to protect the interest of its pilots, and who was present at Complainant's own request. Dec. Tr. 498; *see also* Mar. Tr. 38. Mr. Anderson, Complainant's *own* witness, also agreed that check ride three was performed in accordance with PTS.³²

The only remaining testimony, therefore, is that of Mr. Blackstock. As Respondent has observed, Mr. Blackstock's testimony was very detailed during direct examination; however, he

For example, one issue Inspector Sain expressed concern over in his report was that PSA uses upgrade candidates as acting first officers during upgrade check rides. However, Mr. Dybdal testified that PSA typically conducts its upgrade training by pairing upgrade candidates. Accordingly, it was not unusual for [Complainant] to be paired with Mr. Blackstock during the May 16 check ride.

Respondent's closing brief at 21, n. 28 (internal citations omitted).

³² Complainant argues that the opinion of Mr. Anderson should be given significant weight because, "although Mr. Anderson was not type-qualified to examine a candidate in PSA's CL-65 plane . . . the examination process is governed by a set of rules and regulations codified in the FAA PTS [and FSIMS]. Although the type of airplane is different, the process is identical." Complaint's closing brief at 25-26. I agree that Mr. Anderson is generally qualified to render an opinion in this case. *See* CX-30. However, as stated above, his specific statements are in fact unfavorable, or at least unhelpful, to Complainant. Additionally, although Mr. Anderson did note that APD Christner issued the amended Notice of Disapproval after the seven day window, he apparently did not find this failure to rise to the level of a PTS violation. Finally, to the extent that Mr. Anderson generally suggested that presence of FAA personnel in the simulator was problematic, I give significant consideration to the observation of Mr. Zweidinger:

Sir, if you can't get used to the fact that after having spent thousands of hours in a cockpit that you're going to have observers in your cockpit often, including the FAA . . . possibly representatives of the government or the NTSB, company officials, and check airmen, and that bothers you to the extent you can't perform, you don't belong in the cockpit.

Mar. Tr. 114; *see also* Dec. Tr. 639.

could not recall many of the details about which opposing counsel asked on cross-examination. See Respondent's closing brief at 20, n. 27 (citing Dec. Tr. 167-68). I agree with this characterization of Mr. Blackstock's testimony, and I also agree with Respondent that this incongruity casts doubt on Mr. Blackstock's direct examination testimony. Additionally, I agree 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 *id.* (citing Dec. Tr. 165-66).³³ 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.³⁴ 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.

Finally, in evaluating the testimony with respect to check ride three, I must specifically address the circumstances under which APD Christner changed Complainant's Notice of Disapproval. When asked why he issued a revised Notice, APD Christner explained that he "did not put down any incomplete items on [the first form], like [he] should have." Dec. Tr. 821. "When [he] was notified of the problem, [he] talked to [his] instructor supervisor and told him what [he] had done." *Id.* He was then instructed to call the FAA, and Ellen Tom told him to reissue another Notice of Disapproval to correct his mistake. *Id.* at 821-22. He agreed that the difference between the two forms is that, on the latter, he included "the incomplete items that [they] did not check that [he] did not put on the first one." *Id.* at 823. He clarified that there were no additional unsatisfactory items on the revised Notice, only incomplete ones. *Id.* He also explained that he put the date 5/16/09 on the revised Notice because one is required to fill in the date on which the examination took place. *Id.*

In his closing brief, Complainant argues that:

Christner's story doesn't wash: did he draw the new [Notice of Disapproval] at Ellen Tom's request, because he had neglected to show the incomplete items 12 days later and his supervisor had asked him to call Ms. Tom to decide how to handle it, as he testified at [during the December hearing]? Or was the truth closer to the 2010 NTSB hearing explanation that his supervisor simply told him to include the incomplete items and there was no mention whatsoever of asking the FAA or Ellen Tom? Or did he add the alleged incomplete areas because Attorney

³³ Respondent also argues that I should not credit the testimony of Mr. Blackstock because, like Complainant, he also failed his second upgrade attempt and was terminated. Respondent's closing brief at 20, n. 27 (citing Dec. Tr. 170-72). "Thus, Mr. Blackstock is not an impartial witness and has every reason to misrepresent the truth." *Id.* Whether or not Mr. Blackstock is in fact a biased witness is a determination that I need not make, as I discredit his opinion on other grounds. However, the fact that he could not pass his upgrade tests further suggests that he lacks certain technical knowledge, making it difficult for him to assess Complainant's performance.

