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Issue Date: 19 May 2015

Case No.: 2013 AIR 21

In the Matter of
ANTHONY BERROA,
Complainant

v.

SPECTRUM HEALTH HOSPITALS,
d/b/a AERO MED,
Respondent

Appearances: Mr. Nathaniel J. Kaleefey, Attorney
For the Complainant

Mr. Anthony R. Comden, Attorney
Mr. Gregory P. Ripple, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER –
DISMISSAL OF COMPLAINT**

This case arises under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121 (“AIR 21” or “the Act”), as implemented by 29 C.F.R. Part 1979. Specifically, 49 U.S.C. § 42121(a)(2) - (4) and 29 C.F.R. § 1979.102 prohibit an air carrier, or contractor or subcontractor of an air carrier, from discharging, or otherwise discriminating against, any employee with respect to compensation, terms, conditions, or privileges of employment because the employee: a) provided to the employer or Federal Government information; b) filed or caused to be filed a proceeding; c) testified in a proceeding; or d) participated in a proceeding, 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. At the same time, under 49 U.S.C. § 42121(d) and 29 C.F.R. § 1979.102(c), the employee protection provisions “shall not apply with respect to an employee . . . who acting without direction from [an] air carrier . . . deliberately causes a violation of any requirement relating to air carrier safety under this subtitle or any other law of the United States.

Procedural History

On June 19, 2013, Mr. Berroa filed a complaint with the Occupational Safety & Health Administration (“OSHA”), U.S. Department of Labor (“DOL”) under the AIR 21 employee protection provisions, RX 4.¹ Mr. Berroa alleged that Spectrum Health Hospitals, d/b/a Aero Med (“Aero Med”), terminated his employment on March 26, 2013 in reprisal for his appraisal and recommendation that a pilot not be permitted to operate a helicopter due to an incident that occurred on February 5, 2013.

On August 15, 2013, the OSHA Regional Administrator dismissed Mr. Berroa’s complaint on the basis that although he engaged in a protected activity Aero Med had a legitimate business reason for its decision to terminate Mr. Berroa’s employment, RX 4. On September 18, 2013, Mr. Berroa appealed the adverse decision and dismissal of his AIR 21 complainant, RX 4.

Pursuant to a Revised Notice of Hearing, dated December 17, 2013, ALJ II, I conducted a hearing in Grand Rapids, Michigan on June 17, 18, and 19, 2014 with Mr. Berroa, Mr. Kaleefey, Dr. Robert Hubers, Mr. Comden, and Mr. Ripple.

Evidentiary Discussion

When CX 17 was initially offered, I deferred a decision on Respondent’s relevance objection and provided Complainant’s counsel an opportunity to reoffer the exhibit later in the proceedings, TR, p. 262. Since counsel did not subsequently reoffer the exhibit, I now sustain Respondent’s relevance objection. CX 17 id not admitted.

On September 15, 2014, in his closing brief, Complainant’s counsel attached, and referenced, the following three exhibits: A) Aero Med’s July 18, 2013 response to OSHA regarding Mr. Berroa’s AIR 21 whistleblower complaint; B) a January 16, 2009 FAA interpretation of the term “known icing;” and C) calculation of Mr. Berroa’s “total annual salary + retirement + benefits.”

On September 22, 2014, Respondent’s counsel objected to admission of the three exhibits because under 29 C.F.R. § 18.54(a), the evidentiary record closed at the end of the proceedings; and Complainant has failed to demonstrate that the evidence was not readily available at the time of hearing.

On September 24, 2014, Complainant’s counsel responded that since I permitted admission of RX 4, the Complainant’s Request for Hearing,² Exhibit A was submitted to be part of the administrative record. I will accept Exhibit A as ALJ III for the purposes of the administrative record

¹The following notations appear in this decision: ALJ – Administrative Law Judge exhibit; CX – Complainant exhibit; RX – Respondent exhibit; and TR – Transcript.

²As I advised the parties at the hearing, TR, p. 299, Mr. Berroa’s appeal was already in the administrative record.

Second, Complainant's counsel advised that Exhibit B is an authoritative letter by the FAA, which while readily available online, was being offered "as a courtesy." Since the 2009 correspondence was clearly available prior to the hearing but not offered at that time, Respondent's objection to Exhibit B is sustained.

Third, Complainant's counsel explained that Exhibit C expands the information in CX 5 with a spreadsheet and a narrative, translating the information in CX 5 into useable yearly totals, "using complex arithmetic operations like multiplication, division, and addition." Again, regardless of the stated purpose of the submission, and the nature of the calculations, Complainant's counsel has failed to establish the narrative and spreadsheet calculations were not readily available prior to the close of the evidentiary record at the close of the hearing on June 19, 2014. Respondent's objection to Exhibit C is sustained.

Accordingly, my decision in this case is based on the hearing testimony, and the following exhibits admitted into evidence: CX 1 to CX 16; CX 18 to CX 23; CX 25 to CX 40; CX 44 to CX 46; CX 48 to CX 53; RX 1 to RX 17, RX 18 (except handwritten annotations), and RX 19 to RX 24.

Parties' Positions

Complainant³

Mr. Berroa has proven that Aero Med terminated his employment because he engaged in AIR 21 protected activities of reporting violations made by Mr. Hardcastle, a probationary pilot.

As background, Aero Med hired Mr. Berroa in 1999. He became an FAA-certified training captain in 2010. In that capacity, he trained three new hires, and in August 2012, he received a positive performance review. In September 2012, Mr. Berroa began to train another new hire, Mr. Hardcastle. During the course of that training, Mr. Berroa often intervened during Mr. Hardcastle's flights to note something that needed correction to comply with an FAA standard or regulation, such as not following a flight controller's instruction. On December 14, 2012, Mr. Berroa administered a checkride on Mr. Hardcastle. While Mr. Hardcastle successfully passed the Section 293 and Section 299 portions of the evaluation, he failed the Section 297 portion.⁴ This was the first time Mr. Berroa had failed a pilot during his tenure as a training captain. When Mr. Berroa reported the checkride results, Mr. Stretton seemed fine with Mr. Berroa's handling of the flight. However, Mr. Stretton subsequently took over Mr. Hardcastle's training.

In late December 2012, while flying with Mr. Hardcastle, Mr. Cobb observed Mr. Hardcastle violate Federal Aviation Regulations ("FAR"), lose situational awareness, and exercise poor aeronautical decision-making. When Mr. Cobb reported the issues to Mr. Stretton in early January 2013, Mr. Stretton advised that he would correct the issues with Mr. Hardcastle,

³TR, pp. 9-24; and September 13 and 15, 2014 closing brief.

⁴See 14 C.F.R. §§ 135.293, 135.297, and 135.299.

which Mr. Stretton attributed to deficient training. At that time, Mr. Cobb also told Mr. Berroa about Mr. Hardcastle's incidents.

In January 2013, Mr. Bluemel flew with Mr. Hardcastle, observed issues with FAR compliance, situational awareness, decision-making. He reported the issues to Mr. Stretton.

On January 6, 2013, on a flight with Mr. Berroa, Mr. Hardcastle rapidly flew the helicopter towards the ground due to confusion with an air traffic controller. Mr. Berroa again reported the issue to Mr. Stretton and recommended Mr. Hardcastle's termination. In response, Mr. Stretton started an investigation into the incident.

On February 5, 2013, after Mr. Hardcastle rejected a flight due to misinterpretation of the weather, Mr. Berroa explained that his analysis of the weather had been incorrect. Later in the day, Mr. Hardcastle accepted another flight request to transport a patient, which Mr. Berroa would have rejected. Shortly after lift-off, Mr. Hardcastle aborted the flight. When Mr. Berroa reported the issue to Mr. Stretton on February 9, 2013, Mr. Stretton opined the flight had met the criteria to launch. Mr. Berroa again recommended Mr. Hardcastle's termination because of safety issues. Later that day, Mr. Stretton completed a form criticizing Mr. Berroa waiting so long to determine Mr. Hardcastle's deficiencies. Believing Mr. Berroa should not continue as a training captain, Mr. Stretton opined that consideration should be given to his termination. Mr. Stretton also annotated his intention to seek guidance from HR and Dr. Hubers. In a February 15, 2013 e-mail, Mr. Stretton informed Dr. Hubers of the February 5, 2013 flight and recommended that Mr. Berroa's employment be terminated.

At the end of February 2013, Mr. Anderson's certification expired. On March 8, 2013, Mr. Berroa administered a checkride for Mr. Anderson.

In March 2013, Dr. Hubers proceeded with the process of terminating Mr. Hardcastle's employment due to his weakness as a pilot. Meanwhile, Mr. Berroa continued to fly as a training captain into March 2013. On March 14, 2013, Mr. Hardcastle resigned.

On March 17, 2013, after a purported investigation, Dr. Hubers recommended that Mr. Berroa's employment be terminated due in part to his violation of an FAA standard when he launched into known, or potential, icing. Mr. Stretton and HR concurred. After a Blue Ribbon Panel affirmed termination, Mr. Stretton, Dr. Hubers, and an HR representative signed the termination document. Mr. Berroa's employment was terminated on March 26, 2013 and his appeal was denied on April 4, 2013. The termination letter contained significant adverse comments which was a "deathblow" to Mr. Berroa's aviation career.

This factual background first demonstrates that Mr. Berroa engaged in several activities protected under AIR 21. First, on December 14, 2012, Mr. Berroa informed Mr. Stretton that Mr. Hardcastle had failed the December 14, 2012 checkride, which meant Mr. Hardcastle failed to meet the FAA's practical test standards for helicopters in the areas of situational awareness and aeronautical decision-making, and thus was an unsafe pilot. Second, on January 9, 2013, Mr. Berroa notified Mr. Stretton that on January 6, 2012, Mr. Hardcastle failed to recognize that an air traffic controller had provided incorrect information; his demonstrated lack of situational

awareness, and aeronautical decision-making deficit required Mr. Berroa to intervene and direct Mr. Hardcastle to execute a missed approach. Third, on February 9, 2013, Mr. Berroa informed Mr. Stretton that on the February 5, 2013, 5:00 p.m. mission, Mr. Hardcastle's action violated situational awareness and aeronautical decision-making standards as set out in FAA Advisory Circular No. 61-134, p.3 and Advisory Circular No. 60-22, p. 2. Fourth, during meetings on February 22, 2013, and March 13, 2013 with Dr. Hubers and Ms. McDowell, the HR representative, Mr. Berroa reiterated Mr. Hardcastle's violations of the situational awareness and aeronautical decision-making standards on December 14, 2012, January 6, 2013, and February 5, 2013.

Considering Mr. Hardcastle's insufficient experience, and that every pilot who flew with Mr. Hardcastle noted similar deficiencies in situational awareness and aeronautical decision-making, Mr. Berroa's reported violations by Mr. Hardcastle were objectively reasonable. Mr. Hardcastle's sufficient skills in 2012 do not outweigh the specific negatives observed by Mr. Berroa and other pilots in 2013. Although Mr. Berroa initially believed Mr. Hardcastle was trainable, his opinion changed in late 2012 and early 2013 due to Mr. Hardcastle's significant shortfalls. Further, although qualified to fly VFR (visual flight rules), Mr. Hardcastle's inability to pass the IFR (instrument flight rules) portion (section 297) of the checkride precluded Mr. Hardcastle from being cleared to fly solo patient missions. And, to the extent Aero Med agreed with Mr. Berroa and terminated Mr. Hardcastle, that action does not alter the protected status of Mr. Berroa's reports and further demonstrates the objective reasonableness of the his concerns.

In addition to the termination of his employment, Mr. Berroa suffered several other adverse actions: loss of his training captain responsibilities for Mr. Hardcastle, fabricated coaching memorandums in January and February 2013, threatened removal of his checkride duty by Respondent's plan to have Flight Safety International ("Flight Safety") conduct the checkride in a simulator, an investigation, adverse information in the termination document, denial of request to resign, and blacklisting.

In establishing causation under the current contributing factor standard, Mr. Berroa need only establish that a protected activity was a factor in, rather than the principle reason for, Aero Med's decision to take adverse action.

Close temporal proximity, and disparate treatment, can provide circumstantial evidence of causation. Mr. Berroa's December 14, 2012 protected activity was contributing factor in his removal from Mr. Hardcastle's training, and a counseling memorandum, which he received soon after the protected activity. Likewise, the January 2013 and February 2013 protected activities preceded all the remaining adverse actions by days and weeks.

In terms of disparate treatment, Aero Med permitted Mr. Hardcastle to resign but refused Mr. Berroa's similar request. The company also provided a severance benefit to Mr. Hardcastle.

Additionally, circumstantial evidence of pretext is demonstrated by multiple reasons for the termination action, which were subsequently abandoned by Aero Med during the hearing. And, while Mr. Stretton asserts that he does not terminate employees, he clearly recommended that Mr. Berroa be terminated.

Further, a protected activity is inextricably intertwined with an unfavorable personnel action when it is a link in the causation chain that led to the adverse action. Notably, Aero Med's knowledge of purported basis for Mr. Berroa's termination, his failure to intervene during the February 5, 2013 flight in a timely manner, was based solely on Mr. Berroa's report of the incident. Likewise, the outside counsel termination opinion upon which Dr. Hubers relied was generated only because Aero Med became aware of the February 5, 2013 incident from Mr. Berroa.

Consequently, the preponderance of the evidence proves that Mr. Berroa's protected activities were contributing factors in the multiple adverse actions.

As to a purported affirmative defense, Aero Med can not establish the requisite elements: the independent significance of the non-protected activity; facts that would change in the absence of the protected activity; and employer's likely reaction to the alleged wrongdoing in the absence of the protected activity. Due to shifting explanation for the termination, and since Mr. Berroa did not act in a reckless manner on February 5, 2013, Aero Med cannot establish the first and third elements. Further, since Mr. Berroa's report about the February 5, 2013 flight is so inextricably intertwined, and the single catalyst for Aero Med's action, the company cannot establish the second element.

And, Aero Med's assertion that its termination decision was a business judgment is insufficient. Its additional assertion that it would have terminated Mr. Berroa even absent protected activities because based on after acquired information it discovered that he let Mr. Anderson fly mission without a current certification is not established because the responsibility for those missions under the FARs belonged to Mr. Stretton and Mr. Anderson, rather than Mr. Berroa.

Due to the loss of his employment, Mr. Berroa lost an annual income of \$144,000 and now will earn about \$16,900 a year doing menial jobs. He also lost paid time off and the value of a pilot's on-going training. Mr. Berroa has drained all his retirement savings. Mr. Berroa suffered devastating emotional and physical consequences because the termination crushed him. As a result, he seeks \$300,000 in emotional damages. Due a lack of medical insurance, he has been unable to obtain treatment for insomnia and back pain. The lack of income has also precluded his obtaining sufficient flying hours to retain an active pilot's license; and Aero Med has subsequently replaced Mr. Berroa. As a result, reinstatement is not possible and front pay is warranted for at least five years, reduced by Mr. Berroa's current income, and supplemented with the amount of additional taxes he will have to pay upon receiving the benefits in a lump sum. And, in terms of equitable relief, every record in Aero Med's personnel file relating to Mr. Berroa's protected activities should be destroyed. Finally, Mr. Berroa requests attorney fees, including an additional \$100,000 in future legal expenses to require Aero Med to expunge his record under state law.

Respondent⁵

After lengthy investigations, Aero Med terminated the employment of two pilots in March 2013, Mr. Hardcastle and Mr. Berroa. In Mr. Hardcastle's case, while some disagreement existed, several respected Aero Med pilots opined that he did not meet the Aero Med standards for pilots. In light of legitimate concerns about his competence, Aero Med could not continue his employment. In Mr. Berroa's case, an outside aviation counsel opined that he acted in a reckless and careless manner when he allowed the launch of a helicopter on February 5, 2013 despite his assessment about unfavorable weather conditions. His actions jeopardized the safety of the aircraft and crew. A waiting patient was also placed in jeopardy due the delayed notification caused by Mr. Berroa's actions. In light of outside counsel's findings, Aero Med had no choice but to terminate Mr. Berroa's employment in order to avoid legal, moral, and ethical culpability. As a result, Mr. Berroa has failed to establish that any protected activity was a contributing factor in his termination. Aero Med has also established that it would have eventually terminated Mr. Berroa's employment regardless of any protected activity.

Specifically, providing air ambulance services under a Part 135 certificate issued by the FAA, Aero Med transports patients from scenes of accidents and community hospitals to the Spectrum Health hospital facility in Grand Rapids, Michigan. In addition to pilots, the Aero Med helicopters are staffed with physicians and flight nurses.

Aero Med hired Mr. Berroa in 1999, and made him a training captain and check airman in 2010. In those capacities, he was responsible for training and evaluation of newly hired pilots, and conducting annual checkrides for all Aero Med pilots as required by the FAA, including checks under Sections 293, 297, and 299 of Part 135. Up until he received counseling for persistent tardiness in June 2011, Mr. Berroa's performance had been favorable. Due to ongoing tardiness, he received a written warning in October 2012, which advised that if performance standards were not met further corrective actions could occur up to, and including, termination.

In October 2012, Aero Med hired Mr. Hardcastle. As training captain, Mr. Berroa became responsible for his training. Early in the training, while Mr. Hardcastle was not as smooth and competent as desired, Mr. Berroa nevertheless believed he was trainable. On December 14, 2012, Mr. Berroa administered a three-part checkride which had a line portion (Section 299), VFR portion (Section 293), and IFR portion (Section 297), to determine whether Mr. Hardcastle was qualified for single pilot operations in both IFR and VFR conditions. However, due to issues with an instrument approach, Mr. Berroa decided to terminate the IFR portion and conduct additional training. Subsequently, Mr. Berroa admitted that he should have instead conducted additional training and then complete the IFR portion. Further, at completion of the checkride, Mr. Berroa only annotated Mr. Hardcastle's completion of the line and VFR portions. He did not note either that Mr. Hardcastle failed the IFR portion, or the IFR portion was terminated in order to conduct further training. Since Mr. Hardcastle was scheduled to go to Flight Safety for instrument and procedures training, Mr. Berroa planned to administer the IFR check after Mr. Hardcastle returned and had flown with a few pilots. When Mr. Berroa advised Mr. Stretton of all the results of the checkride, he expressed confidence that Mr. Hardcastle would be able to achieve the requisite competence to pass the IFR portion.

⁵TR pp. 24-29; and September 15, 2014 closing brief.

During his training with Flight Safety, which included 12 hours of simulator flying, Mr. Hardcastle received the highest proficiency level from all instructors. His situational awareness was rated “good” to “very good.” Upon his return from training, Mr. Hardcastle had five flights with Mr. Cobb and one flight with Mr. Bluemel. They did not provide any immediate feedback, and Mr. Stretton was unaware that Mr. Hardcastle had flown with these pilots.

On January 6, 2013, Mr. Berroa flew with Mr. Hardcastle in “low” IFR conditions. When approaching the Grand Rapids airport, and following an air traffic controller’s vectors (heading directions), Mr. Hardcastle failed to notice that the controller had placed them too close to the outer marker (precision approach navigation aid). As a result, Mr. Hardcastle started the precision approach above glideslope and increased his rate of descent, which in turn caused Mr. Berroa to prompt Mr. Hardcastle to execute a missed approach. When Mr. Berroa advised Mr. Stretton of the missed approach, Mr. Berroa stated for the first time that he could no longer train Mr. Hardcastle because Mr. Hardcastle was incompetent. Mr. Stretton then questioned Mr. Berroa’s statement because there had been no documentation in the training records of any problems. At Mr. Stretton’s direction, Mr. Berroa prepared a memorandum setting out Mr. Hardcastle’s deficiencies relating to judgment, aeronautical decision-making, radio procedures, and droop and over-speeding the helicopter rotors’ rpm. Then, in February 2013, Mr. Berroa wrote another memo setting out the details of the January 6, 2013 flight

When Mr. Stretton checked with Flight Safety, they gave Mr. Hardcastle a better-than-average rating. Due to that input, the lack of training documentation substantiating Mr. Hardcastle’s deficiencies, and Mr. Berroa’s previous assurances that Mr. Hardcastle was trainable, Mr. Stretton decided that he did not have grounds to terminate Mr. Hardcastle. As a result, he decided to continue his training. After about a dozen flights, Mr. Stretton concluded that Mr. Hardcastle was not an unsafe pilot, but he also was not familiar with the type of helicopter Aero Med was flying.

On February 5, 2013, just before 5:30 p.m., while Mr. Hardcastle and Mr. Berroa were on duty, Aero Med received a request to transport a patient from Ionia Hospital to Grand Rapids. As a trainee, Mr. Hardcastle handled the pre-flight duties of assessing the weather, which at the time of the assignment was marginal with low ceilings and approaching darkness. Mr. Berroa concluded the printed weather information and forecast indicated the flight was very marginal, but doable. Additionally, earlier in the day, Mr. Berroa had critiqued Mr. Hardcastle’s rejection of flight request due to weather. Under these circumstances, Mr. Hardcastle accepted the late afternoon flight. Although Mr. Hardcastle was in the right seat, Mr. Berroa was logging his flight time as PIC (pilot in command). Additionally, as a certified flight instructor, he was ultimately responsible for the safe operation of the flight, and had the authority to intervene at any time to take control, and abort the flight.

After Mr. Hardcastle accepted the flight, but before their departure, Mr. Berroa concluded the weather at the field, consisting of fine droplets on the glass windshield and dropping temperatures, coupled with the potential for icing at their cruising altitude of 1,000 to 1,200 feet, would not permit them to fly and pick up the patient for transport. While Mr. Berroa decided that he would abort the flight if Mr. Hardcastle did not do so independently, Mr. Berroa still elected to permit lift-off and let Mr. Hardcastle fly to the airport boundary in order to see if Mr.

Hardcastle would decide to abort the mission on his own. Mr. Berroa admitted he knew at least ten minutes before departure that they would never arrive to pick up the patient. Likewise, he never informed the flight physician and nurse about his conclusion concerning the weather and their scheduled flight. Shortly after lift-off, Mr. Hardcastle aborted the flight and landed. When they landed, ice had already accumulated on the nose of the aircraft even though they had only climbed to 200 to 300 feet.

When Mr. Berroa expressed to Mr. Stretton his concern that Mr. Hardcastle did not recognize the icing potential, and took off, Mr. Stretton told him to put his concerns in writing, which he did some time afterwards in February 2013. At Mr. Stretton's request, on February 13, 2013, Mr. Berroa also provided a training summary and assessment concerning Mr. Hardcastle for submission to Dr. Hubers. A little over a week later, Mr. Berroa met with Dr. Hubers and Mr. Stretton to discuss Mr. Berroa's training. Dr. Hubers asked for the meeting because in December 2012 he had been advised that Mr. Hardcastle's training was going smoothly and on schedule.

Since Flight Safety and Mr. Stretton had positive reports on Mr. Hardcastle, while Mr. Berroa presented a contrary view, Dr. Hubers decided to have Mr. Berroa work with Flight Safety to develop a training plan that addressed Mr. Berroa's concerns. Mr. Berroa was going to develop flight scenarios for Flight Safety. On February 22, 2013, Dr. Hubers also met with Mr. Cobb and Mr. Bluemel to discuss their flying experiences with Mr. Hardcastle. Both pilots expressed an opinion that Mr. Hardcastle lacked the abilities necessary to be an Aero Med pilot. At the same time, the Aero Med chief pilot, Mr. Wroblewski, opined that while Mr. Hardcastle's flying skills needed development, he was a competent and safe pilot.

Towards the end of February 2013, Mr. Berroa advised Dr. Hubers that Flight Safety would not be able to use customized training scenarios. Finally, by March 9, 2013, since Dr. Hubers was unable to get a consensus from the Aero Med pilots, and in the interest of safety, he concluded that he had no recourse but to let Mr. Hardcastle go. However, on March 14, 2013, Mr. Hardcastle resigned before being informed of the termination decision.

Following his February 22, 2013 meeting with Mr. Berroa, Dr. Hubers was also concerned that Aero Med may have violated FAA regulations when Mr. Berroa permitted the helicopter to depart in icing conditions on February 5, 2013. Essentially, by critiquing Mr. Hardcastle for taking off in those conditions, Mr. Berroa was conceding that he had also violated FAA standards. So, Dr. Hubers asked for an opinion from an outside counsel about the situation. While waiting for a response, Dr. Hubers prepared a preliminary SBAR (Situation – Background – Assessment – and Recommendation) summary regarding Mr. Berroa's poor judgment in letting Mr. Hardcastle depart and his failure to provide prompt notice that the aircraft would be unable to complete the accepted patient flight.

On March 22, 2013, Dr. Hubers received outside counsel's report which indicated Aero Med did not violate FAA standards since Mr. Hardcastle aborted the mission within the airport boundary when the actual conditions were not as forecast, which did not include icing conditions at the time of lift-off. At the same time, counsel advised that Mr. Berroa had violate Part 135 by permitting a crew member to launch into weather that he knew had known icing conditions.

Further, as an instructor pilot, Mr. Berroa was charged with providing instruction and ensuring safety through collaborative interaction; he had an absolute duty to prohibit the launch of the helicopter on that day.

Upon receipt of the report, Dr. Hubers provided a copy, with an updated SBAR, to his superiors and HR. After a March 25, 2013 meeting with HR and his superiors, Dr. Hubers decided to terminate Mr. Berroa's employment.

In his AIR 21 complaint, Mr. Berroa failed to identify any specific protected activity, or any specific violation of an FAA order, regulation, or standard. Subsequently, at the hearing, he identified two protected activities: his report of the December 14, 2012 checkride and his January 6, 2013 complaint. However, neither incident involved a protected activity.

In terms of alleged adverse actions, Complainant's counsel only identified Mr. Berroa's termination. Notably, the December 2013 checkride form did not identify any unsatisfactory performance or violation by Mr. Hardcastle and the final checkride determination was approval. A failed IFR checkride would have required Mr. Berroa to indicate the checkride result was disapproved. There is no evidence that Mr. Berroa informed Mr. Stretton that Mr. Hardcastle had violated an FAA standard, rule, or regulation. Instead, he only advised Mr. Stretton that he terminated the IFR portions because Mr. Hardcastle had difficulty on an instrument approach.

In terms of causation, in regards to the December 14, 2012 report, Mr. Stretton supported Mr. Berroa's assessment and indicated Mr. Hardcastle would get additional training at Flight Safety. In other words, Aero Med responded positively to Mr. Berroa's assessment of Mr. Hardcastle's flying capabilities.

Mr. Berroa's report of Mr. Hardcastle chasing the glideslope during the January 6, 2013 flight was not a contributing factor because rather than retaliate against Mr. Berroa, Mr. Stretton looked into his concerns, reviewed Mr. Hardcastle's training records, noted the absence of any noted deficiencies, and checked with Flight Safety. Based on the information he obtained, he had no choice but to take over Mr. Hardcastle's training.

Similarly, when Dr. Hubers received Mr. Berroa's concerns on February 13, 2013 about Mr. Hardcastle's skills, he took Mr. Berroa's report seriously. He met with Mr. Berroa, reviewed training records, and sought the assessments from Mr. Stretton, Mr. Cobb, and Mr. Bluemel. By February 22, 2013, in order to address Mr. Berroa's concerns Dr. Hubers decided that Mr. Hardcastle should return to Flight Safety for training with scenarios developed by Mr. Berroa. However, after being informed that Flight Safety could not provide customized training, and, due to a lack of consensus among the Aero Med pilots, and conflicting assessments of Mr. Hardcastle's suitability as an Aero Med pilot, Dr. Hubers decided termination of his employment was warranted. This sequence of events demonstrates that rather than retaliate Dr. Hubers carefully considered the deficiencies in Mr. Hardcastle's flying noted by Mr. Berroa, and took steps to fully address Mr. Berroa's concerns to the extent that he eventually terminated Mr. Hardcastle's employment, as Mr. Berroa had recommended.

The evidentiary record also clearly shows that Aero Med's decision to terminate Mr. Berroa was based on a legitimate business reason, and unrelated to any protected activity. After learning the full details of February 5, 2013 flight, Dr. Hubers became concerned about potential FAA violations and sought the advice of outside counsel. Counsel's subsequent report indicated that Mr. Berroa had violated his responsibility as a certified flight instructor when he failed to advise Mr. Hardcastle of the adverse weather conditions and allowed the flight to enter a situation that compromised safety. Further, Mr. Berroa demonstrated a complete lack of concern for the patient awaiting transportation. That attitude was contrary to Aero Med's mission and purpose. And, had Dr. Hubers ignored counsel's conclusion, Aero Med would have been placed in tremendous risk. Thus, Aero Med's sole motivation for Mr. Berroa's termination was his compromise of safety, his attitude to a patient, and outside counsel's determination, with the latter being the principal basis for discharge.

In the absence of any other evidence, Mr. Berroa can only rely on the timing of his reports and subsequent termination as circumstantial evidence of a causative link. However, temporal proximity alone cannot establish causation when the record also contains substantial overwhelming evidence to the contrary. In particular, Dr. Hubers' termination decision is more closely aligned with the timing of the outside counsel's report, occurring within a few days of its receipt, which supports the determination that the adverse action was based on legitimate non-discriminatory reasons.

In terms of purported disparate treatment, Mr. Berroa was not treated differently than Mr. Hardcastle principally because Mr. Hardcastle resigned before he received notice of termination. That is, Mr. Hardcastle was not given a choice between resignation or termination. Absent his resignation, Mr. Hardcastle would have been terminated albeit for different reasons than the basis for Mr. Berroa's separation. Further, Aero Med did not give Mr. Hardcastle a severance benefit. Instead, Mr. Hardcastle paid for his subsequent Airline Transport Pilot license by reimbursing Aero Med. Aero Med did not provide the training. Additionally, Mr. Stretton was not permitted to violate FAR standards and still keep his job because on the February 15, 2013 flight, which was not a patient flight, Mr. Hardcastle was fully qualified to operate the aircraft under both Part 91 and Part 135 since it occurred in VFR conditions.

Finally, absent any protected activity, Aero Med would still have terminated Mr. Berroa's employment based on after-acquired evidence. One of Aero Med's pilots, Mr. Anderson was required to pass a line check, VFR check, and an IFR check by the end of February 2013. However, Mr. Berroa did not administer those requisite checks until March 8, 2013. As a result, due to Mr. Berroa's error, Mr. Anderson was not current to fly Aero Med aircraft from March 1 to 8, 2013 but nevertheless was the PIC on four patient flights and on repositioning flight. Mr. Berroa compounded the issue by failing to notify Aero Med of the lapse in Mr. Anderson's certification. The issue was discovered only during an audit of Aero Med's training records. Consequently, an award of back-pay should be limited to the period from the date of discharge to the date the new information was discovered. Since Mr. Berroa was responsible for performing Mr. Anderson's required checks, he was derelict in his duties by failing to give Mr. Anderson a timely checkride, such that Mr. Berroa's termination would have been warranted. Consequently, reinstatement/front pay are also inappropriate, and Mr. Berroa's back pay should terminate on May 2, 2013 when Aero Med was informed of the issue.

Issues

1. Protected activity.
2. Adverse personnel action.
3. Contributing factor.
4. Affirmative defense
5. Damages.

Summary of Evidence

Mr. Anthony (“Tony”) Berroa (TR, pp. 32-335)

[Direct examination] In the early 1980s, after a year of college, Mr. Berroa attended flight school off and on. During this period, he worked as a caddy, gas station attendant, and credit card embossing worker. In 1987, he became a commercial pilot and certified flight instructor (“CFI”) at American Helicopters. Presently, he also holds an airline transport pilot (“ATP”) license. As a CFI, Mr. Berroa also holds an instrument rating in rotary wing aircraft. With that certification, Mr. Berroa can teach a person to fly from primary flight training through airline transport pilot. As of the date of the hearing, since helicopter rent is \$400 an hour, Mr. Berroa’s license is not current due to his inability to accomplish sufficient takeoffs and landings to satisfy the annual requirement. After working for American Helicopters, Mr. Berroa became a charter pilot for New York/Island Helicopters. In 1990, he joined OmiFlight in upper Michigan as an emergency services pilot. In 1999, Mr. Berroa joined Aero Med with 3,000 hours of flying experience; he currently has 5,000 hours in helicopters. At that time he joined Aero Med, it had the best flight and maintenance programs in the state, and seven pilots.

CX 1 is Mr. Berroa’s job description at Aero Med. The minimum experience requirement is now 2,000 hours. Mr. Berroa was required to demonstrate knowledge and understanding of, and comply with, all applicable regulatory requirements, including FAR Parts 61 (training), 91 (general aviation), 119 (air charter), and 135 (air carrier); FAA advisory circulars, and Aero Med’s approved manuals.

At Aero Med, he flew various versions of the Sikorsky S-76 helicopter (“S-76”), which is a twin engine aircraft with top speed of 155 knots, and normal cruising speed of 140 to 145 knots. It does not have de-icing capabilities. The aircraft has two sets of control for two pilots up front, and a rear compartment with a stretcher and four seats for a patient, physician, nurse, and two other individuals. The aircraft is complex and has an autopilot, navigation system, and multiple communication devices.

In VFR conditions, only one pilot is required. The pilot must be a certified commercial pilot, with a current FAA medical, and current Part 293 (VFR) and Part 299 (line or route) checkrides. Checkrides may be conducted by a check airman on behalf of the FAA. In IFR conditions, a pilot must also have a current Part 297 (instrument) checkride and be certified on autopilot, in lieu of flying with co-pilot. Absent an autopilot, two pilots are needed for safety redundancy, with one pilot designated the pilot in command, or PIC. The PIC is responsible for the flight and associated clearances. Aero Med's helicopters have autopilot, which can make a precision approach. The category one weather minimums for Aero Med is a 200 foot ceiling and a half-mile visibility.

