



Issue Date: 10 October 2018

Case No.: 2016-AIR-00016

In the Matter of

BRIAN BELL

Complainant

v.

BALD MOUNTAIN AIR SERVICE

Respondent

DECISION AND ORDER GRANTING RELIEF

This matter arises under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR 21”), which was signed into law on April 5, 2000. *See* 49 U.S.C. § 42121. The Act includes a whistleblower protection provision, with a Department of Labor complaint procedure. Implementing regulations are at 29 C.F.R. Part 1979, published at 67 Fed. Reg. 15,453 (Apr. 1, 2002). The Decision and Order that follows is based on an analysis of the record, including items not specifically addressed, the arguments of the parties, and applicable law.

I. PROCEDURAL BACKGROUND

Complainant filed an AIR 21 complaint with the Occupational Safety and Health Administration (“OSHA”) on December 2, 2012. *See* CX 5 at 211.¹ In its February 16, 2016 letter, OSHA made the following determinations: Complainant timely filed his complaint; Respondent is an “air carrier” under AIR 21, Complainant is a covered “employee” under AIR 21, Complainant engaged in protected activities, Respondent was aware of Complainant’s protected activities when it subjected him to adverse employment actions (suspension, termination, and blacklisting). Complainant’s protected activities was a contributing factor in Respondent’s decision to take adverse actions against him, and Respondent failed to show by clear and convincing evidence that it would have taken the same adverse actions against Complainant in the absence of his protected activities. OSHA found the following damages warranted: back wages, reinstatement, and compensatory damages for pain and suffering. CX 5

¹ This Decision uses the following abbreviations: “CX” refers to Claimant’s Exhibits; “RX” refers to Employer’s Exhibits; and “Tr.” refers to the transcript of the February 27 to March 2, 2017 hearing.

at 201-05. On March 11, 2016, Respondent objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ").

Subsequently, on March 16, 2016, this matter was assigned to the undersigned. On March 22, 2016, this Tribunal issued the Notice of Assignment and Conference Call. Respondent responded to the Notice of Assignment by letter dated April 5, 2016, and attached its pre-hearing position statement.

After granting a number of continuances, this Tribunal held a hearing in this matter in Anchorage, Alaska from February 27 to March 2, 2017. Complainant and Respondent's representative were present during all of these proceedings. At the hearing, this Tribunal admitted Respondent's Exhibits ("RX") 1 – 29, Complainant's Exhibits ("CX") 1 – 4, 6 – 11, 15, 18, 20, 21, 23, 33, 34, 37, 39, 39A, 40, & 41. Tr. at 1177.

Complainant submitted his closing brief on May 30, 2017. Respondent submitted its closing brief on July 5, 2017. Complainant submitted his reply brief on August 2, 2017.

II. FACTUAL BACKGROUND AND EVIDENCE

A. Stipulated Facts (Tr. at 21.)

1. Complainant and Respondent are subject to AIR 21.
2. Complainant was hired to service the recently awarded Alaska Regional Hospital ("ARH") medevac contract.
3. Complainant attended CAE simuflite training in Dallas, Texas between August 13, 2011 and August 27, 2011.
4. On November 20, 2012, Complainant contacted the Federal Aviation Administration ("FAA").
5. On November 21, 2012, Complainant met with and interviewed with the FAA.

B. Testimonial Evidence

Brian Bell (Tr. at 346-480)

Complainant testified that he started flying in 1974, holds a commercial instrument certificate with instrument and seaplane ratings, and holds an Airline Transport Pilot ("ATP") certificate with type ratings in the Eclipse Jet, Cessna Citation Jet, and Beech King Air 350. He earned both a Bachelor's and Master's degree from Embry Riddle Aeronautical University and attended George Washington University's Aviation Safety and Security Certificate Program. He has worked in aviation-related jobs over the last thirty years, including a number of aviation management positions. He also served with the National Air Disaster Alliance Foundation, testified in State of Florida ValuJet 592 hearings, and reported being an aviation expert used by TV stations when aircraft accidents occurred. Tr. at 346-50.

Complainant joined Respondent in August 2011 to fly medevac aircraft for the Alaska Regional Hospital (“ARH”) contract. He interviewed for the position with Eric Lee. Respondent hired Complainant and paid for him to attend King Air School, but did not provide him with a salary while he attended school. Complainant started flying for the ARH contract on September 15, 2011, when Respondent purchased and retrofitted a King Air 200. Complainant believed the ARH contract had a “shaky” start due to Respondent’s lack of experience with medevac operations. Mr. Lee had been tasked with hiring pilots for the King Air 200, but he had no experience in the aircraft. Complainant thought at least one of the initial pilots hired for the King Air 200 should not have been hired. Tr. at 350-55.

In December 2011, Respondent made Complainant its Assistant Chief Pilot. This was announced in an email to both Respondent’s employees and ARH on December 13, 2011 and again on December 16. *See* CX 6, pp. 222-224; Tr. at 360-63. Complainant believed ARH was very happy with his performance, but thought ARH did not feel that Mr. Lee or Mr. Porter were responsive to ARH’s needs. He denied ever receiving any complaints in his employee file from ARH. Tr. at 371-75.

The ARH contract became very busy and was taxing on the King Air 200, which had sat for a number of years before Respondent retrofitted it as a medevac aircraft. At that time there was no approved minimum equipment list (“MEL”) for the aircraft, which would allow the operator to defer maintenance on certain non-essential items for a period of time. The King Air 200’s fire detection system began malfunctioning and reporting false fire warnings, so Respondent deactivated the system. According to Complainant, this was a “big no-no,” since such an issue would not be covered under an MEL. Mr. Lee prepared a MEL, but it was not presented to and approved by the FAA until several months later. In the meantime, Complainant alleged that Mr. Porter instructed the crews not to write any maintenance issues on the flight logs; instead, they were to write them on a yellow pad of paper. Mr. Porter also instructed the mechanics keep the pads of paper hidden so the FAA would not see it if they walked in. All the pilots knew that Mr. Porter’s instructions were not appropriate.² Complainant stated that he had concerns about Respondent’s lack of FAA compliance right from the beginning, when he first went with Respondent to pick up the King Air 200 in Pennsylvania. Complainant had worked for other Part 135 air carriers operating on slim margins, but Respondent seemed to have more FAA compliance issues than he had ever seen before. During his 18 months with Respondent, Complainant only recalled the FAA being present at Respondent’s business once for his checkride with the FAA Principal Operations Inspector (“POI”) to become a check airman. It takes about 20 minutes to drive from Complainant’s house to the Signature East hangar,³ longer in poor weather. During Complainant’s tenure with Respondent, the pilot files were located in Mr. Lee’s office in Homer. Tr. at 355-60.

Prior to sending his October 16, 2012 email to Mr. Porter, Complainant had also become concerned about Respondent’s pilots’ records. In August 2012, he had a conversation with Mr. Lee and Mr. Moss in which Mr. Lee asked Complainant to set up controlled flight into terrain

² Complainant asserted that he raised this issue to someone, but—other than noting that Mr. Porter knew his instructions were inappropriate—did not specify to whom he raised this issue. Tr. at 257.

³ Signature East is located in Anchorage, and Respondent kept some of its records there. *See* Tr. at 231.

“CFIT”) training⁴ from the Medallion Foundation.⁵ However, Mr. Lee subsequently emailed Complainant and instructed him not to contact the Medallion Foundation, which struck Complainant as strange. *See* CX 21. After Mr. Roberts came on board, the personnel and pilot files maintained in Homer, Alaska showed up at Respondent’s Anchorage facility.⁶ Complainant decided to inspect his own file based on Mr. Lee’s email and discovered a forged record of CFIT training. This record falsely indicated that Complainant took CFIT training while employed with Respondent, and contained a forgery of his own signature. As he looked through the rest of his pilot file, he discovered more forged training records. Complainant also looked through other pilot records, some of which falsely documented that he had given training sessions to Respondent’s other pilots. These false records also contained forgeries of Complainant’s signature. This discovery upset Complainant, and over the next few days he began making copies of the records that he believed were forgeries. He also spotted forgeries of other pilot signatures, and he copied those records as well. Tr. at 360-69.

On October 16, 2012, Complainant sent an email to Mr. Porter because he had wanted to speak to Mr. Porter about Mr. Lee’s actions. *See* CX 7. Since Complainant’s concerns were about his supervisor’s—Mr. Lee’s—actions, he believed he had to talk directly to Mr. Porter. Complainant struggled a long time before he sent this email, as he believed that he was putting his job in jeopardy. He had hoped that the email would communicate his willingness to work together with Mr. Porter to fix the problems internally, since he did not want to see Mr. Porter get into trouble. After sending the email, Complainant did not hear from Mr. Porter until almost the end of October, when Mr. Porter met him at the Millennium Hotel in Anchorage, about half a mile from Respondent’s Signature East facility.⁷ At this time, the pilot records were still in Signature East. Complainant invited Mr. Porter to go look at the records, but Mr. Porter said that “he didn’t need to” and that he was not going to fire Mr. Lee. According to Complainant, they “left it that [Mr. Porter] was going to look into it.” Complainant denied having any knowledge that Respondent was trying to fire him, and denied writing this email or meeting with Mr. Porter to preempt an impending termination. Tr. at 364-71.

On November 19, 2012, Complainant contacted Mr. Porter one last time to try to handle these matters internally. In a telephone call, Mr. Porter informed Complainant that Mr. Lee admitted to falsifying the CFIT paperwork. Complainant asserted that there were many more falsified records, and Mr. Porter expressed discontent that Complainant was “holding [him] hostage.” At the end of the conversation, Mr. Porter told Complainant that he would get back to

⁴ *See generally*, Information for Operators (InFO) 08043, Controlled Flight into Terrain (CFIT) Training (10 July 08) available at https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/info/all_infos/media/2008/info08043.pdf.

⁵ The Medallion Foundation is a nonprofit aviation safety organization out of Alaska. Tr. at 271.

⁶ The pilots’ files arrived in Anchorage before Complainant sent his email to Mr. Porter because he based the email on what he had seen in those files. These files were located on a bookshelf in one of the offices upstairs.

⁷ Prior to Complainant’s meeting with Mr. Porter at the Millennium Hotel, he had met Mr. Roberts only once. Tr. at 371.

him that afternoon. Complainant testified that he also spoke with Mitch Stanaland on November 19, 2012, who said he was going to the FAA that day and encouraged Complainant to do the same. Complainant told Mr. Stanaland that he would give Mr. Porter time to get back to him that afternoon, but that he would have no other choice but to call the FAA if he did not. Mr. Porter did not get back to Complainant that afternoon, and Complainant called the FAA on November 20, 2012. Complainant believed that the consequences of going to the FAA were not going to be good for him or Respondent, and thought he would lose his job. He went to the FAA office on November 21, 2012 and brought copies of the documents that he believed were forgeries and falsifications.