³⁴ For example, Mr. Blackstock was perturbed that APD Christner changed the order in which he and Complainant flew. However, APD Christner gave uncontradicted testimony that Mr. Sain requested the change in order. Dec. Tr. 816-17. Therefore, Mr. Blackstock's impression that this change was part of some kind of conspiracy to prevent Complainant from passing his check ride is unfounded.

Hudson had asked in his letter for specificity on behalf of [Complainant] in prepping for his fourth and final ride on May 26 and the PSA Training Department was feeling pressure?

Complainant's closing brief at 21 (internal citations omitted).

Having reviewed the evidence, I find that Complainant has not established that APD Christner acted improperly with respect to the revised Notice of Disapproval. Firstly, I agree with APD Christner's testimony that only change he made was including the incomplete items. *See* CX-13. Both Mr. Anderson and Mr. Zweidinger testified that it is not unusual to revise such forms, and this testimony has not been contradicted. *See* Dec. Tr. 73-74, 132; Mar. Tr. 103-04. Furthermore, the FAA also found that APD Christner had handled the Notice of Disapproval revision properly. *See* CX-20.³⁵

In addition to the above, Complainant argues the following:

In late 2012, PSA provided [Complainant] and his attorney a letter purportedly written to PSA's Gary Dybdal by PSA Captain/APD Christner. The letter was not dated or signed. It purported to list the reasons for [Complainant's] failure to pass the May 16, 2009 check ride. That letter was never provided to [Complainant] or his attorney until right before the hearing in December, 2012. It was never provided in 2010 in conjunction with the NTSB hearing; it was never provided in discovery in this AIR case. If this letter had been written contemporaneous with the May 16, 2009 check ride, why was there a need to issue an amended *Notice of Disapproval*? If this letter had been generated on or

³⁵ Finally, having reviewed the NTSB transcript, I do not find any explicitly contradictory testimony by APD Christner, as Complainant seems to imply exists. Specifically, the following exchange occurred during the NTSB hearing:

Q: Okay. Mr. Christner . . . there's a second Notice of Disapproval below the first, and it has the same date. Is there a reason why that particular notice was amended or done again after this check ride that you administered?

A: Yes.

Q: Why is that?

A: Because I forgot to include the items that were not completed during the test when I initially issued the pink slip.

Q: It was merely a question of you remembering to include incomplete items?

A: No, I did not remember. I was told.

Q: And who told you?

A: Jeremy Swisegood, the instructor that gave [Complainant] his retraining told me.

RX-35 at 518-19. I agree that APD Christner did not further explain that, based on this conversation, he then called Ellen Tom. However, there is nothing *inconsistent* between the two statements; in both, APD Christner testified that the supervisor brought the issue to his attention, and he revised the Notice as a result. *See also* Dec. Tr. 834 (clarifying that instructor Jeremy Swisegood caught the error). Furthermore, during both the NTSB hearing and my hearing, APD Christner explicitly testified that the change was *not* in response to any communication with Gary Dybdal, the recipient of Attorney Hudson's letter. RX-35 at 520; Dec. Tr. 834. Therefore, Complainant's suggestion that APD Christner changed his story is unfounded.

around May 16, 2009, it would have been easy for PSA to provide it to [Complainant] or his attorney in response to Mr. Hudson's May 26, 2009 letter to PSA.