During a training mission, the CFI does not handle the controls. During a training flight, the probationary pilot sits in the right seat and the instructor is in the left seat. They communicate over their helmet intercom. When only one pilot is flying, he seats in the right seat.

CX 2 is the first page of Aero Med's operation specifications, or flight manual, which is required under Part 135. The manual indicates that as an air carrier, Aero Med is required to conduct a patient flight under Part 135. Flights conducted for crew training, maintenance, testing, ferrying, repositioning, and transport of company official are conducted under Part 91, which is less restrictive. A typical patient flight usually has three legs conducted under the Parts 135 and 91. On the first leg from the Grand Rapids airport to the accident site or hospital for pick-up, Part 91 applies since only the crew, including the medical personnel, are on-board. On the second leg to the treatment facility, when the patient is a passenger, the aircraft is flown under Part 135. Part 91 is less restrictive in terms of weather minimums for VFR and has no limit on the number of hours a pilot may fly. In IFR conditions, both Parts have the same weather minimum. The third leg of the mission, the return to base ("RTB") at Grand Rapids airport after the patient has been dropped off, is conducted under Part 91.

The current Aero Med minimum pilot experience is 2,000 hours, which can take two and a half years to accumulate in commercial aviation. In the military world, it would take about 20 years. The biggest issues for a probationary pilot is becoming familiar with the multiple systems, including autopilot, on the S-76, and learning its handling characteristics. At the same time, he should have a thorough understanding of FAA regulations and air dynamics; and developed situational awareness and aeronautical skills.

Mr. Hardcastle joined Aero Med and entered the training program around September 2012. At that time, having been a training captain since 2010, Mr. Berroa had trained both civilian and military pilots. In his experience, the military pilot needed a little more training, up to eight weeks. Mr. Berroa knew very little about Mr. Hardcastle. As a military pilot, Mr. Hardcastle had not flown the S-76; most of his time was in the Black Hawk helicopter.

In addition to initial training, all Aero Med pilots attend Flight Safety twice a year, which is a company that provides flight simulation training. The simulator operates in three dimensions, including pitch and yaw, and has computer generated graphics of the local Grand Rapids area. The main focus of the training is emergency procedures, such as dual engine failure and transmission problems.

As a training pilot, or instructor, Mr. Berroa had to make sure the pilots were meeting standards. Although the Aero Med pilots referred to a new pilot as the “new guy,” the legal term is “probationary pilot.” A new pilot is limited to Part 91 flying because he has not met the requirements to carry passengers for Aero Med under Part 135, which includes a flight test. Until then, the new pilot can fly passengers only if he is with a certified rated pilot. During that type of flight, the NTSB (National Transportation Safety Board) considers the highest licensed pilot, which in this case would be the instructor pilot, as being responsible. However, during a Part 91 flight, when the new pilot is in the right seat, he is the PIC; while both pilots log PIC time under the FAA regulations. When Mr. Berroa was on a training flight, the probationary pilot retained functional control of the aircraft. On each training flight, Mr. Berroa made sure the probationary pilot understood that he had control and must handle the aircraft. The person in the right seat dominates. However, during a training flight, if a crash occurred, the NTSB would most likely ultimately determine that the CFI was in charge.

As the director operations, Mr. Stretton was Mr. Berroa’s supervisor. Mr. Stretton did not give Mr. Berroa a timeline for the training of Mr. Hardcastle. Mr. Berroa flew with Mr. Hardcastle in the role of training captain from September until December 14, 2012, about 11 weeks. After that point, he flew with Mr. Hardcastle two more times, but not as a training captain.

CX 3 is an FAA Form 8410-3, which is used on a checkride. Paragraph 7 of the form evaluates judgment, or aeronautical decision-making. Aeronautical decision-making “is paramount to everything we do. If you are not capable of making sound judgments, nothing else matters.” The process involves: perceive what’s going on; process the information; and develop and execute a plan of action – perceive, process, and plan (the three Ps). Situational awareness is part of aeronautical decision-making because it relates to being properly aware of what is going on in order to develop an appropriate plan. Based on the experience level of the new pilots, Mr. Berroa expected them to have already developed these skills.

Aeronautical decision-making relates to all aspects of a flight, from determining whether to accept the flight, establishing fuel requirements, recognizing airspace limitations. When Mr. Berroa is flying a training mission, the probationary pilot will accept the flight. Otherwise, whoever is planning to be in the right seat will decide whether to accept the flight.

Aero Med pilots usually obtain their weather information over the internet from the National Weather Service. The information may also be obtained from flight service stations.

As a training captain in the left seat, Mr. Berroa doesn’t intervene. “Regardless of who you’re training, you have to allow that individual to make their mistakes . . . If I were to intervene every time a particular pilot had a problem . . . he’s not going to learn the system. You have to allow them to learn from their mistakes.” As a CFI flying the students, you intervene and take control when there is a clear and present danger. As a CFI on an Aero Med training flight, you intervene verbally or object to what is happening. If a pilot doesn’t respond and it’s a flight safety issue, such as potential damage to the aircraft and property, or an unsafe flight condition such as a stall or too rapid a descent on a precision approach, Mr. Berroa would advise the pilot that he is taking the aircraft’s controls. However, Mr. Berroa has never been in

situation with an Aero Med pilot where he has had to take intervene by taking control of the helicopter. Over the course of his last two years with Aero Med, Mr. Berroa had to intervene verbally about a dozen times. At the same, with one particular pilot, he had to intervene about every other flight.

In evaluating weather, Mr. Berroa considers current weather at the airport and forecast weather from the National Weather Service for the next two to three hours for the destination and the route, which are considered primary weather products. Such reports may include information about icing. Secondary weather products, such as a pilot report, are also available; however, a decision to flight may not be based on secondary information. A pilot has to remember that weather is dynamic. And, marginal weather is significant in Mr. Berroa's role as a training captain because it enables him to assess a trainee's aeronautical decision-making.

CX 5 is a summary of his income from November 1, 2011 through December 2013 while he worked at Aero Med. It shows a yearly wage of \$112,000, consisting of a salary of about \$98,000, plus \$4,000 in employer's retirement contributions, and \$10,000 in benefits.

After completion of a typical Aero Med flight, the crew would conduct a debrief in the flight communications area to discuss any issues that arose during the mission.

Mr. Berroa viewed himself as the gatekeeper for probationary pilots. He was responsible for the people that he flew with and wanted to keep them and the program safe. So, when he became the training pilot, Mr. Berroa initiated additional training for the pilots and created documentation to track flying and ground training. Mr. Berroa enjoyed instructing and teaching as a training captain in part because he learned more about aviation by teaching people. The job was challenging but at the same time stimulating.

Mr. Bluemel is an excellent pilot, and one of the best at Aero Med. Mr. Berroa respects his aviation capabilities.

After his first flight with Mr. Hugh Hardcastle, during which he observed him fly for about 10 minutes, Mr. Berroa advised Mr. Stretton that Mr. Hardcastle was a little rusty on the flight controls, apparently since he had not been flying for about a year. For the next couple of months, Mr. Berroa flew with Mr. Hardcastle out of Big Rapids in the advanced model of the S-76. Understandably, Mr. Hardcastle did not know the S-76's systems, and as a military pilot, he was unfamiliar with the autopilot. In the early phase, Mr. Hardcastle had a tendency to repeat mistakes. For example, since he was unfamiliar with the local area, he kept wanting to descend to about 500 feet about 10 miles away from the destination in VFR conditions. Mr. Berroa advised that was dangerous because there may be unseen obstructions between his location and the destination. A much safer practice was to remain at 800 to 1,000 feet until arriving at the destination. He constantly had to remind Mr. Hardcastle to do that. Mr. Hardcastle would typically respond, "okay." He never really changed that practice.

In addition to documenting Mr. Hardcastle's training, Mr. Berroa discussed Mr. Hardcastle's training with Mr. Stretton about once a week. He advised Mr. Stretton that there were some issues with Mr. Hardcastle, such as his early descents to destinations.

During the early portion of the training, Mr. Berroa attributed most of the issues to Mr. Hardcastle being nervous.

Mr. Hardcastle had been a maintenance pilot and served in Iraq.

In the middle of December 2012, Mr. Berroa administered a checkride for Mr. Hardcastle, with the intention to complete all three required checks for Parts 293, 297, and 299; as well as the autopilot certification. Mr. Berroa passed the Part 293 and Part 299 portions of the checkride. However, during an instrument approach to the hospital, Mr. Hardcastle did not maintain the proper tolerances and Mr. Berroa told him “you’re messing this up.” As a result, since Mr. Hardcastle had already passed two portions of the checkride, and rather than fail him on the entire flight, Mr. Berroa decided to treat the IFR portion as training and accomplish the IFR check on a later flight, which he believed that he was authorized to do. Subsequently, Mr. Berroa learned that he had misinterpreted the regulation because while a checkride could be interrupted for more training in flight, the Part 297 check still had to be administered on the same flight. He was not permitted to administer the check at a later date. That is, if a person fails one portion of the checkride, the entire checkride is deemed to be a failure. Mr. Berroa wanted to enable Mr. Hardcastle to be able to continue flying VFR missions. Additionally, since Mr. Hardcastle seemed somewhat down, Mr. Berroa did not want to exacerbate him emotionally.

Mr. Berroa has never failed anyone on a checkride.

Upon completion of the flight, Mr. Berroa did not document Mr. Hardcastle’s failure on the IFR portion because he thought he could attribute the approach to training. On the checkride document, CX 3, he only checked “135.293,” even though Mr. Berroa had failed the Part 297 portion. Shortly thereafter, Mr. Berroa told Mr. Stretton about what happened. Mr. Berroa doesn’t recall Mr. Stretton’s response but he appeared to be “fine” with Mr. Berroa’s decision.

Since Mr. Hardcastle was scheduled to go to Flight Safety for 10 hours of training within a few days, which should be sufficient additional training, Mr. Berroa decided to wait for him to return and then administer the Part 297 checkride.

During lunch one day at Flight Safety, Mr. Berroa heard Mr. Hardcastle tell one of the instructors that if Aero Med didn’t work out he could always go work in the Gulf. Mr. Berroa believed that comment reflected some resignation about what might happen.

Mr. Berroa told Mr. Jeff Wroblewski, the chief pilot, that he intended to have Mr. Hardcastle fly with other line pilots, in particular Mr. Cobb and Mr. Bluemel, who was a CFI, when he returned from Flight Safety; and then take the Part 297 checkride. At that point, Mr. Hardcastle “should be on his own.” Mr. Berroa advised Mr. Cobb and Mr. Bluemel of some of the things he had noted and asked the pilots to see Mr. Hardcastle repeated those actions.

Sometime after his flight with Mr. Hardcastle, Mr. Cobb told Mr. Berroa that Mr. Hardcastle was flying all over the place, and came extremely close to an antenna while being fixated on the radios and flying on autopilot. Mr. Cobb had to advise Mr. Hardcastle of the situation and came close to taking the controls to maneuver away from the antenna. Mr. Berroa

did not report that incident to Mr. Stretton but he believed Mr. Cobb spoke directly with Mr. Stretton about the flight. Based on Mr. Cobb's description of what happened, while no regulation had been violated, Mr. Berroa opined that Mr. Hardcastle had violated the standards of good judgment. However, he did not express his opinion to Mr. Stretton.

During Mr. Hardcastle's training, Mr. Berroa told Mr. Stretton about Mr. Hardcastle's issues with decision-making, judgment, and rotor drooping. The computer in the S-76 will stop allowing additional fuel go to the engine to prevent over-speeding the rotor. Consequently, if a pilot continues to pull up on the collective, which increases the pitch of the rotor, after the computer has stopped additional fuel, the increased drag from the rotor will cause to rotor rpm to slow down, which can be felt in the aircraft and is known as drooping of the rotor rpm. According to the aircraft flight manual, the minimum rotor rpm is 106%. On departure, Mr. Hardcastle routinely pulled up too much on the collective which caused the rotor rpm to fall below 106% - drooping the rotor. His practice violated an FAA regulations, Part 91.9, which requires a pilot to fly an aircraft with the limitations set by the aircraft flight manual.

Another example concerning judgment and decision-making occurred when the airport tower cleared Mr. Hardcastle to fly in a direction that would require crossing an active runway after lift-off. Rather than flying across the runway in the middle, which is the safest way to fly over the runway since other aircraft may be at either end, Mr. Hardcastle flew around one end of the runway.

A further example occurred on January 6, 2013. Mr. Berroa, as training captain, and Mr. Hardcastle, as PIC, flew an IFR mission in the local area of the airport to practice instrument approaches. They were vectored by an air traffic controller to the starting point for an ILS (instrument landing system) approach, but the controller put them too close to the starting point, or outer marker, that was located five miles from the airport. So, as Mr. Hardcastle initiated the ILS approach, he was above the glidepath and started a descent to get back on the glideslope. He continued to increase the rate of descent from 400 feet per minute to 1,000 feet per minute but still could not capture, or return to, the glideslope. The missed approach altitude for the ILS was 200 feet. At 500 feet, and with a rapid rate of descent, Mr. Berroa asked Mr. Hardcastle if he was on a stabilized approach (on course and on glidepath). Mr. Hardcastle replied, "yes," even though they were still in a rapid descent and had not yet intercepted the glideslope. When Mr. Berroa questioned Mr. Hardcastle about the high rate of descent, he said he was attempting to intercept the glideslope. At that point, Mr. Berroa intervened. He noted they were close to the ground and still hadn't hit the glideslope, and asked Mr. Hardcastle what he was going to do. Mr. Hardcastle asked, "missed approach?" And, Mr. Berroa said, "yes." In other words, Mr. Hardcastle required prompting before executing the missed approach maneuver. Mr. Hardcastle violated the FAA standard that requires a pilot to exercise good judgment. In Mr. Berroa's opinion, they were in an "extremely, extremely dangerous" situation still "trying to chase down and re-intercept a glideslope" at 500 feet above the ground, with a descent rate of 1,000 feet per minute. At that rate of descent, they would have flown through the 200-foot minimum before gaining altitude on the missed approach. He thought Mr. Hardcastle was being careless.

Shortly thereafter, Mr. Berroa told Mr. Stretton about the ILS approach and indicated that he didn't think Mr. Hardcastle was going to work out because the incident was a significant lapse for an experienced pilot. It scared Mr. Berroa. Mr. Berroa doesn't recall much of a reaction from Mr. Stretton about the incident. Instead, addressing Mr. Berroa's recommendation that it wasn't going to work out, Mr. Stretton said that if they fired Mr. Hardcastle it would reflect poorly on himself and Mr. Berroa. Later, possibly in February 2013, Mr. Stretton asked him to prepare a summary about what happened, CX 6.

The next day, because he wasn't sure that Mr. Stretton had listen to him very well, Mr. Berroa sent him an e-mail, CX 7. He described Mr. Hardcastle's knowledge base, physical control of the aircraft, and his aeronautical decision-making. Mr. Berroa also expressed his belief that while Mr. Hardcastle was capable, Mr. Berroa wasn't always sure that he would perform to standards. Mr. Hardcastle did not consistently demonstrate single pilot competence and appeared to be unable to correct previously identified deficiencies.

On another occasion, while departing Grand Rapids for the Grand Rapids airport in VFR conditions, the air traffic controller cleared Mr. Hardcastle to proceed inbound to the filed. Mr. Hardcastle then made a turn in the other direction, away from the airport. Mr. Berroa didn't say anything to see what Mr. Hardcastle would do. Mr. Hardcastle didn't realize his error until the air traffic controller asked him where he was going. At that point, he turned back in the correct direction to the airport. This incident was an example of poor situational awareness. Mr. Hardcastle also violated Part 91 which requires a pilot to comply with air traffic control clearances. Since Mr. Hardcastle had been flying in the local area for a couple months, and they were VFR, Mr. Berroa expected that he would know the direction to the airport by then. Mr. Berroa told Mr. Stretton about this incident.

In the second week of January 2013, after Mr. Hardcastle had flown with Mr. Cobb and Mr. Bluemel, Mr. Stretton took over training Mr. Hardcastle. Mr. Stretton did not discuss the change with Mr. Berroa. Instead, Mr. Berroa found out that he was no longer training Mr. Hardcastle when he saw Mr. Hardcastle's name crossed off on the days that Mr. Berroa worked.

On February 5, 2013, Mr. Berroa was on his regular shift, as the duty pilot. Mr. Hardcastle was attached to him that day because Mr. Stretton was out of town. However, consistent with Aero Med practice, because Mr. Hardcastle was still in training, they reversed their roles. Mr. Hardcastle would be in the right seat as the duty pilot and handle everything; and Mr. Berroa would act as a training captain. They both had radios and computers to check the weather, but were in different rooms. In the morning, a call came in for 20-minute flight to a location about 30 miles west of Grand Rapids. Mr. Hardcastle responded and turned down the request due to weather; and "I was fine with that." Mr. Hardcastle explained he declined the flight due the forecast of inclement weather coming in from the northwest. While Mr. Berroa had no problem with his decision, Mr. Berroa said he would have accepted the flight. The bad weather was coming in from the north and since they were going to the west, they would be flying towards the bad weather with good weather behind them that would able to them to turn around in good weather if necessary.

At some time in late January 2013, Mr. Stretton told Mr. Berroa that he intended to give Mr. Hardcastle authorization to fly solo Part 135 (passenger) flights in VFR conditions. Mr. Berroa responded that was bad idea because Mr. Hardcastle could fly out in VFR conditions but if the weather collapsed it would turn into an emergency situation. It was unprecedented because no other Aero Med pilot had been given authorization for Part 135 flights without also being IFR qualified.

Around 5:20 p.m., on February 5, 2013, a flight request came in from Ionia Hospital that was maybe 15-minute flight. Although Mr. Hardcastle was making the decisions and Mr. Berroa was hanging back, he still checked the weather on his own. The weather was “extremely marginal, 12, 1,300 foot-ceiling,” with “four miles visibility.” Since the weather was marginal and it was getting dark, Mr. Berroa followed his usual practice, looked out the window, and then went outside to look for the radar dish that’s a mile away, and watch aircraft as they entered the clouds. Mr. Berroa then checked the local hourly forecast, the 24-hour forecast for the airport, secondary sources, and pilot reports (PIREPs) from departing planes – they were reporting nothing in terms of icing. Mr. Berroa also noticed “a very fine mist in the air.” When he came back in the terminal, he heard Mr. Hardcastle accept the flight. Mr. Berroa went back outside again and looked at the hanger, cars, and chain link fence because with the combination of the mist and low temperature he believed that “en route we would encounter icing.” Mr. Berroa also noticed that so far, Mr. Hardcastle hasn’t been outside; “he’s going on the printed weather.” Based on the printed weather, “the flight was doable, very marginal, but you could do it.” However, Mr. Berroa expected that once Mr. Hardcastle went outside and pulled the aircraft out of the hanger, he would evaluate the actual conditions and determine that they shouldn’t go to Ionia. But, “that’s not what happened.” Instead, Mr. Hardcastle made it clear that they were going and had the physician, nurse, and Mr. Berroa get in the aircraft.

At that point, “I have to decide how far do I let this go? I need to stop it at some point, but I wanted to afford him the opportunity to realize what was going on with the environment.” So, Mr. Berroa chose the cutoff point would be the airport fence that was not far from the hanger, when they would be at about 400 feet. If Mr. Hardcastle did not turn around by the fence then “I would turn around.” Although there were extremely fine droplets coalescing on the glass windshield that were turning into bigger drops, Mr. Berroa estimated the “icing threat would be somewhere at about our cruise altitude, 1,000, 1,200 feet.” Additionally, the printed weather indicated there was no icing; there was no ice on vehicles that had been sitting outside for 10 hours; there was no ice on the chain-link fence; there was no ice on the ramp; and no pilot that had landed at Grand Rapids reported icing. So, “I allowed the liftoff because every indication” showed no icing at the airport. At the same time, due to the setting sun and associated temperature, Mr. Berroa concluded that they couldn’t “go on the en route portion of the flight.” That’s “why I elected to stop the flight at the fence. But I wanted to see – I needed to see if he was going to be able to detect his on this own, or if he was going to make the decision to continue.”

As soon as Mr. Hardcastle accepted the flight, and after Mr. Berroa had looked outside, he decided there was going to be icing on the route. If Mr. Berroa had been on a single pilot on the flight, he would not have accepted the flight. It would be bad judgment to take off in that weather.

Mr. Berroa did not know whether Mr. Hardcastle had considered the PIREPs.

Mr. Berroa did not think there was a problem lifting off to the airport fence. “The problem was in the potential of what we would have encountered in the en route phase of the flight and him not being able to realized that with the visible moisture and the decrease in temperature, and the onset of night. . . icing never entered his mind.” During the debrief, Mr. Hardcastle stated that he wasn’t thinking out icing.

The flight was not a training flight. Instead, the mission of the flight was to pick up a patient that needed transportation. And, while the situation was going on, the patient was waiting for transportation. About ten minutes elapsed between the time Mr. Berroa decided that he wouldn’t have accepted the flight and Mr. Hardcastle eventually turned the aircraft around. Mr. Berroa didn’t think about the patient because the pilot decision-making process can not include consideration of the patient. In retrospect, Mr. Berroa realized that he could have advised the flight tower personnel that they weren’t going to fly the mission. Transporting patients is Aero Med’s business.

CX 8 showed the hourly observations of the weather at Grand Rapids airport. It doesn’t show that there’s a threat of icing. CX 9 is the terminal forecast; it does not mention icing.

In Mr. Berroa’s opinion, by lifting off, Mr. Hardcastle violated the standard concerning aeronautical decision-making. At the same time, Mr. Berroa acknowledged that what constitutes bad judgment has a range among pilots. Nevertheless, Mr. Berroa believes Mr. Hardcastle should have considered and recognized the potential for icing given the conditions; his failure to do so showed poor aeronautical decision-making.

When they returned to the hanger, there was ice on the very tip of the radome.

The next time he saw Mr. Stretton less than a week later, Mr. Berroa told him about Mr. Hardcastle’s failure to consider icing on the flight and that it represent a violation of the aeronautical decision-making standard. In stronger language, Mr. Berroa again stated that he didn’t think Mr. Hardcastle should be working at Aero Med. Mr. Stretton again responded that firing Mr. Hardcastle would reflect badly on Mr. Stretton and Mr. Berroa. In response, Mr. Berroa stated that he was more concerned about safety.

Subsequently, Mr. Stretton asked Mr. Berroa to prepared a written summary about the incident, CX 10.

Mr. Hardcastle was legal to take off. “The mistake, the error, was in his thought process, that we could fly to Ionia . . . his intent was to take off, leave the airport environment, and fly 20 miles away.”

The flight was aborted within the parameters that Mr. Berroa had set. By the time they took off the sun had set and Mr. Hardcastle stated that the cloud ceiling was too low to for the flight. So, he turned around, which showed good judgment. However, Mr. Hardcastle aborted the flight for a completely different reason which Mr. Berroa did not think was a valid reason. In

his opinion, Mr. Hardcastle was mistaken because the ceiling was as reported, about 1,200 feet. At the same time, since Mr. Hardcastle appeared to honestly believe the ceiling was too low, he exercised good judgment.

Later, Dr. Hubers also asked Mr. Berroa to send him the memo. He responded with an e-mail, CX 11. In the correspondence, Mr. Berroa provided additional information about Mr. Hardcastle's checkride and his current status. Mr. Berroa also expressed his belief that Mr. Hardcastle should not be working for Aero Med. His opinion was based on his cumulative experience with Mr. Hardcastle.

On February 22, 2013, Mr. Berroa attended a meeting with Dr. Hubers and Mr. Stretton. Because Mr. Stretton was the duty pilot, he left the meeting early. At the meeting, Mr. Berroa recommended that they terminate Mr. Hardcastle's employment. Dr. Hubers did not want to fire him, queried whether they could do something, and suggested additional training with Flight Safety. Based on his experience with Flight Safety, Mr. Berroa was resistant because he didn't think the training would provide an objective view. He thought a better assessment could be made based on input from the people who had flown with Mr. Hardcastle and observed his lapses in judgment. Eventually, Mr. Berroa agreed to go along with sending Mr. Hardcastle to Flight Safety if Mr. Berroa could develop the scenarios for the simulator training. Dr. Hubers agreed and assigned Mr. Berroa the task of developing the training scenarios.

When Mr. Berroa called Flight Safety about the scenarios, he was advised that it was against FAA regulations for Flight Safety to use scenarios other than the scenarios and the training syllabus that had been approved by the FAA's principal operating inspector. In light of that response, and although Mr. Hardcastle was scheduled for four simulator rides and a simulator checkride at Flight Safety, which would have been acceptable to the FAA, Mr. Berroa reverted to his original opinion that most likely Flight Safety would not be in a position to observe Mr. Hardcastle's judgment issues. Up till then, Aero Med had never used Flight Safety for a Part 297 checkride.

Mr. Berroa sent Dr. Hubers an e-mail with attachments about the viability of using Flight Safety as an option, CX 13. He noted that while Flight Safety's training was very good for aircraft procedures, they would not be able to evaluate Mr. Hardcastle's aeronautical decision-making issues that arose during Aero Med missions. For example, they would be unable to simulate outside weather which required a pilot to make decisions.

CX 12 is the limitation page for the Sikorsky S-76C++ aircraft, and shows the limits for the rotor.

Sometime in March 2013, Mr. Stretton scheduled a meeting to obtain a consensus from the pilots about what to do with Mr. Hardcastle. However, when they arrived, Mr. Stretton indicated that HR prohibited him from discussing Mr. Hardcastle at the meeting. Instead, they discussed using Flight Safety for checkrides for all pilots.

At that time, Mr. Berroa was unaware that he was being investigated. He did not know that Mr. Stretton had prepared a coaching and mentoring document about their February 9, 2013 meeting. Mr. Berroa continued to fly patients and was not removed from being a line pilot.

After the pilots' meeting, Mr. Berroa met again with Dr. Hubers. He informed Dr. Hubers about his conversation with Flight Safety, and expressed his opinion that Flight Safety would not be able to observe Mr. Hardcastle's deficiencies. Consequently, he again recommended that Aero Med terminate Mr. Hardcastle's employment. Dr. Hubers did not appear to be happy with Mr. Berroa's position. They had a plan and Dr. Hubers wanted to proceed. Mr. Berroa could not go along with the plan and would step down from being a training captain and check airman.

Training was never conducted on the Part 135 leg of a mission with a patient.

On March 26, 2013, Mr. Berroa attended a meeting with Ms. Cassandra McDowell from HR, Mr. Stretton, and Dr. Hubers. Dr. Hubers handed Mr. Berroa his termination papers, CX 14, and stated the reasons for the action.

Mr. Berroa appealed the termination and requested reinstatement, CX 15. But, the request was not granted.

The loss of job has dramatically affected Mr. Berroa's life and his standard of living. Due to the stated basis for the termination, careless and reckless behavior, Mr. Berroa was unsuccessful over the course of several weeks with applications for various aviation jobs for which he was otherwise well qualified. He sent out at least 13 resumes. Instead, he has a regular job with U-Haul, making \$8.50 an hour, and supplements his income as a pizza delivery driver.

Due to his inability to afford the prohibitive cost of flying, about \$3,000 to \$4,000, he is no longer current in the helicopter.

Mr. Berroa's savings are gone, CX 16. After a "drawn-out process," he was divorced around time of his separation from Aero Med, and his ex-wife received half of their savings.

Mr. Hardcastle resigned. He subsequently became an airline transport helicopter pilot.

Mr. Berroa enjoyed making a living as a helicopter pilot. He was proud of his accomplishments and the work he was doing at Aero Med. The manner in which his career was stripped from him crushed Mr. Berroa. "It was a severe blow that I never saw coming."

If the Aero Med environment were different, he'd like to go back. Mr. Berroa is currently 51. He intended to work as a helicopter pilot until he was 65 or 68.

Mr. Berroa has no retirement plan in place other than Social Security.

After his termination, Mr. Berroa received unemployment benefits of about \$1,200 a week.

After his termination, Mr. Berroa applied for aviation work at the University of Michigan, Air Care in Kalamazoo, and a helicopter pilot job in Detroit. After he was unsuccessful, he worked for Amazon starting in November 2013 at \$7.50 an hour, \$250 a week, for nine weeks. Since mid-February 2014, he's been with U-Haul at about \$250 a week, with an additional \$75 a week from delivering Pizza.

His gross income in 2013, which included withdrawals from savings, was about \$90,000. Other than his Aero Med employment, he did not work much in 2013 as he was seeking reemployment in aviation.

After his termination, Mr. Berroa had difficulty sleeping. He also continues to experience stress/tension backaches. Mr. Berroa did not take medication for depression or a sleeping disorder.

[Cross examination] As a check airman, Mr. Berroa was responsible for administering checkrides to Aero Med pilots in a timely manner.

The consequence for not having a current Part 293 (VFR) checkride is that a pilot may not accept a Part 135 (patient) flight. There are serious consequences for both the pilot and the pilot's employer if the pilot takes a Part 135 flight when he does not have a current checkride.

RX 1 is the Airman Competency Proficiency Check, FAR Part 135, for Mr. Hardcastle's December 14, 2012 checkride. When Mr. Berroa administered the evaluation, he intended to do a checkride for Parts 293, 297, and 299. Because Mr. Hardcastle met the standards, Mr. Berroa approved him for Part 293 and Part 299 checks. Mr. Berroa rated Mr. Hardcastle's judgment satisfactory, which is a pass. He also rated Mr. Hardcastle satisfactory in missed approach. At the time of the check, Mr. Berroa had been flying with Mr. Hardcastle for 10 weeks. Mr. Berroa did not mark any category on the form unsatisfactory ("U"). Although Mr. Berroa testified that at some point in the flight he decided to discontinue the Part 297 evaluation, he did not note Mr. Hardcastle's deficient performance with respect to those areas on the form. However, the form's check mark show the evaluation was only for Part 293 and Part 299. The form doesn't represent an evaluation of Part 297 proficiencies.

Mr. Berroa admits that his decision to discontinue the Part 297 portion of the checkride and not returning to a Part 297 evaluation during the same flight violated FAA regulations. He has not reported that violation to the FAA or NASA.

As an Aero Med check airman, Mr. Berroa performed checkrides for Mr. Anderson. On January 11, 2012, Mr. Berroa conducted a checkride for Mr. Anderson and Part 293 and line check portions of the certification remained in effect until January 2013, RX 2. On March 8, 2013, Mr. Berroa conducted another checkride for Mr. Anderson, RX 3.

After the December 14, 2012 checkride, Mr. Berroa only flew with Mr. Hardcastle two more times: January 6, 2013 and February 5, 2013.

The sound judgment check on the December 14, 2012 checkride form indicates that Mr. Hardcastle demonstrated sound judgment on that 1.2 hour flight. In his subsequent letter about Mr. Hardcastle's flying capabilities, CX 7, Mr. Berroa noted that Mr. Hardcastle doesn't consistently use good judgment. He produced that letter after one additional flight with Mr. Hardcastle. Mr. Berroa is not aware of any documentation that he prepared prior to January 6, 2013 which criticized Mr. Hardcastle.

The crew on the February 5, 2013 flight consisted of Mr. Berroa, Mr. Hardcastle, Ms. Whitehead, and a flight physician. Both Mr. Berroa and Mr. Hardcastle logged PIC time for the flight, because Mr. Berroa was the flight instructor and Mr. Hardcastle was the pilot in command with control of the aircraft. In his April 25, 2014 deposition, Mr. Berroa said his role in the aircraft was pilot in command and Mr. Hardcastle's role was pilot. Mr. Berroa's responsibility was the safe conduct of the flight.

Based on his responsibility as training captain and CFI, and since he would ultimately be responsible as pilot in command, Mr. Berroa made his decision that the February 5, 2013 flight was not going to get the patient at least 10 minutes before the flight departed. He concluded that the flight would be dangerous and Mr. Hardcastle should not have taken off.

When deciding whether to accept a flight, a pilot is expected to consider various weather reports, make his own observations of the weather, and use his common sense and judgment. And, based on his personal observations of the weather, Mr. Berroa concluded Aero Med could not accept the February 5, 2013 flight. At that time, he did not contact flight communications and advise that they would not be picking up the patient. He also did not inform the flight nurse and flight physician. His failure to communicate delayed the patient being transported to the hospital.

As Mr. Hardcastle took off, Mr. Berroa did not say anything about the weather. Mr. Hardcastle independently decided to abort the mission. Mr. Berroa did not intervene.

In his report of the February 5, 2013 flight, CX 10, Mr. Berroa indicated that Mr. Hardcastle should have turned down flight for two reasons: a) the flight did not meet the FAA-required obstacle and cloud clearance; and b) based on the conditions on the ramp, including a very fine drizzle and a temperature of -1 degree C, the threat of icing should have been apparent to Mr. Hardcastle. Mr. Hardcastle should have canceled the flight due to the potential for icing. His decision to take off was a serious error. The report does not include Mr. Berroa's stated opinion during his testimony that ice wouldn't form until 1,000 to 1,200 feet, and they would experience ice en route. His assessment about the altitude turned out to be incorrect since they had icing at 300 to 400 feet.