On November 23, 2012, the FAA conducted a surprise inspection of Respondent's Anchorage facility. Complainant arrived shortly after the FAA inspectors left, but did not stay long. He alleged that he spoke with Bill Ryan, the Director of Maintenance, who told him that the FAA had showed up for a routine inspection. He explained that he did not show up for the whole day because the FAA did not invite him to be there during the inspection. Mr. Porter did not contact him at any time on November 23, 2012. Ultimately, the FAA fined Respondent \$67,240 for the matters surrounding Complainant's disclosures to the FAA.⁸ Tr. at 389-96.

On November 25, 2012, Complainant received a text from Mr. Porter informing him that he was suspended. Complainant received no other contact from Mr. Porter prior to this text. Mr. Porter's text asked Complainant to contact him, but Complainant did not that day. He explained that he believed it would not have served any purpose because "all hell was breaking loose with the FAA." He also alleged that he was receiving phone calls from other pilots who claimed to have been instructed not to report to Complainant anymore. Complainant stated that he was not invited to the 12:00 p.m. ARH pilot's meeting on November 25 at Signature East. On November 26, 2012, Complainant received a call from the FAA, who asked him to help them locate Mr. Porter. Complainant did not know where Mr. Porter was, but did tell them that Mr. Porter had a 2:00 p.m. meeting that day over at ARH. Tr. at 396-401.

On November 27, 2012, Complainant received an email from Mr. Porter saying that he needed to hear from Complainant by the end of the day, or he would consider Complainant had abandoned his job. Complainant had not missed any shifts and taking calls from employees, so he believed he had not abandoned his job. He explained that he was laying low because he was a whistleblower. Complainant did not have an office at Respondent's Anchorage facility that he was expected to man, and was working normally in November around the time of the FAA inspection. In response to Mr. Porter's email, Complainant called Mr. Porter and left a voicemail. When Mr. Porter did not return his call, Complainant also sent Mr. Porter an email on November 27. Mr. Porter did not respond to either. Complainant never received a formal notice of termination so he thought that he was still on suspension, but was not sure if it was paid or unpaid. To this day, Complainant has not been told that his employment with Respondent has been terminated. Tr. at 401-05.

⁸ On November 24, 2012, Complainant received an email from the FAA acknowledging his status as a whistleblower. Tr. at 417; CX 23 at 568-72.

Complainant recounted the King Air 350 familiarization flight that he and Mr. Roe took to Beluga. They landed the airplane, but when they went to turn around at the end of the runway the aircraft started to bog down in soft gravel and mud. Complainant asserted that the aircraft never left the runway or went into a ditch. As they started to bog down, Complainant's inclination was to shut down both engines and stop; however, Mr. Roe, who was sitting in the right seat, increased the throttle to make the turn. While making this turn, the vacuum created by the propeller pulled a rock into it, striking the propeller. Complainant stated that this is a common occurrence for a propeller aircraft on a gravel runway, and Respondent ultimately fixed the propeller by filing it down. On another trip to Beluga, Complainant alleged witnessing a Navajo—an aircraft only one-half the weight of the King Air 350—bog down in the same spot on the runway. Following these incidents, Complainant told Respondent that he did not want to fly the King Air 350 to Beluga because it was dangerous. He believed Respondent's Twin Otter was a much better aircraft for landing at Beluga because it had fat "tundra tires" and its wings and engines are much higher off the ground. Nevertheless, Respondent continued to use the King Air 350 for that contract, despite using the Twin Otter for some flights when the weather was bad. Tr. at 374-80.

Complainant also recalled an incident between him and Mr. Lee. Mr. Lee had just worked well over his allowed 14 hours, and told Complainant he needed to fly with him to Beluga in the Twin Otter. When Complainant informed Mr. Lee that he had not been checked out in the Twin Otter, Mr. Lee replied, "yeah you are." Complainant reasserted: "No. I'm not. I've never taken a checkride." Mr. Lee insisted that Complainant had been checked out in the Twin Otter, and eventually Complainant and Mr. Lee flew the plane to Beluga. They continued to argue over Complainant's authority to pilot the aircraft during the flight. Tr. at 379-81.

Complainant had concerns about a particular pilot—Mike Mikar—in August 2012 because of circumstances surrounding a random drug test. Respondent had scheduled this pilot to take a random drug test for three weeks, but Mr. Mikar had yet to take it. Normally, a random drug test is administered immediately, within an hour or two. Complainant knew that this pilot had a prior DUI and had lost his driving privileges for a year, so the delayed random drug test caused alarm bells to go off. Part of Respondent's FAA fine was attributable to its violations of the FAA's drug testing policy.⁹ Mr. Porter was the administrator of that program, not Complainant. Tr. at 405-08.

CX 20, page CX0531 is a legitimate report of a check ride conducted on April 30, 2012, though Complainant did not complete that form. Some of the check rides are legitimate; however, CX 18, page CX0505 contained the forged signature of Complainant. Similarly, on CX 18, page CX0506, the instructor's signature is not Complainant's signature; it is forged. CX 18, page CX0507 relates to employee safety training. The training of that pilot did take place, but employee signature is not that of Complainant; it too is forged. CX 20, page CX0508 purports to contain Complainant's signature, but it is also a forged signature. All of the signatures with "BBs" are forged versions of Complainant's signature. See CX 20 at 509, 510. Tr. at 409-15.

⁹ See generally, 14 C.F.R. Part 120.

As for remedies, Complainant would consider reinstatement with Respondent. Subsequent to his employment with Respondent, Complainant applied for quite a few airline jobs but had no success. He used Respondent and Mr. Porter as a reference for a while but stopped because he received information that caused him to believe they were blackballing him. Tr. at 420-22. At one point Complainant was able to get a part-time flying job flying a King Air 350 for the North Slope. It was for 90 days, but the first day he was there he was approached by an employee who asked Complainant what happened between him and Mr. Porter. Complainant understood the job to be two weeks on and two weeks off, but the actual job was three days on and two days off. Complainant has been married 37 years and he did not want to work that way and be away from his wife that long so he quit. Tr. at 423-25.

Upon cross examination, Complainant admitted that he had a conflict with his roommate for the North Slope job because his roommate did not respect the fact that Complainant worked a night shift. Complainant also acknowledged that his resume submitted for the North Slope position referenced working for ARH, not Respondent. See RX 16. Complainant disagreed that this representation was a lie; he used that language because he believed Respondent had blacklisted him. On that resume, Complainant indicated that he has 10,200 hours total flight time. However, a resume in an application for employment dated April 2014 listed 1,000 more total hours of flight time. See RX 22. Complainant explained that the earlier application was not up to date and that those numbers were estimates. Tr. at 426-34.

Complainant reiterated that Mr. Makar was a friend and denied that he was going after him to have Mr. Makar's airman's medical certificate taken from him; "I was . . . investigating why it took three weeks for someone to do a random drug test." Complainant was more concerned about the administration of Respondent's drug and alcohol program. He denied that he was alleging that Mr. Makar was drunk on duty. The audio recording of Mr. Makar was provided to Complainant from ARH because they were concerned about it.¹⁰ Complainant agreed that four months after the incident, he did speak with Mr. Makar's flight medical examiner about his concern that a person with a prior DWI took three weeks to submit to a random drug test. Tr. at 442-45.

Complainant's October 16, 2012 email to Mr. Porter does not use the word "forgery" or explicitly references Mr. Lee, but it does include the word "falsification." See CX 7 at 225. Complainant agreed that his concerns about the King Air began in September 2011, but that he did not write the email until October 2012. During those months, Complainant acknowledged that he flew the aircraft, conducted check-rides and gave flight instruction in it "quite a bit." Complainant admitted that he flew the King Air when it was not airworthy. Tr. at 446-48. Complainant agreed that he had no difficulty making safety complaints with prior employers, including quitting an aviation company because it was "operating unsafely." Tr. at 449-52; RX 23 at 1. Complainant acknowledged that Mr. Porter had asked him to on November 25, 2012 to call him back "at your earliest convenience," but reiterated that he did not contact Mr. Porter right away because he knew that the FAA investigation was occurring and he did not think it prudent to talk with him at that time. Tr. at 454. Complainant felt that "it was implied" to

¹⁰ Complainant later testified that Mitch Stanlin from ARH had the audiotape and emailed it to Complainant. Tr. at 455.

Respondent's management that he was going to the FAA, though he never informed them directly. He also never told Mr. Porter to fire Mr. Lee because Mr. Porter was fully aware of what Mr. Lee was doing and what the email was about. Tr. at 456-57.

Complainant did not know what kind of work Mr. Roberts had been doing for Respondent, and he did not know how Mr. Roberts could have investigated his concerns since Mr. Roberts did not know Mr. Lee or anything about Part 135 operations. Tr. at 458-59. Complainant did not like being relegated to second-in-command in the King Air 350. Complainant admitted that he did not want to fly the King Air 350 to Beluga because it was the wrong aircraft for that mission. Tr. at 459-62.

On redirect, Complainant testified that Respondent's employees would contact him by calling him on his personal cell phone.¹¹ During the period November 23-27, 2012, he did not receive any phone call, according to his cell phone records, from Mr. Lee or Mr. Porter. In neither of the Respondent's safety manuals introduced at the hearing is there a requirement to notify Respondent about safety violations prior to contacting the FAA. At the time of the meeting between himself and Mr. Porter at the Millennium Hotel, Complainant still was trying to help Mr. Porter salvage his business. At the time that Complainant went to the FAA, he did not know that Mr. Segal had already gone to the FAA. Tr. at 471-74.

Upon this Tribunal's questioning, Complainant explained that he lost his medical while working for Evergreen, a former employer, for three months due to high sugar levels in his test results. *See* RX 23. He did obtain a new first class medical certificate but could not remember when it expired. Complainant does not currently have a medical certificate because "it costs a lot of money to get a medical these days." Tr. at 478-80.

James Moss (Tr. at 45-140)

Mr. Moss moved to Alaska in 1968. In 1980, he earned his private pilot's license. Mr. Moss currently holds the following ratings: ATP, multi-engine land; certified flight instructor instruments airplane, and certified flight instructor helicopter. He also holds an airframe and powerplant mechanic's certificate with a current inspection authorization. He has accrued about 5,000 hours of total flight time. Mr. Moss has known Mr. Porter since high school and considers him a friend. Mr. Porter ran Respondent, and grew the business by the number and type of aircraft of aircraft operated. Respondent transitioned out of fish spotting, hunting, and guiding operations into scenic flights. Tr. at 45-52.

In 2009, Mr. Porter asked Mr. Moss to come work for Respondent. Mr. Moss started working for Respondent in February 2010 as a company safety officer, pilot, and mechanic. He was stationed at Homer, Alaska—Respondent's principle place of operations—where Respondent kept and maintained most of the aircraft. Respondent also stored its employees' personnel files there. Mr. Moss did not know Complainant at the time Respondent hired him. Tr. at 52-58.