PSA also did not provide a copy of the 'amended' *Notice of Disapproval* to [Complainant's] attorney. Even after a request by the attorney, PSA refused to postpone the last check ride to allow [Complainant] additional time to study for all the items that were raised in that amended *Notice*. The only rational explanation for this behavior is that PSA was out to punish [him] for 'opening up his big mouth' to the FAA

Complainant's closing brief at 23-24 (apparently addressing RX-24).³⁶ I give little weight to this argument for several reasons. Firstly, APD Christner himself testified that he wrote this letter a month or two after the check ride, not contemporaneously with the May 16 check ride. Dec. Tr. 795-96. Therefore, this letter would not have been available to provide to Mr. Hudson on May 26. Additionally, whether or not APD Christner communicated with Mr. Dybdal about the check ride would not have obviated the need for him to submit a revised Notice of Disapproval to the FAA, as required. Therefore, these concerns are without merit, and I do not find the weight of the evidence to establish either that APD Christner followed improper procedures during the third check ride, or that he improperly failed Complainant.

ii. Complainant's May 29, 2009 check ride (check ride four)³⁷

Complainant underwent his fourth and final upgrade attempt (check ride four) on May 29, 2009. Dec. Tr. 22.³⁸ 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. 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, specifically "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. Complainant also argues that he received no credit for the maneuvers he performed correctly on check ride three, contrary to FSIMS. Complainant's closing brief at 24 (citing RX-3 at 171).³⁹ For reasons explained above, I can

³⁶ At a certain point in the proceedings, I asked Complainant to resubmit CX-31 and CX-32 to the Court. Complainant's counsel apparently submitted another copy of RX-24 as C-31; however, CX-31 refers to another document.

³⁷ As previously explained, I do not give preclusive effect to the findings made by the NTSB regarding Complainant's fourth check ride. *See* n. 11, *supra*.

³⁸ Complainant concedes that he received a standard pre-flight briefing before this check ride. Dec. Tr. 418.

³⁹ APD Harris himself testified that he was "not sure" whether Complainant would have been entitled to credit for items that he completed successfully on his prior check ride. Dec. Tr. 940-41. However, Mr. Dybdal explained that "[i]f [the] examiner suspects that there are other issues going on that may jeopardize the type certificate, he has the option to perform the entire check ride over again." *Id.* at 616. Therefore, APD Harris was not compelled to give credit to Complainant for maneuvers that he performed correctly on May 16.

only weigh the testimony of the witnesses to determine if this check ride was administered fairly and whether Complainant's failure was proper.

a. Stipulated Testimony of ALPA Rep Joseph Connelly

The parties stipulated that if called to testify, Captain Connelly, would have further testified that:

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 [Complainant] to perform. Captain Connelly agreed with Captain Harris's assessment that [Complainant] had failed the type ride. Captain Connelly also observed the debrief after the May 29, 2009 type ride. . . . Captain Connelly again reported back to Captain Stanley at ALPA that the May 29, 2009 type ride was administered fairly.

Dec. Tr. 981-82.

b. Testimony of FAA Inspector Best

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").

c. Testimony of David Anderson

Mr. Anderson, Complainant's own expert witness, stated that check ride four was "conducted in accordance with the practical tests standards." Dec. Tr. 82. However, he expressed some concern that, as far as he understood, "there were four separate representatives of the FAA [in] the simulator." *Id.*⁴⁰ "It has been [his] experience [that] when an FAA inspector shows up to observe a check ride that it does have an impact on the applicant and everybody concerned." *Id.* at 86.

⁴⁰ Mr. Anderson testified that Complainant recorded check ride four, and that he had reached certain conclusions based on the transcript of those recordings. Dec. Tr. 83-84. However, as I previously found the transcript of the recordings to be inadmissible, I do not consider this testimony. *See id.* at 956-64.

Considering the evidence at subsection (ii)(a)-(c) above, I find that Complainant cannot establish that check ride four was administered unfairly. To the contrary, the FAA Inspector, his own ALPA rep, and his own expert witness reached the opposite conclusion. Additionally, even if Mr. Anderson was correct that the presence of the FAA officials on the ride had a negative impact on Complainant's performance, I cannot say that their presence prejudiced the test in any way. Rather, I again underscore Mr. Zweidinger's testimony that the ability to perform under stressful conditions is a necessary skill for a pilot. *See* n. 32, *supra*. Finally, Complainant himself does not specifically argue that he should have passed this test, in contrast with check rides one and three. *See* Complainant's closing brief at 31. Therefore, no evidence supports a finding that check ride four was administered improperly or that Complainant should not have failed.⁴¹