In his subsequent appeal of the OSHA dismissal, Mr. Berroa stated his belief that it would be against FAA standards to take off because there was a potential for ice and the return flight would be hampered by clouds. However, what he meant was that it was not the actual take off; it was the en route phase of the flight that would be against FAA standards.

Mr. Berroa acknowledged that in his deposition he stated if Mr. Hardcastle violated any regulation, Mr. Berroa as well violated the regulation in connection with February 5, 2013 flight. However, Mr. Berroa doesn't agree that if Mr. Hardcastle violated any FAA standard in connection with the February 5, 2013 that Mr. Berroa also violated those standards because Mr. Berroa was an instructor. In that position, in order to evaluate, he needs to let a pilot to do what he intends to do. So, the fact that Mr. Hardcastle violated a standard on February 5, 2013 doesn't mean Mr. Berroa also violated an FAA standard.

Mr. Berroa disagreed with Dr. Hubers' plan to send Mr. Hardcastle to Flight Safety even though the Flight Safety indicated that their existing scenarios were sufficient to address his concerns about Mr. Hardcastle.

On June 24, 2011, Mr. Berroa was counseled for repeated tardiness, RX 5. On October 15, 2012, Mr. Berroa received a written warning for tardiness, RX 6. Based on the warning, Mr. Berroa was aware that if performance standards were not met, he was looking at further discipline, potentially including termination.

When Mr. Stretton indicated that he wanted to authorize Mr. Hardcastle to fly as a line pilot, Mr. Berroa disagreed. To Mr. Berroa's knowledge, Mr. Stretton never issued the authorization. So Mr. Stretton heeded Mr. Berroa's recommendation.

[Re-direct examination] In his February 5, 2013 report, CX 10, Mr. Berroa reference a regulation, A021, which relates to the aero medical aviation industry. Under A012, every pilot prior to flight must check the route of the flight for the highest obstruction and then maintain a specific altitude above that obstruction, as well as maintain FAA-required cloud clearance. When Mr. Hardcastle planned the mission, he used daytime minimums even though it was going to be dark in 20 minutes, and nighttime minimums would be applicable shortly after takeoff, if not at takeoff. The deficiency "speaks to decision-making." Although the nighttime minimums may have been applicable, they were nowhere near the highest obstruction at lift-off, so no regulation was broken. Consequently, Mr. Hardcastle didn't violate the regulation, but his planning failed to take into account the nighttime portion of his flight.

A checkride certifies that a pilot is competent for future flights.

Mr. Berroa had no intention of flying past the airport fence on February 5, 2013 due to the downrange icing threat that existed.

Mr. Berroa acknowledged that he had an obligation to notify Aero Med when the plan changed for the February 5, 2013 flight. He didn't notify Aero Med at the time that he changed the plan for the flight.

Mr. Berroa doesn't have an answer for why he wouldn't write down in the memo that Mr. Stretton asked him to write down everything that he previously verbally told Mr. Stretton about the February 5, 2013 flight.

When Flight Safety indicated that they couldn't use his scenarios, Mr. Berroa decided that the plan to send Mr. Hardcastle to Flight Safety would not be implemented.

The FAA practical test standards, CX 18, provide a baseline for pilot skills. CX 18 is also used in training.

Mr. Jeffrey L. Cobb
(TR, pp. 336-369)

[Direct Examination] Mr. Cobb has the following licenses: commercial, rotary wing; instrument; and airline transport pilot. In the Michigan National Guard, he is also an instructor pilot and examiner. He has over 5,000 flying hours. He has trained about 20 pilots over the course of about 24 years. He joined Aero Med in 1999.

Situational awareness is the ability to know where you are at all times, as well being aware of what to expect from the aircraft and surrounding environment, in order that you can adjust your actions for the safest outcome.

Aeronautical decision-making involves all the decisions a pilot makes from preflight planning, to in-flight planning, to landing. Preflight planning includes checking aircraft; and obtaining weather information, NOTAMs (notice to airmen), and any applicable temporary flight restrictions.

Mr. Cobb likes to use marginal weather to get an idea how a pilot in training will react to weather; in particular, on whether he will decide to go into the weather.

After Mr. Cobb returned from Iraq, he received training from Mr. Berroa. He has also attended Flight Safety training and flown with other Aero Med pilots. Mr. Cobb flew with three probationary pilots, including Mr. Hardcastle.

He flew with Mr. Hardcastle at the end of December 2012 after Mr. Hardcastle attended Flight Safety. Mr. Berroa asked him to take the flights with Mr. Hardcastle to see if Mr. Cobb had any concerns. That was the first time he had been asked by a training captain to do something like that.

Mr. Cobb flew five flights with Mr. Hardcastle. On the first flight, Mr. Hardcastle seemed unsure of himself during the run-up. And, when they flew through a non-tower controlled airspace, Mr. Hardcastle did not tune into the radio frequency for common traffic calls to monitor traffic. When Mr. Cobb asked him why he didn't use the frequency, Mr. Hardcastle indicated that he was clearing visually. Although not required by regulation, the Airman Information Manual ("AIM") recommends radio communication to provide additional clearance with other aircraft in non-controlled airspace. Aero Med does not have a policy requiring the practice.

On other flights, Mr. Hardcastle consistently demonstrated uncertainty in starting the aircraft which surprised Mr. Cobb because Mr. Hardcastle had been training for two and a half

months. While usually start-up took seven minutes, Mr. Hardcastle would take 20 to 25 minutes. “He was just very unsure of himself on what he was doing.” Although he had a written start-up checklist, Mr. Hardcastle would “read the step, he would look for the switch, and then he’d go back and read the step again, like he was unsure of which switch he was suppose to push.” Mr. Hardcastle told Mr. Cobb that he wasn’t sure why Aero Med had hired him.

His last flight with Mr. Hardcastle around the first week in January 2013 was the most memorable. After lifting off of the hospital helicopter pad, and while making a left turn, Mr. Hardcastle, who was flying in the right seat, had his head inside the cockpit trying to tune the frequency for Grand Rapids Approach rather than looking out the left side of the aircraft. He was having trouble because Grand Rapids Approach kept telling him to stand-by and he apparently wasn’t hearing them. Meanwhile, they continued in a left turn which would cause them to strike an antenna. So, Mr. Cobb “grabbed the cyclic (flight control stick) to stop the turn and tell him to stop the turn.” When Mr. Cobb asked Mr. Hardcastle what he was doing, Mr. Hardcastle explained that he had the aircraft set on autopilot. However, the altitude Mr. Hardcastle set on autopilot was not high enough to clear the antenna, and “he had [the aircraft] in a turn out to the left side, going towards [the antenna].” Mr. Cobb was “really upset” about the incident because he believed that Mr. Hardcastle would have flown into the antenna if someone had not been up front in the left seat with him and seen the antenna. Additionally, there was no need for Mr. Hardcastle to make the radio change during the left turn because he did not need to establish radio contact until they reached 2,000 feet. Mr. Hardcastle did not have situational awareness. “He had no idea that the antenna was there, that he was heading towards it.”

While on autopilot, the aircraft will maintain a turn, altitude, and airspeed. Mr. Cobb does not use autopilot in a turn.

Within two to three days, due to Mr. Hardcastle’s inattention concerning the antenna, Mr. Cobb went to Mr. Stretton and “explained the situation” and indicated that Mr. Hardcastle should not continue to be employed by Aero Med. Mr. Stretton replied that was not what he wanted to hear. He believed that he could fix Mr. Hardcastle. Mr. Cobb also told Mr. Berroa what happened.

After their conversation, Mr. Stretton started flying with Mr. Hardcastle. However, several people asked Mr. Cobb why Mr. Hardcastle was still on the schedule. After numerous people came to Mr. Cobb, he asked for a meeting the Dr. Hubers because Mr. Stretton did not appear to be handling the situation. In the first part of February, Mr. Cobb met with Dr. Hubers and told him about his flights with Mr. Hardcastle, Mr. Hardcastle’s low self-confidence, his unsureness, the radio issue, the antenna incident, and the safety concerns raised by medical personnel. Dr. Hubers thanked Mr. Cobb for the information and said that he would look into it. Dr. Hubers also asked Mr. Cobb to document the flight, CX 19.

Later in February 2013 or in the first part of March 2013, Mr. Cobb attended another meeting with Dr. Hubers which included an HR representative. He again described the flights and repeated his concerns. Eventually, Mr. Hardcastle resigned and Mr. Cobb felt relief.

Mr. Cobb was not disciplined for violating the standard concerning situational awareness.

A pilot meeting was also conducted in March 2013 to discuss whether Flight Safety should be used for checkride training, rather than a check airman. Mr. Cobb believed the better practice was to use a check airman rather than a simulator, three other pilots agreed with him. Two pilots favored Flight Safety. Mr. Stretton specifically told them that the meeting was not about Mr. Hardcastle. The meeting was mandatory for all pilots but Mr. Hardcastle was not present.

[Cross examination] Mr. Cobb is not a CFI.

The flights with Mr. Hardcastle were conducted with patients on board and were regularly scheduled.

Mr. Cobb did not participate in the decision to terminate Mr. Hardcastle.

Mr. Bradford (“Brad”) H. Stretton
(TR, pp. 371-545)

[Direct examination] Mr. Stretton started at Aero Med about 1987 as a line pilot. Currently, he is the Director of Operations. He assumed that role in about 2008 or 2009. He has known Dr. Hubers for 10 to 15 years. Mr. Stretton has both a multi-engine ATP and a helicopter ATP. He also has an airframe and power mechanic license. Mr. Stretton is responsible for overseeing all Aero Med training. CX 20 is his job description. Although he does not have a bachelor’s degree, Mr. Cobb has 16 years of managerial experience as chief pilot and director of operations with another company.

Mr. Stretton is responsible for the discipline of employees, and conducts annual reviews of employee performance. CX 21 is Mr. Berroa’s annual review for 2012, covering the period from July 2011 through June 2012. Mr. Berroa made great progress in training and had expert knowledge. At the time, Mr. Stretton rated seven people. Mr. Berroa’s rating was about average with most of the pilots receiving a 3.5 out of 5.0.

Mr. Stretton is also in charge of hiring new pilots. CX 1 is the job description for an Aero Med pilot. It lists an experience requirement of 2,000 flying hours. Emergency medical service (“EMS”) experience is preferred, but it is difficult to find people with that qualification.

When Mr. Hardcastle applied for a job at Aero Med, he submitted an resume, CX 22. Mr. Hardcastle had 2,500 hours in variable pitch and turboprop engines, both fixed wing and helicopter. He had 20 years of military service as a pilot; most of that time was in helicopters. He had also been a maintenance check pilot in the Army, and possessed an airframe/power plant license.

Mr. Stretton appointed Mr. Berroa to the position of training captain/check airman. He also appointed his predecessor, Mr. Bluemel. Mr. Stretton makes those appointments based on recommendations from Flight Safety.

Mr. Stretton conducts a background check when hiring a pilot. Mr. Hardcastle's background, CX 23, showed attendance at a flight school from 2006 to 2008, with a graduation date of June 2007. However, verification indicated the time period was March 2000 to July 2006, with a graduation date in 2006.

Mr. Stretton doesn't consider training captain to be a promotion because there is no increase in pay. The job has increased responsibilities, which includes a safety component.

Initial training at Flight Safety costs \$43,000. Continuing twice-a-year training runs about \$23,000 per pilot.

Mr. Berroa conducted the training of Mr. Hardcastle and provided oral reports towards to the end of the training. They started before Mr. Berroa went to Flight Safety in December 2012. Mr. Berroa reported that he did not think Mr. Hardcastle was as smooth and competent as he should be; but, he assured Mr. Stretton that Mr. Hardcastle would be fine. Since Mr. Berroa indicated Mr. Hardcastle would be fine, Mr. Stretton took no action.

Around mid-December 2012, Mr. Berroa advised Mr. Stretton about Mr. Hardcastle's checkride. According to Mr. Berroa, Mr. Hardcastle did not perform the maneuvers that would enable him to have passed the IFR checkride; but he passed him on the Parts 293 and Part 299 portions of the checkride. Mr. Berroa said Mr. Hardcastle had problems on the approach. But, Mr. Stretton noted that Mr. Berroa rated Mr. Hardcastle's ILS as satisfactory.

Mr. Stretton puts an authorization letter in each pilot's file. He has done that before, even if the pilot is only qualified for VFR. Even though the pilot can't fly in the weather, his ability to fly VFR is helpful, "we don't fly very much IFR, especially in the winter because of icing." After passing the VFR portion, Mr. Hardcastle could fly a VFR mission by himself. In the past, prior to Aero Med obtaining IFR certification, the pilots all flew VFR.

In the fall of 2012, Mr. Stretton was not aware of any Aero Med pilots assigned Part 135 flights who were only qualified to fly VFR flights. After his December 2012 checkride, Mr. Hardcastle did not fly a Part 135 flight solo with a patient because Mr. Stretton hadn't given him the authorization letter. Mr. Stretton was still going through a review process concerning the disconnect between Mr. Hardcastle and Mr. Berroa. Mr. Stretton had Mr. Hardcastle fly with other pilots as pilot in command because Mr. Stretton was trying to establish were Mr. Hardcastle was in his training.

Some of Mr. Berroa's feedback after the December 2012 checkride was positive, some of it was negative. Nevertheless, Mr. Berroa expressed confidence that he would be able to complete Mr. Hardcastle's training.

In late January 2013, Mr. Cobb came to Mr. Stretton with concern about Mr. Hardcastle's abilities. Mr. Stretton attributed most of the issues to training Mr. Hardcastle may not have received involving familiarization with the local area, which might explain Mr. Hardcastle flying into a no-fly zone around a hospital. Mr. Cobb also reported that Mr. Hardcastle almost hit antenna while departing the hospital on the way back to the airport. Mr. Cobb didn't tell Mr.

Stretton that he took control of the aircraft. During training, Mr. Hardcastle should have been showed the no-fly zones and the local obstacles. Additionally, in Mr. Stretton's experience, Mr. Hardcastle had the ability to recognize and remember specific things that were taught to him.

Mr. Stretton also reviewed on-line location flight data and didn't believe "the situation was what was reported." Mr. Stretton doesn't believe Mr. Hardcastle almost hit an antenna. At the same time, Mr. Stretton acknowledged that he wasn't in the aircraft with Mr. Cobb and Mr. Hardcastle on that flight. He also did not inform Mr. Cobb that he believed Mr. Cobb was incorrect because he wanted to evaluate what was going on with Mr. Hardcastle. Mr. Stretton doesn't recall what he did to evaluate Mr. Hardcastle.

Eventually, in January 2013, Mr. Stretton started flying with Mr. Hardcastle because Mr. Berroa said that he was done training Mr. Hardcastle because Mr. Hardcastle was incompetent. Mr. Stretton responded "After all this time you've been training with him, and with no documentation in his training record to show deficiencies, you now tell me you have these deficiencies?" Every flight had an evaluation, but nothing had been written anywhere to reflect any discrepancies. Even on the flights that Mr. Berroa had previously expressed a concern to Mr. Stretton, there was no documentation.

After this conversation, Mr. Stretton concluded that he would have to conduct Mr. Hardcastle's training. He had about a dozen flights with Mr. Hardcastle. Mr. Hardcastle was not very proficient with the S-76, but he was not an unsafe pilot and not really different than any other pilot who was new to Aero Med and didn't have previous experience with the S-76. Mr. Stretton planned to send Mr. Hardcastle to Flight Safety for the Part 297 checkride to obtain an independent evaluation. Additionally, Mr. Berroa was the only check airman at Aero Med and an apparent tension existed between Mr. Berroa and Mr. Hardcastle.

Previously, Mr. Hardcastle told Mr. Stretton that he believed Mr. Berroa was singling him out and treating him unfairly. Mr. Stretton doesn't know why he didn't bring in Mr. Hardcastle and Mr. Berroa to sort out what was going on between them. In 2013, when Mr. Stretton told Mr. Berroa about Mr. Hardcastle's concerns, Mr. Berroa responded that he didn't care. So Mr. Stretton concluded that he couldn't change Mr. Berroa's mind about Mr. Hardcastle's training.

Mr. Berroa indicated that Mr. Hardcastle should not work at Aero Med because he did not meet the standard to be expected for his training timeline. On a subsequent document that Mr. Stretton requested to determine where Mr. Hardcastle was with his training, CX 7, Mr. Berroa referenced Mr. Hardcastle's problems with situational awareness and aeronautical decision-making.

When Mr. Stretton contacted Flight Safety about Mr. Hardcastle's training with them, the instructors had a different evaluation that was different than Mr. Berroa's assessment. They opined that he was a better-than-average pilot in the S-76 for someone with his qualifications. Flight Safety assesses pilots differently depending on their skill level.

A new pilot will be methodical and show less confidence in what he is doing in the cockpit. With 40 hours in the S-76, Mr. Hardcastle was still a new pilot. The qualification period for a new pilot at Aero Med varied from two to five months.

Drooping the rotor is not a violation of a regulation. There's no problem if a pilot unintentionally droops the rotor because "the computer will essentially at some point . . . will tell you that's enough and it will stop it." The flight manual doesn't say you can't droop the rotor. In the S-76, dropping below 107% RPM is drooping the rotor. You can be in compliance with the manual if you have a transient drop to 91% on two engines. Mr. Berroa didn't specify the rpm associated with Mr. Hardcastle's drooping. And, that statement does not represent a violation. Some operators purposefully droop the rotor because the slower the rotor is going, the more efficient it is, and the aircraft climbs better.

The FAA regulations require a pilot to follow the aircraft manufacture's recommendations.

After Mr. Berroa's January 6, 2013 memo, Mr. Stretton had no other choice than to take over Mr. Hardcastle's training. He took no other action. Mr. Stretton considered Mr. Berroa's attitude towards Mr. Hardcastle's training to be "pretty arrogant." He was disappointed with Mr. Berroa's response, but took no other action.

The lack of documentation of training deficiencies by Mr. Berroa was problematic because the Flight Safety report of Mr. Hardcastle's December 2012 training was "glowing" and did not contain any deficiencies, while at the same time, Mr. Berroa was demanding that Aero Med fire Mr. Hardcastle. Mr. Stretton can't do that without documentation. Further, Aero Med is required under its Part 135 certification to document training to establish that a pilot has been trained and proven his competency. Mr. Berroa's documentation for Mr. Hardcastle contained no deficiencies. There were no annotations of deficiencies at the time the flights were conducted. The training documentation did not reference drooping rotors or the other incidents Mr. Berroa reported in his January 6, 2013 memo. Further, Mr. Berroa reported deficiencies in Mr. Hardcastle's abilities on the checkride; but everything was checked satisfactory for the Part 293 and Part 299 portions of the checkride, which included the ILS. Mr. Hardcastle's failure to complete the Part 297 was not documented on the checkride form. Mr. Stretton was aware of that Mr. Hardcastle didn't execute the second ILS only due to Mr. Berroa's verbal debriefing of the checkride with Mr. Stretton. Mr. Stretton did not ask Mr. Berroa to document the failure. When he asked why it wasn't documented, Mr. Berroa replied that he did not think the issue would result in Mr. Hardcastle not completing his training.

Mr. Stretton is not aware of any other instance when Mr. Berroa planned a VFR/IFR checkride but only completed the VFR portion.

Based on his conversation with Mr. Berroa, Mr. Stretton completed a coaching and mentoring form on January 9, 2013, CX 25. He wrote the memo as a "reference for the future." The subject conversation occurred on January 9, 2013 and involved Mr. Berroa sharing information with Aero Med personnel on the performance of pilots in training, in particular Mr.

Hardcastle. The document remained in Mr. Stretton's desk file. He did not give it to anyone. Later, he told Dr. Hubers about the conversation.

As Mr. Stretton started his training of Mr. Hardcastle in January 2013, he was also trying to determine if there was a breakdown of their behaviors towards each other. He talked to other people and looked at the training records which did not have anything. He also spoke with Flight Safety. At this point, he did not involve Dr. Hubers other than to let him know there was a problem with the progression of Mr. Hardcastle's training. He spoke with Dr. Hubers right after he received Mr. Berroa's memorandum. Mr. Stretton advised that he was going to evaluate Mr. Hardcastle. Mr. Stretton was also trying to see if Mr. Berroa would accept using Flight Safety to evaluate Mr. Hardcastle, but Mr. Berroa would not accept that. Mr. Stretton didn't need Mr. Berroa's acceptance but he was trying to get everybody to kind of agree on a plan. He wasn't sure how Aero Med could continue to run an efficient problem and have Mr. Berroa remain as the training captain.

Mr. Hardcastle did not complete the training because he resigned.

In addition to Mr. Berroa's memorandum, Mr. Stretton advised Dr. Hubers of his other conversations with Mr. Berroa about Mr. Hardcastle. He noted that Mr. Berroa had assured him that Mr. Hardcastle would complete his training and everything would be fine. He did not go into the specific details of Mr. Berroa's concerns.

Around January 6, 2013, while attempting to determine Mr. Hardcastle's training history, he found information that two other pilots, Mr. Cobb and Mr. Bluemel, had flown with Mr. Hardcastle. Mr. Bluemel acknowledged that he had flown with Mr. Hardcastle once and would provide a document about his opinion; but Mr. Bluemel never submitted the documentation. Mr. Cobb submitted a report about Mr. Hardcastle's issues. Mr. Cobb flew with Mr. Hardcastle from December 28 through December 31, 2012.

A person can't be terminated without documentation.

Mr. Stretton wasn't seeking Mr. Berroa's approval to send Mr. Hardcastle to Flight Safety; he was seeking his support since at the end of the day, Mr. Stretton had to work with Mr. Berroa. He didn't need Mr. Berroa's permission to send Mr. Hardcastle to Flight Safety.

Mr. Stretton had some concern about Mr. Cobb and Mr. Bluemel flying with, and evaluating, Mr. Hardcastle because they were not authorized to do so. Mr. Hardcastle was authorized to fly with the training captain and anyone else authorized by the chief pilot or Mr. Stretton. The chief pilot was not aware of their flights. The only time more than one pilot might be on the crew would be a medical flight. And, while some of their flights were medical flights, Mr. Stretton had not been advised that Mr. Cobb and Mr. Bluemel were evaluating Mr. Hardcastle; and, one of the flights was actually a training flight with no medical personnel on board. Neither Mr. Cobb nor Mr. Bluemel were authorized to conduct a training flight, which was a very big concern.

On February 5, 2013, Mr. Berroa was still a check airman and training captain, so he was authorized to fly with Mr. Hardcastle. A couple days after the flight, Mr. Berroa informed Mr. Stretton what happened. He was frustrated and mad because Mr. Hardcastle accepted the flight. Mr. Berroa stated that he knew they were going to encounter icing conditions and Mr. Hardcastle should never have left the ground. Mr. Stretton assumed Mr. Hardcastle was flying the aircraft, but Mr. Berroa was the ultimate pilot in command. Mr. Stretton asked Mr. Berroa to write it down. Eventually, Mr. Stretton received Mr. Berroa's written statement about the flight.

After receiving the documentation, Mr. Stretton tried to determine what happened. He reviewed the load manifest and the attached weather report, which is required if a flight is turned down or aborted. The weather was 1,400 feet, broken and four miles visibility. There was no mention of ice. The requirement for the flight was VFR, which is 1,000 feet and three miles visibility. So, the forecast weather was better than VFR. The obstacles clearances for the flight met the requirement of A021. The flight was a Part 135 (patient) mission with a patient to pick-up. Mr. Stretton concluded the flight met the criteria for a Part 135 flight. However, because he wasn't on the ramp with Mr. Berroa, Mr. Stretton couldn't determine whether Mr. Berroa was right or wrong, so he wasn't going to overrule Mr. Berroa. So, that was the end of it as far as Mr. Stretton was concerned. CX 26 is Mr. Berroa's memo about the February 5, 2013 flight with Mr. Stretton's handwriting at the bottom and attached notes.

Around this time, Dr. Hubers did not ask Mr. Stretton for an update of Mr. Berroa's training.

Mr. Stretton created another coaching and mentoring form, dated February 9, 2013 to commemorate his conversation with Mr. Berroa about the February 5, 2013 flight, and due to his concern that tensions between Mr. Hardcastle and Mr. Berroa were escalating. Mr. Stretton completed a coaching and mentoring form on Mr. Berroa but not Mr. Hardcastle because Mr. Berroa was not following the chain of command and limiting his conversation about pilot evaluations to Mr. Stretton. Mr. Berroa continued to demand that Mr. Hardcastle be terminated but there was still no documentation other than the February 5, 2013 flight plus on other flight. There was still nothing in the training records to show that Mr. Hardcastle was deficient after 40 hours of flying. Mr. Stretton believed Mr. Hardcastle's issue might be a direct reflection on Mr. Berroa's training. During their conversation about his flight they repeated their previous conversation. When Mr. Stretton again observed that Mr. Hardcastle's situation was a "reflection on your abilities to train, and without documentation, you're now telling me after 40 hours I should terminate him," Mr. Berroa responded that he didn't care. And, Mr. Stretton replied that he should care because it was his job to train people. At this time, Mr. Stretton believed that Mr. Berroa should no longer be the training captain. At the bottom of the form, Mr. Stretton expressed his intention to seek guidance on whether Mr. Berroa should be terminated.

Mr. Stretton later talked with Dr. Hubers and said they should look into whether or not Mr. Berroa should continue to be the training captain. Mr. Stretton expressed his opinion that Mr. Berroa should not remain the training captain because he was not following his instructions, not documenting pilot deficiencies during training, and not bringing issues directly to him without having conversations with other Aero Med personnel. Mr. Stretton was only addressing Mr. Berroa's status as training captain, and believed that keeping Mr. Berroa as a line pilot

would be the best scenario. However, he did not make that distinction to Dr. Hubers about keeping Mr. Berroa as a line pilot. Mr. Stretton did not express an opinion to Dr. Hubers about Mr. Berroa's termination.

CX 28 is an e-mail by Mr. Stretton with an attached training record.

CX 31 is Mr. Hardcastle's resignation letter that Mr. Stretton received. The night before his resignation Mr. Hardcastle told Mr. Stretton that he felt that things were not going very well. Mr. Stretton talked to him about some of Mr. Berroa's concerns and stated there was always a chance that Mr. Hardcastle would be terminated. Mr. Hardcastle responded, "Then, I will resign." Mr. Stretton replied that he didn't want Mr. Hardcastle to resign. But, Mr. Hardcastle thought it was time to resign. Mr. Stretton did not tell Mr. Hardcastle that he was going to be terminated.

CX 35 is NASA form that Mr. Stretton completed which self-discloses an incident concerning checkride lapses. The report involves Mr. Anderson who still works for Aero Med. At present, no disciplinary action has been taken against Mr. Anderson.

After he left Aero Med, Mr. Hardcastle attended Flight Safety to get his ATP. Mr. Stretton was not involved in his attendance. He did not coordinate with HR to make his attendance possible.

Mr. Stretton did not file a NASA report regarding the February 5, 2013 flight.

Although Mr. Stretton may be involved in the process leading up to termination, he does not make the final determination. He provides performance information for consideration. The other people involved are HR and Dr. Hubers.

In regards to outside counsel, Mr. Stretton submitted Mr. Berroa's account of the February 5, 2013 flight.

[Cross examination] Based on the weather report, Mr. Stretton concluded that it was legal for the February 5, 2013 flight to depart. However, he did not make an independent assessment of the weather existing at the time of the flight.

Based on Mr. Berroa's statement, CX 26, that he anticipated encountering icing conditions, "I was amazed that the aircraft departed the Grand Rapids airport." The flight should not have lifted off because of Mr. Berroa's conclusion that a potential for icing during the flight existed. Mr. Berroa was ultimately the pilot in command for that flight. As pilot in command/training captain, it was Mr. Berroa's ultimate responsibility to inform Mr. Hardcastle before departure that he had determined there was a potential for icing and advise Mr. Hardcastle that he could not depart.

CX 28 contains Flight Safety evaluations that show during the sixth simulator flight Mr. Hardcastle completed all elements of the S-76C++ initial training in an above average manner. He had very good use of the checklist. Mr. Stretton gave great weight to the evaluation because the simulator can expose a pilot to issues you may never see in the aircraft.

[ALJ examination] Up until Mr. Berroa's termination, Mr. Stretton's opinion remained that Mr. Berroa should no longer be the training captain. He wasn't involved in the final termination decision. After his initial input, he had no further conversations with Dr. Hubers. The night before Mr. Berroa was terminated, he was told to be at the hospital the next morning at 6:30 a.m. He did not know what the outcome would be. He found out about the termination decision while sitting in the room with Ms. McDowell, Dr. Hubers, and Mr. Berroa. "I really wasn't thrilled that that had happened," but it wasn't his call.

Ms. Jessica M. Whitehead
(TR, pp. 550-564)

[Direct examination] Ms. Whitehead has been an Aero Med flight nurse for over six years. She works 12 hour shifts on standby, and responds with the Aero Med crew on emergency calls for helicopter transport.

On February 5, 2013, a call came in a for patient transfer flight. Once the pilot advised that they were good for weather, she went to get her medical supplies and met the physician walking out the door to the aircraft. As the physician was describing the patient, Ms. Whitehead felt some precipitation on her nose and opined that she wasn't sure they would go the flight. They eventually lifted off to go on the flight, but turned around at the edge of the airport and came back.

Mr. Berroa did not say anything to her before the flight that he had decided that Aero Med was not going to be able to make the flight. She needed that information because if the flight wasn't going to go, then the patient required another means of transportation, and there would not have been a delay in obtaining ground transportation for the patient. Some patients are in a time-sensitive condition.

Because she felt some precipitation and it was February, she had some concern about the possibility of icing at the altitude they would be flying. On the other hand, she trusted Mr. Berroa since he was a training captain. If only Mr. Hardcastle had been flying, she would have said "no go."

Ms. Whitehead raised her concern with Mr. Stretton because he was the director of operations, and after talking with Mr. Berroa, she believed her concerns about the safety of accepting that flight, and Mr. Hardcastle as a pilot trainee, were valid.

Mr. Hardcastle was in the front seat. But she could see who was flying. She doesn't know who decided to turn around.

She had confidence after reporting her concern to Mr. Stretton that the process of evaluating Mr. Hardcastle's abilities would produce the correct result. Based on her experience with Mr. Hardcastle, she believed his departure from Aero Med was the correct conclusion.

[Cross examination] Ms. Whitehead always felt safe flying with Mr. Berroa.

Because Mr. Hardcastle was sitting in the right seat, she thought he might be flying, but if anything happened Mr. Berroa would take over. "I don't believe that we should have lifted in that weather, but I'm not a pilot." Mr. Berroa permitted the lift off and she trusted him. Nevertheless, she had a concern because from her experience with flying in precipitation, and because it gets colder at altitude, there was a possibility of icing.

She didn't report either Mr. Berroa or Mr. Hardcastle to Mr. Stretton. She just told him what happened. He would have known who was on board the aircraft.

Based on her flying experience with Mr. Hardcastle, while he was very smart, "he wasn't quick in acting, and confident in his actions." She observed Mr. Berroa having to repeat questions to Mr. Hardcastle which she believed that Mr. Hardcastle should know as a pilot. Mr. Hardcastle also wasn't quick in making decisions and he repeatedly asked questions about things that he should already have known. In light of her flying with other new pilots, Ms. Whitehead developed a sense that Mr. Hardcastle was not progressing the way other pilots had progressed, which made her uncomfortable.

Under Aero Med policy, any crew member can say no to a flight without retribution. Because she trusted Mr. Berroa, Ms. Whitehead did not say no to the February 5, 2013 flight. But, in hindsight, she believes she should have said no.

Ms. Whitehead was relieved by Mr. Hardcastle's departure. She was surprised by Mr. Berroa's termination.

Ms. Whitehead can see the back of the pilots' heads from her position in the aircraft. There's a small wall between the medical compartment and the cockpit and she can't see below the pilots' waist. Through radio communications in her helmet, she can hear most of the pilots' conversations.

Ms. Shawn Ulreich
(TR, pp. 565-615)

[Direct examination] Mr. Ulreich is the vice-president for clinical operations and chief nurse executive. Part of her strategic oversight and operational responsibilities includes the emergency department, of which Aero Med is a component.

In March 2013, Mr. Ulreich was one of the decision-makers in determining whether to obtain an aviation consultant. She felt they needed an expert review of the situation and an outside opinion. RX 7 is the consultant's review. RX 8 is the March 24-25, 2013 e-mail chain responding to the report. The correspondents include Dr. Hubers, Ms. Kiely and Ms. McDowell

from HR, and Ms. Van Ree who is the director of nursing for emergency services including Aero Med.

At a March 25, 2013 meeting, they discussed Mr. Berroa's employment situation. Their decision was to terminate his employment. All participants concluded termination was warranted. Ms. Ulreich concurred because the recommendation came from a reputable expert and Ms. Ulreich considered Mr. Berroa's behavior reckless and inappropriate for a training captain. There was no discussion of retaining Mr. Berroa as a line pilot.

During her ten years with Aero Med, she is unaware of any training captain being relieved of that position.

Ms. Ulreich took part in Mr. Berroa's appeal, which is a two-step process. RX 9 is the response to Mr. Berroa's appeal which upheld the termination decision. In the letter, Mr. Berroa was advised of his right to continue his appeal with a panel review, which is the second level of appeal.

[Cross examination] Mr. Berroa was careless because he knew the weather was unsafe for takeoff, did not share that information with Mr. Hardcastle, and disregarded a waiting patient. And, as a training captain, he had a responsibility to communicate his concerns about the weather.