¹¹ On cross-examination, Complainant testified that Respondent did not provide him with a business cell phone to use. Tr. at 471.

Mr. Moss first started to have concerns about the Respondent's maintenance, safety, and recordkeeping after two single-engine Otters¹² brushed against each other; clearly a reportable incident.¹³ Although he was not at the actual incident sight, the radio calls indicated damage to a flight control service and a propeller. When asked for his opinion, Mr. Moss told them not to fly the aircraft until it was inspected. He recalled that the Director of Maintenance (Bill Ryan) gave similar advice. Nevertheless, the Chief Pilot and Director of Safety, Eric Lee, elected to fly it back home anyway with paying passengers on board. As Eric Lee was the Director of Safety, Mr. Moss reported directly to him. Mr. Moss had an argument with Mr. Lee about whether the incident should be reported. Mr. Lee said "Nope, not at all. Mind your business." Mr. Moss also told Mr. Porter the next day that the incident needed to be reported. Mr. Porter said "No. It can't be. It won't be." And as far as Mr. Moss knew, the incident was never reported to the FAA: "[t]hat airplane was repaired on the sly. No documentation." The damage turned out to not be serious, but they did not know that prior to inspection and repair. Mr. Moss asserted that prudence would have dictated flying a mechanic over to inspect the plane before its flight. Due to this incident, Mr. Moss began to realize that Respondent's safety program was not very robust. Tr. at 54-57.

Mr. Moss testified that Mr. Lee's abrasive, "my way or the highway" attitude was caustic to Respondent's employees. He did not like Mr. Lee, but Mr. Porter wanted him to try and work with Mr. Lee because Mr. Lee was eventually going to buy the business. Mr. Moss stated that many people came to him complaining about Mr. Lee, but Mr. Porter would dismiss those complaints when Mr. Moss brought them to his attention. Tr. at 59-60.

Mr. Moss recalled a few more significant safety-related incidents while working for Respondent. He noted a Conoco Phillips oil and gas producer guideline audit that occurred in June 2011, which he described as a "landmark" safety incident.¹⁴ Another safety incident occurred in 2012 with a Twin Otter in Barrow, Alaska. While the aircraft was taking off, fuel started spraying up out of the floor and all over a passenger in the back. Despite being a reportable incident,¹⁵ Respondent failed to file a report with the NTSB. The aircraft subsequently flew from Barrow to Deadhorse and then back to Homer, but Respondent did not obtain a ferry permit.¹⁶ The next day—before the fuel leak had been fixed—Respondent used that aircraft to fly Conoco Phillips personnel. Mr. Moss stated that Mr. Lee was making these decisions, and that Mr. Porter knew about it. The oil company customer (Shell) to whom this plane had been assigned caught wind of this and made Respondent stand down from their contract until the safety issue was resolved. After the fuel incident, Mr. Lee remained with the company but was banished to "flying Bears for a while, while the damage control was going on

¹² A single-engine Otter is a DeHavilland DHC-3 aircraft, and a twin-engine Otter is the DHC-6 model.

¹³ 49 C.F.R. Part 830 identifies what types of incidents and damage the NTSB requires operators to report in short order.

¹⁴ Mr. Moss did not elaborate on this incident.

¹⁵ While this was obviously a serious event, this Tribunal questions whether this was, in fact, an immediately reportable incident. *See* 49 C.F.R. § 830.5.

¹⁶ When there is no real alternative, a ferry permit may be obtained to fly a damaged airplane somewhere for maintenance. Tr. at 61. *See* 14 C.F.R. §21.197 and FAA Form 8130-6

there.” Shell conducted an extensive investigation and noted the conflict of interest of having the Chief Pilot also being the Director of Safety. *See* CX 28. Shell also required Respondent to change its safety procedures and protocols. Tr. at 56-69.

Mr. Moss alleged that Respondent also failed to maintain MEL compliance. Instead of logging MEL deficiencies observed in preflight inspections, employees would place yellow sticky notes over the inoperable instrument and fly the plane. They jokingly called this practice “pocket squawks.” He could not cite a particular example of this practice, but stated that it occurred. Tr. at 63.

Mr. Moss first met Complainant in May 2011 at the ARH. At this meeting, Mr. Moss gave a group presentation on how Respondent could start from ground zero to develop a medevac program that embraced safety. After this, Respondent sent the pilots, including Complainant, down to Texas for King Air 200 specific training. Mr. Moss did not meet with Complainant in person very often, but had frequent telephone contacts with him. Tr. at 69-72.

Respondent held weekly safety meetings that Mr. Moss was responsible to conduct. Because employees were stationed all over, they would call in to those meetings. Complainant always called in to the safety meetings to contribute. Mr. Moss opined that Complainant had more experience than anyone else in the medevac pilot crew, and his experience made him a valuable resource. Complainant was not responsible for maintaining the pilots’ records or Respondent’s drug testing program. The pilots’ training records stayed in binders that were in the Chief Pilot’s office in Homer, and Mr. Porter was responsible for the drug testing program. Mr. Moss never heard any complaints about Complainant, but he did hear many pilots complain about Mr. Lee. For instance, Mr. Lee named himself the Agent in Charge for contacts with ARH. That person is supposed to be accessible 24 hours a day, but Mr. Lee would not answer the phone. ARH would call Complainant when they could not contact Mr. Lee, and after a while ARH called Complainant first when an issue arose. Mr. Moss recalled an incident where Mr. Lee showed up and insisted that he was going to be the pilot in command (“PIC”) on a medevac flight, but Mr. Lee was not checked out on the King Air 200. Mr. Moss objected, but Mr. Lee “shot it down.” Mr. Moss knows that Mr. Lee acted as PIC on at least two medevac flights using the King Air 200. Mr. Moss complained to Mr. Porter on several occasions about Mr. Lee and he went to him one last time in October 2012, but Mr. Porter really wanted Mr. Lee to buy the business. Tr. at 73-79.

Mr. Moss stated that he was aware of discrepancies in his own employee records as of October 2012. He explained that he took a checkride for his first annual officer ride in the Twin Otter in June 2012 with John Siegel. Mr. Lee was the check airman. Due to a late start and bad weather, Mr. Moss did not perform all of the required maneuvers or complete the oral portion. The checkride was therefore incomplete, and Mr. Moss stated that he never saw or signed a checkride form. However, he later discovered that the paperwork had been falsified to show that he had completed and signed the checkride, which led him to conclude that Mr. Lee falsified the results.¹⁷ Mr. Moss averred that upon discovery, he reported the incident to the FAA. Tr. at 79-

¹⁷ CX 18, p. CX0519 is a check ride form dated 6/26/12. Mr. Moss did not perform numbers 6, 7, 9, 11, 13, 15-18, and 25 on this form, and he did not do an oral exam. Mr. Moss testified that the flight training

83. Mr. Moss also alleged that prior to a particular audit from the Medallion Foundation, Mr. Lee failed to give employees the required training, so he would falsify records to make it look like they sat through certain training. Tr. at 93.

Prior to leaving Respondent's employ on October 28, 2012, Mr. Moss emailed Mr. Porter about some safety concerns that—from Mr. Moss's perspective—Mr. Porter had failed to address. Specifically, Complainant had emailed Mr. Porter on October 16, 2012, raising various concerns about safety violations and asking to speak with Mr. Porter about these items in detail. See CX 7. Mr. Moss received a copy of this email via courtesy copy,¹⁸ and had waited ten days for Mr. Porter to respond to Complainant. Seeing no response from Mr. Porter, Mr. Moss felt compelled to comment, and emailed Mr. Porter to express that he "very much agreed with what [Complainant] said" because it was thoughtful and provided solutions. See CX 7, p. CX0226. Mr. Porter never responded to this email,¹⁹ and Mr. Moss was unaware of any action taken by Respondent in response to either emails. At the time he wrote his October 26, 2012 email to Complainant, Mr. Moss knew of Randy Roberts but had not met him. Tr. at 83-86.

To his knowledge, none of the maintenance or checkride issues Mr. Moss described had been fixed prior to his departure from Respondent's employ. Mr. Moss had worked this seasonal job for three years, and Respondent did not invite him back for a fourth year. He believes he did not receive a fourth year invitation because he indicated that he did not like working with Mr. Lee. In addition, he had just quit his position as Respondent's safety officer, but continued to serve as one of Respondent's pilots. Tr. at 87-92.

CX 15 is Respondent's safety manual as of February 7, 2011.²⁰ There had been changes in the manual prior to Mr. Moss's departure in October 2012. The manual showed that the president of the company—Jeanne Porter—has final authority over the success of the safety program. CX 15, p. CX0315. Mr. Moss stated that Mrs. Porter did not have any dealings with Respondent's day-to-day operations or safety, and thus Respondent did not follow its own manual on safety. The chain of command required an employee to go through Mr. Lee to try and fix any problems, but he was the problem. Tr. at 93-100.

After Mr. Moss left Respondent's employ, he received a call from Complainant who said that the FAA wanted to talk to him. So Mr. Moss contacted the FAA and spoke with an aviation safety inspector named Mr. Gillespie. He spoke with Mr. Gillespie several times that first week. About a year later Mr. Moss was subpoenaed to testify at an NTSB hearing on charges against

log at CX 18, p. CX0517 is falsified; it is not his signature and it looks like Mr. Lee's handwriting. Nor was the signature on CX 18, p. CX0515 his signature, although it is purported to be. CX 18, p. CX0507 and CX0508 purport to contain Complainant's signature, but Mr. Moss alleged they are not Complainant's signature. Tr. at 104-111.

¹⁸ After examining the email from Complainant to Mr. Porter, Mr. Moss thought he may have received the email through a blind courtesy copy. Tr. at 84.

¹⁹ Mr. Moss later testified that Respondent terminated his email access two days after sending his email, on October 28, 2012. Tr. at 90-91.

²⁰ Mr. Moss stated that this manual was not accepted by the FAA or required to be followed as part of Respondent's air carrier operating certificate. Tr. at 100.

Mr. Lee. The NTSB found Mr. Lee guilty of approximately 23 charges and all of his certificates were revoked.²¹ Tr. at 100-102.