In so finding, I also note Complainant's implicit concern that APD Christner provided Complainant with the amended Notice of Disapproval for the third check ride right before his final check ride, and that PSA refused to postpone this check ride in order to give Complainant more time to prepare. I agree that such a postponement would have been considerate on the part of PSA; however, Complainant's earlier receipt of the amended Notice of Disapproval would not have necessarily positioned him more favorably, as the only change was the inclusion of incomplete items, *i.e.* items that were not tested. *See* Dec. Tr. 823. Additionally, as explained previously, the APD administering the final check ride was not obligated to give him credit for previously-completed items; therefore, Complainant should have been prepared to be retested on any item during check ride four.

Finally, because I have not found the weight of the evidence to establish that either check ride three or check ride four was administered unfairly, or that Complainant should not have failed, these tests cannot constitute adverse actions within the meaning of the Act, as there was no inherent "reference to potential discipline." *See Williams* at 11. Additionally, if administered in a neutral manner, then these check rides could not have been "act[s] of deliberate retaliation." *Id.* In other words, although Complainant's failure triggered his ultimate termination, this failure was not an inherent result of the upgrade tests themselves. The only adverse action in this case is therefore the June 1, 2009 termination.⁴²

⁴¹ Complainant's sole remaining argument is that Complainant's fourth check ride began at 10 am on May 29, 2009, and that Ellen Tom informed Complainant—by letter dated that same day (May 29)—that he needed to undergo a 44709 reexamination. Complainant's closing brief at 25. Complainant argues that this is a suspiciously fast turnaround, because it takes approximately five days for a Notice of Disapproval to arrive at the FAA office. *Id.* Complainant concludes that "[t]here can be no other explanation for this amazing 'efficiency' except to show that PSA and the FAA Cincinnati [office] were working hand in hand to ensure that [Complainant] did not advance to Captain." *Id.* I agree that this timing could appear suspicious, but Complainant has not proffered any concrete evidence to support his theory. Furthermore, there is no reason that Ms. Tom had to wait for the formal Notice of Disapproval to send out her letter, and there are many ways she could have been informed instantly of Complainant's failure as soon as the check ride ended (phone, email, *etc.*). *See generally* Dec. Tr. 636 (establishing that the airline must inform the FAA of a check ride failure); *id.* at 745-46 (establishing that an upgrade check ride takes no more than 2.5 hours). Therefore, this allegation is unsubstantiated.

⁴² I do not evaluate the fairness of check rides one and two for two reasons. Firstly, even if these tests were administered improperly, they fall outside of the time bar in this case. *See* n. 17, *supra*. Additionally, these rides cannot show a pattern of improper check ride administration, as I have found check rides three and four to have been administered fairly. *See generally* Mar. Tr. 68-69.

5. Whether Complainant’s Activity was a Contributing Factor in the Unfavorable Personnel Action

A complainant “bears the burden of establishing by a preponderance of the evidence that protected activity was a contributing factor in [the] adverse action. He need not provide direct proof of discriminatory intent but may instead satisfy his burden of proof through circumstantial evidence of discriminatory intent, [where] no so-called smoking gun or direct evidence of discriminatory intent exists.” *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-28, slip op. at 12 (ARB Nov. 30, 2006). As the Administrative Review Board explained in *Barber v. Planet Airways, Inc.*:

[W]hile a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive. For example, inferring a causal relationship between the protected activity and the adverse action is not logical when the two are separated by an intervening event that *independently* could have caused the adverse action. Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee’s burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action.

Barber v. Planet Airways, Inc., ARB No. 04-056, ALJ No. 2002-AIR-19, slip op. at 6-7 (ARB Apr. 28, 2006)(internal citations omitted); *see also Clark* at 12-13.⁴³

A. Intervening act

In the present case, I have found the only actionable adverse action to be Complainant’s June 1, 2009 termination. Because I have determined that the letter from Mr. Hudson to Mr. Dybdal constitutes protected activity, there is temporal proximity between at least that instance of protected activity and the adverse action. As explained above, I have also found that Mr. Zweidinger constructively knew about this protected activity. However, 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*.⁴⁴ Therefore, Complainant’s May 29, 2009 check ride failure—which I previously found to be fair—was an

⁴³ “Retaliatory motive may be inferred when an adverse action closely follows protected activity. An inference of discrimination, *i.e.*, the protected activity contributed to the adverse action, is less likely to arise as the time between the adverse action and the protected activity increases. But if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised.” *Clark* at 12-13.