Ms. Ulreich had no interaction with Mr. Berroa or any other training captain. She did not talk to Mr. Berroa or Mr. Hardcastle about the flight. At the time of the flight, Mr. Hardcastle was in an orientation phase, during which competency is being ascertained and the employee is being provided feedback.

She did not receive any direct information about what happened on the February 5, 2013 flight. Instead, she learned the details through other people and sources.

During consideration of Mr. Berroa's appeal, Ms. Ulreich reviewed the information and termination decision to see if she had missed anything. She doesn't recall that Mr. Berroa attached any information to his appeal.

In the e-mail chain, SBARs for Mr. Berroa and Mr. Hardcastle were attached. She considered that correspondence in conjunction with the SBAR.

She recalls the outside opinion indicated that Aero Med did not commit any violation of an FAA regulation, or breach Aero Med's Part 135 operations manual. The opinion letter was persuasive.

Ms. Ulreich was part of the meeting because she was the next level of supervision for Aero Med. Dr. Hubers was present because he is the ultimate decision-maker. Ms. McDowell and Ms. Kiely from HR were present. And, Ms. Kathy Van Ree was present because she is the director of emergency services and works closely with Dr. Hubers.

After their discussion, Dr. Hubers stated they should move forward with termination. Ms. Ulreich agreed and supported the action. Since she was Dr. Hubers' supervisor, the ultimate decision was hers to make. She was the final decision-maker. The two HR representatives were present to provide expertise on the HR process. They did not object to the termination decision. No pilot from operations was present. Mr. Stretton was not present since he reported directly to Dr. Hubers. Ms. Ulreich believes Mr. Stretton's recommendation was termination. Ms. Ulreich did not sign the termination document.

Ms. Ulreich had a meeting with Dr. Hubers about Mr. Hardcastle, the status of his training, and what they might do with him.

[Re-direct examination] RX 10 is the SBAR that was attached to Dr. Huber's March 24, 2013 e-mail.

Ms. Ulreich is aware that there was an earlier draft of outside counsel's letter dated March 22, 2013.

RX 11 was also attached to Dr. Hubers' e-mail.

[Re-cross examination] Of the reasons set out in the SBAR, Mr. Berroa's actions concerning the February 5, 2013 flight were the most egregious. And, that was the grounds for termination.

Mr. Jeffrey B. Wroblewski
(TR, pp. 616-626)

[Direct examination] Mr. Wroblewski is the chief pilot for Aero Med. He has been with the company for six years, and in his present position for the last three years. As chief pilot, he assists the director of flight operations with scheduling and coordinating training.

After Mr. Hardcastle came back from Flight Safety, Mr. Wroblewski had a conversation with Mr. Berroa who said that Mr. Hardcastle would be ready to fly as a line pilot. So, the following month, he was put on the schedule as a line pilot. However, due to some complications and misunderstandings, Mr. Stretton had him removed from the schedule as a line pilot.

Mr. Wroblewski flew with Mr. Hardcastle about four times. Mr. Wroblewski believed that he was a competent pilot. At the same time, he could understand why some people might believe that he needed more time in the aircraft to be able to fly for as a single pilot. Mr. Hardcastle was very hesitant sometimes in terms of trying to please everyone. Sometimes, he was a little too reluctant to perform just to ensure that he didn't upset anyone. Based on their flights, Mr. Wroblewski had no concerns that Mr. Hardcastle was unsafe.

At Dr. Hubers' request, Mr. Wroblewski provided his written observations about Mr. Hardcastle, RX 12. The statement is consistent with the verbal information he gave Dr. Hubers about Mr. Hardcastle.

[Cross examination] All four flights with Mr. Hardcastle occurred prior to his written observations. But, maybe it was only two flights.

Mr. Wroblewski scheduled Mr. Hardcastle to fly with him. No one instructed him to do that. Either Mr. Berroa or Mr. Wroblewski flew with Mr. Hardcastle on mission flights.

Towards the end of the year, Mr. Stretton told Mr. Wroblewski to only put Mr. Hardcastle on the flying schedule with Mr. Wroblewski.

Dr. Hubers wanted to speak to everyone and Mr. Wroblewski waited his turn to speak with him about Mr. Hardcastle's performance.

Mr. Hardcastle was very safety oriented. He may have been a little slow on start-up, but he had everything memorized. He backed things up with a checklist. Mr. Wroblewski was impressed with his desire to do things by himself.

Dr. Robert ("Butch") H. Hubers
(TR, pp. 626-802)

[Direct examination] Dr. Hubers has worked for Spectrum Health Aero Med for 20 years. Since the fall of 2009, he has served as the medical and program director of Aero Med, which is a department of Spectrum Health. In that capacity, he is responsible for all physicians, nurses, medical teams, flight communicators, pilots, and maintenance personnel. The sole mission of Aero Med is to transport critically-ill patients in the safest manner possible. Aero Med only transports critically-ill patients who have a time-sensitive requirement for medical care.

Prior to the recent situation, Mr. Berroa was an excellent, and very competent, pilot. He had Dr. Hubers' full confidence. Based on Mr. Stretton's recommendation, and confirmation by Flight Safety, Dr. Hubers approved his assignment as check airman and training captain. As a check airman, Mr. Berroa was responsible for the administration of checkrides, and the associated documentation. He was also required to make sure that Aero Med pilots maintained their certification. As training captain, Mr. Berroa had two duties. First, he was involved in the training of new hires. Second, he provided continuation training and education for the established Aero Med pilots.

Dr. Hubers was involved in the decision to hire Mr. Hardcastle. The hiring process involves an initial screening by the hospital, an evaluation by Mr. Stretton, and an interview with Dr. Hubers.

Mr. Berroa was responsible for Mr. Hardcastle's training.

On February 11, 2013, Mr. Berroa sent him an e-mail that raised concerns about Mr. Hardcastle's qualifications, CX 11. In response, Dr. Hubers met with Mr. Berroa on February 22, 2013. RX 13 are the minutes from that meeting. Dr. Hubers had Mr. Berroa go through his concerns about Mr. Hardcastle. Up until then, Dr. Hubers was only aware that Mr. Hardcastle

was taking longer than expected to get online. In December 2012, he had been advised that Mr. Hardcastle was going to be on schedule and that things were progressing smoothly. In a mid-January 2013 discussion with Mr. Stretton, Dr. Hubers learned that some issues had arisen with Mr. Hardcastle's training but a new plan was in place to help Mr. Hardcastle overcome any deficiencies; Mr. Stretton would take over training. Dr. Hubers had also obtained Flight Safety's December 22, 2012 evaluation, CX 28, that indicated Mr. Hardcastle had good situational awareness and aircraft systems knowledge. And, while Dr. Hubers had received some negative reports from other pilots, what Mr. Berroa presented at the meeting about Mr. Hardcastle's situational awareness and aviation decision-making was "a real, real difference from what I had been hearing." Although Mr. Stretton had taken over training, Mr. Berroa opined that it didn't matter how much training Mr. Hardcastle received because his deficiencies could not be trained out.

In light of the conflicting opinions on Mr. Hardcastle's capabilities, and in attempt to gain a consensus, Dr. Hubers believed the only viable plan was to send Mr. Hardcastle back to Flight Safety for an evaluation that was separate from the Aero Med organization.

On February 22, 2013, Dr. Hubers met with Mr. Cobb, RX 14, and Mr. Bluemel, RX 15. On March 6, 2013, he met with Mr. Wroblewski, RX 16. Due to expressed concerns about Mr. Hardcastle's flying, he invited anybody at a corporate meeting around the fourth Tuesday of the month (February 26, 2013) with a concern to come forward. These three pilots either came forward, or were identified as having flown with Mr. Hardcastle. Mr. Stretton had told Dr. Hubers that Mr. Cobb and Mr. Bluemel had issues with Mr. Hardcastle.

Mr. Cobb was concerned about an incident when he believed Mr. Hardcastle would have hit an antenna if Mr. Cobb hadn't intervened. Mr. Hardcastle had also flown through a no-fly zone. Mr. Bluemel identified numerous operational deficiencies that arose during his one flight with Mr. Hardcastle. Mr. Wroblewski considered Mr. Hardcastle was competent; however, he was concerned about what was being said around Aero Med about Mr. Hardcastle.

CX 44 is Mr. Bluemel's summarization of his concerns about Mr. Hardcastle. CX 19 is Mr. Cobb's written analysis of Mr. Hardcastle. RX 12 is Mr. Wroblewski's letter about Mr. Hardcastle. Dr. Hubers asked for this documentation. Dr. Hubers had also asked Mr. Berroa for Mr. Hardcastle's training records, but he did not receive them. During a follow-up, Mr. Berroa replied that he didn't realize Dr. Hubers needed them so quickly. "Then, after that, I never did get the rest of his training records."

On February 27, 2013, Dr. Hubers discussed with Mr. Berroa a plan to send Mr. Hardcastle to Flight Safety to work with Mr. David Roth who was well respected. Mr. Berroa indicated that he would like to write scenarios that would address his concerns about Mr. Hardcastle, RX 17. Dr. Hubers considered the request to be "completely reasonable." He asked Mr. Berroa to discuss the scenarios with Mr. Stretton, and then arrange a conference call with Flight Safety to get verification that they could do the scenarios.

When Dr. Hubers called Mr. Berroa about a week later, Mr. Berroa stated that he had talked with Mr. Roth and was advised that Flight Safety did not believe they could perform the scenarios as requested, and they couldn't validate questions Aero Med had about Mr. Hardcastle's capabilities. Dr. Hubers was shocked because now there was no plan, and absent a consensus among the Aero Med pilots, he would have to let Mr. Hardcastle go. As a result, he contacted HR and they requested documentation. Dr. Hubers then sent Mr. Berroa an e-mail on March 5, 2013 requesting additional documentation, RX 18.

Subsequently, on March 7, 2013, Dr. Hubers had a conference call with Mr. Stretton and Mr. Roth at Flight Safety because considering the amount of money Aero Med spent for Flight Safety training and Flight Safety's reputation, he was confused about why they couldn't do what Aero Med was requesting, RX 19. Mr. Roth informed them that in his conversation with Mr. Berroa, Mr. Berroa asserted that Mr. Stretton didn't know what he was doing. Mr. Roth also told Dr. Hubers that Flight Safety could address Mr. Hardcastle's deficiencies with their own scenarios.

RX 20 is a March 6, 2013 follow-up e-mail to Mr. Berroa asking for Mr. Hardcastle's documentation, which according to Mr. Stretton at the time were in Mr. Berroa's possession.

By the first week of March 2013, Dr. Hubers was no closer to obtaining a consensus about Mr. Hardcastle. Due to the conflicting opinions, he found it very difficulty to actually assess Mr. Hardcastle's proficiency. Even though Mr. Roth had advised that Flight Safety could provide an assessment, Dr. Hubers still would have pilots stating that Mr. Hardcastle was not competent. In particular, after Dr. Hubers spoke with Mr. Roth, he discussed using Flight Safety with Mr. Berroa. But, Mr. Berroa indicated that he wouldn't accept Flight Safety's evaluation if they didn't do scenarios that addressed the deficiencies he had identified.

On February 15, 2013, Mr. Stretton sent Dr. Hubers an e-mail asking for a meeting with him and HR because he wanted to terminate Mr. Berroa, CX 28. At that time, Mr. Stretton was one of the most experienced Aero Med pilots. Dr. Hubers didn't have a reaction to the e-mail because at that point he was not aware of the reason for Mr. Stretton's request.

Shortly thereafter, Dr. Hubers discussed the request with Mr. Stretton. Mr. Stretton was frustrated with Mr. Berroa. Dr. Hubers responded that frustration was an insufficient basis for termination. There was nothing of substance.

Later, at the corporate meeting with the pilots and staff, Dr. Hubers told everyone that a training plan was in place and asked everyone to give them time to go through the process before making up their minds about someone's competency.

On March 9, 2013, Dr. Hubers prepared a summary and chronology about what was happening, RX 21. The document shows that the corporate meeting occurred on February 26, 2013.

Also, on March 9, 2013, Dr. Hubers prepared a summary concerning Mr. Hardcastle, and Dr. Hubers' investigation into his qualifications, RX 22. By this time, Dr. Hubers concluded that he would terminate Mr. Hardcastle. There was no plan in place to get a consensus of the pilots and no other plan had been brought forward. That left Dr. Hubers without any way to determine whether Mr. Hardcastle was safe or not. Mr. Berroa had brought forward his concerns while Mr. Stretton liked Mr. Hardcastle. So, between the two pilots, he eventually sided with Mr. Berroa because the noted deficiency was in aeronautical decision-making, and Mr. Berroa provided the example of Mr. Cobb's flight with Mr. Hardcastle. However, that deficiency was apparently periodic and did not occur all the time. Yet, rather than a shortfall in knowledge, Mr. Hardcastle's issue could put his crews at risk. Ultimately, Dr. Hubers erred on the side of safety.

Dr. Hubers scheduled a meeting with Mr. Hardcastle and HR. Although Mr. Stretton and Mr. Hardcastle did not know Dr. Hubers had decided to terminate Mr. Hardcastle's employment. They knew the meeting was to discuss Mr. Hardcastle's employment. The meeting did not occur because Mr. Hardcastle resigned. Dr. Hubers did not affirmatively give Mr. Hardcastle the option to resign in lieu of termination.

On March 13, 2013, Dr. Hubers met with Mr. Berroa and Ms. McDowell from HR to clarify Mr. Berroa's concerns and get validation from HR, RX 23. The meeting lasted three hours. During the course of the meeting, Mr. Berroa brought up the February 5, 2013 flight and tried to clarify his thoughts. But, he still reached the same conclusions. Dr. Hubers responded that Mr. Berroa could have let Dr. Hubers or flight communications know that the mission was going to be aborted as he walked out of the building and still have accomplished what he proposed to do. Dr. Hubers also noted that he still hadn't received Mr. Hardcastle's training records and Mr. Berroa replied that he thought he had more time to send them. Dr. Hubers asked Mr. Berroa to provide more information about Mr. Hardcastle's deficiencies.

Previously, during their first meeting in mid-February 2013 about the February 5, 2013 flight, after Mr. Berroa described what happened, Dr. Hubers asked, "What about the patient?" Mr. Berroa looked stunned as though it was the first time he realized the flight was a confirmed patient flight and not a training flight. Dr. Hubers expressed his concern that they delayed care for a critical patient.

Mr. Berroa continued to fly patients after Dr. Hubers pointed out his concern about the patient delay. Standing alone that issue wasn't sufficient to stop Mr. Berroa from flying.

Mr. Hardcastle resigned March 14, 2013, which was the day after Dr. Hubers' meeting with Mr. Berroa.

By the time of the March 13, 2013 meeting, Dr. Hubers concluded that while Aero Med had the training records, he no longer needed them because there was no other plan to validate whether Mr. Hardcastle he was safe to fly for Aero Med. On March 15, 2013, Mr. Berroa forwarded additional information, CX 13.

When Mr. Berroa brought his concern about the February 5, 2013 flight, Dr. Hubers was surprised that Mr. Berroa would have permitted lift-off when he knew there was icing. Dr. Hubers was sensitive to the issue because he had been trying to obtain an aircraft with de-icing capabilities. Dr. Hubers was very concerned that they violated A021 by flying an aircraft without de-icing capabilities into icing conditions. So, he decided to seek an opinion by outside counsel about the launch criteria and whether Aero Med had committed any violations on February 5, 2013.

On March 22, 2013, Dr. Hubers received a draft of outside counsel's opinion letter, RX 11. Dr. Hubers contacted the attorney around the beginning of March 2013 after he learned about the February 5, 2013 flight and the potential for an A021 violation. Taking an aircraft into known icing conditions was something Aero Med had never done. Some of the delay in seeking outside counsel was attributable to Dr. Hubers' efforts to validate what happened and determine from Mr. Stretton whether they had an issue. He also had to obtain permission from Ms. Ulreich, his vice-president and supervisor.

On March 24, 2013, Dr. Hubers prepared the SBAR, RX 10. Dr. Hubers recommended termination of Mr. Berroa for egregious acts and referenced outside counsel's letter. Mr. Berroa "knowingly took our aircraft and our team and put our program at risk, putting our aircraft into a condition that he believed existed." The outside counsel had also characterized his actions as reckless and careless. And, while insufficient as a sole basis for termination, Mr. Berroa's disregard for the patient was "extremely concerning" considering his years of experience and because as a physician Dr. Huber feels very strongly about his patients. Their business is providing transport for critical patients.

In a March 24, 2013 e-mail, Dr. Hubers provided the SBAR and outside counsel's letter to Ms. Ulreich, Ms. Van Ree, Ms. McDowell, and Ms. Kiely, RX 8.

On March 25, 2013, Dr. Hubers received outside counsel's final version of his opinion, RX 7, and also met with Ms. Ulreich, Ms. Van Ree, Ms. McDowell, and Ms. Kiely to discuss Mr. Berroa's employment status. At the meeting, they reviewed outside counsel's letter. They all concurred that Mr. Berroa should no longer work for them based on his act of flying into known icing. RX 14 is the corrective action counseling report. As reasons for termination, the report lists the February 5, 2013 flight, the outside counsel's letter, and two other reasons associated with conduct and communication. Dr. Hubers would not have terminated Mr. Berroa for the conduct and communication issues. Again, the primary reason for his termination was flying into known icing conditions.

Dr. Hubers asked Mr. Stretton to review the SBAR because he wanted to be sure his statements about FAA requirements were correct, CX 34.

Concerning Mr. Anderson's lapsed certification, CX 35, a review of training records disclosed that Mr. Anderson flew four patient care flights and one repositioning flight while his certification had expired. The potential fines for Aero Med for permitting these flights amounts to \$120,000 to \$150,000; the charge is \$10,000 per leg, and each flight has three legs. The FAA is currently investigating the charges.

During his employment, Mr. Berroa never advised Aero Med that Mr. Anderson's recertification and checkride dates had passed. Similarly, Mr. Anderson also did not advise Aero Med.

If during Mr. Berroa's employment Dr. Hubers had become aware of Mr. Berroa's failure to conduct the checkride in a timely manner, and failure to disclose that timeliness failure, those omissions would have been grounds for termination.

At the time of his termination, Mr. Berroa had an existing warning letter on his record.

An investigation into Mr. Anderson's employment status is on-going.

[Cross examination] NASA is a voluntary self-reporting system and Aero Med became aware of record-keeping deficiency in their training records from the FAA. Self-disclosure does not immunize the community from liability or further investigation. Self-disclosure is a good business practice.

The outside counsel's letter was a sufficient reason standing alone to terminate Mr. Berroa.

Dr. Hubers met with Mr. Cobb and Mr. Bluemel, and was aware of the contents of their statements about Mr. Hardcastle. One of the pilots had to physically intervene while Mr. Hardcastle was flying the aircraft near an antenna. While Mr. Bluemel had many concerns, he did not state he felt unsafe flying with Mr. Hardcastle.

Mr. Berroa's designation as training captain had enhanced respect and responsibility. He was going to train Aero Med pilots. Aero Med relied on him to ensure the safety of the pilot program. Dr. Hubers wanted the Aero Med staff to have confidence in him. Nevertheless, after he learned from Mr. Berroa that he had knowingly flown into an icing situation, Dr. Hubers had to investigate the issue. Dr. Hubers started with Mr. Stretton to see if he understood the regulations correctly. Then, he sought the opinion of an outside counsel.

Mr. Berroa's main concern with Mr. Hardcastle was his aviation decision-making which is paramount in a pilot's career. So, Mr. Berroa was very concerned about Mr. Hardcastle's lapses in that area because they could make their program unsafe. Initially, Mr. Berroa agreed to a different plan to validate his concerns. They then developed a plan involving Flight Safety which may have alleviated his concerns if Mr. Hardcastle passed Mr. Berroa's scenarios.

Even though he was aware of Mr. Berroa's flight into icing condition, he continued to rely on Mr. Berroa concerning Mr. Hardcastle because industry experts had not yet validate his concerns about Mr. Berroa's action on February 5, 2013.

In weekly management meetings, Dr. Hubers had been advised that while Mr. Hardcastle was rusty, things were moving along appropriately. He was going to Flight Safety and upon his return, it was expected that he'd be put on the schedule. Dr. Hubers assumed that feedback was based on Mr. Berroa's assessment as training captain. So, Dr. Hubers was surprised when he

received Mr. Berroa's letter in February 2013 about terminating Mr. Hardcastle. Up until then, Dr. Hubers was aware Mr. Hardcastle had issues because Mr. Stretton told him in January. But, Dr. Hubers was not aware Mr. Hardcastle needed to be terminated. Conversations with Mr. Stretton about terminating Mr. Hardcastle did not occur until after Mr. Berroa's letter.

Dr. Huber relied on Mr. Stretton's opinion when it came to hiring and promoting pilots. He relied on Mr. Stretton's opinion about pilot performance. Dr. Hubers agreed with Mr. Berroa's 2012 performance evaluation, CX 21.

Dr. Hubers does not need a consensus for hiring or terminating a pilot. However, if there is factual or opinion dispute about a pilot's level of competency, he will seek a consensus of the pilots because they are the experts in their field. Mr. Berroa's case is the only time that Aero Med were not in agreement.

Mr. Berroa's competency was at issue from the February 5, 2013 flight. He had violated an FAA regulation and put Aero Med's program at risk.

RX 22 was a memorandum to reconcile Dr. Hubers' thoughts about Mr. Hardcastle. One of those thoughts was possible termination.

The SBAR for Mr. Berroa's termination was not as verbose as the memorandum about Mr. Hardcastle because they are two different documents and served two different purposes. The memorandum was a reconciliation of many thoughts, while the SBAR is a structured document.

Dr. Hubers need documentation for a termination action in order to subsequently justify the action in light of employees' rights under the company's progressive disciplinary policy. Documentation, even for a probationary employee, is also necessary for possible litigation. The FAA also requires documentation concerning pilot proficiency.

Mr. Berroa, Mr. Cobb, and Mr. Bluemel had negative opinions about Mr. Hardcastle's proficiency. Mr. Stretton and Mr. Wroblewski did not.

The cause of Mr. Hardcastle's termination was his deficiency that had safety implications. The cause of Mr. Berroa's termination was a violation of FAA regulations that involved judgment in terms of pilot proficiency. Dr. Hubers had zero tolerance for that type of violation.

CX 45 (and RX 16) is Dr. Hubers' minutes from his meeting with Mr. Wroblewski. Mr. Wroblewski believed Mr. Hardcastle was proficient.

Aero Med has eight pilots and spends about \$250,000 each year on training with Flight Safety.

In his meeting with Mr. Cobb, Dr. Hubers asked him about the February 5, 2013 flight because Mr. Cobb said he was aware of the flight and thought that Mr. Hardcastle did not show good aeronautical decision-making. In regards to Mr. Berroa's action, when Dr. Hubers asked Mr. Cobb if he would have lifted-off, Mr. Cobb replied, "no."

At a corporate meeting, Dr. Hubers was attempting to gain a better understanding of how the Aero Med pilots felt about present and potential uses of Flight Safety, including checkrides. On the use of Flight Safety to conduct checkrides, the pilots were split.

While Dr. Hubers contacted the outside counsel on March 17, 2013 to ask questions about the Aero Med program, it was not his first contact with the attorney regarding Mr. Berroa.

CX 48 is the SBAR about Mr. Berroa. CX 49 is Dr. Hubers' e-mail to Ms. McDowell about Mr. Berroa's SBAR.

After his separation, Mr. Hardcastle asked Dr. Hubers if Aero Med could pay for his portion of Flight Safety training in order that he might save some money in moving forward in his career. Since he had already been trained at Flight Safety, Mr. Hardcastle worked out an arrangement with Flight Safety – for a discounted rate, \$5,900, he could take his checkride. Dr. Hubers had nothing to do with the arrangement. Aero Med was billed for the checkride and paid the bill. Mr. Hardcastle then reimbursed Aero Med. This transaction was not arranged prior to Mr. Hardcastle's separation.

CX 50 relates to exit interviews.

If an applicant presented the same information that is in Mr. Berroa's termination letter, Dr. Hubers would not hire him.

Spectrum Health (Aero Med) Helicopter Pilot Position Description⁶ (CX 1)

The pilot operates Aero Med helicopters and has authority for decision-making regarding acceptance of flights as it relates to safety, mechanical conditions, and weather conditions. He or she performs duties as specified by Aero Med's general operations manual, and FAA operations specifications. Two thousand hours of helicopter experience, with 1,500 hours as pilot in command, is required. Required licenses and certifications include FAA commercial helicopter license with instrument endorsement, and ATP for helicopter.

⁶While I have read/reviewed all the admitted exhibits, I have only summarized the potentially relevant content that was not unduly repetitious of the hearing testimony.

FAA Operations Specification – Aero Med
(CX 2)

On April 8, 2009, the FAA issued operations specifications and license to Aero Med to conduct flights under 14 C.F.R. Part 91 for crew member training, maintenance flights, ferry flights, repositioning flights, and the carriage of company officials.

FAR 135 Airman Competency/Proficiency Form
(CX 3)

The form may be used for checkrides under FAR 135.293, FAR 135.297 and FAR 135.299.

Authorization Letter – Mr. Berroa
(CX 4)

On January 1, 2007, Aero Med authorized Mr. Berroa to act a pilot in command.

Payment Summary – Mr. Berroa
(CX 5)

From January 1, 2011 through December 31, 2012, Mr. Berroa's cumulative gross pay was \$243,910.42.

Flight Summary – January 2013
(CX 6)

Mr. Berroa, training captain/check airman, summarized that on a day, instrument-training flight, an air traffic controller gave Mr. Hardcastle vectors for a precision approach which placed Mr. Hardcastle on top of the final approach fix rather than the usual three miles away, thereby placing the aircraft above the glideslope. As a result, in order to intercept the glideslope, Mr. Hardcastle initiated a descent exceeding 1,000 feet per minute. When Mr. Berroa asked Mr. Hardcastle whether the approach was stabilized, Mr. Hardcastle said, "yes." Mr. Berroa then had to explain the precarious situation associated with a high rate of descent and prompted Mr. Hardcastle to execute a missed approach.

Mr. Berroa opined that with 20 years of experience, Mr. Hardcastle should be able to recognize when the aircraft was not in a stabilized approach and determine the most appropriate course of action, which was to immediately execute a missed approach. His inability to execute properly demonstrated a deficiency in aeronautical decision-making under the stress of unforeseen situations that may be encountered in flight.

Training Assessment – January 6, 2013
(CX 7)

Mr. Berroa rendered an assessment of Mr. Hardcastle's training as of January 6, 2013. For the past three months, Mr. Hardcastle had flown 45 hours in the S-76, with 35 hours dedicated to training. He also acquired five additional hours of training at Flight Safety. In terms of cognitive skills, Mr. Hardcastle had an excellent knowledge base and understanding of aircraft systems. For physical flying ability, although somewhat slow, Mr. Hardcastle was able to perform any given task required by the practical test standard. However, he did not consistently demonstrate: a) sound judgment and aeronautical decision-making; b) single pilot competence; and, c) the ability to correct deficiencies that have been brought to his attention, including radio procedures, over-torqueing the engines, drooping rotor rpm, overspeed of rotor rpm, and maintenance of a safe altitude prior to reaching a destination. Concerning his attitude and interpersonal skills, Mr. Hardcastle got along with co-workers and always presented himself ready and willing to do any assigned task. At the same time, he expressed some resignation to co-workers.

Weather Observations – Gerald R. Ford International Airport
(CX 8 and CX 9)

On February 5, 2013, the hourly weather observation at the Grand Rapids airport at 1653 (4:53 p.m.) was overcast, 1,100 foot ceiling, five miles visibility with haze; 0.01 inch of precipitation; and a temperature of 30 degrees. The reading for 1753 (5:53 p.m.) was overcast, 1,300 foot ceiling, four miles visibility with haze, no precipitation, and a temperature of 30 degrees.

Summary and Annotation – February 5, 2013
(CX 10, CX 26, and RX 4)

At approximately 1740 (5:40 p.m.), a request was received to transport a patient from Ionia to Grand Rapids. The reported weather at Grand Rapids was 1,300 foot ceiling, four miles visibility, and a temperature of minus one degree Celsius. Mr. Hardcastle accepted the flight, completed the paperwork, moved the aircraft out of the hanger, completed pre-flight and take-off checks, and took off for Ionia. When he reached the north runway and estimated the ceiling to be 500 feet, Mr. Hardcastle aborted the flight for "low ceilings." At that time, Mr. Berroa "could not determine the actual ceiling due to darkness." Upon post-flight inspection of the aircraft, ice accumulation was noted on the nose of the aircraft.

In Mr. Berroa's opinion, Mr. Hardcastle made two errors. First, since darkness was only 20 minutes away at 5:50 p.m., the night terrain/obstacle clearance value of 500 feet above the highest obstacle was applicable. Applying the night obstacle clearance to the current weather would have lead to the flight being turned down for not meeting the required obstacle and cloud clearance requirement mandated by FAA operation specification A021.

Second, based on his observation of the weather at the hanger, Mr. Berroa determined the ceiling and visibility were consistent with the weather report. However, while standing on the

ramp, Mr. Berroa felt a very fine drizzle. Considering the current temperature of minus one degree Celsius, the threat of icing was noticeable and should have been apparent to Mr. Hardcastle. In those conditions, “Mr. Hardcastle should have cancelled the flight due to the potential for icing during the flight.”

Mr. Berroa observed that the abilities to evaluate weather conditions from both printed reports and personal observations, and weather interpretation in order to obtain a realistic assessment of weather conditions that will be experienced during a flight are basic airmanship skills, and integral elements in the aeronautical decision-making. Mr. Hardcastle’s inability to recognize and determine a realistic assessment of the weather conditions on February 5, 2013 was a serious error that demonstrated a “lack of adequate decision-making capabilities.”

On the bottom of the report, Mr. Stretton annotated “highest obstacle en route 313 feet AGL (above ground level), 1,195 feet MSL (mean sea level).”

Letter – February 13, 2013
(CX 11)

At Mr. Stretton’s request, Mr. Berroa wrote a letter to Dr. Hubers explaining the December 14, 2012 checkride and Mr. Hardcastle’s flight schedule status.

On December 14, 2012, Mr. Berroa administered an FAA Part 135 VFR/IFR checkride to Mr. Hardcastle. During the IFR portion of the evaluation, Mr. Hardcastle made several procedural errors that would have precluded Mr. Hardcastle from passing the entire checkride. However, Mr. Berroa had authority from the FAA to change the IFR portion of the checkride to a training flight, while still passing Mr. Hardcastle on the VFR portion of the checkride. Completion of the VFR portion of the flight did not mean that Mr. Hardcastle could be scheduled to fly on in his own. At the same time, having completed the VFR portion of the checkride, Mr. Hardcastle was still able to fly all flight legs of a patient flight (in VFR conditions and with another pilot), which would enable Mr. Hardcastle to improve his deficient areas. Mr. Berroa also did not want to further erode Mr. Hardcastle’s self-confidence by failing him on the checkride.

Mr. Berroa further advised Dr. Hubers that Mr. Hardcastle’s deficiencies were “systemic in nature, spanning his career as an aviator.” I don’t feel this is the place to attempt to correct those issues.”

Flight Manual S-76 Operating Limits
(CX 12)

The power-on, dual engine, rotor limits are: maximum – 108%; minimum – 106 %; and transient – 91%.

E-Mail and Letters – March 15, 2013
(CX 13)

On March 15, 2013, Dr. Hubers forwarded to Ms. McDowell and Ms. Kiely two letters he received from Mr. Berroa by e-mail.

In the letter, considering the amount of training Mr. Hardcastle had received from Aero Med and Flight Safety, Mr. Berroa opined that no additional training or assessment would correct Mr. Hardcastle's previously reported problem of being unable to make corrective actions required to overcome his deficiencies in aeronautical decision-making. In the interest of safety, Mr. Berroa recommended that Mr. Hardcastle's training with Aero Med be terminated.

In a second letter, Mr. Berroa acknowledged that Flight Safety did an excellent job measuring a pilot's aircraft handling capabilities, as well as ensuring that a pilot maintains commercial pilot standards. However, although Flight Safety also assessed aeronautical decision-making, based on his experience, Flight Safety focused on procedural-based issues and not the "soft" skills associated with cognitive reasoning that are required in real work situations. In other words, it was possible for a pilot with serious deficiencies to train for several days (at Flight Safety), and fly a checkride without encountering a situation that would bring his deficiencies to light. Consequently, Mr. Berroa did not feel that Flight Safety could adequately validate the issues with Mr. Hardcastle that Mr. Berroa had identified.

Corrective Action Report – March 26, 2013
(CX 14)

On March 26, 2013, Mr. Berroa was terminated for acting in a reckless and careless manner that exposed Aero Med, its staff, and its patients to significant and unnecessary risk when he allow a flight to take-off during known icing conditions. Additionally, Aero Med had concerns about his professionalism in the work place and communications.

In terms of expected level of performance, as a training captain and leader in Aero Med, Mr. Berroa was expected to adhere to, and demonstrate, professional behavior and discretion, and uphold Aero Med core values.

Since Mr. Berroa had an active written warning, Aero Med skipped two levels of corrective actions and chose termination due to the nature of the company's concerns.

Previous corrective action steps included an October 15, 2012 corrective action, and a coaching and mentoring action on January 9, 2013.

Dr. Hubers and Mr. Berroa signed the form.