On cross-examination, Mr. Moss admitted that, because he did not complete a checkride in June 2012; he had been flying illegally for at least four months during the duration of the oil company contract. Mr. Moss admitted that he asked for immunity from the FAA enforcement attorney concerning those illegal flights. Because he was no longer employed by Respondent in November 2012, Mr. Moss did not have personal knowledge of any communications between Mr. Porter and Complainant following the October 2012 emails, nor was he aware of any action that Respondent took to address the safety concerns that had been raised. Back in 2012 it was common for Mr. Moss to send and receive texts from Complainant. Mr. Moss is familiar with Bill Ryan—Respondent’s Director of Maintenance—but did not remember receiving a call from Mr. Ryan in December 2012 where he allegedly told Mr. Ryan that he knew who went to the FAA and “you’ve got some real problems.” Mr. Moss has no personal knowledge of why Randy Roberts was hired by Respondent. Mr. Moss agreed that Mr. Lee was “at the center of most of those problems,” and thought a reasonable solution would have been firing Mr. Lee. Mr. Moss acknowledged that he was not at the lake where the two Otters collided, and he admitted that he had no personal knowledge of the condition of the Twin Otter with the fuel leak when it landed in Deadhorse. Tr. at 111-21.

Upon the Tribunal’s questioning, Mr. Moss said he saw the damage to the Otter that collided with another at Cross Wind Lake when it came back to Homer. He saw the repair to the aileron, but was not aware of any repair logbook entry. He explained that there would be no record of “pocket squawks” because they were not recorded in the aircraft’s logbooks. Mr. Moss acknowledged that the incomplete checkride used as the basis for him to continue to operate for several months was not in compliance with the requirements for Part 135 operations. Mr. Moss asserted there was a maintenance record for the repair of the Twin Otter’s bladder, but alleged that this aircraft flew three flights between discovery of the punctured fuel bladder and the actual repair. Tr. at 128-31.

On further redirect, Mr. Moss reviewed Shell’s November 2011 investigation of the punctured fuel bladder incident. *See* CX 28, pp. CX0633-53. Mr. Moss believed that Shell required Respondent to stand down a week or so prior to this report so it could conduct this investigation. Mr. Moss stated that he had been complaining about a lack of a robust safety culture for two years—an issue noted in the Shell 2011 investigation and also raised by Complainant in his November 2012 email. Tr. at 132-39.

Brian Porter (Tr. at 141-345)

Mr. Porter is a “life-long Alaskan.” He started flying when he was ten years old, and began commercial flights in his twenties. In 1993, he and his wife started Respondent in Homer, Alaska and the company gradually grew both in the number of aircraft it operated and the

²¹ *See Administrator v. Lee*, NTSB Case No. SE-19564 (Jan. 10, 2014) (finding Mr. Lee falsified training and logbook records and revoking all of his airman certificates). Mr. Lee did not appeal the NTSB’s decision. *See* CX 2.

number of contracts it acquired. In the company's 25-year history, no accidents have occurred, which Mr. Porter alleged is rare for an Alaskan aviation company. Mr. Porter's wife is Respondent's president and was active in the business when it began, but does not participate anymore due to an illness. Tr. at 168, 250-54.

In late 2012, Respondent had about six pilots flying the Twin Otters, two flying single Otters, and eight flying under the ARH contract: 16 pilot files in total.²² Tr. at 146. Around this time Respondent experienced tremendous growth. It had two airplanes on the North Slope, had just acquired the ARH contract with the King Air 200, had two pilots flying single Otters out of Homer for bear viewing, and had acquired the King Air 350.²³ The ARH contract was a standalone contract and it was based out of Anchorage. Complainant was the ground instructor, flight instructor, and check airman for that contract. Complainant was the liaison between Respondent and ARH, and did not have a schedule because he was "on point."²⁴ Mr. Porter stated that Respondent flew an excessive number of ARH flights around November 2012, which was too much work for one airplane. After Respondent acquired the Shell contract, Mr. Moss resigned his position as Safety Officer and told Mr. Porter that he just wanted to be a pilot. Mr. Porter did not fill the Safety Officer position after Mr. Moss left, as Mr. Lee said that he would do it himself. Only Respondent's clients—not the FAA—required Respondent to have a Director of Safety position. Tr. at 147-71.

In the course of Respondent's business, Mr. Porter would ask his Chief Pilot, Mr. Lee, if their pilots had their checkrides in order.²⁵ Mr. Lee would tell him that they were—though Mr. Porter later learned that this was false. But at the same time, he was getting rumblings from other employees, like Complainant and Mr. Moss, who did not get along with Mr. Lee. Mr. Moss in particular had been complaining about Mr. Lee since 2010, but Mr. Porter initially attributed this to personality differences. When Mr. Porter started hearing different stories from Mr. Moss and Mr. Lee that did not add up, he decided to hire an outside person to "audit the whole thing." For this role, Respondent hired Randy Roberts, who joined Respondent around September 2012.²⁶ Tr. at 147-51.

²² Complainant did not have a line pilot schedule with Respondent because he was "on point"—available 24 hours a day, 7 days a week, 365 days a year. "[Complainant] described himself as a Relief Pilot in case anybody else couldn't do the flight." Respondent paid him for this schedule for almost a year. Tr. at 158-61.

²³ Mr. Porter later testified that the King Air 350 was purchased in 2011 and he was hoping to put it to work for the Shell contract and use it for a general backup for the Twin Otters. He had also considered it for use with the ConocoPhillips contract. Tr. at 161.

²⁴ Mr. Porter confirmed that Complainant was essentially on call through November 2012, 24/7, 30 days a month. When asked if he had received guidance from the FAA in light of the flight and duty time limitations in 14 C.F.R. § 135.267, Mr. Porter relayed that the FAA stated that a pilot's time on the schedule is considered duty time. He and Complainant talked about documentation and Complainant would "obviously not be on assigned duty time officially." Tr. at 338-45.

²⁵ Mr. Porter later intimated that Complainant had been tasked with handling training, checkride forms, and assigning pilots to duty stations. Tr. at 268.

²⁶ Mr. Porter later testified that Respondent hired Mr. Roberts in October 2012. Tr. at 189.

On October 16, 2012, Complainant emailed Mr. Porter, laying out a number of general safety concerns and expressing a willingness to talk with Mr. Porter about these concerns “in depth.” CX 7. After Mr. Porter received this email, he travelled to the Millennium Hotel in Anchorage to meet with Complainant in mid-November 2012. Tr. at 166. Mr. Porter recalled that this meeting lasted about 45 minutes. Tr. at 318. It became apparent to Mr. Porter that Mr. Lee was not going to get along with Complainant and a couple of others. At that point, Mr. Lee and Complainant’s relationship had “totally deteriorated.”²⁷ Tr. at 141-48. Mr. Porter acknowledged that during their meeting at the Millennium Hotel, Complainant told him that there “were forgeries,” but reiterated that Complainant never provided him with an example. He denied refusing an offer from Complainant to go to Signature East and review the alleged forged, missing, and incomplete files together. Tr. at 318. Mr. Porter testified that he had just hired Mr. Roberts to audit the books in October 2012, who he expected to sort through the conflicting stories from his employees. Tr. at 197-98.

On November 23, 2012, Mr. Porter learned that the FAA was inspecting their building, Signature East, in Anchorage when he received a call from Respondent’s Director of Maintenance, Bill Ryan. As Mr. Porter recalled, the FAA inspection concerned some maintenance on the King Air and Respondent’s pilots’ records. Mr. Porter learned from Mr. Ryan that Complainant had arrived at the facility a few minutes after the FAA inspectors arrived, but left shortly thereafter. By the time Mr. Porter arrived, about an hour or so after the FAA left, Complainant was gone. Mr. Porter also talked with Mr. Roberts about the pilots records, but did not attempt to contact Complainant. Tr. at 162-65.

Two days later, on November 25, 2012, Mr. Porter suspended Complainant via text. *See* CX 8. Mr. Porter sent an email 33 minutes later restating the suspension. *See* CX 9. Complainant knew the FAA was performing an inspection at Signature East, and Mr. Porter would have expected Complainant to stay and try to explain the paperwork to the FAA investigators. Mr. Porter denied believing at that time that Complainant was the source of the FAA complaint; instead, Mr. Porter thought that Complainant was the subject of the FAA’s investigation. Mr. Porter noted that Complainant was at Signature East every time something was going on, and he thought Complainant was “suspiciously absent” when the FAA arrived to investigate the paperwork for which Complainant had responsibility. Mr. Porter also stated that he suspended Complainant upon the counsel of Mr. Roberts “because we didn’t want him goofing with the records.” Mr. Roberts had put those records in order, only to later discover that someone had messed with them before the FAA arrived for their inspection.²⁸ Mr. Porter agreed that there would be no reason for Complainant to mess with the records because he was the whistleblower, but at the time he did not believe Complainant had gone to the FAA. Mr. Porter admitted that between the time of the FAA inspection on November 23, 2012 and the time that

²⁷ Mr. Porter testified that on one occasion he flew Complainant down to Homer because, according to Mr. Lee, Complainant was not sending Mr. Lee the files on the pilots to whom Complainant was giving checkrides. Mr. Lee suggested that they “bring [Complainant] down to Homer so that all three of us could sit at the table across from each other and hash it out . . .” Tr. at 147.

²⁸ However, Mr. Porter later affirmed that the FAA had secured the records of Complainant on their November 23, 2012 visit in Anchorage. From what he understood from either Mr. Roberts or Mr. Ryan, the FAA had taken pictures of Complainant’s records. Tr. at 293-94.

he sent the text to Complainant on November 25, 2012, he made no attempt to contact Complainant. Nor did Mr. Porter recall asking anyone else to attempt to contact Complainant. He believed that Complainant lived only a few minutes away from Signature East and expected that Complainant would have known he was there. Tr. at 169-75, 223-30, 273, 292-93.

Later that day, on November 25th, 16 minutes after suspending Complainant, Respondent had a meeting with all of its pilots in Anchorage. Mr. Porter and Mr. Roberts attended that meeting as were other pilots. During this meeting, Mr. Porter probably said that Complainant was no longer Respondent's point of contact for the ARH contract for he had been suspended. Tr. at 223-30. Mr. Porter denied knowing in 2012 that there was a whistleblower in his company who was talking to the FAA. However, he thought that he did tell his host of pilots at the November 25, 2012 meeting that he thought that a couple of Respondent's employees had gone to the FAA; but he thought the pilots that had were John Siegel and Mr. Moss, not Complainant.²⁹ Tr. at 295-320.

Mr. Porter suspected that Mr. Moss was a whistleblower because of his relationship with Mr. Lee.³⁰ Further, Mr. Moss had been concerned about some nonstandard wrapping on one of the aircraft's right engine several months prior, and the FAA asked to look at the paperwork for that maintenance item. The FAA inspectors also looked at pilot records, which was not unusual, but Mr. Porter did think it was unusual for Complainant, who was always there, to be absent. Mr. Porter thought that Complainant was not there because he was hiding from the FAA. Since Complainant's records seemed to be a focal point of the FAA's investigation, Mr. Porter did not believe that Complainant had filed the FAA complaint. Tr. at 175-78.