⁴⁴ 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*.

intervening act that severs the inference of retaliation. Furthermore, given Mr. Zweidinger's extensive experience and credibility, I give significant weight to testimony that, even if he had known about *any* of Complainant's protected activities, this knowledge would have had no bearing on his decision to terminate Complainant's employment. *See, e.g.* Mar. Tr. 28-29.⁴⁵

B. Animus on the part of PSA

Complainant's allegation of general animus on the part of PSA also does not support a finding that his protected activity contributed to his termination. Specifically, Complainant notes that, during the NTSB hearing, Mr. Collins testified that, after speaking with Mr. Rose, his general impression was that PSA was "out to get" Complainant. *See* Complainant's closing brief at 16. During the hearing, I ruled that this testimony constituted double hearsay, and was thus inadmissible. Mar. Tr. 83 ("It may be an admission against interest if it was a statement by Mr. Collins, but you can't have double hearsay here dealing with Rose talking to Collins, talking to that proceeding, and then now reading it into this record."). Additionally, even if the statement were otherwise admissible, it only establishes Mr. Collins's *perception* of how Mr. Rose felt. Furthermore, this statement is vague; Mr. Collins did not testify that PSA was targeting Complainant for specific reasons, *i.e.* for engaging in protected activity. Therefore, this statement is of no legal value.

Complainant also notes that "PSA Line Captain Chris Salistine stated directly to Blackstock that PSA 'didn't like [Complainant] and want[ed] to get rid of him.'" Complainant's closing brief at 11 (citing Dec. Tr. 159-60). However, even if this statement were admissible, it is completely irrelevant to the question of whether Complainant's protected activity contributed to his termination, as Captain Salistine was a line captain who had nothing to do with the administration of Complainant's check rides or with his termination. *See* Dec. Tr. 157-60. In addition, Complainant states that "Behzad Rajabi overheard APD Harris, APD Gilliam and other PSA pilots" making derogatory statements about Complainant. Complainant's closing brief at 11-12. Putting aside the question of hearsay, I find the involvement of APD Harris in this conversation to be of some concern; in the worst case, it indicates some level of animus on his

⁴⁵ Specifically, 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).

part. However, I specifically questioned APD Harris about this issue, and I find his testimony that he harbored no ill will toward Complainant when he performed the check rides to be credible. *See* Dec. Tr. 929. I also note that the alleged statements repeated by Mr. Rajabi occurred more than a year before the final check ride, minimizing their significance. *See* Dec. Tr. 176. Therefore, I find this testimony insufficient to establish any relevant animus on the part of APD Harris.⁴⁶ Finally, I underscore that, even if PSA did have animus toward Complainant, the relevant legal question is whether his protected activity contributed to his termination, not whether the company otherwise decided to terminate him for improper reasons. Therefore, even a finding of animus would not support Complainant's prima facie claim.

CONCLUSION

I find that Complainant engaged in protected activity within the meaning of the AIR21 Act; however, he cannot establish by a preponderance of the evidence that his protected activity was a contributing factor in his termination, the relevant adverse action in this case. Therefore, as Complainant has not established every element of a prima facie case, his claim for benefits must be denied, and I need not address whether Respondent has shown by clear and convincing evidence that it would have fired him absent his protected activity.

ORDER

The claim of Claudio Occhione for relief under AIR21 is hereby **DENIED**.

MICHAEL P. LESNIAK
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. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the

⁴⁶ APD Christner also testified that he had no opinion of Complainant before the third check ride and that he harbored no ill will toward him. *See* Dec. Tr. 826-27, 873-75. Complainant has not proffered any significant evidence to the contrary.

Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov. Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

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

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

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

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

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