Internal Review Request – April 1, 2013
(CX 15)

On April 1, 2013, Mr. Berroa submitted an appeal of his termination. Mr. Berroa stated that the asserted reasons for the termination were false. He asserted that he was terminated for bringing up safety concerns, and recommending a remedy. The purported January 9, 2013 coaching never took place. And, finally Aero Med had failed to adhere to its core values in terminating Mr. Berroa.

Retirement Account Balance
(CX 16)

On April 1 2013, Mr. Berroa's account balance was \$104,538.80. On June 30, 2013 the vested balance was \$0.00.

Coaching and Mentoring Report – January 9, 2013
(CX 25)

On January 9, 2013, Mr. Stretton spoke with Mr. Berroa about sharing information with other Aero Med personnel about the performance of pilots during training.

FAA Commercial Pilot, Rotorcraft, Practical Test Standards – February 2013
(CX 18)

According to the Foreword, the publication establishes the standards for helicopter commercial pilot certification practical tests. The FAA requires its inspectors and designated pilot examiners to conduct practical tests (checkrides) in compliance with the standards. The standards may also prove helpful during training, and for preparation for the practical test.

The manual indicates that if an examiner determines a task is incomplete or the outcome is uncertain, the examiner may require the applicant to repeat the task or portions of the task. However, this provision “does not mean that instruction, practice, or repeating of an unsatisfactory task is permitted during the certification process.”

Task C in preflight preparation requires an applicant to demonstrate the ability to analyze available weather reports, charts, and forecasts, with emphasis on specific sources, including icing and freezing level information.

Flight Analysis – Mr. Cobb
(CX 19)

Mr. Jeff Cobb summarized his observations concerning five flights that he flew with Mr. Hardcastle on December 29, 30, and 31, 2102.

On one flight, when departing the Butterworth Hospital from the helipad, Mr. Hardcastle started a turn, and engaged the heading autopilot while attempting to contact air traffic control.

He was unaware of the position of the aircraft in regards to an area antenna. As a result, the aircraft was flying in a pattern that would have impacted the antenna if Mr. Cobb had not alerted Mr. Hardcastle to the immediate danger which placed the safety of the crew at risk.

Mr. Hardcastle flew below 700 feet AGL through a no-fly area because he had no idea where this restricted airspace was located.

When flying past Greenville, Mr. Hardcastle never tuned in the radio frequency or made a radio call about flying through this airspace.

After being informed to make radio calls while flying through “no-towered” airport airspace, all of Mr. Hardcastle’s calls were inconsistent with the aircraft’s altitude because he mixed AGL and MSL altitudes.

Mr. Hardcastle demonstrated a lack of confidence and knowledge in making radio calls to ATC (air traffic control).

In Mr. Cobb’s opinion, Mr. Hardcastle’s single pilot operation of the Aero Med helicopter did not reflect his years of experience. The skills that he lacked should have been established many years ago; and he had failed to develop the necessary skills for flying as a single air medial transport pilot in a safe and efficient manner. In Mr. Cobb’s opinion, Mr. Hardcastle represented a safety hazard to Aero Med. He recommended that Mr. Hardcastle be released from his employment with Aero Med.

Job Description, Manager, Flight Operations (CX 20)

The incumbent is responsible for all matters relating to Aero Med flight operations, include regulatory compliance and the hiring and training of employees.

Annual Appraisal Review – 2012 (CX 21)

For the rating period July 1, 2011 through June 30, 2012, Mr. Stretton gave Mr. Berroa a 3.0 rating (achieves expectations) in the performance areas of flexibility, inclusion and diversity, innovation, principles and values, teamwork, and timeliness of work. He was rated 4.0 (exceeds expectations) in quality focus due to his improvement in the quality of the training program, with a concurrence from Dr. Hubers. And, Mr. Berroa received a 5.0 (exceptional performance) in the area of job knowledge for being the expert in all aspects of Aero Med’s services, and “creating a more documented training department,” with a thank you from Dr. Hubers.

Resume and Education – Mr. Hardcastle
(CX 22 and CX 23)

Mr. Hardcastle had 25 years of US Army aviation experience with 2,500 hours as a “fixed” wing airline transport pilot. He held a commercial rotary wing pilot’s license in Bell and Sikorsky helicopters. He had 15 years experience as an airframe, and power plant rated mechanic. Mr. Hardcastle had a bachelor of science degree from Embry-Riddle University.

Coaching and Mentoring Report – February 9, 2013
(CX 27 and RX 4)

On February 9, 2013, Mr. Stretton conducted a follow-up with Mr. Berroa of the January 9, 2013 counseling about Mr. Hardcastle’s training. In response, Mr. Berroa told Mr. Stretton about two incidents that occurred on the same day. The first incident occurred when Mr. Hardcastle elected not to take a flight request based on reported weather. Mr. Berroa informed Mr. Hardcastle that he would have taken the flight. Second, later in the day, Mr. Hardcastle accepted a flight request to Ionia, but shortly after take-off aborted the flight due to un-forecast weather. Upon return to Aero Med, Mr. Berroa told Mr. Hardcastle that he would not have accepted the flight due to the weather forecast.

Mr. Berroa also stated Mr. Hardcastle did not make good aeronautical decisions, and did not demonstrate sound judgment. He recommended that Aero Med terminate Mr. Hardcastle’s employment. Mr. Stretton responded that Mr. Berroa had been flying with Mr. Hardcastle for more than 40 hours and was only just then telling him that Mr. Hardcastle should be terminated. Mr. Stretton said “this was a direct reflection on your training abilities.” As training captain, Mr. Berroa should have been able to make a determination about Mr. Hardcastle’s insufficient abilities within an hour or two of flying with him. Mr. Berroa replied, “I don’t care.” And, Mr. Stretton responded, “You should care, it’s your job.”

Mr. Stretton added, “After this conversation, I do not feel Tony (Mr. Berroa) should continue to be the Aero Med training captain, and I will seek guidance from HR and Dr. Hubers, and even consider if Tony should continue employment at Aero Med.”

At the bottom of the form, Mr. Stretton add a note that on February 13, 2013, Mr. Berroa aborted two flights due to un-forecast weather.

Flight Safety Training Record and E-Mails
(CX 28)

From December 17, 2012 through December 23, 2012, Flight Safety provided Part 135 training for Mr. Hardcastle, which included seven simulators rides, totaling 12 hours. Mr. Hardcastle was rated proficient in every task. He demonstrated good systems knowledge. His situational awareness and ADM (aeronautical decision-making) were very good. “Client completed all elements of S-76C++ initial [training] in above average manner.”

On February 14, 2013, Mr. Stretton forwarded to Dr. Hubers Mr. Hardcastle's Flight Safety training report and highlighted the assessment by Flight Safety that his performance was above average. In Mr. Stretton's opinion, "This is not a pilot we need to let go for not being able to perform the mission!"

On February 15, 2013, Mr. Stretton indicated that he wanted to meet with Dr. Hubers and HR. "I want to terminate him (Mr. Berroa)! I don't want to, but he will no longer be the training captain, and I do not want to manage him after this; he will be nothing but a cancer on the group." In addition to his continued unprofessional conduct, his comment that he doesn't care "is enough for me."

Mr. Stretton also advised that he surprised Mr. Hardcastle when he jumped in the auxiliary crew seat on a flight. After telling Mr. Hardcastle to ignore him, Mr. Hardcastle flew the mission "just fine," and appeared encouraged.

Resignation Letter – March 14, 2013
(CX 31)

On March 14, 2013, Mr. Hardcastle signed a letter of resignation for "personal" reasons. He had discussed his departure with management. Mr. Hardcastle asserted that his resignation was not coerced, or based on administrative or punitive actions.

E-Mail – March 18, 2013
(CX 33)

On March 18, 2013, Mr. Stretton reviewed a SBAR for Mr. Berroa and advised that he thought Dr. Hubers could proceed, but he did not think it was enough to "hang him!"

NASA Aviation Safety Reporting System ("ASRS") Form – May 2, 2014
(CX 35)

According to the form, ASRS is used to identify issues in the aviation system which need to be addressed. Section 91.25 of the FAA regulation (14 C.F.R. 91.25) "prohibits reports filed with NASA from being used for FAA enforcement purposes. This report will not be made available to the FAA for civil penalty or certificate violations for violations of the Federal Air Regulations."

On May 2, 2014, Aero Med reported that during an inspection of its pilot training records, the director of operations discovered a discrepancy that arose in 2013. The pilot's checkride required under Part 293 expired at the end of February 2013. However, the pilot did not undergo a timely line check. The Aero Med check airman did not conduct the checkride until March 8, 2013. In the eight days between the expiration of his prior checkride and the March 8, 2013 checkride, the pilot flew as pilot in command on four Part 135 flights, three of which had passengers on board. The check airman responsible for failing to give a timely checkride had been terminated. The same check airman also failed to document that he conducted a Part 293 checkride for another pilot.

FAA Regulations
(CX 29, CX 30, and CX 36 to CX 40)

Part 91.101 requires each pilot in command to become familiar with weather reports and forecast for flights in IFR, or not in the vicinity of an airport.

Part 135.95 prohibits a certificate holder from using the services of an airman unless the person has an appropriate and current airman certificate.

Part 135.293, prohibits a certificate holder from using the services of an airman unless the pilot has passes a written or oral test administered by an authorized check pilot on the pilot's knowledge of multiple aspects of flying its equipment, including systems knowledge, aircraft operating specification, flight procedures, navigation, and weather.

Part 135.297 prohibits a certificate holder from using the services of an airman unless the pilot has passed an instrument proficiency check administered by an authorized check pilot.

Part 135.299 prohibits a certificate holder from using the services of an airman unless the pilot has passed a flight check in the type of aircraft the pilot is to fly.

Flight Analysis – January 1, 2013
(CX 44)

On March 6, 2013, Mr. Dale, a CFI, documented the flight that he flew with Mr. Hardcastle.

On January 1, 2013, Mr. Bluemel was assigned as a day pilot at Grand Rapids. Mr. Berroa asked him to sit in the left seat and observe Mr. Hardcastle. Consequently, during the morning brief, he advised that he would be seating left seat and that he would not handle any responsibilities unless safety required.

Mr. Hardcastle accepted the first flight to be conducted in “marginal but flyable” weather due to forecasted light snow. During pre-flight, Mr. Hardcastle was “extremely slow” with his checklist. Prior to completion, due to low temperatures and forecast moisture, Mr. Bluemel had to query Mr. Hardcastle why he had failed to arm the pitot tube⁷ heat and windshield anti-ice. Mr. Hardcastle turned the switches on. Next, during take off, Mr. Hardcastle pulled too much power, which caused a slow droop of the rotor rpm. While en route, while the expected altitude was 2,000 feet MSL, Mr. Hardcastle's altitude varied from 1,900 to 1,600 feet MSL, and he failed to advise air traffic control of the deviations as required. His airspeed approached the max velocity of 155 knots. “Just as I was going to take the controls,” Mr. Hardcastle backed off on the airspeed. While overhead an uncontrolled airport, Mr. Hardcastle put in the wrong radio frequency which also required Mr. Bluemel's correction. After they arrived, Mr. Hardcastle completed the approach and landed without any issues. After being advised the patient had died, Mr. Hardcastle again “slowly and methodically” prepared for departure; this time he turned on the pitot tube heat and windshield anti-ice. On take off, excessive power was again applied.

⁷The pitot tube is used to measure an aircraft's airspeed.

After the flight, Mr. Bluemel debriefed Mr. Hardcastle about his observations. He was very receptive and took notes. Mr. Hardcastle explained that he was purposefully deviating his altitude in order to maintain obstacle clearance while being as low as possible due to reduced visibility. Mr. Bluemel expressed a preference to keep altitude in an unfamiliar area; and regardless, he needed to inform ATC of his altitude deviation.

In summary, Mr. Bluemel believed Mr. Hardcastle's flying was "rough, with abrupt control inputs." He had "poor situational awareness," and his radio communications were "careless throughout this short flight." Mr. Bluemel was surprised by his level of incompetence, considering that he had been signed off to fly 135.293 VFR, which meant he could have flown the flight by himself.

When Mr. Bluemel shared his observations with Mr. Berroa, Mr. Berroa noted the deficiencies were repeated issues and that Mr. Hardcastle was not making progress. Mr. Berroa also shared that another pilot had experienced similar issues with Mr. Berroa. Mr. Berroa intended to discuss the situation with Mr. Stretton.

Finally, Mr. Bluemel commented that while he only flew once with Mr. Hardcastle, he believed his observations would be consistent with observations by other pilots.

Meeting Minutes – Mr. Wroblewski (CX 45 and RX 16)

On March 6, 2013, Dr. Hubers, Mr. Stretton, and Dr. Hubers met to discuss Mr. Hardcastle's qualifications. On one flight, Mr. Wroblewski had no concerns with Mr. Hardcastle. On another flight, Mr. Hardcastle lowered the gear box at 130 knots, which was textbook, rather than 120 knots used by Aero Med pilots. When Mr. Wroblewski asked him why he didn't wait to 120 knots, Mr. Hardcastle indicated that no one at Aero Med had told him about the practice. Mr. Hardcastle told Mr. Wroblewski that he did not feel welcome by some Aero Med personnel, including Mr. Berroa; he asked that if he was going to get fired Mr. Wroblewski let him know so that he could quit.

After his meeting with Dr. Hubers, Mr. Berroa seemed happy that there was a plan involving Flight Safety. But, after learning that Flight Safety could not do the checkride, Mr. Berroa stated that he would not sign off on Mr. Hardcastle, and would not change his mind.

Mr. Wroblewski opined that that Mr. Berroa should not have launched into the icy conditions.

In Mr. Wroblewski's opinion, Mr. Hardcastle had positive traits, and was very compliant and humble. He would rather leave Aero Med than disrupt the organization. Mr. Wroblewski considered Mr. Hardcastle to be a competent and experienced pilot. At the same time, his flying skills were weak. Mr. Wroblewski was concerned that Mr. Berroa may have indicated to Mr. Hardcastle that he would not fit in with Aero Med.

Mr. Cobb's Deposition Excerpts
(CX 46 and RX 24)

Mr. Cobb believed that his conversation with Dr. Hubers about the February 5, 2013 flight took place on February 22, 2013. Dr. Hubers brought up the flight, which Mr. Cobb thought was strange because he wasn't on the flight, and believed Dr. Hubers already had enough information from his flights with Mr. Hardcastle.

Evaluation of a flight in hindsight is difficult because two pilots looking at the same weather information may reach different conclusions on whether to take a flight based on their experience, particularly if a pilot is not familiar with winter weather in Michigan. From his review of the documented weather information, they did not fly into icing conditions because those conditions were not reported until later in the night.

Mr. Cobb heard about the February 5, 2013 flight from several people, including Mr. Berroa. Based on what he knew about the flight, Mr. Cobb told Dr. Hubers that as an instructor pilot, "I wouldn't have let the guy take off, but I would probably let him do the run-up and then stopped him." However, if someone else is doing the training, and he thinks the weather is not that bad, then it's his choice to let the other pilot take off. The forecast weather permitted a legal launch of the aircraft. But, what a pilot actually runs into is another thing. At the same time, marginal weather can be good for training.

In summary, although Mr. Cobb would not have taken off, since at the moment of take off there was no icing in the forecast, "they had weather to take off." It was within the pilot's discretion.

SBAR – March 17, 2013 and March 24, 2013, and E-Mails
(CX 48, CX 49, and RX 10)

On March 17, 2013, Dr. Hubers prepared a SBAR concerning the termination of Mr. Berroa's employment. During the investigation of concerns about Mr. Hardcastle, several behavioral issues and potential FAA violations by Mr. Berroa were discovered.

There was a significant lack of documentation by Mr. Berroa as a training captain concerning Mr. Hardcastle's training. The other documentation that Dr. Hubers had received were two letters from Mr. Berroa recommending Mr. Hardcastle's termination. Potential FAA violations involved launching into potential icing and a reported A021 violation on a flight with Mr. Hardcastle. Mr. Berroa also delayed a patient's care by trying to validate a new pilot's abilities. Mr. Berroa also stated that safety, and not patient care, was his only concern.

On March 19, 2013, Dr. Hubers forwarded Mr. Berroa's SBAR to Ms. McDowell. On the same day, she responded that the SBAR was sufficient but recommended two additions. First, that Mr. Berroa was on an active first warning. Second, as training captain, Mr. Berroa was considered a leader and expected to be held to that standard.

On March 24, 2013, Dr. Hubers revised Mr. Berroa's SBAR as recommended.

E-Mail – March 15, 2013
(CX 50)

Dr. Hubers advised Ms. McDowell that he will figure out the Flight Safety cost for Mr. Hardcastle's training and determined how it will be paid.

Load Manifest –February 5, 2013
(CX 51)

On February 5, 2013, the flight departed at 1800 (6:00 p.m.) and returned at 1806 (6:06 p.m.). The minimum safe altitude was 900 feet. Pilot in command was Mr. Hardcastle; "CP" was Mr. Berroa.

Meeting Minutes – Mr. Bluemel
(CX 53 and RX 15⁸)

On February 22, 2013, Mr. Bluemel met with Dr. Hubers. Mr. Bluemel stated that Mr. Berroa asked him to evaluate Mr. Hardcastle's proficiencies due to Mr. Berroa's concerns. During flight with Mr. Hardcastle, Mr. Bluemel developed a long list of problems and concluded Mr. Hardcastle lacked the caliber that Aero Med needed in its pilots. In particular, Mr. Hardcastle did not turn on the pitot tube heat and windshield anti-icing even though the forecast weather included snow; pulled too much power on take off; had radio procedure difficulties; and made altitude changes without notifying air traffic control.

Mr. Bluemel had 100% confidence in Mr. Roth at Flight Safety.

FAR 135 Airman Competency/Proficiency Forms
(RX 1 to RX 3))

On January 11, 2012, Mr. David Anderson successfully passed FAR 135.293, FAR 135.297, and FAR 135.299 checkrides administered by Mr. Berroa in the S-76.

On December 14, 2012, Mr. Hardcastle successfully passed FAR 135.293 and FAR 135.299 checkrides administered by Mr. Berroa in the S-76.

On March 8, 2013, Mr. David Anderson successfully passed FAR 135.293, FAR 135.297, and FAR 135.299 checkrides administered by Mr. Berroa in the S-76.

Coaching and Mentoring Report – June 24, 2011
(RX 5)

On June 24, 2011, Mr. Stretton counseled Mr. Berroa because over the past six months, Mr. Berroa failed to report for duty at the start of his shift 10 times, which caused Aero Med to be out of service due to the lack of a helicopter pilot. Mr. Berroa was advised that an Aero Med pilot was expected to clock-in 15 minutes prior to the start of his shift in order to complete

⁸As formatted by Dr. Hubers.

necessary pre-flight inspections and paperwork. Mr. Stretton indicated that if Mr. Berroa continued to be tardy, the coaching report may become part of his personnel file. Mr. Berroa signed the form without comment.

Corrective Action Report – October 15, 2012
(RX 6)

On October 15, 2012, Mr. Stretton issued a first written warning to Mr. Berroa for being tardy 11 times in the past 10 months; and six times in the last four months. His tardiness put Aero Med out of service due to the lack of a helicopter pilot. Mr. Berroa was advised that an Aero Med pilot was expected to clock-in 15 minutes prior to the start of his shift in order to complete necessary pre-flight inspections and paperwork. Mr. Stretton indicated that if Mr. Berroa continued to be tardy, and failed to meet expectations, “further corrective action will occur up to and including termination.” Mr. Berroa signed the form without comment.

Mr. David Baxter’s Letter – March 22, and 25, 2013⁹
(RX 7 and RX 11)

Mr. Baxter summarized his legal review of certain issues associated with Aero Med’s Part 135 flight operations to determine whether Aero Med violated any FAA regulation or their FAA Part 135 operations manual. Specifically, Aero Med was concerned whether the dispatch and launch of Flight 10880 on February 5, 2013 in a S-76 helicopter that was not rated for operations in known icing represented any violation.

As background, Mr. Baxter noted that his law firm specialized in aviation litigation, representing at times Part 135 operators. To assist in the review, the law firm retained the services of an expert helicopter pilot (“expert”).

The expert reviewed various Aero Med e-mails, including Mr. Berroa’s summarization of the December 14, 2012 checkride, and his summarization of the February 5, 2013 flight; the personnel record of Aero Med employees; and the load manifests from flights that occurred on December 29, 30, and 31, 2012, and February 5, 2013.

Upon review of the documents, and consultation with the helicopter expert, Mr. Baxter concluded that the launch of Aero Med’s S-76 helicopter on February 5, 2013 did not represent any violation of an FAA regulation or the Part 135 operations manual because at the time of launch “forecasted” icing conditions did not exist. As a result, the pilot in command, Mr. Hardcastle, did not commit any violation of FAA regulations or breach Aero Med’s Part 135 operations manual, A021, when he launched the aircraft. Additionally, Mr. Baxter noted that Mr. Hardcastle prudently aborted the mission when he determined the actual weather was not as forecast and had deteriorated from the time the forecast weather had been obtained.

⁹The only difference between the two versions is that in the March 25, 2013 letter, the portion of the review concerning Mr. Cobb in the March 22, 2013 letter has been removed.

On the other hand, the expert opined that Mr. Berroa “would have violated both 14 C.F.R. Part 91.3 and Aero Med’s Part 135 certificate (requiring adherence to the operation manual of each aircraft)¹⁰ by knowingly permitting his fellow crewmember to launch into weather which Mr. Berroa declared he knew (based on his own assessment) had known icing conditions. Additionally, Mr. Berroa purposively withheld his assessment of the weather from the pilot in command, Mr. Hardcastle. The expert believed that if Mr. Berroa had shared his analysis of the weather, Mr. Hardcastle would have taken that information into account in determining whether to launch the aircraft.

Further, as a training pilot and part of the crew of that flight, Mr. Berroa had the responsibility to provide instruction through collaborative interaction with his fellow crewmember, and ensure safety. While he was tasked with teaching Aero Med pilots to avoid hazardous flight conditions, Mr. Berroa “himself allowed flight into what he called known icing conditions in an aircraft not equip to do so.” It was Mr. Hardcastle’s proper decision-making that prevented further flight.

Because “Mr. Berroa had an absolute duty to prohibit the launch of Flight 10880 if he felt that such was in violation of the Federal Aviation Regulations,” his failure to stop the flight, “can be construed as both reckless and careless.”

As corrective action, the expert recommended further training of Aero Med pilots to reinforce FAA standards of professional conduct and judgment.

Concerning the flights in December 2012, while Mr. Cobb’s role should have been more specifically defined, because he was fully certified to act as a single pilot PIC for Aero Med, the operation of these flights did not represent any violation.

E-Mails
(RX 8)

On March 24, 2013, Dr. Hubers forwarded Mr. Baxter’s legal review and Mr. Berroa’s SBAR to Ms. Ulrich, Ms. Van Rhee, Ms. McDowell, and Mr. Kiely.

On March 25, 2013, in the morning, Ms. Van Rhee agreed that Mr. Berroa should be terminated.

Denial Letter – April 4, 2013
(RX 9)

On April 4, 2013, Ms. Ulrich upheld the termination decision and denied Mr. Berroa’s internal appeal. She advised that if he wanted to request a panel appeal, he should contact Ms. McDowell.

¹⁰Aero Med’s S-76 was not certified for flight in known icing conditions.

Letter – March 6, 2013
(RX 12)

Mr. Wroblewski discussed some of the highlights of his March 6, 2013 discussion with Dr. Hubers. Mr. Wroblewski reported that Mr. Hardcastle was excited as he started to flying during working shifts with patients. During his last two flights with Mr. Hardcastle, and at Mr. Hardcastle's request, Mr. Wroblewski neither coached nor helped him. During hanger discussions about possible scenarios for incoming requests, Mr. Hardcastle was positive and very compliant. He had been unaware that Aero Med had a standard practice of extending gear at 120 knots, rather than the flight manual's 130 knots.

While Mr. Hardcastle noticed a change in Mr. Berroa's attitude towards him, Mr. Hardcastle didn't speak badly of Mr. Berroa and accepted all the responsibility. Apparently, due to exchanges between Mr. Berroa and Mr. Hardcastle in front of a medical crew, a flight nurse expressed a concern to Mr. Wroblewski about Mr. Hardcastle's flying abilities.

Mr. Wroblewski believed the information Mr. Berroa has shared with others had been detrimental to Mr. Hardcastle.

Two weeks before Christmas, Mr. Berroa told Mr. Wroblewski that Mr. Hardcastle would be fine and could be added to the schedule after his return from Flight Safety. However, after Mr. Hardcastle's return from Flight Safety, Mr. Berroa's opinion has fluctuated.

Meeting Minutes – Mr. Berroa
(RX 13)

On February 22, 2013, Dr. Hubers met with Mr. Berroa and discussed in more detail Mr. Berroa's concerns set out in his February 13, 2013 correspondence. Mr. Berroa explained his position once again about Mr. Hardcastle's systemic deficiencies associated with the ability to consistently demonstrate solid judgment and good aeronautical decision-making.

When Dr. Hubers asked Mr. Berroa to reconcile his observations with Flight Safety's evaluation of Mr. Hardcastle, Mr. Berroa did not know how he would do that. Mr. Berroa could only report what he observed. He also noted that Flight Safety used a different training program from what Mr. Hardcastle had flown locally for Aero Med.

After some discussion, they decided that Mr. Berroa will develop a list of concerns generated by all staff pilots. These concerns will be developed into scenarios. Then, Mr. Eber or Mr. Roth, two training pilots at Flight Safety, will actually test Mr. Hardcastle in the scenarios and make a recommendation. Mr. Berroa was advised that he'd have to work directly with Flight Safety. The plan would be completed by March 1, 2013 and then reviewed by Mr. Stretton and Dr. Hubers before implementation.

Meeting Minutes – Mr. Cobb
(RX 14)

On February 22, 2013, Dr. Hubers met with Mr. Cobb. Mr. Berroa asked Mr. Cobb to fly with, and evaluate, Mr. Hardcastle at the end of December 2012. During five flights, Mr. Cobb determined that Mr. Hardcastle could fly the aircraft but he did not always process changes that were occurring in flight.

During one flight, when departing the Butterworth Hospital, Mr. Hardcastle initiated a turn, engaged the autopilot, and lost situational awareness to the extent that Mr. Cobb had to grab the flight controls. Mr. Hardcastle was also unaware of a no-fly zone. Mr. Cobb advised both Mr. Berroa and Mr. Stretton about the issues.

Mr. Cobb believes that Ms. Whitehead spoke with Mr. Stretton about Mr. Hardcastle.

In Mr. Cobb's opinion, Mr. Hardcastle did not fly at the level that would be expected of someone with his amount of hours. Mr. Hardcastle's three major systemic issues were decision-making, situational awareness, and self-confidence. Mr. Cobb believed Mr. Hardcastle was a safety hazard to Aero Med and recommended his release from employment.

They also discussed the flight when Mr. Berroa and Mr. Hardcastle flew into icing conditions. Mr. Cobb was aware of the flight. Given the circumstances, Mr. Cobb would not have lifted off. Instead, he would have proceed until Mr. Hardcastle was ready to lift off and then stopped the flight.

Meeting Minutes – Mr. Berroa
(RX 17)

On February 27, 2013, Dr. Hubers met with Mr. Berroa. Mr. Berroa came to Dr. Hubers' office excited about scenario he developed. Since Dr. Hubers did not possess aeromedical expertise to assess the contents of scenarios, he encouraged Mr. Berroa to contact Flight Safety and Mr. Stretton.

E-Mail Annotations
(RX 18)

On a March 5, 2013, Dr. Hubers advised Mr. Berroa that after speaking with HR that he still needed documentation and specific examples which validated Mr. Berroa's assessment of Mr. Hardcastle's deficiencies. He also requested other pilots' assessments; any future training plan that might validate his assessment; and a statement explaining his belief that Flight Safety cannot provide validation.

Conversation Summary
(RX 19)

On March 7, 2013, Dr. Hubers had a conversation with Mr. David Roth at Flight Safety. Mr. Roth was well aware of Mr. Berroa's concerns and believed Flight Safety would be able to develop a suitable plan to evaluate aeronautical decision-making. Mr. Roth was a check airman with over 7,000 hours in the S-76. When Mr. Berroa called Mr. Roth, Mr. Berroa appeared to have already made up his mind about Flight Safety's inability. However, Mr. Roth asserted that he was in a better position to place pilots under stress and assess critical decision-making. But, Mr. Berroa was unwilling to compromise. Mr. Berroa also stated that Mr. Stretton didn't know what he was doing. Mr. Roth also observed that Flight Safety was conducting checkrides for several trauma centers.

E-Mail
(RX 20)

On March 6, 2013, Dr. Hubers asked Mr. Berroa for Mr. Hardcastle's training records.

Summary – Dr. Hubers
(RX 21)

Sometime after March 6, 2013, Dr. Hubers summarized a series of events. On February 6, 2013, Mr. Berroa sent a letter to Mr. Stretton about his assessment of Mr. Hardcastle. At that time, the plan was to have Mr. Stretton fly with Mr. Hardcastle to validate Mr. Berroa's observations.

On February 13, 2013, Mr. Stretton advised Dr. Hubers of Mr. Hardcastle's proficiencies. In response, Dr. Hubers asked for documentation from Mr. Berroa about the VFR checkride, Mr. Hardcastle's competency to fly, and his ability to work on the line flying Aero Med aircraft. On the same day, in an e-mail, Mr. Berroa explained the checkride and expressed his conclusion that Mr. Hardcastle's deficiencies were systemic in nature, and had existed throughout his aviation career. Mr. Berroa did not believe Aero Med was the place to attempt to correct those issues.

On February 22, 2013, Dr. Hubers met with Mr. Cobb, Mr. Berroa, and Mr. Bluemel.

On February 26, 2013, at a monthly department meeting, having learned that multiple staff members had been told by pilots that Mr. Hardcastle was not considered safe to fly, Dr. Hubers assured the group that no pilot or medical team member would be put into active service unless there was a consensus that it was safe to do so. Dr. Hubers told that staff that if anyone was concerned about the Aero Med training program or the safety of the program, he or she should express those concerns to Dr. Hubers.

On March 6, 2013, Dr. Hubers had a conference call with Mr. Roth at Flight Safety.

On March 7, 2013, Dr. Hubers conducted a pilots' meeting to discuss the current training program and hiring practices, as well as Flight Safety's role in the process and its value to Aero Med. After the meeting, Dr. Hubers spoke with Mr. Bluemel to clarify comments he had made during their February 22, 2013 meeting.

Summary – Dr. Hubers
(RX 22)

Sometime after March 9, 2013, Dr. Hubers summarized his thoughts concerning Mr. Hardcastle.

Mr. Hardcastle's technical skills had improved significantly over time, especially after flying with Mr. Stretton. Nevertheless, concerns remained about Mr. Hardcastle's ability to make adequate decisions. After a discussion with Mr. Roth, Dr. Hubers believed Flight Safety would be able to adequately assess Mr. Hardcastle. However, the Aero Med pilots believed there was a sufficient difference between flying a simulator and an aircraft that a simulator would not be able to establish that no deficiencies existed.

Compounding the issue is that the Aero Med staff have been told that Mr. Hardcastle is unsafe. This factor in combination with the uncertainty of Mr. Hardcastle's proficiencies could "dramatically injure our safety culture" and would be detrimental to Aero Med's program, such that it was not in the interest of Spectrum Health to have Mr. Hardcastle fly for Aero Med.

Dr. Hubers also believed that it would be unfair to Mr. Hardcastle to put him in a situation where the people under his care during a flight do not think that he is safe. It would create an environment of severe distrust of the Aero Med flight staff. Consequently, Dr. Hubers decided to release Mr. Hardcastle pending the resolution of several issues

One issue was reconciling contradictory statements. After the December 2012 checkride, Mr. Berroa told Mr. Hardcastle that he expected Mr. Hardcastle to finish strong. About the same time, Mr. Berroa told Mr. Wroblewski and Mr. Stretton that Mr. Hardcastle would be ready to fly as a line pilot after his Flight Safety training. A comment from flight communication indicated that a staff member felt Mr. Hardcastle was being set up when Mr. Berroa permitted the take off into icing conditions. Mr. Berroa argued with Mr. Roth over Flight Safety's ability to assess Mr. Hardcastle's decision-making abilities. Documentation concerning Mr. Hardcastle's deficiencies was lacking. Mr. Berroa's failure to timely advise Dr. Hubers that Flight Safety could not do the scenarios as planned. The existence of multiple other concerns about Mr. Berroa's handling of the situation and the current state of the Aero Med training program.

Nevertheless as of March 9, 2013, Dr. Hubers found "it difficult for Hugh (Mr. Hardcastle) to remain an employee of Aero Med.

Meeting Minutes – Mr. Berroa
(RX 23)

On March 13, 2013, Dr. Huber and Ms. McDowell met with Mr. Berroa to clarify his position on Mr. Hardcastle. When specifically asked, Mr. Berroa said yes, he was recommending the termination of Mr. Hardcastle’s employment. Concerning not correcting deficiencies, Mr. Berroa noted that Mr. Hardcastle continued to approach destinations too low.

In regards to aeronautical decision-making, Mr. Berroa referenced the flights Mr. Hardcastle had with Mr. Cobb and Mr. Bluemel. Mr. Berroa asserted that he, rather than Mr. Stretton, had the prerogative to ask Mr. Cobb and Mr. Bluemel to evaluate Mr. Hardcastle.