On November 27, 2012, at 7:35 a.m., Mr. Porter emailed Complainant again. *See* CX 10. This email stated that Mr. Porter had unsuccessfully tried to contact Complainant about the November 23 FAA inspection by phone, text, and email, and had suspended him due to his unresponsiveness. The email further stated that unless Complainant contacted Mr. Porter by the end of the day, he would assume that Complainant intended to abandon his position at Respondent. CX 10. At the hearing, Mr. Porter acknowledged that his assertion in this email—that he had attempted to contact Complainant over the weekend by phone—was incorrect. Mr. Porter further acknowledged that neither his suspension text nor his suspension email (CX 9) make any reference to Complainant abandoning his job as a reason for the suspension. Mr. Porter explained that Mr. Roberts composed the November 27, 2012 email, and they both agreed that Complainant should be terminated for his unresponsiveness. “[Complainant] didn't meet the demand that I had in my mind for him for employment. So I didn't want to pay him anymore.”³¹ Tr. at 231-38, 292, 340.

²⁹ When shown Mr. Siegel's termination of employment letter, dated April 19, 2013, it shows that Respondent was terminating him four months prior, on November 9, 2012. When asked why he was “terminating” an employee four months after the fact, Mr. Porter explained that Mr. Siegel kept submitting time sheets when he was not performing any function for the company. So it was an effort to sever the relationship. Tr. at 295-320.

³⁰ Mr. Porter later indicated that he also thought John Siegel may have been a whistleblower. Tr. at 316.

³¹ Prior to his testimony at this hearing, Mr. Porter had not told anyone that Mr. Roberts had helped him draft that document. Tr. at 340.

Mr. Porter agreed that Complainant called and left a recording on Mr. Porter's cell phone in response to this email. Complainant also emailed Mr. Porter that day, stating that he had returned his call and left a message. *See* CX 11. Mr. Porter asserted that he did not answer Complainant's call because he was "probably busy," and did not listed to Complainant's voicemail or read his email until a day or so later, despite asking Complainant to contact him that day. Mr. Porter stated that he assumed Complainant knew he was in Anchorage and should have come to talk to him in person, despite Mr. Porter signing the email "Gary Porter, Homer, Alaska." He felt that Complainant's failure to maintain proper records put Respondent into a tail spin with the FAA, and he did not feel obligated to take much time out of his busy day to go chase Complainant down or to answer a phone call from him. Tr. at 234-38, 272-73.

Mr. Porter also discussed Mr. Lee's falsification of pilot checkride forms. He believed that Mr. Siegel, Mr. Moss, and Mr. Lee shared culpability for Mr. Siegel and Mr. Moss's incomplete checkrides: Mr. Lee for falsifying the forms, and Mr. Siegel and Mr. Moss for accepting and performing the job without completing the full checkride. Mr. Porter acknowledged that Mr. Lee had falsified some of Mr. Porter's checkride forms, which incorrectly showed that he completed checkrides in Alaska on the same day that he picked up an airplane with his mechanic in Carrollton, Georgia. Mr. Porter had seen three different versions of those checkrides by the time of the hearing, all of which are false. He did not believe that his checkrides were past due, and did not know why Mr. Lee would have forged these checkride forms.³² Though he did not know when Mr. Lee created them, Mr. Porter agreed that the false checkrides were created prior to Respondent terminating Complainant's employment. Mr. Porter's pilot records were maintained in Homer but he did not believe that there was any reason for him to check his own pilot file. He maintained that no one ever came to him with specific allegations of Mr. Lee's forgeries; rather, employee complaints—such as Complainant's October 16, 2012 email (CX 7)—expressed general safety concerns against the company. Mr. Porter claimed he therefore did not have any concrete leads to pursue that would have reasonably caused him to look for forgeries in checkride forms. When pressed, Mr. Porter agreed that Complainant's email was in part a complainant against Mr. Lee because of his role as Director of Safety. Tr. at 144-45, 178-92, 200-12.

Mr. Porter gave a copy of Complainant's October 16, 2012 email to Mr. Lee and Mr. Roberts. Mr. Roberts audited Respondent and found discrepancies in Complainant's recordkeeping, but never provided a written report of his findings to Mr. Porter.³³ Mr. Porter also agreed that the FAA investigation found nothing regarding a lack of record keeping by

³² CX 4, p. CX0199, is Mr. Porter's checkride form dated 12/12/11, the same day that Mr. Porter was in Georgia picking up a plane. The form represents that Mr. Porter's checkride occurred in Deadhorse, Alaska. Mr. Porter thought his checkrides had already been completed in the summer or late fall of 2011. Tr. at 193-94.

³³ Mr. Porter later testified that he did not show Mr. Roberts his pilot file or his forged checkrides because Mr. Porter's records were in Homer while the ARH pilot records were in Anchorage. Mr. Porter recalled having some concern about Respondent's pilots' records being moved back and forth between Homer and Anchorage, but he did not have any direct knowledge of when and where the records were at a given time. Tr. at 295-320.

Complainant. But as a result of the FAA's findings regarding Mr. Lee's recordkeeping, Mr. Porter was asked to step down as the Director of Operations and the company was fined \$35,000 or \$40,000. No adverse FAA actions resulted from Complainant's conduct. *See* CX 1 at 5-13. Mr. Porter agreed that, other than turning the matter over to Mr. Roberts, he did not personally address the concerns Mr. Moss and Complainant communicated to him in their October 2012 emails. Tr. at 200-12.

Mr. Porter claimed he first learned that Mr. Lee forged training documents in November 2012 when the FAA pointed it out to him. Following the discovery of these forgeries, Mr. Porter took no action against Mr. Lee because the FAA was taking action against him. Respondent did not suspend or terminate Mr. Lee, nor strip him of his Chief Pilot position, although the FAA rescinded his check airman authority. Mr. Porter stated that Respondent was only performing the ARH contract at that point, and it kept Mr. Lee away from this contract.³⁴ During the FAA investigation, Mr. Porter indicated that he was only going to turn over documents he was required to maintain after two inspectors served him with a letter of investigation at ARH in front of his clients. Mr. Porter denied avoiding service of the FAA's letter of investigation and had no idea why they chose to serve him with documents at his client's place of business. The FAA wanted documents more than a year old and he stated that he would only provide records that he was required to maintain—nothing more. *See* CX 1 at 101. He later apologized to the FAA inspectors for “flying off the handle.” Tr. at 192-97, 223-30, 304.

According to Mr. Porter, Mr. Lee and a few pilots had complained about Complainant for “just normal pilot stuff.” Tr. at 200-01. These reports stuck out to Mr. Porter because pilots usually do not talk much about other pilots. Tr. at 274. Mr. Porter acknowledged that he has no tangible records of any complaints about Complainant, but recalled at least one other pilot—James Roe—saying “I'd rather not fly with [Complainant].”³⁵ Tr. at 202. Mr. Porter later recounted a story where Complainant—while flying with Mr. Roe—had steered an aircraft off the runway upon landing and damaged the propeller. Complainant reported that the runway was “soft,” but the airport custodian disputed this account, maintaining that Complainant bungled the landing and steered the King Air 350 into a ditch. Tr. at 279, 296. Mr. Porter acknowledged that the Beluga airstrip is unpaved and that a Twin Otter would be a better plane to fly into that airstrip because it is built for those types of runways. Since it is not uncommon for airplanes to suffer nicks in their propellers, Mr. Porter agreed that the accident did not demonstrate pilot negligence. Tr. at 327-35.

Following Complainant's termination, Respondent had Mr. Roberts and a couple other employees enact a “full-blown SMS Pro Safety Management System.” Mr. Porter hired a dedicated person to manage that system and continue with the Medallion Safety Foundation,³⁶

³⁴ Between September 3, 2013, the date of the FAA's emergency revocation of Mr. Lee's certificates, and the judge's decision, Mr. Porter retained Mr. Lee to performed clerical matters. Tr. at 312-13.

³⁵ Mr. Porter also recalled hearing that Complainant had some issues working a flight management system on a separate flight, which was later shown to be “maybe operator error.” Tr. at 274.

³⁶ The Medallion Safety Foundation is an organization whose mission “is to reduce aviation accidents by fostering a proactive safety culture and promoting higher safety standards through one-on-one mentoring,

and today Respondent is a shield holder. Respondent hired a new Director of Safety a couple of days after Mr. Porter terminated Complainant's employment with Respondent, and that position has remained filled. Mr. Porter initially kept Mr. Robert's function as an auditor a secret from Respondent's other employees, so that no one would try to sell him a biased version of events. Mr. Porter continued to employ Mr. Lee until FAA findings were made against him in 2014. Tr. at 212-19. Mr. Porter agreed that Mr. Moss was very safety conscious and had been a great asset to the company for three years. Nevertheless, Mr. Porter did not try to convince Mr. Moss to stay for a fourth year when he left in November 2012, opting to retain Mr. Lee. Tr. at 150-71.

Mr. Porter identified two of his handwritten "Safety Reports," both dated November 7, 2012. See CX 3 at 193-94. The first report indicated that the FAA had conducted a surprise investigation of the maintenance and operations paperwork at Respondent's Signature Hangar, where one of Respondent's pilots had mistakenly told the FAA that Respondent only kept inaccessible electronic records. Mr. Porter wrote: "Further training on procedure concerning record keeping needs to be investigated." CX 3 at 193. He testified that he believed the pilot referenced in the safety report was Mike Makar. Tr. at 257. The second report indicated that the FAA conducted an unannounced inspection of all Respondent's flight and maintenance records at both Homer and Anchorage, which found that Respondent's individual pilot records were incomplete. Mr. Porter wrote "[Respondent] should have been monitoring its record keeping for FAR compliance, later audits of pilot records showed some deficiencies with every folder." In this report, he also drafted a list of five "Suggestions" related to buttressing Respondent's record keeping procedures, the first of which was "dismissal of Assistant Chief Pilot [Complainant] from his duties." CX 3 at 194. Mr. Porter also identified a letter sent from the FAA to Respondent on November 27, 2012. See CX 3 at 195. This letter indicated that the FAA had conducted a routine records inspection on November 23, 2012 at Respondent's Anchorage facility, where a crewmember informed stated that all flight and duty records were kept electronically and he was unable to access them. Mr. Porter testified that this crewmember was pilot Mike Makar. Tr. at 255-63.