According to Mr. Berroa, the January 2013 flight and the associated missed approach, coupled with earlier incidents lead to his conclusion that Mr. Hardcastle was not competent to be an IFR single pilot.

When asked whether the February 5, 2013 flight met launch criteria, Mr. Berroa replied yes and no. The launch met the launch criteria for a day flight but with night approaching, the flight would have violated night-time FAA operations specification for A021 and would have represented another example of poor decision-making. For several reasons, although the forecast weather did not include icing, Mr. Berroa “would absolutely not” have taken the flight. First, he couldn’t see beyond the radar across the tarmac. Second, departing aircraft were disappearing “quite too soon into the clouds.” Third, when he went outside there was a very fine drizzle with the temperature below freezing, therefore it was a known icing condition. Mr. Berroa did not stop the flight because he needed “to see how far [Mr. Hardcastle] would go.” Mr. Hardcastle did not notice the visual clues and upon return there was icing on the nose of the aircraft. The correct reason for aborting the flight was the potential for icing, not low clouds.

In regards to the waiting patient, Mr. Berroa did not see doing anything different. The patient was not his concern. He doesn’t even consider the patient. Instead, safety was his most important goal.

Mr. Berroa explained that if he had failed Mr. Hardcastle on the IFR portion of the checkride, then all of the checkride would have been a failure. Had he put any negative comment on the checkride form about the IFR portion, he would have had to fail Mr. Hardcastle on the VFR portion too. It was all or nothing. Even though he passed Mr. Hardcastle on the VFR portion, it was not Mr. Berroa’s intention to have him fly on the schedule solo.

In terms of communications with Aero Med personnel, Mr. Berroa indicated that he had said he would not let his son fly with Mr. Hardcastle. As to communication with management, Mr. Berroa explained that after talking with Flight Safety about the scenario, plans had changed. He was also unclear when Dr. Hubers wanted the training records.

Mr. Berroa had no concerns over any PIC issue. In an emergency, Mr. Hardcastle would be the PIC in VFR conditions; while the other pilot would be the PIC in IFR conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Credibility Determinations

Based on their demeanor, generally direct answers, and general lack of equivocation, I found the sworn testimony of the witnesses in this case, including Mr. Berroa, Mr. Stretton, and Dr. Hubers probative. Further, I consider any associated testimonial inconsistencies to be attributable to incomplete recollections rather than purposeful inaccuracies. To extent any discrepancies exist, I place greater probative value on the nearly contemporaneous documentation compiled at the time of the events than the subsequent testimony more than a year later.

Specific Findings

Early 1980s to 1999

After a year in college and working several non-professional jobs, Mr. Berroa starts his aviation career in 1987 as a commercial pilot and CFI with an instrument rating in rotary wing aircraft at American Helicopters. He eventually earns an airline transport pilot license. After working for American Helicopters, Mr. Berroa becomes a charter pilot for New York/Island Helicopters. In 1990, he joins OmiFlight as an emergency services pilot.

1999 through 2010

In 1999, with 3,000 hours of helicopter experience, Mr. Berroa joins Aero Med, which has the best flight and maintenance programs in Michigan.

The sole mission of Aero Med is to transport critically ill patients who have a time-sensitive requirement for medical care in the safest manner possible.

As an Aero Med pilot, Mr. Berroa flies various versions of the Aero Med's S-76, which does not have de-icing capabilities. The aircraft is configured to transport a patient and another person, with flight controls for two pilots, and seats for a medical team consisting a physician and nurse. The aircraft is also equipped with an autopilot and is capable of making precision approaches with a category one weather minimum of 200 foot ceiling and a half-mile visibility.

As an air carrier, Aero Med is required to conduct its patient transportation flights under FAA's Part 135. Its flights involving crew training, maintenance, testing, ferrying, repositioning, and transport of company officials are conducted under Part 91, which is less restrictive in terms of pilot qualifications. Typically, a patient transport flight consists of three legs. On the first leg from the Grand Rapids airport to the accident site or hospital to pick up a patient, Part 91 applies since only the crew, including the medical personnel, are on-board. On the second leg to the treatment facility, when the patient is a passenger, the aircraft is flown under Part 135. The third leg of the mission, the return to Grand Rapids airport after the patient has been dropped off, is conducted under Part 91. If IFR conditions exist on the entire route, all three legs of the mission are subject to Part 135 requirements. Since Aero Med's S-76 has an autopilot, the aircraft can be

flown in IFR conditions by one IFR qualified pilot with current Part 293, Part 297, and Part 299 checkrides. Flights conducted under Part 91 can be flown by one pilot, who has current Part 293 and Part 299 checkrides. Usually, the pilot in the right seat is the PIC who is responsible for all aspects of the flight. During training missions, the probationary pilot is in the right seat and CFI, or training captain, seats in the left seat.

In addition to initial training, all Aero Med pilots attend Flight Safety for recurrent training twice a year. The cost for initial training is about \$43,000. Recurrent training costs about \$23,000 a year.

2010

Mr. Berroa becomes the training captain, and a check airman for Aero Med. In addition to ensuring the safe conduct of a training flight, Mr. Berroa instructs and evaluates probationary pilots on the S-76 systems and Aero Med procedures. Based on the minimum flying experience requirement, new pilots are expected to have already developed proficient skill in situational awareness and aeronautical decision-making, which involves a pilot being able to perceive what is happening during flight, accurately process that situational information, and execute an appropriate plan as necessary.

As a check airman, Mr. Berroa is responsible for the administration of checkrides, and the associated documentation. He is also required to make sure that Aero Med pilots maintain their certification. As training captain, Mr. Berroa has two duties. First, he is involved in the training of new pilots. Second, he provides continuation training and education for the established Aero Med pilots.

When Mr. Berroa is on a training flight, the probationary pilot retains functional control of the aircraft and Mr. Berroa seldom intervenes verbally and only takes control of the aircraft if the probationary pilot fails to respond to an imminent unsafe flight condition. Over the course of next two years, Mr. Berroa verbally intervenes about a dozen times. He never has to physically intervene.

If an accident occurs during a training flight, the NTSB will most likely determine that the CFI who is in charge is ultimately responsible.

As the director of Aero Med flight operations, Mr. Stretton is Mr. Berroa's immediate supervisor.

Mr. Jeff Wroblewski is the Aero Med chief pilot and assists Mr. Stretton with scheduling and coordinating training.

Dr. Hubers serves as the medical and program director of Aero Med, which is a department of Spectrum Health. In that capacity, he is responsible for all physicians, nurses, medical teams, flight communicators, pilots, and maintenance personnel.

FAA regulation, Part 91.101 requires each pilot in command to become familiar with weather reports and forecast for flights in IFR or not in the vicinity of an airport.

FAA regulation, Part 135.95 prohibits a certificate holder from using the services of an airman unless the person has an appropriate and current airman certificate.

FAA regulation, Part 135.293, prohibits a certificate holder from using the services of an airman unless the pilot has passed a written or oral test administered by an authorized check pilot on the pilot's knowledge of multiple aspects of flying its equipment, including systems knowledge, aircraft operating specification, flight procedures, navigation, and weather.

FAA regulation, Part 135.297 prohibits a certificate holder from using the services of an airman unless the pilot has passed an instrument proficiency check administered by an authorized check pilot.

FAA regulation, Part 135.299 prohibits a certificate holder from using the services of an airman unless the pilot has passed a flight check in the type of aircraft the pilot is to fly.

June 24, 2011

Mr. Stretton counsels Mr. Berroa because over the past six months, Mr. Berroa failed to report for duty at the start of his shift 10 times, which caused Aero Med to be out of service due to the lack of a helicopter pilot. He advises Mr. Berroa that an Aero Med pilot is expected to clock-in 15 minutes prior to the start of his shift in order to complete necessary pre-flight inspections and paperwork. Mr. Stretton indicates that if Mr. Berroa continues to be tardy, the coaching report may become part of his personnel file. Mr. Berroa signs the form without comment.

January – February 2012

As an Aero Med check airman, Mr. Berroa successfully conducts a Part 293, Part 297, and Part 299 checkride for Mr. Anderson. As a result, Mr. Anderson remains current through the end of February 2013.

June 30, 2012

For the rating period July 1, 2011 through June 30, 2012, Mr. Stretton rates Mr. Berroa as achieving expectations in the areas of flexibility, inclusion and diversity, innovation, principles and values, teamwork, and timeliness of work. In his opinion, Mr. Berroa exceeds expectation in quality focus due to his improvement in the quality of the training program. Dr. Hubers concurs. And, Mr. Stretton determines that Mr. Berroa demonstrated exceptional performance in the area of job knowledge for being the expert in all aspects of Aero Med's services, and creating a more documented training department. Dr. Hubers adds a thank you.

September 2012 to Mid-December 2012

Mr. Hardcastle, a former Army helicopter pilot who has never flown the S-76, joins Aero Med and enters a training program conducted by Mr. Berroa. As a probationary pilot, Mr. Hardcastle can fly patients only if he is with a fully qualified Aero Med pilot.

After his first flight with Mr. Hugh Hardcastle, Mr. Berroa advises Mr. Stretton that Mr. Hardcastle is a little rusty on the flight controls, apparently since he had not been flying for about a year. For the next eleven weeks, Mr. Berroa flies with Mr. Hardcastle in the advanced model of the S-76. Understandably, Mr. Hardcastle does not know the S-76 systems, and as a military pilot, he is unfamiliar with the autopilot. In the early phase of his training, Mr. Hardcastle has a tendency to repeat mistakes. In particular, he consistently descends to about 500 feet about 10 miles away from the destination. Mr. Berroa has to continually advise Mr. Hardcastle that a much safer practice is to remain at 800 to 1,000 feet until arriving at the destination.

During his training flights, Mr. Hardcastle also routinely pulls too much on the collective which causes drooping of the rotor rpm to drop below the flight manual's minimum for rotor rpm.

On one flight, after flying in the local area for several weeks, an air traffic controller clears Mr. Hardcastle to proceed directly to the Grand Rapids airport. However, Mr. Hardcastle loses situational awareness and turns in the opposite direction from the airport. Mr. Hardcastle doesn't realize his error until the air traffic controller asks where he is going. Mr. Hardcastle then turns in the correct direction towards the airport.

Mr. Berroa provides reports about Mr. Hardcastle's training to Mr. Stretton, and includes observations about Mr. Hardcastle's issues with decision-making, judgment, and rotor drooping. Mr. Berroa opines that Mr. Hardcastle is not as smooth and competent as he should be. Nevertheless, Mr. Berroa assures Mr. Stretton that Mr. Hardcastle will be fine.

Mr. Wroblewski flies a few flights with Mr. Hardcastle. He considers Mr. Hardcastle a competent and safe pilot. Mr. Hardcastle is a little slow on start-up, but he has everything memorized and backs up his actions with a checklist. Mr. Wroblewski is impressed with Mr. Hardcastle's desire to do things by himself. At the same time, Mr. Wroblewski understands why another pilot might believe that Mr. Hardcastle needs more time in the aircraft in order to become a solo mission pilot for Aero Med.

October 15, 2012

Mr. Stretton issues a first written warning to Mr. Berroa for being tardy 11 times in the past 10 months, and six times in the last four months. His tardiness puts Aero Med out of service due to the lack of a helicopter pilot. Mr. Berroa is advised that an Aero Med pilot is expected to clock-in 15 minutes prior to the start of his shift in order to complete necessary pre-flight inspections and paperwork. Mr. Stretton indicates that if Mr. Berroa continues to be tardy, and fails to meet expectations, further corrective action would occur up to and including termination. Mr. Berroa signs the form without comment.

Early December 2012

In weekly management meetings, Dr. Hubers is advised that while Mr. Hardcastle is rusty, his training is progressing smoothly. Upon his return from Flight Safety, it is expected that Mr. Hardcastle will be put on the flying schedule.

December 14, 2012

Mr. Berroa administers a checkride for Mr. Hardcastle, with the intention to complete all three required checks for Part 293, Part 297, and Part 299; as well as the autopilot certification. Mr. Hardcastle passes the Part 293 and Part 299 portions of the checkride. However, during the Part 297 IFR instrument approach to the hospital, Mr. Hardcastle does not maintain proper tolerances. As a result, since Mr. Hardcastle has already passed two portions of the checkride, and rather than fail him on the entire flight, Mr. Berroa decides to characterize the failed IFR approach as a training, which he believes that he is authorized to do. In addition, Mr. Berroa wants to enable Mr. Hardcastle to continue flying VFR and did not want to discourage him.

Upon completion of the flight, Mr. Berroa documents Mr. Hardcastle's successful completion of the Part 293 and 299 portions of the checkride. He rates Mr. Hardcastle's judgment and missed approach for the VFR portion of the flight satisfactory. Mr. Berroa does not document Mr. Hardcastle's deficiencies and failure on the IFR portion because he has decided to treat the IFR approach as training. Since Mr. Hardcastle is scheduled to attend Flight Safety for 10 hours of additional training within a few days, Mr. Berroa decides to wait for Mr. Hardcastle's return from Flight Safety to re-administer the Part 297 checkride.

December 15 to December 28, 2012

Mr. Berroa advises Mr. Stretton about the results of Mr. Hardcastle's checkride, and specifically notes that due to problems with an approach, Mr. Hardcastle was unable to pass the IFR portion of the checkride. Mr. Berroa expresses confidence that he will be able to complete Mr. Hardcastle's training and IFR checkride.

Mr. Berroa tells Mr. Jeff Wroblewski that he intends to have Mr. Hardcastle fly with other line pilots, in particular Mr. Cobb and Mr. Bluemel, and then administer the Part 297 checkride, when Mr. Hardcastle returns from Flight Safety. At that point, Mr. Hardcastle should be on his own.

For one week, Flight Safety provides Part 135 training for Mr. Hardcastle, which includes seven simulator rides, totaling 12 hours. Flight Safety instructors rate Mr. Hardcastle proficient in every task; specifically note that his systems knowledge is good, and his situational awareness and ADM are very good; and certify that he has completed all elements of S-76C++ initial training in an above average manner.

Mr. Berroa shares some of his observations about Mr. Hardcastle with Mr. Cobb, who has flown with Aero Med since 1999, and Mr. Bluemel, who is a CFI, and a former Aero Med training captain. He asks them to fly with Mr. Hardcastle to evaluate his skills.

December 29, 30, and 31, 2012

On the first of five flights with Mr. Cobb, Mr. Hardcastle seems unsure of himself during the pre-flight run-up. When they fly through a non-tower controlled airspace, Mr. Hardcastle does not tune into the radio frequency for common traffic calls to monitor traffic, which Mr. Cobb believes is a good practice. On the remaining flights, Mr. Hardcastle consistently demonstrates uncertainty in starting the aircraft. Rather than the usual seven minutes, Mr. Hardcastle takes 20 to 25 minutes.

On their last flight, after lifting off from a hospital helicopter pad, Mr. Hardcastle starts a left turn, sets the autopilot, and loses situational awareness when he looks inside the cockpit at the radio as he attempts to contact Grand Rapids Approach. Meanwhile, Mr. Cobb observes that at the set altitude the aircraft will strike an antenna if they continue in the left turn. Mr. Cobb grabs the cyclic to stop the turn as he tells Mr. Hardcastle to stop the turn and asks him what he is doing. Mr. Hardcastle responds that he was using the autopilot. Mr. Cobb is upset by the incident because he believes that if Mr. Hardcastle had been alone, he would have flown into the antenna.

January 1, 2013

Mr. Bluemel takes a flight with Mr. Hardcastle, who has accepted the flight, with marginal but flyable” weather due to forecasted light snow. During pre-flight, Mr. Bluemel observes that Mr. Hardcastle is “extremely slow” with his checklist. Although light snow is forecast, Mr. Hardcastle fails to arm the pitot tube heat and windshield anti-ice. Mr. Bluemel has to point out the omissions. On take off, Mr. Berroa pulls too much power, causing a droop in rotor rpm. While en route, Mr. Hardcastle varies his planned altitude of 2,000 MSL from 1,900 to 1,600 feet, without advising air traffic control. Mr. Hardcastle almost exceeds the maximum airspeed for the S-76 of 155 knots. Mr. Hardcastle flies over an uncontrolled airport using the wrong radio frequency. On the return flight, Mr. Hardcastle again uses excessive power. After the flight, Mr. Bluemel debriefs Mr. Hardcastle about his observations. Mr. Hardcastle is very receptive and takes notes. When Mr. Hardcastle explains that he was purposefully deviating his altitude in order to maintain obstacle clearance while being as low as possible due to reduced visibility, Mr. Bluemel expresses his preference to keep altitude in an unfamiliar area, and notes that air traffic control must be notified of altitude deviations.

Mr. Bluemel considers Mr. Hardcastle’s flying rough, with abrupt control inputs. Mr. Hardcastle also has poor situational awareness, and his radio communications are careless. Considering that Mr. Hardcastle has already been signed off to fly Part 293 flights, Mr. Bluemel is surprised by Mr. Hardcastle’s level of incompetence on this flight.

Mr. Bluemel shares his observations with Mr. Berroa who responds that the noted deficiencies are repeated issues for Mr. Hardcastle. Mr. Berroa also indicates that another pilot observed similar problems; and Mr. Hardcastle is not making progress. Mr. Berroa tells Mr. Bluemel that he intends to discuss the situation with Mr. Stretton.

Early January 2013

Mr. Cobb tells Mr. Berroa that during their flights, Mr. Hardcastle was flying all over the place. On one flight, Mr. Hardcastle came extremely close to an antenna while being fixated on the radios and flying on autopilot, which caused Mr. Cobb to intervene. Mr. Berroa believes that Mr. Cobb is going to tell Mr. Stretton about the flight involving the antenna.

Within two or three days of his last flight with Mr. Hardcastle, and due to his inattention concerning the antenna, Mr. Cobb tells Mr. Stretton about the flight. Mr. Cobb states that Mr. Hardcastle should not continue to be employed by Aero Med. Mr. Stretton responds that is not what he wants to hear, and expresses a belief that he can fix Mr. Hardcastle's problems.

Based on his experience with Mr. Hardcastle, Mr. Stretton has concluded that he has the ability to recognize and remember specific things that he is taught. Consequently, Mr. Stretton attributes most of Mr. Hardcastle's issues to the training that he may not have received regarding local area familiarization. Since Mr. Hardcastle only has 40 hours in the S-76, Mr. Stretton considers him to a new pilot.

January 6, 2013

Mr. Berroa and Mr. Hardcastle, as PIC, fly an IFR training mission in the local area of the airport to practice instrument approaches. An air traffic controller vectors Mr. Hardcastle to a position too close to the starting point for the approach, which places the aircraft well above the glideslope at the start of the approach. In response, Mr. Hardcastle starts a rapid rate of descent of 1000 feet per minute to return to the glideslope. At 500 feet, with a rapid rate of descent and still above glidepath, Mr. Berroa asks Mr. Hardcastle if he is on a stabilized approach. Mr. Hardcastle replies "yes," even though they are in a rapid descent close to the ground and have not yet intercepted the glideslope. When Mr. Berroa questions Mr. Hardcastle about the high rate of descent, Mr. Hardcastle responds that he is attempting to intercept the glideslope. At this point, Mr. Berroa intervenes by noting they are very close to the ground and still haven't intercepted the glidepath. He asks what Mr. Hardcastle plans to do and Mr. Hardcastle queries, "missed approach?" Mr. Berroa says "yes," and Mr. Hardcastle executes a missed approach.

Mr. Berroa believes they were in an extremely dangerous situation trying to still intercept the glideslope at 500 feet with a high rate of descent which would have caused them to fly through the 200 foot minimum for the approach before gaining altitude on the missed approach. With 20 years of flying experience, Mr. Hardcastle should have been able to recognize when the aircraft was not in a stabilized approach and determine the most appropriate course of action, which was to immediately execute a missed approach. Mr. Berroa believes Mr. Hardcastle was being careless, and his inability to timely execute a missed approach demonstrated a deficiency in aeronautical decision-making under the stress of unforeseen situations that may be encountered in flight.

Mr. Berroa tells Mr. Stretton about the ILS approach and states that he think Mr. Hardcastle is not going to work out because the incident was a significant lapse for an experienced pilot. Mr. Berroa opines that Mr. Hardcastle may be an incompetent pilot, and

questions the effectiveness of additional training missions with Mr. Hardcastle. Upset and disappointed, Mr. Stretton notes that after all the time Mr. Berroa has spent training Mr. Hardcastle there is no documentation in his training records about any deficiencies. Additionally, terminating Mr. Hardcastle would reflect poorly on his training.

Around January 6, 2013

While attempting to determine Mr. Hardcastle's training history, Mr. Stretton discovers that Mr. Cobb and Mr. Bluemel have flown with Mr. Hardcastle. Mr. Bluemel acknowledges that he has flown with Mr. Hardcastle once and promises to provide a document about his opinion. Mr. Stretton did not know that the two pilots were evaluating Mr. Hardcastle. He is concerned about Mr. Cobb and Mr. Bluemel flying with, and evaluating, Mr. Hardcastle because they were not authorized to do so.

Mr. Stretton contacts Flight Safety about their training of Mr. Hardcastle. The instructors indicate that Mr. Hardcastle was a better-than-average pilot in the S-76 for someone with his qualifications.

January 7, 2013

Concerned about his conversation with Mr. Stretton, Mr. Berroa sends him a documented assessment of Mr. Hardcastle's training. Mr. Berroa notes that for the past three months, Mr. Hardcastle has flown 45 hours in the S-76, with 35 hours dedicated to training. He also acquired five additional hours of training at Flight Safety. In terms of cognitive skills, Mr. Hardcastle has an excellent knowledge base and understanding of aircraft systems. In physical flying ability, although somewhat slow, Mr. Hardcastle is able to perform any given task required by the practical test standard. However, Mr. Hardcastle does not consistently demonstrate: a) sound judgment and aeronautical decision-making; b) single pilot competence; and, c) the ability to correct deficiencies that have been brought to his attention, including radio procedures, over-torqueing the engines, drooping rotor rpm, overspeed of rotor rpm, and maintenance of a safe altitude prior to reaching destinations. Concerning his attitude and interpersonal skills, Mr. Hardcastle gets along with co-workers and always presents himself ready and willing to do any assigned task. At the same time, he has expressed some resignation to co-workers.

After his conversation with Mr. Berroa and receiving Mr. Berroa's memorandum about Mr. Hardcastle's training, Mr. Stretton concludes that he will have to conduct Mr. Hardcastle's training, in part due to the apparent tension between Mr. Berroa and Mr. Hardcastle. Over the course of several weeks, he schedules himself for about a dozen flights with Mr. Hardcastle. Mr. Hardcastle is not very proficient with the S-76, but he is not an unsafe pilot and not really different than any other pilot who is new to Aero Med, and didn't have previous experience with the S-76.

Mr. Stretton speaks with Dr. Hubers to let him know there is a problem with the progression of Mr. Hardcastle's training. Mr. Stretton advises that he has a new plan in place to help Mr. Hardcastle overcome any deficiencies by taking over his training.

January 9, 2013

Mr. Stretton talks to Mr. Berroa about sharing information with other Aero Med personnel about the performance of pilots in training, in particular Mr. Hardcastle. For future reference, Mr. Stretton completes a coaching and mentoring form about his conversation with Mr. Berroa and places it in his desk.

Late January 2013

Mr. Stretton tells Mr. Berroa that he intends to give Mr. Hardcastle an authorization letter to fly Part 135 passenger flight in VFR conditions. Mr. Berroa responds that course of action is a bad idea because if weather conditions turn IFR, the situation would become an emergency. Additionally, no other Aero Med pilot had been given authorization for Part 135 flights without also being IFR-qualified.

First Part of February 2013

After several people ask Mr. Cobb why Mr. Hardcastle is still on the schedule, and believing that Mr. Stretton is not handling the situation, Mr. Cobb asks for a meeting with Dr. Hubers. Mr. Cobb tells Dr. Huber about his flights with Mr. Hardcastle, with emphasis on his low self-confidence, his un-sureness, the radio communication shortfalls, the antenna incident, and the safety concerns raised by medical personnel. Dr. Hubers thanks Mr. Cobb for the information and said that he would look into it. Dr. Hubers asks Mr. Cobb to document the flights. Mr. Cobb subsequently submits his summary to Dr. Hubers about his five flights with Mr. Hardcastle at the end of December 2013.

February 5, 2013

Due to Mr. Stretton's absence, while Mr. Berroa is on his regular shift as duty pilot, Mr. Hardcastle is assigned to Mr. Berroa for the day. Since Mr. Hardcastle is still in training, he will fly the right seat and Mr. Berroa will be in the left seat.

In the morning, a call comes in for 20-minute flight to a location about 30 miles west of Grand Rapids. Mr. Hardcastle turns down the request due to forecasted inclement weather. Based on the location of the destination, Mr. Berroa advises Mr. Hardcastle that he would have accepted the assignment since they could have avoided the incoming weather if necessary.

Around 5:20 p.m., on February 5, 2013, a flight request comes in from Ionia Hospital for a 15-minute patient flight. Mr. Berroa first checks the forecast weather, which is marginal with 1,300 foot ceiling and four miles of visibility; no icing is forecast. Mr. Berroa also goes outside to check the local weather. There is no ice on the vehicles, chain-link fence, or ramp; and no pilot landing at the airport has reported icing. However, a very fine mist is in the air, the temperature is just below freezing, and darkness is approaching. Mr. Berroa concludes the flight should not be accepted because a potential for icing exists at their cruise altitude of 1,200 feet. If Mr. Berroa had been the single pilot on the flight, he would not have accepted the flight.

When Mr. Berroa returns inside, he hears Mr. Hardcastle accept the flight based on the printed forecast weather, which while marginal is within Aero Med limits for a patient flight. Mr. Berroa then decides to see if Mr. Hardcastle will recognize what is going on with the actual weather and in particular, the potential for icing. He plans to stop the flight at the airport boundary and an altitude of 400 feet if Mr. Hardcastle hasn't aborted the flight by then. Mr. Berroa does not advise Aero Med communications that they will not be transporting the patient at Ionia. He does not tell Mr. Hardcastle about his determination that a potential for icing exists.

Mr. Berroa also observes that during Mr. Hardcastle's pre-flight planning, he uses daytime minimums for obstacle clearance even though darkness is approaching and the flight will be conducted during night time which make night time minimums for obstacle clearance applicable under A021.

Since Mr. Hardcastle accepted the flight after checking the weather, the medical team, consisting of a physician, and Ms. Whitehead, a flight nurse, board the aircraft. During that process, Ms. Whitehead feels precipitation and becomes concerned since it is February that they might experience icing on the flight. Based on her experience flying with Mr. Hardcastle, and watching Mr. Berroa's interaction with him, Ms. Whitehead develops a sense that Mr. Hardcastle is not progressing the way other new pilots have progressed, which makes her uncomfortable. However, because she trusts Mr. Berroa as the training captain, Ms. Whitehead does not say no to the flight.

By the time they take off at 6:00 p.m., the sun has set. Approaching the airport boundary at about 300 to 400 feet, and without Mr. Berroa's intervention, Mr. Hardcastle states that the cloud ceiling is too low for the flight and he turns around. The aircraft lands at 6:06 p.m. About 10 minutes have elapsed between the time Mr. Berroa decided that he would not take the flight due to potential icing and Mr. Hardcastle aborted the mission for a low ceiling. When they return to the hanger, Mr. Berroa and Mr. Hardcastle see ice on the very tip of the radome. During the debrief, Mr. Hardcastle states that he wasn't thinking about icing.

Second Week of February 2013

After the February 5, 2013 flight, because Mr. Stretton is the director of operations, Ms. Whitehead talks to him about the February 5, 2013 flight. She describes what happened, and relays her concerns about the potential icing situation and the safety issue associated with accepting the flight in the weather conditions present on the ramp. Because Mr. Stretton will know who the pilots were on the flight, she does not specifically single out any pilot.

February 9, 2013

Mr. Berroa tells Mr. Stretton about the February 5, 2013 flight, and Mr. Hardcastle's decision to accept a flight when Mr. Berroa would have declined the flight based on the actual weather conditions, which included the potential for icing. Mr. Berroa asserts that Mr. Hardcastle's failure to consider icing on the flight was a violation of the aeronautical decision-making standard. Mr. Berroa again states in stronger language that he doesn't think that Mr. Hardcastle should be working at Aero Med. When Mr. Stretton responds that Mr. Hardcastle's

termination will reflect badly on his training, Mr. Berroa replies that he doesn't care because he is more concerned with safety. Mr. Berroa admonishes that Mr. Berroa should care since it is his job to train new pilots. Mr. Stretton asks Mr. Berroa to prepare a summary of the February 5, 2013 flight.

Mr. Stretton creates another coaching and mentoring form to commemorate his conversation with Mr. Berroa about the February 5, 2013 flight, and due to his concern that tensions between Mr. Hardcastle and Mr. Berroa are escalating. He notes that Mr. Berroa continues to demand that Mr. Hardcastle be terminated; but there is still noting in the training records after 40 hours of training other than Mr. Berroa's summaries of the February 5, 2013 flight and the flight in January 2013. Mr. Stretton continues to consider Mr. Hardcastle's deficiencies a direct reflection on Mr. Berroa's ability to train. Based on their exchange, Mr. Stretton notes that he does not feel Mr. Berroa should continue to be the Aero Med training captain; expresses an intention to seek guidance from HR and Dr. Hubers; and ponders a consideration of whether Mr. Berroa should continue his employment with Aero Med..

Later, Mr. Berroa sends his written summary of the February 5, 2013 flight to Mr. Stretton. He notes that the ability to evaluate weather conditions from both printed reports and personal observations, and interpretation of the weather information in order to obtain a realistic assessment of weather conditions that will be experienced during a flight, are basic airmanship skills and integral elements in the aeronautical decision-making. Mr. Berroa concludes that Mr. Hardcastle's inability to recognize the actual weather, and determine a realistic assessment of the weather conditions for the February 5, 2013 flight, were serious errors that demonstrated a lack of adequate decision-making capabilities.

February 13, 2013

Mr. Stretton advises Dr. Hubers of Mr. Hardcastle's proficiency issues and scheduled training. In response, Dr. Hubers requests that Mr. Berroa provide documentation about the December 2013 checkride, Mr. Hardcastle's competency to fly, and his ability to work on the line flying Aero Med aircraft.

At Mr. Stretton's request, Mr. Berroa sends an e-mail to Dr. Hubers about concerns about Mr. Hardcastle's qualifications. He provides the details about the December 14, 2012 checkride and explains that while Mr. Hardcastle passed the VFR portion of the checkride, he made several procedural errors that precluded his completion of the IFR portion of the checkride. Mr. Berroa also states that Mr. Hardcastle's deficiencies are systemic in nature, and have apparently spanned his career as an aviator. Mr. Berroa does not feel that Aero Med is the place to correct Mr. Hardcastle's deficiencies.

February 14, 2013

Mr. Stretton forwards to Dr. Hubers Mr. Hardcastle's Flight Safety training report and highlights the assessment by Flight Safety that his performance was above average. Mr. Stretton opines that Mr. Hardcastle is not a pilot that Aero Med needs to let go for being unable to perform the mission.

About this time, Mr. Stretton also sends Mr. Berroa's written summary about the February 5, 2013 flight to Dr. Hubers. Dr. Hubers is surprised that Mr. Berroa would have permitted lift-off when he knew there was icing, particularly since the model of the S-76 that Aero Med was flying did not have de-icing capabilities.

February 15, 2013

Mr. Stretton indicates that he wants to meet with Dr. Hubers and HR to discuss terminating Mr. Berroa. Mr. Stretton has decided that Mr. Berroa will no longer be the training captain, in particular after Mr. Berroa indicated that he didn't care about Mr. Hardcastle's training status. Mr. Stretton expresses concern about Mr. Berroa's professionalism, and his ability to manage Mr. Berroa after removing him from the training captain position. Mr. Stretton believes Mr. Berroa may become a cancer within the pilot group.

Dr. Hubers discusses the request with Mr. Stretton. Mr. Stretton expresses his frustration with Mr. Berroa. However, Dr. Hubers responds that frustration is an insufficient basis for termination, and Mr. Stretton has not presented anything of substance.

February 22, 2013

Dr. Hubers and Mr. Berroa

Dr. Hubers meets with Mr. Berroa to obtain more detail about his concerns with Mr. Hardcastle flying deficiencies. Mr. Berroa again explains his position about Mr. Hardcastle's systemic deficiencies associated with the ability to consistently demonstrate solid judgment and good aeronautical decision-making. He recommends terminating Mr. Hardcastle's employment. When Dr. Hubers asks Mr. Berroa to reconcile his observations with Flight Safety's evaluation of Mr. Hardcastle. Mr. Berroa indicates that he can only report what he has observed. He notes that Flight Safety conducts a different training program than what Mr. Hardcastle has flown locally for Aero Med.

Dr. Hubers does not want to fire Mr. Hardcastle, and queries whether they can do something, such as additional training with Flight Safety. Because he doesn't think Flight Safety can provide a sufficient assessment, Mr. Berroa opines that a better assessment should be based on input from pilots who have actually flown with Mr. Hardcastle, and directly observed his lapses in judgment. Eventually, Mr. Berroa agrees with a plan to send Mr. Hardcastle to Flight Safety for simulator training and evaluation based on scenarios developed by Mr. Berroa which address Mr. Hardcastle's observed issues. Having reached an agreement, Dr. Hubers directs Mr. Berroa to work directly with Flight Safety to develop his training scenarios, and have a completed plan by March 1, 2013 for review by Mr. Stretton and Dr. Hubers.

Dr. Hubers and Mr. Cobb

Dr. Hubers meets with Mr. Cobb to discuss his flights with Mr. Hardcastle, and Mr. Hardcastle's issues with aeronautical decision-making. According to Mr. Cobb, Mr. Berroa asked Mr. Cobb to fly with, and evaluate, Mr. Hardcastle at the end of December 2012. During the five flights, Mr. Cobb determined that Mr. Hardcastle could fly the aircraft but he did not always process changes that were occurring in flight. During one flight, when departing the Butterworth Hospital, Mr. Hardcastle initiated a turn, engaged the autopilot, and lost situational awareness to the extent that Mr. Cobb had to grab the flight controls. Mr. Hardcastle was also unaware of a no-fly zone. Mr. Cobb advised both Mr. Berroa and Mr. Stretton about the issues. Mr. Cobb opines that Mr. Hardcastle does not fly at the level that would be expected of someone with his amount of hours. Mr. Hardcastle's three major systemic issues are decision-making, situational awareness, and self-confidence. Mr. Cobb believes Mr. Hardcastle is a safety hazard to Aero Med and recommends his release from employment.

Mr. Cobb believes that Ms. Whitehead has spoken with Mr. Stretton about Mr. Hardcastle.

Dr. Hubers also asks Mr. Cobb about the February 5, 2013 flight because Mr. Cobb said he was aware of the flight based on conversations with other people, including Mr. Berroa. After noting that evaluation of a flight in hindsight is difficult because pilots may reach different conclusions, Mr. Cobb indicates that from his review of the documented weather information, Mr. Hardcastle and Mr. Berroa did not fly into icing conditions because those conditions were not reported until later in the night. The forecasted weather permitted a legal launch of the aircraft and taking off was at the pilot's discretion. At the same time, in response to Dr. Hubers' question, although marginal weather can be good for training, based on what he knew about the flight, Mr. Cobb tells Dr. Hubers that as an instructor pilot he would not have let Mr. Hardcastle take off. Instead, he would have stopped Mr. Hardcastle after the engine run-up. Dr. Hubers asks Mr. Cobb to provide a document with his observations about Mr. Hardcastle.

In his subsequent (undated) summary of his flights with Mr. Hardcastle, Mr. Cobb recounts their near miss with an area antenna; Mr. Hardcastle's radio procedures difficulties; and his flying unaware through a no-fly zone. Mr. Cobb opines that Mr. Hardcastle's flying skills did not reflect his years of experience. Mr. Hardcastle lacked the necessary skills, which he should have developed years ago, for flying as a single air medical transport pilot in a safe and efficient manner. Mr. Cobb opines that Mr. Hardcastle represents a safety hazard to Aero Med, and recommends that he be released from his employment with Aero Med.

Dr. Hubers and Mr. Bluemel

Dr. Hubers meets with Mr. Bluemel, who states that Mr. Berroa asked him to evaluate Mr. Hardcastle's proficiencies due to Mr. Berroa's concerns. Mr. Bluemel recalls that during the flight with Mr. Hardcastle he developed a long list of problems and concluded Mr. Hardcastle lacked the caliber that Aero Med needed in its pilots. In particular, Mr. Hardcastle did not turn on the pitot tube heat and windshield anti-icing even though the forecast weather included snow;

consistently pulled too much power on take off; had radio procedure difficulties; and made altitude changes without notifying air traffic control. Dr. Hubers requests documentation.

Subsequently (March 6, 2013), Mr. Bluemel sends Dr. Hubers his written summary about his January 1, 2013 flight with Mr. Hardcastle. He adds that when he shared his observations with Mr. Berroa, Mr. Berroa noted the deficiencies were repeat issues and that Mr. Hardcastle was not making progress. Mr. Berroa also shared that another pilot had experienced similar issues with Mr. Berroa. Mr. Bluemel closes by commenting that while he only flew once with Mr. Hardcastle, he believes his observations are consistent with observations by other pilots.

February 26, 2013

During a monthly department meeting, having learned that multiple staff members have been told by pilots that Mr. Hardcastle is not considered safe to fly, Dr. Hubers assures the group that no pilot or medical team member will be put into active service unless there was a consensus that he or she is safe. Dr. Hubers tells the staff that if anyone is concerned about the Aero Med training program, or the safety of the program, he or she should express those concerns to him.

February 27, 2013

Dr. Hubers meets with Mr. Berroa, who is excited about scenarios he has developed. Since Dr. Hubers did not possess aeromedical expertise to assess the contents of scenarios, he encourages Mr. Berroa to discuss the scenarios with Mr. Stretton, and then arrange a conference call with Flight Safety to get verification that they can do the scenarios.

End of February – Beginning of March 2013

Mr. Berroa calls Flight Safety about scenarios for Mr. Hardcastle's training and speaks with Mr. Roth, who is a Flight Safety instructor and check airman with over 7,000 hours in the S76. Mr. Berroa is advised that it is against FAA regulation for Flight Safety to use scenarios other than the scenarios and the training syllabus that had been approved by the FAA's principal operating inspector. Aware of Mr. Berroa's concerns, Mr. Roth indicates that Flight Safety would be able to develop a suitable plan to evaluate Mr. Hardcastle's aeronautical decision-making. However, Mr. Berroa opines that Flight Safety most likely would not be in a position to observe Mr. Hardcastle's judgment issues. Mr. Roth believes that he is in a better position to place pilots under stress and assess critical decision-making. But, from Mr. Roth's perspective, Mr. Berroa appears to have made up his mind about Flight Safety's lack of capability to evaluate Mr. Hardcastle's deficiencies, and is not willing to compromise. At one point in their conversation, Mr. Berroa states that Mr. Stretton does not know what he is doing.

Based on his conversation with Mr. Roth, and because Aero Med has never used Flight Safety for a Part 297 checkride, Mr. Berroa reverts back to his opinion that Mr. Hardcastle should be terminated as an Aero Med pilot. Mr. Berroa sends Dr. Hubers an e-mail about the unsuitability of using Flight Safety to assess Mr. Hardcastle's aeronautical decision making. Consequently, since Flight Safety cannot validate his concerns, and in the interest of safety, Mr. Berroa again recommends what Mr. Hardcastle's training to be an Aero Med pilot be terminated.

Dr. Hubers is shocked because now there is no plan, and absent a consensus among the Aero Med pilots he may have to let Mr. Hardcastle go. Since the plan to send Mr. Berroa to Flight Safety to fly Mr. Berroa's scenarios appears to be no longer viable, Dr. Hubers contacts HR about Mr. Hardcastle's separation. HR requests documentation.

Dr. Huber obtains Flight Safety's evaluation of Mr. Hardcastle's training in December 2012 that indicates Mr. Hardcastle had good situational awareness and aircraft systems knowledge, which is different from what Mr. Berroa is reporting.

Having learned the details about the February 5, 2013 flight and its launch into known icing conditions, as well as Mr. Cobb's flights with Mr. Hardcastle in December 2012, and after seeking clarification from Mr. Stretton and obtaining permission from Ms. Ulreich, Dr. Hubers contacts Mr. Baxter, an aviation litigation attorney, about potential violations of FAA regulations and standards by Aero Med due to the flight.

March 5, 2013

Dr. Hubers advises Mr. Berroa that after speaking with HR that he still needs documentation and specific examples which validate Mr. Berroa's assessment of Mr. Hardcastle's deficiencies. He also requests other pilots' assessments; any future training plan that might validate his assessment; and a statement explaining his belief that Flight Safety cannot provide validation.

March 6, 2013

Dr. Hubers meets with Mr. Stretton and Mr. Wroblewski to discuss Mr. Hardcastle's qualifications. On one flight, Mr. Wroblewski had no concerns with Mr. Hardcastle. On another flights, Mr. Hardcastle lowered the gear box at 130 knots, which was textbook, rather than 120 knots used by Aero Med pilots. When Mr. Wroblewski asked him why he didn't wait to 120 knots, Mr. Hardcastle indicated that no one at Aero Med had told him about the practice. Mr. Hardcastle told Mr. Wroblewski did not feel welcome by some Aero Med personnel, including Mr. Berroa; he asked that if he was going to get fired Mr. Wroblewski let him know so that he could quit.

According to Mr. Wroblewski, while Mr. Berroa seemed happy after his meeting with Dr. Hubers, when he learned the Flight Safety could not do the checkride, Mr. Berroa said that he would not sign off on Mr. Hardcastle; he would not change his mind.

Mr. Wroblewski opines that Berroa should not have launched into the icy conditions on February 5, 2013.

Mr. Wroblewski believes Mr. Hardcastle has positive traits; he is very compliant and humble and would rather leave Aero Med than disrupt the organization. Mr. Wroblewski considers Mr. Hardcastle to be a competent and experienced pilot, although his flying skills are weak. Mr. Wroblewski is concerned that Mr. Berroa may have told Mr. Hardcastle that he would not fit in with Aero Med. Dr. Hubers asks Mr. Wroblewski to document his observations.

In a subsequent summary, Mr. Wroblewski reports that Mr. Hardcastle was excited as he started to flying during working shifts with patients. During his last two flights with Mr. Hardcastle, and at Mr. Hardcastle's request, Mr. Wroblewski neither coached nor helped him. During hanger discussions about possible scenarios for incoming requests, Mr. Hardcastle was positive and very compliant. He had been unaware that Aero Med had a standard practice of extending gear at 120 knots, rather than the flight manual's 130 knots. While Mr. Hardcastle has noticed a change in Mr. Berroa's attitude towards him, Mr. Hardcastle doesn't speak badly of Mr. Berroa and accepts all the responsibility. Apparently, due to exchanges between Mr. Berroa and Mr. Hardcastle in front of a medical crew, a flight nurse expressed a concern to Mr. Wroblewski about Mr. Hardcastle's flying abilities. Mr. Wroblewski believes the information Mr. Berroa has shared with others had been detrimental to Mr. Hardcastle.

Dr. Hubers sends Mr. Berroa an e-mail requesting Mr. Hardcastle's training records.

March 7, 2013

Dr. Hubers conducts a conference call with Mr. Stretton and Mr. Roth at Flight Safety. Mr. Roth is well aware of Mr. Berroa's concerns, and believes Flight Safety would be able to develop a suitable plan to evaluate Mr. Hardcastle's aeronautical decision-making. Mr. Roth reports that during his call with Mr. Berroa, Mr. Berroa appeared to have already made up his mind about Flight Safety's inability, and was unwilling to compromise. Mr. Roth believes that he is in a better position to place pilots under stress and assess critical decision-making. Mr. Berroa also stated that Mr. Stretton didn't know what he was doing. Mr. Roth notes that Flight Safety is conducting checkrides for several trauma centers.

Attempting to gain a better understanding of how the Aero Med pilots felt about present and potential uses of Flight Safety, including checkrides, Dr. Hubers conducts a meeting with all Aero Med pilots, except Mr. Hardcastle. He discusses the current training program and hiring practices, as well as Flight Safety's role in the process and its value to Aero Med. Concerning having Flight Safety conduct checkrides, the pilots were split. Two pilots favor the use of Flight Safety; while Mr. Cobb and three other pilots believe use of a check airman rather than a simulator for checkrides is a better practice.

After the meeting, Dr. Hubers speaks with Mr. Bluemel to clarify comments he had made during their February 22, 2013 meeting.

Dr. Hubers also meets with Mr. Berroa to discuss Mr. Hardcastle and Flight Safety. Mr. Berroa again asserts that Flight Safety would not be able to observe Mr. Hardcastle's deficiencies that have occurred while flying at Aero Med. Consequently, Mr. Berroa states that he will not go along with a plan to send Mr. Hardcastle to Flight Safety for evaluation and validation; he will not accept Flight Safety's evaluation if they don't do scenarios that address Mr. Hardcastle's identified issues. Mr. Berroa again recommends that Aero Med terminate Mr. Hardcastle's employment.

Dr. Hubers is no closer to obtaining a consensus about Mr. Hardcastle. Due to the conflicting opinions, he finds it very difficult to actually assess Mr. Hardcastle's proficiency. Even though Mr. Roth advised that Flight Safety could provide an assessment, Dr. Hubers still would have pilots stating that Mr. Hardcastle is not competent, and Mr. Berroa refuses to accept an evaluation by Flight Safety

March 8, 2013

Mr. Berroa successfully conducts a Part 293, Part 297, and Part 299 checkride for Mr. Anderson, which renews Mr. Anderson's currency.

March 9, 2013

In considering Mr. Hardcastle's employment status, Dr. Hubers first notes that his technical skills had improved significantly over time. However, Dr. Hubers is also unable to obtain a consensus among the Aero Med pilots about Mr. Hardcastle's ability to consistently make sound and safe aeronautical decisions. While, Dr. Hubers believes Flight Safety can adequately address any deficiencies, several Aero Med pilots believe that because there was a sufficient difference between flying a simulator and an aircraft, a simulator will not be able to establish that Mr. Hardcastle's deficiencies no longer exist. Further compounding the issue, some of the Aero Med staff have been told that Mr. Hardcastle is unsafe, which has created an atmosphere of severe distrust by the Aero Med flight staff of Mr. Hardcastle's flying abilities.

Consequently, Dr. Hubers concludes that Mr. Hardcastle's employment must be terminated because no plan exists to obtain a consensus; and Dr. Hubers does not have any way to determine whether Mr. Hardcastle will be a safe pilot for Aero Med. Unable to resolve the conflict between his pilots on Mr. Hardcastle's flying capabilities, and since the purported, periodic deficiencies involve aeronautical decision-making, Dr. Hubers concludes that he must err on the side of safety.

Dr. Hubers schedules a meeting with Mr. Hardcastle and HR about Mr. Hardcastle's employment situation. Neither Mr. Stretton nor Mr. Hardcastle are advised that the meeting involves terminating Mr. Hardcastle's employment.

Despite his decision concerning Mr. Hardcastle, Dr. Huber believes that he has several other issues to resolve concerning Mr. Berroa, including: Mr. Berroa's representation after the December 2012 checkride that Mr. Hardcastle would soon be ready to fly as a line pilot versus his change of opinion less than a month later; flight communication comment that indicates a staff member felt Mr. Hardcastle was being set up when Mr. Berroa permitted Mr. Hardcastle to take off into icing conditions; Mr. Berroa's argument with Mr. Roth over Flight Safety's ability to assess Mr. Hardcastle's decision-making abilities; the absence of training documentation concerning Mr. Hardcastle's deficiencies; Mr. Berroa's failure to timely advise Dr. Hubers that Flight Safety could not do the scenarios as planned; and multiple other concerns with Mr. Berroa's handling of the situation and the current state of the Aero Med training program.

March 13, 2013

Dr. Hubers meets with Mr. Berroa and Ms. McDowell for three hours to clarify Mr. Berroa's concerns about Mr. Hardcastle and obtain validation from Ms. McDowell. When questioned, Mr. Berroa recommends Mr. Hardcastle's termination.

Concerning the December 2012 checkride, Mr. Berroa again explains his decision to pass Mr. Hardcastle on the VFR portion of the checkride, even though Mr. Hardcastle was unable to pass the IFR portion. He clarifies that even though he passed Mr. Hardcastle on the VFR portion, it was not his intention to have him fly on the schedule as a solo pilot.

In terms of Mr. Hardcastle's inability to correct deficiencies, Mr. Berroa observes that Mr. Hardcastle continues to approach destinations at low altitude. Concerning inadequate decision-making, Mr. Berroa referenced Mr. Hardcastle's deficiencies during his flights with Mr. Cobb and Mr. Bluemel. Based on these incidents, his own training flights with Mr. Hardcastle, and Mr. Hardcastle's problems with the precision approach during the January 2013 flight, Mr. Berroa concludes that Mr. Hardcastle lacks the competency to fly as an Aero Med IFR solo pilot.

Mr. Berroa again brings up the February 5, 2013 flight and tries to clarify his thoughts. Regarding launch criteria, Mr. Berroa observes that while the forecast weather did not include icing conditions, Mr. Berroa would not have taken the flight based on his personal observations of the actual local weather conditions outside. Mr. Berroa did not stop the flight because he wanted to see how far Mr. Hardcastle would go. He faults Mr. Hardcastle for failing to recognize the actual visual clues about the potential for icing. Rather than a low ceiling, Mr. Hardcastle should have aborted the flight due to the potential for icing.

Based on Dr. Hubers' concern that they delayed care for a critical patient, he asks "What about the patient?" Mr. Berroa responds that he would not do anything different because the patient was not his concern; he didn't consider the patient since safety was his most important goal. Dr. Hubers responds that Mr. Berroa could have advised him, or flight communications, as he walked out of the building that the flight would be cancelled, while at the same time evaluate Mr. Hardcastle's response to the weather. Mr. Berroa reiterates his response.

Regarding communications with Aero Med personnel, Mr. Berroa indicates that he had said he would not let his son fly with Mr. Hardcastle. As to subsequent communication with management and Dr. Hubers, Mr. Berroa explains that after talking with Flight Safety about the scenario, he believed plans had changed, and was uncertain when Dr. Hubers wanted the training records

Finally, when Dr. Hubers also observes that he still hasn't received Mr. Hardcastle's training records, Mr. Berroa replies that he thought he had more time. Dr. Hubers requests a written assessment.

In the evening, Mr. Hardcastle tells Mr. Stretton that he feels things were not going very well. Mr. Stretton tells him about some of Mr. Berroa's concerns and states there was always a chance that Mr. Hardcastle could be terminated. Mr. Hardcastle responds that he would rather resign. Mr. Stretton replies that he doesn't want Mr. Hardcastle to resign. But, Mr. Hardcastle thinks it is time to resign.

March 14, 2013

Mr. Hardcastle resigns.

Mr. Hardcastle asks Dr. Hubers if Aero Med can pay for his portion of Flight Safety training in order that he might save some money in moving forward in his career. Since he had already been trained at Flight Safety, Mr. Hardcastle worked out an arrangement with Flight Safety – for a discounted rate of \$5,900, he could take his ATP checkride.

March 15, 2013

On March 15, 2013, Dr. Hubers forwards to Ms. McDowell and Ms. Kiely two letters he received from Mr. Berroa by e-mail. In the first letter, in light of the amount of training that Mr. Hardcastle has received from Aero Med and Flight Safety, Mr. Berroa opines no additional training or assessment will correct Mr. Hardcastle's previously reported problem of being unable to make corrective actions required to overcome his deficiencies in aeronautical decision-making. In the interest of safety, Mr. Berroa recommends that Mr. Hardcastle's training with Aero Med be terminated. In a second letter, Mr. Berroa acknowledges that Flight Safety does an excellent job measuring a pilot's aircraft handling capabilities, as well as ensuring that a pilot maintains commercial pilot standards. However, although Flight Safety also assesses aeronautical decision-making, based on his experience, Flight Safety focuses on procedural-based issues and not the "soft" skills associated with cognitive reasoning that are required in actual work situations at Aero Med. As a result, Mr. Berroa believes it is possible for a pilot with serious deficiencies to train for several days at Flight Safety, and fly a checkride without encountering a situation that would bring his deficiencies to light. Consequently, Mr. Berroa does not feel that Flight Safety would be able to adequately validate the issues with Mr. Hardcastle that Mr. Berroa has identified.

Dr. Hubers advises Ms. McDowell that he will figure out the Flight Safety cost for Mr. Hardcastle's training, and determine how it will be paid. Subsequently, Aero Med is billed for the checkride and pays the bill. Mr. Hardcastle then reimburses Aero Med.

March 17, 2013

Dr. Hubers prepares a SBAR concerning the termination of Mr. Berroa's employment. Dr. Hubers highlights several behavioral issues and a potential FAA violations by Mr. Berroa that he discovered while investigating problems with Mr. Hardcastle. Specifically, as training captain, Mr. Berroa did not maintain documentation concerning Mr. Hardcastle's training other than two letters recommending his termination. Mr. Berroa permitted a launch into potential icing that may represent potential FAA and A021 violations. Mr. Berroa also delayed a patient's

care while trying to validate a new pilot's abilities. And, Mr. Berroa states that safety, and not patient care, is his only concern.

Dr. Hubers asks Mr. Stretton to review the SBAR because he wants to be sure his statements about FAA requirements are correct.

March 18, 2013

Mr. Stretton reviews a SBAR for Mr. Berroa and advises Dr. Hubers that while it may not be enough to get Mr. Berroa, he should still proceed.

March 19, 2013

Dr. Hubers forwards Mr. Berroa's SBAR to Ms. McDowell. Ms. McDowell later responds that the SBAR is sufficient but recommends two additions. First, Mr. Berroa is on an active first warning. Second, as training captain, Mr. Berroa is considered a leader, and expected to be held to that standard.

March 22, 2013

Mr. Baxter sends his legal review to Dr. Hubers regarding Aero Med's concern of whether the dispatch and launch of Flight 10880 on February 5, 2013 in a S-76 helicopter that was not rated for operations in known icing represented any violation. Upon review of the provided documentation, including Mr. Berroa's summarization of the December 14, 2012 checkride, and his summarization of the February 5, 2013 flight; the personnel record of Aero Med employees; and the load manifests from flights that occurred on December 29, 30, and 31, 2012, and February 5, 2013, and in consultation with a helicopter pilot expert, Mr. Baxter reaches several conclusions.

First, because Mr. Cobb was fully certified to act as a single pilot PIC for Aero Med, the operation of his flights with Mr. Hardcastle in December 2012 did not represent any violation.

Second, the launch of Aero Med's S-76 helicopter on February 5, 2013 did not represent any violation of an FAA regulation or the Part 135 operations manual because at the time of launch "forecasted" icing conditions did not exist. As a result, the pilot in command, Mr. Hardcastle, did not commit any violation of FAA regulations or breach Aero Med's Part 135 operations manual, A021, when he launched the aircraft which did not have de-icing capabilities. Additionally, Mr. Baxter notes that Mr. Hardcastle prudently aborted the mission when he determined the actual weather was not as forecast, and had deteriorated from the time the forecast weather had been obtained.

Third, by purposively withholding his assessment of the weather from Mr. Hardcastle, the pilot in command, Mr. Berroa violated both 14 C.F.R. Part 91.3 and Aero Med's Part 135 certificate by knowingly permitting his fellow crewmember to launch into weather which Mr. Berroa declared he knew had known icing conditions.

Fourth, as a training pilot and part of the crew of that flight, Mr. Berroa breached his responsibility to provide instruction through collaborative interaction with his fellow crewmember, while ensuring safety. While he was tasked with teaching Aero Med pilots to avoid hazardous flight conditions, Mr. Berroa nevertheless allowed flight into what he called known icing conditions in an aircraft not equip to fly in such conditions.

Fifth, because Mr. Berroa had an absolute duty to prohibit the launch of flight if he felt that such was in violation of the Federal Aviation Regulations, his failure to stop the flight was reckless and careless.

March 24, 2013

Dr. Hubers revises Mr. Berroa's SBAR recommending his termination for egregious acts by adding the language suggested by Ms. McDowell. Dr. Hubers references Mr. Baxter's letter.

Dr. Hubers believes termination is warranted because Mr. Berroa knowingly permitted an Aero Med aircraft to take off into weather conditions which he believed had the potential for icing, thereby placing the Aero Med aircraft, the on-board medical team, and Aero Med's program at risk; an act that Mr. Baxter characterized as reckless and careless. Dr. Hubers concludes that Mr. Berroa violated FAA regulations involving judgment, for which Dr. Hubers has zero tolerance. And, while insufficient as a sole basis for termination, Mr. Berroa's disregard for the patient on February 5, 2013 is extremely concerning to Dr. Hubers since Aero Med's business is providing transport for critically ill patients, and because as a physician Dr. Huber feels very strongly about his patients.

Dr. Hubers sends Mr. Berroa's SBAR and Mr. Baxter's letter to Ms. Ulreich, Ms. Van Ree, Ms. McDowell, and Ms. Kiely.

March 25, 2013

In the morning, Ms. Van Rhee advises Dr. Hubers that she agrees Mr. Berroa should be terminated.

Prior to the meeting, Ms. Ulreich reviews the SBAR and outside counsel's recommendation, which she considers persuasive. Of the reasons for termination set out in the SBAR, she considers Mr. Berroa's actions and inactions during the February 5, 2013 flight to be the most egregious.

Ms. Ulreich, Dr. Hubers, Ms. Kiely, Ms. McDowell, and Ms. Van Ree meet to discuss Mr. Berroa's employment situation. After their discussion, which does not include consideration of retaining Mr. Berroa as a line pilot, Dr. Hubers states they should move forward with termination. All participants agree termination is warranted. Having the final authority, Ms. Ulreich concurs with termination because Mr. Berroa's behavior was reckless, careless, and inappropriate for a training captain. Mr. Berroa knew the weather was unsafe for takeoff, did not share that information with Mr. Hardcastle, and disregarded a waiting patient. As a training captain, he had a responsibility to communicate his concerns about the weather.

March 26, 2013

Mr. Berroa attends a meeting with Dr. Hubers, Mr. Stretton, and Ms. McDowell. Dr. Hubers informs Mr. Berroa that his employment is being terminated and provides a copy of the corrective action report for the termination action. As reasons for termination, the report cites the February 5, 2013 flight, outside counsel's letter, and two other reasons associated with conduct and communication.

At the time, Mr. Berroa has 5,000 hours in helicopters. His yearly wage is about \$112,000, consisting of a salary of \$98,000, plus \$4,000 in employer retirement contributions, and \$10,000 in benefits. From January 1, 2011 through December 31, 2012, Mr. Berroa's cumulative gross pay was \$243, 910.42.

April 1, 2013

Mr. Berroa submits an appeal of his termination, asserting the stated reasons for the termination are false. Mr. Berroa maintains that he was actually terminated for bringing up safety concerns, and recommending a remedy. Further, according to Mr. Berroa, the January 9, 2013 coaching/mentoring session never took place. Finally, Mr. Berroa charges that Aero Med has failed to adhere to its core values in terminating his employment.

April 4, 2013

Ms. Ulreich upholds the termination decision and denies Mr. Berroa's internal appeal. She advises that if he wants to request a panel appeal, he should contact Ms. McDowell.

Remainder of 2013

The loss of his Aero Med job dramatically affects Mr. Berroa's life and his standard of living. Having enjoyed his career as a helicopter pilot, and being proud of his accomplishments, Mr. Berroa is crushed by the manner in which he lost his employment. It is a severe blow that he never saw coming. Mr. Berroa has difficulty sleeping. He does not take medication for depression or a sleep disorder.

Due to the stated basis for the termination, careless and reckless behavior, Mr. Berroa is unsuccessful over the course of several weeks with several applications for various aviation jobs for which he is otherwise well qualified.

In November, Mr. Berroa works for Amazon for nine weeks, earning \$7.50 an hour.

Mr. Berroa receives about \$1,200 a week in unemployment benefits.

By the end of June 2013, Mr. Berroa's retirement account of \$104,538.80 is depleted.

His gross income in 2013, which includes withdrawals from savings is about \$90,000.

2014

In February, Mr. Berroa obtains a regular job with U-Haul, making \$8.50 an hour, or about \$250 a week; and supplements his income as a pizza delivery driver for about \$75 a week.

Due to his inability to afford the prohibitive cost of flying, Mr. Berroa is unable to retain his currency as a helicopter pilot.

Mr. Berroa continues to experience stress/tension backaches.

Spring 2014

A review of training records discloses that Mr. Anderson flew several flights in March 2013 while his Part 293 certification had expired. The records indicate that his Part 293 checkride currency expired at the end of February 2013. However, Mr. Berroa did not conduct a Part 293 re-currency checkride until March 8, 2013. As a result, during the eight days when he was no longer certified, Mr. Anderson flew as pilot in command on four Part 135 flights, three of which had passengers on board.

The potential fines for Aero Med for permitting these flights amounts to \$120,000 to \$150,000; the charge is \$10,000 per leg, and each flight has at least three legs.

During his employment, Mr. Berroa never advised Aero Med that Mr. Anderson's re-certification and checkride dates had passed. If during Mr. Berroa's employment, Dr. Hubers had become aware of Mr. Berroa's failure to conduct the checkride in a timely manner, and his associated failure to disclose that untimely checkride, those omissions would have been grounds for termination of his employment.

May 2, 2014

Aero Med self-discloses flights conducted by a pilot with a lapsed license (Mr. Anderson) to NASA's voluntary self-reporting system. The company also advises that the check airman responsible for failing to give a timely checkride (Mr. Berroa) had been terminated.

AIR 21 Whistleblower Protection Adjudication

Under 49 U.S.C. § 42121(b)(2)(B)(iii) and 29 C.F.R. § 1979.109(a), to establish that a respondent has committed a violation of the employee protection provisions of AIR 21, a complainant must prove by a preponderance of the evidence¹¹ that an activity protected under AIR 21 was a contributing factor in the unfavorable personnel action alleged in the complaint. Accordingly, to establish a violation of AIR 21, a complainant must prove three elements: a) protected activity; b) unfavorable personnel action; and, c) contributing factor.

However, according to 49 U.S.C. § 42121(b)(2)(B)(iv) and 29 C.F.R. § 1979.109(a), even if a complainant satisfies his burden of proof, he may not be entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

Issue No. 1 – Protected Activity

The first requisite element to establish unlawful retaliation against a whistleblower is the existence of a protected activity. The Secretary, U.S. Department of Labor, (“Secretary”) has broadly defined “protected activity” as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn’t matter whether the allegation is ultimately substantiated, the complaint must be “grounded in conditions constituting reasonably perceived violations.”¹² And, the complainant’s concern must at least “touch on” the subject matter of the related statute.¹³ Additionally, the standard involves an objective assessment of reasonableness. The subjective belief of the complainant is not sufficient.¹⁴ That is, an employee need not prove an actual FAA violation to satisfy the protected activity requirement where (1) the employee’s report or attempted report is “related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, and (2) the employee’s belief of a violation is subjectively and objectively reasonable.¹⁵ And, in general, in the absence of specific statutory language to the contrary, protection of an employee’s report or complaint

¹¹29 C.F.R. § 1979.109 states the complainant must have “demonstrated” all three elements to establish entitlement to any relief. In a more recent whistleblower regulation, 29 C.F.R. § 1985.109(b), 79 Fed. Reg. 18630-18644, 18636 (Apr. 3, 2014), DOL determined that the term “demonstrates” means to prove by a preponderance of the evidence. See 79 Fed. Reg. 18636, citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 475 n.1 (5th Cir. 2008) (“the term ‘demonstrates’ [under identical burden-shifting scheme in the Sarbanes-Oxley whistleblower provisions] means to prove by a preponderance of the evidence.”). See also *Jones v. United Airlines, Inc.*, ARB No. 12-055, ALJ No. 2011 AIR 7, slip op. 3 (ARB (Administrative Review Board) July 24, 2013) (a complainant must prove by a preponderance of the evidence that protected activity was a contributing factor to the alleged adverse action).

¹²*Minard v. Nerco Delamar Co.*, 92 SWD 1 (Sec’y Jan. 25, 1995), slip op. 8.

¹³*Nathaniel v. Westinghouse Hanford Co.*, 91 SWD 2 (Sec’y Feb. 1, 1995), slip op. 8-9; and *Dodd v. Polysar Latex*, 88 SWD 4 (Sec’y Sept. 22, 1994).

¹⁴*Kesterson v. Y-12 Nuclear Weapons Plant*, 95 CAA 12 (ARB Apr. 8, 1997).

¹⁵*Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, ALJ No. 2013-AIR-9 (ARB Feb. 13, 2015).

about a potential violation is not limited to actions arose outside the complainant's assigned duties.¹⁶

Turning to the specific AIR 21 provisions, 49 U.S.C. § 42121(a)(1) – (4), and 29 C.F.R. §§ 1979.102(a) and (b), set out four types of protected activities. First, the employee “provided, caused to be provided, or is about to provide (with any knowledge of the employer), or cause to be provided, to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.” Second, the employee “has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.” Third, the employee “testified or is about to testify in such a proceeding.” And, fourth, the employee “assisted or participated or is about to assist or participate in such a proceeding.”

The implicit purpose of the employee protection provisions of AIR 21, to encourage the reporting of matters involving, or relating to, violations of any federal law or FAA order, regulation, or standard concerning air carrier safety, also affects the scope of protected activities under 49 U.S.C. § 42121(a)(1). The Supreme Court noted in a parallel statute, that the statute’s language must be read broadly because “[a] narrow hyper-technical reading” of the employee protection provision of the Act would do little to effect the statute’s aim of protecting employees who raise safety concerns.¹⁷ Such statutes have a “broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality.”¹⁸

Considering the above stated principles, an AIR 21 protected activity under 49 U.S.C. § 42121(a)(1) has three components.¹⁹ First, the employee’s information must involve, or relate to, a purported violation of a Federal law or FAA regulation, standard or order relating to air carrier safety, and at least “touch on” air carrier safety. Second, the complainant’s belief about the purported violation must be subjectively held, and objectively reasonable. Third, the complainant must communicate his information or safety concern to either his employer or the Federal Government.

¹⁶See *Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005 SOX 44, slip op. 13 (ARB Jan. 10, 2010).

¹⁷*Kansas Gas & Electric Co.*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986).

¹⁸*Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984).

¹⁹See *Benjamin v. Citationshares Management, LLC*, ARB No. 12-029, ALJ No. 2010 AIR 1, slip op. 5-6 (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 or any federal law related to air carrier safety, so long as the employee’s belief of a violation is subjectively and objectively reasonable).