When questioned about the similarities between these reports, Mr. Porter did not believe the three accounts described the same FAA inspection. Specifically, he believed the FAA's surprise inspection of Respondent's Anchorage facility detailed in his first safety report (CX 3 at 193) was different from the surprise inspection of Respondent's Anchorage facility set out in the FAA's November 27, 2012 letter (CX 3 at 195). Tr. at 257-58. He asserted that the FAA had conducted a number of inspections of Respondent prior to November 7, 2012, which was simply the FAA's normal practice. Mr. Porter testified that he had indeed decided as of November 7, 2012 that Complainant should be fired, and that this suggestion likely came from Mr. Lee or Mr. Roberts. Mr. Porter acknowledged that Respondent scheduled Complainant to work 30 days in November 2012. Even though Mr. Porter wrote a suggestion in his November 2012 safety report (CX 3 at 194) that Complainant be dismissed, "we hadn't made the decision yet what exact date his employment was going to end." Complainant was still the head of the ARH contract at that time. Tr. at 322-25.

research, educations, training, auditing and advocacy." It was formed because of the legacy in Alaska of too many aircraft accidents and fatalities. See <https://medallionfoundation.org/>.

When accused of backdating and falsifying these safety reports to suggest that the decision to terminate Complainant occurred on November 7, 2012, Mr. Porter stated: “Oh, I can’t remember that. I don’t remember doing that.” Tr. at 263. Mr. Porter acknowledged that he could have put the wrong date on the safety report when he dated them “November 7, 2012.” Respondent had just started with a new program, SMS, and could not remember if he had to rewrite any safety reports for the new system. Mr. Porter recalled a number of other FAA visits in the weeks and months prior to the November 23, 2012 incident; “the FAA was in and out of our facility there every day or two.” He maintained that he had no reason to forge these November 7, 2012 safety reports. Tr. at 264-65.

Following the discovery of all of the deficiencies from the FAA’s November 23, 2012 inspection, the FAA replaced Respondent’s Principal Operations Inspector (“POI”).³⁷ Respondent voluntarily shut down its operations and interviewed each pilot and ask them to attest under oath what training they actually received. Everyone that was currently employed by Respondent agreed to do that. Further, all except one pilot agreed to take an FAA checkride. Through all of these events, Respondent was able to retain its contract with its oil company customers. At the time Respondent was performing the ARH contract, it held two Medallion Foundation stars. Now they hold all five stars and a shield and have done so for the past two years. Only eight or ten companies in Alaska can claim that and most of the other companies are larger aviation outfits. Tr. at 267-71.

Kathleen Bell (pp. 487-510)

Mrs. Bell, wife of the Complainant, works as a school nurse for seventh and eighth graders and has done so for over 20 years. She also works as in the pediatric intensive care unit at Providence Hospital and has worked there for 36 years. Mrs. Bell stated that it was stressful for Complainant to make the decision to go to the FAA about his concerns with Respondent, but he felt he had no choice because Mr. Porter did not correct the issues. Complainant told her that he might lose his job over all this. She helped Complainant make copies of the falsified records, and was aware that Complainant met with Mr. Porter at the Millennium Hotel. Tr. at 487-92.

After Mr. Porter fired Complainant, she noticed a change in him; he appeared sad, depressed, and stressed out. He was not sleeping or eating well, and had days were he would not get out of bed. Complainant also had a hard time finding another job. He had lots of phone interviews and a few interviews in person, but he never heard back from potential employers after submitting an application. He eventually got a temporary job up on the North Slope where he was told the work schedule would be “three on, three off, two on, two off.” She heard part of that telephone call on a speaker phone, and both her and Complainant believed that “three on, three off” referred to weeks. Complainant agreed to take the temporary job, but after he got there he learned that the work schedule was three days on, three days off. At the time, it costed around \$800 for a round trip ticket from their home in Anchorage to the North Slope, so

³⁷ The POI is the FAA Aviation Safety Inspector designated as the primary operation interface between an assigned air carrier and the FAA. *See generally*, Office of Personnel Management, Job Classification, Aviation Safety Series 1825, <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/1800/aviation-safety-series-1825/>.

Complainant realized that he would have to live there. Mrs. Bell and Complainant thought they could make that work temporarily, but the company paired Complainant with a roommate whose schedule and conduct interrupted his ability to sleep. Mrs. Bell told Complainant to just come home. Tr. at 493-98. The loss of Complainant's income affected their lifestyle. Fortunately, as a nurse, she was able to pick up more hours, but it gets a little old not having any days off. Mrs. Bell stated that other pilots for Respondent informed her that Complainant was a very conscientious and helpful employee. Tr. at 499-501.

On cross-examination, Mrs. Bell said that they had been married since 1977. She did not know if Complainant had been terminated from other flying jobs, but he had left a couple of jobs for safety reasons. He was not depressed after leaving those jobs because he left voluntarily and no bad things were said about him. Mrs. Bell admitted that she did not directly hear anyone speak ill of Complainant, and she had no personal knowledge whether a potential employer contacted Respondent for a reference. Tr. at 502-06.

Erin Witt (Tr. at 516-668)

Mrs. Witt is currently the Chief Pilot for Hageland Aviation, which is part of the largest Part 135 operator in the country.³⁸ She started her aviation career in Alaska flying Beech 1900s and Piper Navajos. She worked for Respondent from 2011 until 2015, starting as a line pilot in the King Air 200 for the ARH contract. She later served as a check airman, was promoted to Director of Safety, and finished her tenure there as the Director of Operations. She left Respondent because she needed to be home a little bit more and she had just learned that she was pregnant for the second time. Tr. at 518-19. After her maternity leave, Mrs. Witt returned to fly with Respondent in a part-time capacity. She also worked with Mr. Roberts with preparing some ground school materials. Tr. at 559-60.

When Respondent hired Mrs. Witt in August 2011, it did not have an airplane for the ARH contract. Respondent sent her to Dallas for simulator training, where she met Complainant and became his partner in simulator training. She felt that his performance in the simulator was below the level of competence she would have expected for someone of his experience. Mrs. Witt thought Complainant was quite easy to get along with on a personal level. He told her and the other pilots there that he was trying to be the Lead Pilot³⁹ because he felt Respondent needed a leader for the ARH operation. Tr. at 520-22.

Following the Dallas training, Respondent obtained the King Air 200 and brought it online for the ARH contract in mid-September 2011. Around December 2011, Respondent made Complainant the Lead Pilot for the ARH contract, which also made him Mrs. Witt's supervisor. Complainant started organizing the flight schedules and became the single point of interface

³⁸ She later testified that in her current position she was supervising 133 pilots. Tr. at 523. Mrs. Witt holds an ATP with type ratings in the Beech 1900 and DC-10. She is a CFI, CFI-I and MEL, and has approximately 8,000 hours total time. Tr. at 518-19.

³⁹ Mrs. Witt later explained that, initially, Respondent's Chief Pilot Mr. Lee was not checked out in the King Air 200. Tr. at 526.

between the pilots and ARH, apart from dispatch.⁴⁰ At the beginning Complainant was great; all of the other line pilots were excited about him heading the contract because it had been difficult to contact Mr. Lee. However, over time things changed, and a couple of events stuck out in her mind. Mrs. Witt recalled Complainant's handling of requested scheduling changes. In April 2012, she requested a simple day trade with another line pilot, which Complainant met with hostility. *See* RX 17. Mrs. Witt felt that this exchange showed Complainant's evolution from a helpful leader to an authoritarian micromanager. Tr. at 523-32.

Ms. Witt first became alarmed about Complainant's micromanagement and safety-related judgment during a medevac flight to Seattle. It was commonplace to spend the night in Seattle, but the medical crew did not want to stay. Mrs. Witt and her co-pilot did not have enough duty time to fly all the way back to Anchorage, so they decided to stop in Sitka, Alaska. As they were coming up on minimum fuel, they noticed that the visibility in Sitka was continuously dropping. The pilots thought that Sitka was probably a poor option at night given the deteriorating weather, so they started checking the weather at other airports. Juneau had stable VFR so, after talking with the medical crew and dispatch, they all made the decision to land there instead. After landing, Mrs. Witt began receiving text messages and phone calls from Complainant asking why they were in Juneau. Mrs. Witt explained their reasoning for choosing Juneau over Sitka, but kept receiving text messages after their duty time had run from Complainant, who thought they should have shot the instrument approach into Sitka.⁴¹ Mrs. Witt felt it was completely inappropriate to second guess their decision that erred on the side of caution and continue to contact them after their duty time. This kind of pushing from Complainant happened often. Mrs. Witt recalled that Complainant would constantly push pilots to fly into Dutch Harbor in low visibility, which she thought was maybe legal but unsafe. Tr. at 533-38.

Mrs. Witt also had concerns about flying with Complainant. She recounted a flight with Complainant into Kodiak, a location that she had not flown into previously. Complainant was the captain and she was the co-pilot. At times, Kodiak has a low cloud layer and is only accessible via VFR, so Complainant wanted to show Mrs. Witt how to fly that. After getting the weather briefing, however, it was clear that they were not going to be able to get under the weather and go in VFR. At some point they were going to have to descent through a layer of clouds, yet Complainant did not want to pick up an IFR clearance. Nevertheless, Mrs. Witt loaded the IFR approach into the navigation system, and during the descent there was red⁴² on the display with oral "terrain" warnings. Mrs. Witt repeatedly told Complainant to climb, but he told her that he knew where they were. She was an experienced Alaskan aviator, but she was very scared to be finding her way through the clouds without an IFR clearance and with terrain warnings going off. After landing, Mrs. Witt was full of adrenaline and called her husband to tell him that she is not sure that she wants to get back on the plane with Complainant. Complainant never indicated that he thought the flight was unsafe; he seemed comfortable

⁴⁰ *See also* Tr. at 562.

⁴¹ When the Tribunal asked, Mrs. Witt said that, at the time they made the decision to divert, the weather at Sitka was not below IFR minimums. However, they did not want to be in a position at night, in icing conditions, to go missed because of the surrounding terrain. Tr. at 533.

⁴² Red on the multi-functional display in an aircraft means that you are flying below nearby terrain; if you do not change course or altitude, you are going to hit something. Tr. at 546.

operating a plane that way. Upon landing back in Anchorage, Mrs. Witt called Mr. Lee and told him “it takes a lot to scare an Alaskan aviator. And I was just scared.” Mr. Lee said he had just gotten off the phone with Complainant, who expressed to him that he was not sure if Mrs. Witt could “cut it” because she did not know how to get into Kodiak VFR. Mrs. Witt encouraged Mr. Lee to download the GPS or TAWS⁴³ data from the flight and determine for himself if he would feel safe in the right seat, being in the clouds with the terrain warning going off, and not executing a missed approach. Tr. at 539-46.

On another occasion, Mrs. Witt again reported Complainant’s behavior to Mr. Lee. Just prior to her going on early maternity leave in June 2012, Mrs. Bell and her crew had timed out on a run to Merrill field,⁴⁴ but there was another medevac mission available. The crew began discussing what to do to accept the flight: whether it would be quicker to bring a crew to Merrill or bring the aircraft back to Anchorage International and then get the patient. During this discussion, another medevac operator got the flight because they were ready to go. When Mrs. Witt arrived back to Anchorage, she received a phone call from Complainant. He was furious, believing that she had caused Respondent to miss a flight. Mrs. Witt alleged that Complainant talked to her “in the most rude, disgusting, awful way,” and fifteen minutes into the conversation she could not breathe because she was crying so hard. Her husband took the phone away from her and hung up, and she called Complainant back fifteen minutes later after she had composed herself. Tr. at 548-52. Mrs. Witt testified that she also heard negative reports from other pilots about Complainant—he had a “him versus everybody thing.” The pilots were all of the impression that something was not right. Tr. at 558.