Finally, the federal aviation regulations governing air safety, 14 C.F.R. § 1.1,²⁰ confer on the pilot in command “final authority and responsibility for the operation and safety of the flight.”²¹

Through counsel, and in the closing brief, Mr. Berroa asserts that he engaged in four protected activities. First, Mr. Berroa notified Mr. Stretton, his supervisor, that Mr. Hardcastle had failed the IFR portion of the December 14, 2012 checkride. Second, Mr. Berroa notified Mr. Stretton that on January 6, 2012, on a precision approach, Mr. Hardcastle demonstrated serious situational awareness and aeronautical decision-making deficits that required Mr. Berroa to intervene and direct Mr. Hardcastle to execute a missed approach for safety purposes. Third, Mr. Berroa informed Mr. Stretton that on a February 5, 2013 mission Mr. Hardcastle’s actions and inactions represented violations of FAA standards for situational awareness and aeronautical decision-making standards. Fourth, during his meetings with Dr. Hubers on February 13, 2013, February 22, 2013, and March 13, 2013, Mr. Berroa reiterated Mr. Hardcastle’s violations of FAA situational awareness and aeronautical decision-making standards during the December 14, 2012, January 6, 2013, and February 5, 2013 flights.

December 14, 2012 Checkride

Following the December 14, 2012 checkride, Mr. Berroa advised Mr. Stretton that due to problems with a precision approach, Mr. Hardcastle was unable to pass the IFR portion of his check ride.

For several reasons, I find this communication is not an activity protected under AIR 21. First, Mr. Berroa’s communication with Mr. Stretton did not also contain an assertion that Mr. Hardcastle’s procedural errors, which caused his failure to pass the IFR portion of the checkride, were significant deficits in situational awareness or aeronautical decision-making, or of sufficient severity to compromise flight safety.

Second, Mr. Berroa’s response to the failed portion of the checkride negates a finding that he subjectively believed Mr. Hardcastle’s inability to successfully complete the IFR approach on his initial checkride demonstrated that Mr. Hardcastle was an unsafe pilot. Notably, Mr. Berroa neither actively intervened during the checkride because Mr. Hardcastle’s flying was unsafe nor documented the IFR portion of the flight as a failure. Instead, after observing Mr. Hardcastle’s failure to fly the precision approach within prescribed standards, Mr. Berroa decided to treat that portion of checkride as training. And, when he discussed the checkride with Mr. Stretton, Mr. Berroa confidently expressed to Mr. Stretton that after additional training with Flight Safety, Mr. Hardcastle would be able to successfully complete an IFR checkride.

²⁰I take judicial notice of 14 C.F.R. § 1.1: “Pilot in command means the person who: (1) Has final authority and responsibility for the operation and safety of the flight.”

²¹*Benjamin v. Citationshares Management, LLC*, at slip op. 6.

Third, the evidentiary record does not support a determination that Mr. Hardcastle's failure to pass the IFR portion on his initial IFR checkride objectively represented a violation of a flying safety standard. At the time of the checkride, Mr. Hardcastle was still a probationary pilot with only about 35 hours of flying time in the complex S-76 helicopter. Within that context, his procedural errors as a probationary pilot are not pro se violations of a flying safety FAA standard or regulation. Though he demonstrated sufficient proficiency flying the aircraft under VFR rules, Mr. Hardcastle still apparently lacked the necessary skills to satisfy the more demanding criteria for a successful IFR checkride. Additionally, since the severity of his deviations from the IFR rules is not established, an objective determination that he violated a flying safety standard is problematic. And, the lack of intervention by Mr. Berroa during the flight, and his decision not to characterize Mr. Hardcastle's IFR checkride as a failure, provide some evidence that Mr. Hardcastle's deficiency during the IFR portion of the checkride did not represent a flying safety violation.

January 6, 2013 Flight

Based on Mr. Berroa's credible testimony about the January 6, 2013 flight, I find his report of Mr. Hardcastle's deficiencies during that flight to Mr. Stretton represented a protected activity.

Specifically, Mr. Hardcastle demonstrated multiple failures in situational awareness, which while individually may not have been critical, cumulatively caused Mr. Hardcastle to fly the S-76 into a hazardous situation at low altitude. First, he failed to recognize that the air traffic controller had placed the aircraft too close to the initial navigation beacon for the precision approach. Then, he failed to recognize that he had entered into an extremely high rate of descent. Finally, he did not recognize that he was not in a stabilized approach near the minimum altitude for the approach.

Mr. Hardcastle also made several poor aeronautical decisions during the approach. Initially, he decided to proceed with the approach despite the air traffic controller's error. He then attempted to intercept the glide slope at an inappropriately high rate of descent. And, he continued with the approach at an excessively high rate of descent of nearly 1,000 feet per minute just 300 feet above the minimum altitude of 200 feet for the precision approach even though he had still not yet intercepted the glideslope and established a stabilized approach on glidepath.

Mr. Hardcastle's multiple errors placed the S-76 in an extremely dangerous position, which required Mr. Berroa's verbal intervention for Mr. Hardcastle to execute a missed in order to prevent the continuation of an unsafe precision approach. Mr. Berroa's active intervention clearly demonstrates a subjectively reasonable assessment of the situation. And, considering the aircraft's attitude and position at the time of Mr. Berroa's intervention, I find Mr. Hardcastle's demonstrated deficiencies in situational awareness and aeronautical decision-making were objectively serious deviations from the FAA standard for the safe conduct of flight by a helicopter pilot in command such that his deficiencies represented violations of the pilot competency standard related to air carrier safety. As result, Mr. Berroa engaged in a protected

activity when he reported Mr. Hardcastle's serious and unsafe deficiencies in situational awareness and aeronautical decision-making during the January 6, 2013 flight to Mr. Stretton.

February 5, 2013

The evidentiary record establishes that on February 5, 2013 Mr. Berroa again observed significant omissions by Mr. Hardcastle in the critical skills areas of situational awareness and aeronautical decision-making. Based solely on forecast weather, which was marginal but flyable, Mr. Hardcastle accepted a Part 135 patient flight without checking the actual weather conditions, which consisted of low ceilings, a fine mist, a temperature below freezing, and approaching darkness. Once outside, while moving the aircraft out of the hanger, conducting pre-flight checks, and having the medical crew board the aircraft, Mr. Hardcastle did not recognize that the combination of fine drizzle, below freezing temperatures, and nightfall with associated lower temperatures indicated the potential for in-flight icing existed, a weather condition for which the Aero Med S-76 that Mr. Hardcastle was going to fly on the Part 135 patient flight was not equipped or certified. During the subsequent engine-up, despite additional evidence in the form of extremely fine droplets coalescing on the glass windshield and turning into bigger drops, Mr. Hardcastle continued to not realize the potential for icing. As a result, he decided to take off, flew to the airport boundary, and reached an altitude of 300 to 400 feet before aborting the mission due to a ceiling lower than forecast. And, by the time they returned to and landed, ice had formed on the S-76 radome nose.

Mr. Berroa's credible testimony establishes that he subjectively believed Mr. Hardcastle's failure to recognize an unexpected change – actual local weather that threatened in-flight icing differed significantly from forecast weather of no icing – and his decision to take off, represented serious deficiencies in the requisite level of situational awareness and aeronautical decision-making for a pilot in command necessary to ensure the safety of the February 5, 2013 Part 135 patient flight.

Further, based on the description of the actual weather by both Mr. Berroa and Ms. Whitehead, which included perceptible precipitation in the form of a fine mist, a temperature below freezing, fine droplets on the windshield coalescing into droplets, and approaching nighttime, I find Mr. Berroa's belief that Mr. Hardcastle's failure to interpret these tangible, and readily apparent, aspects of the actual weather as signs of possible icing during their Part 135 patient flight was a significant compromise of air safety to be objectively reasonable.²²

Accordingly, I find Mr. Berroa engaged in a protected activity when he advised Mr. Stretton of Mr. Hardcastle's significant flaws in situational awareness and aeronautical decision-making when he accepted the February 5, 2013 Part 135 patient flight and took off.

²²While Mr. Baxter expressed an opinion that Mr. Hardcastle's take off was technically legal based on the forecast weather of no icing, the crux of Mr. Berroa's protected activity was his subjectively and objectively reasonable concern that due to significant deficits in situational awareness and aeronautical decision-making, Mr. Hardcastle took off with the intention to fly the Part 135 patient mission in an aircraft neither equipped nor authorized to operate in icing conditions without ever recognizing, based on the actual, observable, weather conditions, the threat of icing en route that would compromise to the flight's safety.

Meetings with Dr. Hubers

Based on the above determinations, I also find that Mr. Berroa engaged in protected activities on February 13, February 22, and March 13, 2013, when he discussed the January 6, 2013 and February 5, 2013 flights with Dr. Hubers, and expressed his aviation safety concerns about Mr. Hardcastle's situational awareness and aeronautical decision-making deficits.

Issue No. 2 – Adverse Action

Concerning an adverse personnel action or event, in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-2 (ARB Sept. 30, 2008), the ARB determined that the deterrence standard established by the U. S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) was applicable in whistleblower cases adjudicated by the U. S. Department of Labor. Previously, a "tangible employment consequence" test had been applied.²³ However, under the *Burlington Northern* adverse action standard, to be deemed "materially adverse," an action must be such that it "would well dissuade a reasonable worker from making or supporting a charge of discrimination." Consequently, since the purpose of the employee protection provision is to encourage employees to freely report non-compliance with statutory requirement, the test is whether the employer's action could dissuade a similarly situated reasonable worker from engaging in protected activity.²⁴

Clearly, on March 26, 2013, Mr. Berroa suffered the ultimate adverse action for an employee, the termination of his employment with Aero Med.²⁵

²³See *Jenkins v. United States Environmental Protection Agency*, ARB No. 98 146, ALJ No. 1988 SWD 2, slip op. at 20 (ARB Feb. 28, 2003) (to be actionable, an action must constitute a tangible employment action; that is, a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits); *Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 1999-WPC-3 (ARB Aug. 28, 2001) (a negative performance evaluation, absent tangible job consequences, is not an adverse action).

²⁴*Id.* at slip op. 19-20.

²⁵Complainant's counsel alleged that Mr. Berroa also suffered the following additional adverse actions: removal from Mr. Hardcastle's training; a false January 9, 2013 coaching memorandum; and denial of request to resign. I consider these allegations subsumed by Mr. Berroa's termination.

Issue No. 3 – Causation

The ARB recently confirmed that “contributing factor” is “any factor which, alone or in connection with other factors, tends to affect in any way” the decision concerning the adverse personnel action, *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005-SOX-33, slip op. at 12 (ARB Sept. 30, 2011) (citing *Marano v. U. S. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)), *aff'd sub. nom. Bechtel v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 2d Cir., No. 11-4918 (2d Cir. Mar. 15, 2013). In the absence of direct evidence of causation, contributing factor may be proven through circumstantial evidence, which may include temporal proximity, indications of pretext, inconsistent application of employer’s policies, and shifting explanations for an employer’s actions. *Bechtel*, ARB No. 09-952, at 13. If a complainant shows evidence of pretext, he may rely on inferences drawn from such pretext to establish by a preponderance of the evidence that protected activity was a contributing factor in the unfavorable personnel action. *Bechtel*, ARB No. 09-952, at 13. Although the ARB has stated that “proof of causation or ‘contributing factor’ is not a demanding standard,” *Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009 FRS 015, slip op. at 15, (Mar. 29, 2013), as previously discussed, the applicable evidentiary burden nevertheless remains preponderance of the evidence.

The determination of contributing factor essentially has two components: knowledge and causation.²⁶ In other words, the employer must have been aware of the protected activity (knowledge) and the protected activity was a contributing factor in the decision to take the adverse personnel action (causation). Further, knowledge of a protected activity may be either actual or imputed. Regarding the latter category, relying on the “cat’s paw” legal concept of liability recognized in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), the ARB has concluded a complainant need not prove the decision maker responsible for the adverse action actually knew of the protected activity if he can establish that any person advising the decision maker on the adverse action was aware of the protected activity. *Rudolph*, slip op 17.

Notably, under these adjudication principles, “[N]either motive nor animus is required to prove causation . . . as long as protected activity contributed in any way to the adverse action.” *Petersen v. Union Pacific Railroad Co.*, ARB No. 13-090, ALJ No. 2011-FRS-17 (ARB Nov. 20, 2014). In other words, while an employer’s stated basis for its action is a consideration,²⁷ the complainant’s burden under the contributing factor standard does not require proof of discriminatory intent.

²⁶See *Bechtel*, slip op. at 13 (the four elements that a claimant must prove by a preponderance of the evidence are: a) statutorily protected activity, b) employer's knowledge of the protected activity, c) adverse action, and d) contributing factor).

²⁷See *Powers v. Union Pacific RR Co.*, ARB No. 13-0334, ALJ No. 2010 FRS 30, dissenting opinion, slip op. 46 (ARB March 20, 2015) (there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor).

Mr. Berroa has established that: a) he engaged in protected activities by reporting Mr. Hardcastle's hazardous deficiencies in situational awareness and aeronautical decision-making during the flights on January 6, 2013 and February 5, 2013 to Mr. Stretton and Dr. Hubers,²⁸ and b) suffered the significant adverse action of loss of employment. Consequently, to obtain relief under the AIR 21 employee protection provisions, Mr. Berroa must establish that at least one of his two protected activities was a contributing factor in the recommendations of Mr. Stretton to terminate his employment, and Dr. Hubers' decision to terminate his employment, effective March 26, 2013.

Since Mr. Berroa described both flights to Mr. Stretton and Dr. Hubers, both Aero Med supervisors were well aware of his protected activities.

In the absence of direct evidence, the next determination of whether their knowledge of Mr. Berroa's protected activities was a contributing factor in their adverse action requires consideration of circumstantial evidence associated with disparate treatment, temporal proximity, as well as Aero Med's stated basis for the adverse action.²⁹

Disparate Treatment

As circumstantial evidence of causation, Mr. Berroa asserts that he was treated differently than Mr. Hardcastle. Specifically, while Mr. Hardcastle was allowed to resign and thus avoid the adverse consequences of being terminated for cause, Mr. Berroa was not permitted to resign. Additionally, Mr. Hardcastle received special treatment when Aero Med paid for Mr. Hardcastle's training with Flight Safety after he left Aero Med.

However, due to distinct differences in the separations of Mr. Berroa and Mr. Hardcastle, neither factor is particularly probative. Mr. Hardcastle resigned before receiving a notice of termination; whereas, Mr. Berroa did not.³⁰ And, Mr. Hardcastle requested an arrangement with Aero Med for additional Flight Safety training for which he would, and did, provide reimbursement; however, the record contains no evidence that Mr. Berroa even asked Aero Med for a similar arrangement.

²⁸Again, I note that I have determined that Mr. Berroa's report of the December 14, 2012 checkride results was not a protected activity.

²⁹While Complainant's counsel noted shifting explanations for Mr. Berroa's termination, and Respondent's litigation decision not to address a couple of the stated reasons for termination, Dr. Hubers' principal basis for his termination decision has consistently been Mr. Berroa's actions during the February 5, 2013 flight.

³⁰Albeit, I recognize that Mr. Berroa was surprised by his termination, while Mr. Hardcastle reasonably perceived that his job was in jeopardy.

Temporal Proximity

While the simple chronological order of an adverse action following a protected activity does not establish causation standing alone, the sequence of events can nevertheless provide circumstantial evidence of causation, particularly when the protected activity is directly related to, and intertwined with, the series of actions that led to the termination of employment.

Considering the first protected activity associated with the January 6, 2013 flight, Mr. Stretton took over Mr. Hardcastle's training right afterwards, and Mr. Berroa was separated less than three months of his discussion with Mr. Stretton about the flight. In those circumstances, the temporal proximity between that first protected activity and Mr. Berroa's termination provides some circumstantial evidence of causation.

The temporal relationship between the second protected activity concerning the February 5, 2013 flight and Mr. Berroa's loss of employment has significant probative value because as discussed below his report about the February 5, 2013 flight was the precipitating event that initiated a course of action that led to his termination on March 26, 2013.

On February 9, 2013, Mr. Berroa described what happened during the February 5, 2013 flight and recommended Mr. Hardcastle's termination. In response, Mr. Stretton concluded that Mr. Berroa should not continue to be the Aero Med training captain in part because he attributed the cause of Mr. Hardcastle's deficiencies that Mr. Berroa identified to Mr. Berroa's ineffectiveness as the training captain, particularly since Mr. Stretton considered Mr. Hardcastle's flying skills to be at least adequate based on his own flying experience with Mr. Hardcastle, and Mr. Hardcastle's successful completion of Flight Safety training in December 2012. As a result, he decided to seek guidance from HR and Dr. Hubers about removing Mr. Berroa from the training captain position, and also began to question whether Mr. Berroa should even continue his employment with Aero Med. Although Mr. Stretton may not have actually been reacting to the aviation safety aspect of Mr. Berroa's report, Mr. Stretton's concern about Mr. Berroa's training effectiveness was nevertheless based Mr. Berroa's description of Mr. Hardcastle's deficits on February 5, 2013 flight, and thus intertwined with Mr. Berroa's protected activity of reporting Mr. Hardcastle's significant flaws in situational awareness and aeronautical decision-making. Subsequently, also based in part on that factual description, by February 15, 2013, Mr. Stretton advised Dr. Hubers that Mr. Berroa should be terminated; and, on March 18, 2013, he concurred with the termination of Mr. Berroa's employment.

During their conversations about Mr. Hardcastle's training, Mr. Berroa also advised Dr. Hubers of his concerns with Mr. Hardcastle's flying deficiencies and specifically referenced the February 5, 2013 flight. While not directly reacting to Mr. Berroa's report of safety issues with Mr. Hardcastle, Dr. Hubers became concerned about whether Mr. Berroa's act of permitting a take off on February 5, 2013 represented a violation of FAA standards that would expose Aero Med to liability. Due to that concern, at the beginning of March 2013, Dr. Hubers sought an opinion from outside counsel. Then, by March 17, 2013, due to several concerns, but principally the potential FAA violation associated with the February 5, 2013 launch of the Aero Med S-76, Dr. Hubers decided to separate Mr. Berroa. And, by March 22, 2013, outside counsel's review of the February 5, 2013 flight, and his opinion that Mr. Berroa's action violated FAA standards,

further supported Dr. Hubers' termination decision. Notably, although Dr. Hubers' focus was on Mr. Berroa's actions, this sequence of events leading to Mr. Berroa's termination was nevertheless predicated on details about the February 5, 2013 flight that were intertwined with Mr. Berroa's protected activity.

Stated Basis for Adverse Action

Regarding Aero Med's stated basis for Mr. Berroa's termination, Mr. Stretton and Dr. Hubers provided credible testimony that their actions were not taken in retaliation for Mr. Berroa's reporting safety concerns about Mr. Hardcastle.

Specifically, in regards to the first protected activity, Mr. Stretton was upset about Mr. Berroa's recommendation that Mr. Hardcastle be terminated after he described what happened during the January 6, 2013 flight. However, Mr. Stretton's reaction was based on the lack of documentation in Mr. Hardcastle's training records about any flying deficiencies over the course of the past four months. And, while Mr. Berroa was no longer training Mr. Hardcastle after his January 9, 2013 exchange with Mr. Stretton, the reason for that change was Mr. Berroa's attitude toward the futility of providing any further training for Mr. Hardcastle, and not his protected activity. Additionally, although he continued Mr. Hardcastle's training, Mr. Stretton took no action to remove Mr. Berroa as the Aero Med training captain, or terminate Mr. Berroa's employment. To the contrary, when he next spoke with Dr. Hubers, Mr. Stretton simply advised of a problem with the progression with Mr. Hardcastle's training that was being addressed.

Significantly, Dr. Hubers took no action against Mr. Berroa concerning this first protected activity.

Concerning the second protected activity, Mr. Stretton decided to remove Mr. Berroa from the training captain position, and for the first time considered his termination, based on Mr. Berroa's statement that he did not care whether Mr. Hardcastle's separation would adversely reflect on the training Aero Med provided.

In addition to the lack of training documentation, Dr. Hubers based his termination decision on Mr. Berroa's decision to permit the launch of the February 5, 2013 flight which outside counsel eventually opined was a careless and reckless act that exposed Aero Med, its staff, and its patients to significant and unnecessary risk.

Discussion

Upon consideration of the lack of disparate treatment, the circumstantial evidence of causation, and Aero Med's evidence of non-discriminatory basis for Mr. Berroa's separation, I first note as previously discussed that the absence of a discriminatory motive does not preclude a finding that a protected activity was a contributing factor in Mr. Berroa's lost of employment with Aero Med.

Next, in regards to the January 2013 protected activity, I find the preponderance of the probative evidence is insufficient to establish that Mr. Berroa's description of Mr. Hardcastle ILS approach on January 6, 2013 was a contributing factor in his subsequent termination. Specifically, while temporal proximity exists, Mr. Stretton removed Mr. Berroa from Mr. Hardcastle's training due to Mr. Berroa's attitude rather than his report. And, neither Mr. Stretton nor Dr. Hubers took any action in response to this protected activity in regards to Mr. Berroa's position as Aero Med training captain, or his employment status.

On the other hand, although Mr. Stretton and Dr. Hubers had a non-discriminatory basis for their actions in the termination of Mr. Berroa after his second protected activity concerning the February 2013 flight, the preponderance of the probative evidence establishes that Mr. Berroa's report about the details of February 5, 2013 flight played an integral, initiating role in the sequence of events that ultimately lead to the termination of his employment. Accordingly, I find, Mr. Berroa's protected activity relating to the February 5, 2013 flight was a contributing factor in the loss of his employment with Aero Med on March 26, 2013.

Issue No. 4 – Affirmative Defense

As previously discussed, under 49 U.S.C. § 42121(b)(2)(B)(iv), and 29 C.F.R. § 1979.109(a), even if a complainant satisfies his burden of proof, he may not be entitled to relief if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. Based on its interpretation of this provision, the ARB indicated that consideration must be given to the combined effect of at least three factors on a case-by-case basis: a) how clear (unambiguous) and convincing (highly probable) the independent significance is of the non-protected activity; b) evidence that proves or disproves whether the employer would have taken the same adverse action; and c) the facts that would change in the absence of the protected activity.³¹ Concerning the third factor, the ARB explained that to properly decide what would have happened in the "absence of" protected activity, consideration is given to facts that would have changed in the absence of the protected activity; that is, material facts necessarily that would have changed in the absence of protected activity.³² Finally, the AIR 21 statute renders whistleblowers no less accountable than others for their infractions or oversights; and protected activity will not shield an under-performing worker from discipline.³³

³¹*Speegle v. Stone & Webster Constr. Co.*, ARB No. 14-079, ALJ No. 2005 ERA 6, slip op. 4 (ARB Dec. 15, 2014).

³²*Citationshares Management, LLC.*, ARB No. 14-039, ALJ No. 2010 AIR 1, slip op 2-5 (ARB July 28, 2014).

³³*McLean v. American Eagle Airlines, Inc.*, ARB, No. 12-005, ALJ No. 2010 Air 16, slip op. 6 and 9 (ARB Sept. 30, 2014).

Clear and Convincing Significance of Non-Protected Activity

For several reasons, I find the evidentiary record presents clear and convincing evidence that Mr. Berroa's act of permitting the Part 135 patient flight to take off on February 5, 2013 demonstrate a serious deficiency in aeronautical decision making, and was a significant breach of his duties as a senior Aero Med pilot in that flight.

First, as Dr. Hubers credibly testified, since the S-76 was not rated under Aero Med's A021 certification to fly in icing conditions, Mr. Berroa demonstrated poor judgment³⁴ in permitting Mr. Hardcastle to launch in the presence of tangible precipitation, below freezing temperature, and impending nightfall, thereby placing the flight crew, a physician, a flight nurse, and the aircraft at both serious potential, and actual, risk. Although he did not see icing at ground level and estimated that the threat of icing to be at the planned cruise altitude of 1,100 feet, Mr. Berroa was clearly aware prior to launch that weather conditions were rapidly deteriorating from the forecast weather. Yet, he still risked permitting the launch based on his assumption that his estimation of the altitude of the icing threat was correct. However, significantly, ice on the S-76 radome nose starkly demonstrated that Mr. Berroa had underestimated the severity of the icing threat since by 300 to 400 feet the S-76 was actually flying in icing conditions.

Second, the combination of Mr. Berroa's decision to see how far Mr. Hardcastle would go without recognizing the threat of icing, and Mr. Berroa's failure to immediately notify flight communications when he determined that mission would be aborted due to potential icing conditions, also placed a critically-ill patient awaiting transportation by Aero Med for time-sensitive medical care – the sole business of Aero Med – at great risk. Further, as Mr. Berroa acknowledged, while focusing on safety associated with Mr. Hardcastle's competency, he didn't even consider the impact of his decision on the patient who was waiting at Ionia for emergency airlift, which reflected an indifference to patient welfare that Dr. Hubers found to be intolerable.

Third, the February 5, 2013 flight was scheduled solely as a Part 135 patient flight. Once Mr. Berroa determined that mission could not be accomplished due to the threat of icing, no authorization remained for Mr. Berroa to permit the take off of the Aero Med S-76 on that mission in the late afternoon of February 5, 2013 with a medical crew onboard.³⁵ And, because Mr. Berroa was no longer training Mr. Hardcastle, he also lacked the authority to convert the Part 135 mission into a training flight, even to the airport boundary, just to see how far Mr. Hardcastle would go without noticing the potential for icing.

³⁴Even Mr. Berroa acknowledged that if he had been a single pilot on that flight he would not have accepted flight because taking off in that weather would have been bad judgment.

³⁵As previously noted, Mr. Berroa acknowledged that if he had been a single pilot he would have aborted the mission as soon as he recognized the potential for icing; he would not have taken off. Mr. Cobb (although the weather was technically legal) and Mr. Woblewski also agreed that they would have aborted the mission and not launched the S-76 in the same situation.

Fourth, and closely related, on February 5, 2013, Mr. Berroa was no longer training Mr. Hardcastle, and thus he was not flying with Mr. Hardcastle that day to assess whether Mr. Hardcastle would recognize a threat of icing. Instead, he was serving as an integral part of the Part 135 patient flight crew by flying as a senior and experienced Aero Med pilot with a probationary pilot in command. In that capacity, he had an obligation to promptly advise Mr. Hardcastle of his assessment that the weather that was dangerously different than forecast, but he failed to do so, with no legitimate mission-related justification for withholding his weather assessment from the pilot in command.

Fifth, after accepting the patient flight, Mr. Hardcastle had ample time as he rolled the aircraft out of the hanger, conducted a pre-flight, had the medical crew board the aircraft, and completed the engine run up, to identify and, assess, all the necessary tangible signs of the threat for potential icing, and abort the mission. Thus, after completion of the engine run-up, both: a) Mr. Hardcastle's failure to consider the possibility of icing based on the cold precipitation on his face,³⁶ and coalescing droplets on the aircraft's windshield; and b) his intention to launch the S-76 and fly the Part 135 patient mission, were profoundly and readily apparent. In that situation, there was no reasonable, or acceptable, need to permit Mr. Hardcastle to actually launch into the deteriorating weather to establish that he did not recognize that the actual local weather conditions presented a serious threat of dangerous icing. Clearly, prior to lift-off, Mr. Berroa already had more than sufficient grounds to critic Mr. Hardcastle's significant shortfalls in situation awareness and aeronautical decision-making.

Sixth, since there was no need to permit the launch of the S-76 to demonstrate Mr. Hardcastle's deficits in situational awareness and aeronautical decision-making, and considering Mr. Berroa's attitude toward continuing any training for Mr. Hardcastle, Mr. Berroa's actions and inactions on February 5, 2013 support a conclusion that he permitted his issues with Mr. Hardcastle's flying abilities and his continued employment as an Aero Med solo pilot, and his dispute with Mr. Stretton regarding Mr. Hardcastle's competency,³⁷ to cloud his own aeronautical decision-making such that he did not advise Mr. Hardcastle of the adverse weather before take-off, and permitted the S-76 take off and climb up to 400 feet where it experienced icing at the expense of aviation safety, the medical team, and the critically-ill patient awaiting time-sensitive transport.

³⁶Even Ms. Whitehead recognized the threat of icing after feeling precipitation on her nose as she went out to the aircraft.

³⁷More specifically, the only apparent purpose of permitting Mr. Hardcastle to launch after he failed to recognize the potential for in-flight icing would be to emphasize the significance of Mr. Hardcastle's failures in situational awareness and aeronautical decision-making, and dramatize the potential unsafe consequences of his shortfalls, thereby providing support for Mr. Berroa's conclusions that Mr. Hardcastle was an unsafe pilot, even after his December 2012 attendance at Flight Safety and Mr. Stretton's subsequent training, and validating his recommendation that Mr. Hardcastle be terminated.

Would Have

Having established by clear and convincing evidence that Mr. Berroa's action in permitting the launch of the Aero Med S-76 on February 5, 2013 was a serious deficiency in aeronautical decision-making and significant dereliction of duty, I must next assess whether the Employer would have terminated Mr. Berroa due to his actions on February 5, 2013.

Dr. Hubers credibly testified that because he had been attempting to obtain a better model that would enable Aero Med to fly during icing conditions, he was sensitive to the weather restrictions of Aero Med's Part 135 certificate for the S-76 due to its lack of de-icing capabilities,. Thus, his immediate response to Mr. Berroa's actions on February 5, 2013 would have been (and was) a concern that by permitting Mr. Hardcastle to launch the Aero Med S-76 on February 5, 2013 when a threat of icing was present Mr. Berroa may have violated an FAA standards and Aero Med's A021 operation certificate and placed at risk that flight and medical crew, which were deficiencies that Dr. Hubers credibly testified he had zero tolerance. His grave concern would have led into further investigation by Dr. Hubers including a inquiry of Mr. Stretton about the potential violations, and a request to obtain an outside counsel review of the situation. In turn, upon validation of the events which occurred, Dr. Hubers would have terminated Mr. Berroa for his breach of expected standards and bad judgment in permitting Mr. Hardcastle to fly Aero Med's S-76 when he already knew that the mission would be aborted and believed there was a threat of icing during the flight.

Change in Facts

Finally, absent Mr. Berroa's protected activity of reporting Mr. Hardcastle's deficiencies on February 9, 2013, Mr. Stretton would not have been learned of the circumstances surrounding the February 5, 2013 flight from Mr. Berroa, which is a significant change in facts because Mr. Berroa's report was the precipitating event which led to his termination.

However, due to an independent event, the sequence of events that lead to Mr. Berroa's termination nevertheless would not have been fundamentally altered absent Mr. Berroa's protected activity. Specifically, due to her significant concern about that threat of icing when she boarded the S-76 on February 5, 2013,³⁸ Ms. Whitehead independently spoke with Mr. Stretton in his capacity as director of operations about the February 5, 2013 flight and the safety issue associated with the acceptance, and launch, of the flight in the weather conditions that were present on the ramp. Since Ms. Whitehead felt strongly enough about the safety issue to come to Mr. Stretton, and Mr. Hardcastle was the pilot in command with Mr. Berroa also onboard, it is reasonable to conclude that Mr. Stretton would have looked into circumstances of the February 5, 2013 flight,³⁹ and also advised Dr. Hubers about the flight since the safety issue had been raised by a member of the medical team rather than a pilot. And, once Dr. Hubers discovered

³⁸Absent her trust in Mr. Berroa, Ms. Whitehead would have aborted the February 5, 2013 flight.

³⁹To the extent Mr. Stretton may have obtained information from Mr. Berroa about his actions, 49 U.S.C. § 42121(d) and 29 C.F.R. § 1979.102(c) may have become a consideration – AIR 21 employee protection provisions are not applicable with respect to an employee who deliberately causes a violation of any requirement relating to air carrier safety.

that Mr. Berroa had permitted Mr. Hardcastle to take off in conditions that even Ms. Whitehead perceived threatened icing, the remaining sequence of events would have played out in the same manner, and with the same result – the termination of Mr. Berroa’s employment.

Summary

Upon combined consideration of the factors discussed above, I find that Aero Med has established by clear and convincing evidence that absent Mr. Berroa’s protected activity of reporting Mr. Hardcastle’s deficiencies on a February 5, 2013 flight as pilot in command of a Part 135 patient flight, it nevertheless would have ended Mr. Berroa’s employment as an Aero Med pilot on March 26, 2013.

Conclusion

Through the preponderance of the probative evidence, Mr. Berroa has proven that his protected activity relating to the February 5, 2013 flight was a contributing factor in the loss of his employment with Aero Med on March 26, 2013. However, Aero Med has also established by clear and convincing evidence that that absent Mr. Berroa’s protected activity of reporting Mr. Hardcastle’s deficiencies on February 5, 2013 as pilot in command of the Part 135 patient flight, it nevertheless would have terminated Mr. Berroa’s employment, which in turn precludes Mr. Berroa obtaining relief under the employee protection provisions of AIR 21. Accordingly, Mr. Berroa’s AIR 21 complainant must be dismissed.⁴⁰

ORDER

Accordingly, the AIR 21 complaint of Mr. Anthony Berroa is **DISMISSED**.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: May 19, 2015
Washington, D.C.

⁴⁰Since Mr. Berroa is not entitled to relief under AIR 21, I need not address the issues of damages, and the limitation of back pay and reinstatement/front pay associated with after-acquired evidence. *See Clemmons v. Ameristar Airways, Inc.* ARB No. 12-105, ALJ No. 204 AIR 11 (ARB Nov. 25, 2013).

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).