On cross-examination, Mrs. Witt stated that she had heard rumors of Mr. Lee forging documents from Complainant while she was on maternity leave. Complainant informed her of the falsifications via a phone call, but she thought it sounded like “one of his rants.” Complainant and Mr. Lee were not getting along at that point, and Mrs. Witt viewed both as manipulative. Therefore, Complainant’s report sounded more like “a slander campaign” than real accusations. Tr. at 625-27. When she returned from maternity leave her pilot file was located in a binder in Anchorage; they were in Mr. Robert’s possession. She recalled seeing pilot logs in a book case like the one portrayed in CX 39 before she went out on maternity leave in June 2012.⁴⁵ However, she observed that the photograph was taken after that because it shows binders for pilots that did not work for Respondent at the time she went on maternity leave. Mrs. Witt testified that she did not sign a training record dated 9/14; it appears to have a forged version of her signature. *See* CX 18 at 514. However, she believed that “most companies, if the person isn’t available to sign the record, would sign in lieu of. I have no problem with this record existing because I did receive the training.” Mrs. Witt could not recall whether she had given someone authorization to sign this training record for her, but did not consider her signature on this form to be a “forgery” because she took the training. When she reviewed her pilot records with Mr. Roberts, this training record (CX 18 at 514) was not in her file. Tr. at 563-79.

⁴³ Terrain Awareness Warning System.

⁴⁴ Merrill field is a general aviation airport located in the northern section of Anchorage.

⁴⁵ At the time of Mrs. Witt’s testimony, CX 39 was for identification only; however, at the end of the hearing CX 39 was admitted. *See* Tr. at 1174.

Prior to her maternity leave, Mr. Porter was the Director of Operations, and the chain of command was: Mr. Porter, Mr. Lee, and then Complainant. If she had a complaint about Complainant she would go to Mr. Lee or Mr. Porter, something she did frequently. She agreed that she could not produce any documentation of her complaints about Complainant because they were telephone calls. Tr. at 583-87. When questioned on the details of her email correspondence with Complainant about her schedule change request (RX 17), Mrs. Witt maintained that Complainant's responses were unprofessional and hostile as a whole. She admitted that she was sarcastic and unprofessional at times in return, because she felt Complainant had pushed her too many times. Mrs. Witt had wanted to work extra days in April 2012, but believed that Complainant would not give her any because of a personality conflict. Tr. at 588-614.

Mrs. Witt testified that she followed Respondent's policy of requiring pilots to record maintenance issues in the aircraft log books, but individual pilots may have used sticky pads instead. She did not know of any times when Respondent failed to disclose reportable incidents to the FAA, and was not aware of Respondent flying an aircraft with the fire detection system disabled. Tr. at 616-19.

Mrs. Witt recalled receiving a text message from Complainant in 2011 after flying from Merrill Field to Ted Stevens International airport at 4000 feet. Complainant commented that "4000 is a bit high from [Merrill Field] to [Ted Stevens]. 2000 generally works." Mrs. Witt admitted that she sent a crude and sexually explicit response that was "unprofessional as hell," but asserted that it was appropriate for the relationship she had with Complainant at that time. She wanted to let Complainant know that telling her what an appropriate attitude was between two airports was over-the-top micromanagement and unacceptable. Tr. at 628-32.

Mrs. Witt recalled Mr. Porter telling her that he terminated Complainant because he failed to show up for work and respond to his emails. She could not remember what day Mr. Porter said that, but believed the conversation occurred in 2012 or 2013. Tr. at 641-42.

On redirect, Mrs. Witt called herself a bush pilot and stated that her vulgar text response conformed to the manner in which she and Complainant communicated in the past. At the time she sent that, Complainant was not her supervisor. She stated that she thought Complainant was lackadaisical towards aviation safety, and that it is preposterous to say that Complainant did not have a bad reputation in the industry before this case. Tr. at 643-47.

Prior to her beginning maturity leave in June 2012, about twice a month Mrs. Witt had conversations with Mr. Lee or Mr. Porter about whether or not they should get rid of Complainant. Complainant's conduct towards her was so out of line that she felt obligated to let Mr. Lee and Mr. Porter know how she felt after that one telephone conversation. Tr. at 647-49.⁴⁶

On re-cross, Mrs. Witt agreed that a record of a § 135.293(a) oral examination for the Beech 200 system dated August 13 is false, because Mr. Lee never administered the oral

⁴⁶ See also Tr. at 658-659.

examination to her. *See* CX 18 at 521. She agreed that the form falsely indicates that the complete 293(a) occurred on August 13, but she disagreed that it is an open and shut case of falsification because part of the examination did occur. Tr. at 663-66.⁴⁷

James Roe (Tr. at 669-700, 785-834)

Mr. Roe has been a professional pilot since 1989. He currently works as a corporate pilot in Las Vegas operating under Part 91.⁴⁸ Tr. at 670-71. Mr. Roe initially started working for Respondent in 2007 until 2009. He left for a short period, but returned to work for Respondent in July 2012, primarily flying the King Air 350.

After returning to work for Respondent in July 2012, Mr. Roe went to recurrent school in Dallas and then flew to Mesa to meet Complainant and ferry the King Air 350 to Alaska. That was the first time that he had met Complainant. Complainant had been in town a couple of days prior, so Mr. Roe assumed that he had looked at the aircraft, but he had not. Consequently, after Mr. Roe and Complainant finished the paperwork and pre-flight, it was a late start for their flight back to Alaska. Mr. Roe flew the first leg of the flight up to Boeing Field in Washington.⁴⁹ After departing Mesa, they had to navigate around thunderstorms. Mr. Roe had hoped to rely upon Complainant for some assistance during that navigation, but Complainant had little situational awareness with regards the nature and location of the weather, how they were going to avoid it, and how to work the aircraft's radar. Consequently, he had to request vectors from ATC until they got around the weather; after that it was an uneventful first leg. Mr. Roe was surprised because he thought he was going to be a non-essential flight crew member that was merely going to assist the transfer of the aircraft. Tr. at 672-81.

After landing at Boeing Field, Complainant and Mr. Roe agreed that Sitka was the best option for the next fuel stop. Mr. Roe was the flying pilot for this leg of the trip as well. They navigated some poor weather and landed in Sitka around 1 a.m. or 2 a.m. Mr. Roe was "dead tired" and insisted that they rest, while Complainant wanted to fly on to Anchorage. The next day Mr. Roe suggested that Complainant fly the last leg to Anchorage, which he did. At this point, Mr. Roe thought that Complainant could have done a number of things differently to make the trip less stressful, though he recognized that there is always a period of familiarization when working with a new pilot. He stated that he had "serious reservations" about the accuracy of

⁴⁷ The Tribunal noted the following after Ms. Witt's testimony:

I do note that the witness, during this time, avoided looking at [Complainant] during the testimony and focused primarily on me. I also note that at times, again so the record is clear because sometimes it doesn't pick it up, she identified herself as a "bush Pilot". I noted her tone and inflection at times to be curt and at times hostile in the cross-examination response to that. That does not mean that I find her incredible. I just note that for the record.

Tr. at 668-69.

⁴⁸ He holds a multi-engine land and sea ATP, is a CFI-I, MEI with type ratings in the Learjet, RA-390 and King Air 300 series. He has approximately 10,000 hours total time. Tr. at 671.

⁴⁹ Mr. Roe later testified that the aircraft was originally certified as a single pilot aircraft. However, one of the reasons the oil company contracts required two pilots was because they wanted redundancy in the cockpit. Tr. at 795-96.

information that he had received about Complainant's experience and qualifications. Mr. Roe was told that the King Air 350 was going to be used part-time for the medevac contract with ARH, but it was going to be primarily used for the Beluga contact. This contract involved shuttling oil company employees and contractors in and out of the Beluga gravel strip three to four days a week. Tr. at 681-87.

Mr. Roe testified that the primary concern of Respondent's pilots was how to get in and out of Beluga's gravel strip safely. They discussed how they were going to mitigate the possibility of damage to the props, engines, and airframe. Mr. Roe's airplane got stuck on that runway four or five years earlier, and he had heard of others getting stuck there too. A day or so later, Mr. Lee, Complainant, and Mr. Roe conducted a familiarization flight to the Beluga airfield. Mr. Roe was initially the flying pilot and Complainant sat in the right seat. They performed a touch-and-go, and then came in for a full-stop landing. After talking about the airfield conditions, they switched seats and Complainant became the flying pilot. Mr. Roe testified that, contrary to Complainant's testimony, he did not add power to the right engine as they turned the aircraft around. He recalled Complainant adding power to the engine to prevent the plane from bogging down; something that "would be instinctive of anybody in that situation." Upon returning from that flight, they noticed a rather large chip on the leading edge of one of the propellers, which was not there before the flight. Mr. Roe agreed that the King Air 350 is not the optimal aircraft to go into that strip; a twin otter would be a better aircraft. He and Complainant had some frank and challenging conversations with Mr. Lee regarding whether it was best airplane for that mission. Tr. at 687-95.

Mr. Roe was the only person with sufficient experience in the King Air 350 to pilot the craft under the terms of the ConocoPhillips contract. This displeased Complainant, who thought he had enough experience in other King Air planes to be a PIC in the 350. Against his wishes, Complainant had to fly with Mr. Roe as the SIC. Despite Mr. Roe's suggestion that they split PIC assignments between them, Complainant refused to act as the flying pilot. Mr. Roe flew the airplane exclusively the entire summer of that contract and felt forced to operate as a single pilot. Complainant would work the radios and help with the flight management system, but did not help with the checklists. Tr. at 693-700, 785-90.

Mr. Roe expressed his opinion on more than one occasion to Mr. Lee⁵⁰ that it was in Respondent's and the clients' best interests if Complainant was replaced on those flights because he was not cooperating or assisting in the cockpit in any way. The client was expecting two pilots to act in a coordinated fashion and that was just not happening, though Mr. Roe never felt that Complainant's actions jeopardized the operation. He explained that the King Air 350 was designed to be flown by a single pilot, so having another pilot in the cockpit was a redundancy meant to reduce risk.⁵¹ Mr. Roe felt that Complainant's disengagement eliminated some of the additional safety that having a SIC in the King Air 350 was designed to provide. Mr. Roe expressed this opinion to Mr. Porter as well. He flew with Complainant on that contract for three

⁵⁰ Mr. Roe later said that he spoke to Mr. Lee on weekly basis, if not more, about the ongoing issue with Complainant's unwillingness to work with him when operating the King Air 350. Tr. at 793.

⁵¹ In response to the Tribunal's questions, Mr. Roe specified that the ConocoPhillips King Air 350 contract required a two member crew, which FAA regulations did not require.

months, four to eight flights a day, three to four days a week. Mr. Roe opined that anyone who acted as Complainant did during this time “should have expected nothing less than to be terminated.” While he did not express this exact sentiment to Mr. Lee or Mr. Porter, he did update them on a weekly basis about Complainant’s lack of participation. Tr. at 788-94, 803.

Complainant had a number of conversations with Mr. Roe about his displeasure with Mr. Lee’s decisions. It was obvious to Mr. Roe that Complainant and Mr. Lee did not see eye to eye, and Complainant did not have a lot of respect for Mr. Lee. Mr. Roe liked Mr. Lee, and considered him trustworthy, a hard worker, and a team builder. He could not bestow the accolade of “team builder and leader” on Complainant. Mr. Roe was aware that Mr. Lee’s FAA licenses had been revoked and the Company was required to pay a fine for his oversights in recordkeeping. The revocation disappointed Mr. Roe because he thought that Mr. Lee was a gifted aviator and was good at his job. Tr. at 799-802.

On cross-examination, Mr. Roe acknowledged that he had not read Complainant’s October 16, 2012 email to Mr. Porter. He also had no knowledge of the oversights or mistakes for which the FAA stripped Mr. Lee’s licenses. He was not part of Mr. Lee’s proceeding, so he could not speak on whether Mr. Lee intentionally broke the law. Tr. at 804-08.

Mr. Roe understood why Complainant could have been disgruntled about his assignment to the contract that flew the King Air 350 through Beluga, but thought he should not have let his emotions affect his actions in the cockpit. Mr. Roe stated that the damage to King Air 350’s propeller at Beluga did not occur because Complainant drove the plane into a ditch. It was his understanding that Complainant, Mr. Siegel, and Mr. Moss were the individuals that alleged Respondent’s wrongdoing to the FAA. He thought that Mr. Porter confirmed this at some point with him. Tr. at 814-25.

On re-direct, Mr. Roe testified that he received an explanation from Mr. Porter or Mr. Lee⁵² as to why Complainant was not terminated for his performance on the ConocoPhillips contract: Complainant was the only other King Air 350 pilot the company had at that time. The King Air 350 was not a common type rating, and Respondent did not have a pool of pilots from which they could have replaced Complainant. At that time, he did not think that there were any other King Air 350 type-rated pilots in Alaska. Complainant never spoke to Mr. Roe about any forged documents or checkrides. Tr. at 826-27. Mr. Roe did not participate in Respondent’s meeting around Thanksgiving of 2012 because he went home for the holidays once the ConocoPhillips contract had been completed. Tr. at 831-33.

John Kevin Siegel (Tr. at 702-55) (via telephone)

Mr. Siegel currently resides in St. Croix, U.S. Virgin Islands and has been flying for 37 years.⁵³ Prior to his employment with Respondent, he worked for Katmai and South Central Air,

⁵² Mr. Roe did not specify whether he heard this explanation from Mr. Lee or Mr. Porter.

⁵³ He holds an ATP, multiengine land and sea, commercial single engine land, advance ground instructor certificate, flight engineer certificate and is a gold seal flight instructor.

both Part 135 air carriers, and MarkAir, a Part 121 air carrier. Tr. at 702-03. Mr. Siegel joined Respondent in March 2007. Tr. at 708.

Mr. Siegel has known Mr. Porter since the early 1990s. Mr. Siegel had previously worked with Mr. Lee in the Caribbean; they got along well and Mr. Siegel considers him a friend. Mr. Siegel also knows Mr. Moss, who Mr. Siegel believed was a meticulous mechanic, decent pilot, and an asset to Respondent. When Mr. Siegel started with Respondent in 2007, he flew the Twin Otter primarily for oil companies. Respondent laid Mr. Siegel off in September 2009 when its oil contracts ended, but hired him again as business picked up in 2010.

Mr. Siegel met Complainant after Complainant arrived in Homer with the King Air 200, which Respondent had just purchased for the medevac contract. Tr. at 703-14. Mr. Siegel was not involved in the medevac operations so he rarely saw Complainant. He believed he did hear at least one complaint about Complainant, but none that were significant. However, he recalled a lot of complaints about Mr. Lee. Tr. at 740-42.

In the summer of 2012, Mr. Siegel learned that Mr. Moss had resigned as Respondent's Safety Officer. At that time, Mr. Siegel had seen some things at Respondent that caused him to have safety concerns, but thought that employees were making a good faith effort towards safety and "things were reasonable." Tr. at 713. Mr. Siegel attended Respondent's weekly, Monday morning safety meetings. Tr. at 715. At some point, Mr. Siegel stumbled on records that he felt were falsified or forged. On one occasion, a pilot commented to Mr. Lee that Mr. Porter's name was on the roster as having attended training when he had not. That did not surprise Mr. Siegel because he "knew that [t]here were times where training and checkrides were highly suspect." Tr. at 716. In fact, he considered Mr. Lee to be "open and cavalier" about the falsification of records. Mr. Siegel recalled seeing "easily a dozen" documents in his pilot file that contained a forged version of his signature. He did not believe this was appropriate, and alleged having conversations with Mr. Lee about it, though he could not recall the details of those conversations. Tr. at 713-18.

Mr. Siegel also recalled finding a falsified checkride record while staying in Deadhorse, Alaska. The report stated that Mr. Lee had given Mr. Porter a multiengine IFR checkride, which Mr. Siegel knew to be false because Mr. Porter and Mr. Lee were in different parts of the country when the purported checkride was reported to have occurred. Mr. Siegel believed Mr. Lee had falsified this checkride form because Mr. Porter had been involved in an IFR incident that caught the FAA's attention. At the time of that flight, Mr. Porter was not instrument current, and Mr. Siegel believed that Mr. Lee created a false checkride record to protect them if the FAA started digging into Mr. Porter's file. After discovering this record, Mr. Siegel looked at other flight logs and found other records that he believed had been falsified. Tr. at 718-23.

Mr. Siegel recalled flying with Mr. Roe at a time when he was obviously not current in the Twin Otter. He also recalled acting as a check airman where he and another pilot flew from Anchorage to Telkeetna. The checkride for the other pilot was "mostly incomplete," lacking an oral examination and other normal checkride procedures. Tr. at 727-29. On the return trip, they were pressed for time and Mr. Siegel may have performed a steep turn. Mr. Siegel later saw a completed checkride form for this flight reflecting that he had satisfactory performance in all

categories, which was false. Mr. Siegel alleged that at Respondent, “not only were pilot records not on hand when checkrides were given but the forms couldn’t be filled out completely because they didn’t have the pilot records.” Mr. Siegel believed that Mr. Lee had become more involved with the day-to-day operation of the company and was overwhelmed. Mr. Lee was getting careless—just throwing stuff together, filling out forms, and scribbling names to try to keep it all together. Tr. at 723-32.

In November 2012, Mr. Siegel had a conversation with someone at the FAA about Respondent. Eventually the FAA started an investigation and interviewed Mr. Siegel, but he did not tell Respondent. Mr. Siegel did not disclose that he was one of the individuals working for the FAA because he feared losing his job. During this time, Mr. Lee called him and implicated two pilots—“Jim Moss and possibly someone else”—as having gone to the FAA. Mr. Siegel believed that Complainant was the other pilot implicated, but could not recall why without listening to Mr. Lee’s voicemail again. Mr. Siegel left Anchorage to take time off on November 9, 2012, which was a normal occurrence for him at that time of year. He expected to be back to work by the end of the year or early January. Mr. Siegel asserted that his name was back on the schedule at some point, but then Respondent brought another, less senior pilot up to the Slope to fly. After this, his name was not on the schedule any more, though he believed this was because Mr. Lee wanted to have a serious conversation with him. Tr. at 731-37.

In April 2013, Mr. Siegel received a termination letter retroactive to November 2012. *See* CX-37. At that time, Respondent would have been aware that he was one of the people cooperating with the FAA. After Respondent fired him, Mr. Seigel tried to find other pilot work and contacted Seaborne Airlines, where he works presently. He had an interview but was not hired,⁵⁴ and ended up finding employment with Clearwater Air in Anchorage. Tr. at 737-40.

On cross-examination, Mr. Siegel acknowledged that he had no personal knowledge of Complainant as a pilot because he never flew with him. When he stopped flying for Respondent on November 9, 2012, the oil contracts had also ended. Tr. at 744-50.

Ricky Coon (Tr. at 757-84 (via telephone))

Mr. Coon knew Complainant a long time ago, having last worked with him in mid-2005 to the end of 2006.⁵⁵ At that time, Mr. Coon was the Director of Operations for Evergreen, a 135 certificate holder based out of Anchorage.⁵⁶ Tr. at 757-59.

⁵⁴ Mr. Siegel testified that an employee at Seaborne Airlines told him that someone at Respondent had given him a negative reference. The Tribunal decided to admit this double hearsay, but noted that this could cause this testimony to be given little weight. Tr. at 739.

⁵⁵ This testimony was allowed for purposes of impeachment. *See* Tr. at 759. Mr. Coon had been contacted by one of Respondent’s maintenance personnel, Bill Ryan (a friend of Mr. Coon), to ask if he would be willing to discuss his experience with Complainant. Tr. at 767-68.

⁵⁶ Mr. Coon started flying in 1988, and holds an ATP as well as multi-engine instructor instrument certification. He is typed rated in Learjet and Aerospace Jetstream 31.

In 2005, Evergreen hired Complainant as a King Air second in command (SIC) for a contract with LifeGuard Alaska. He maintained that position until he left in 2006. About two to three months after Complainant left Evergreen, Mr. Coon received a phone call from Complainant, who was out of state and looking to get another job. He had called to talk about a checkride that Mr. Coon had given Complainant, asking if that was a PIC checkride. Mr. Coon relayed that “No. It wasn’t. It was an SIC checkride.” Complainant responded that he needed that to be a PIC checkride because of a job he was looking into at the time. Mr. Coon considered Complainant’s question to heavily imply a request to change the recorded checkride from SIC to PIC, so he told Complainant he did not want to talk to him ever again and hung up the phone. Tr. at 760-61, 776.

Mr. Coon recalled receiving a fifteen-page confidential safety report authored by Complainant about Evergreen in 2006. *See* RX 19. Complainant had sent the report to Evergreen’s client, a hospital, and Mr. Coon reviewed the report at the client’s request to respond to Complainant’s accusations therein. In Mr. Coon’s view, Complainant had no factual evidence to back any of the statements in that letter; it “was all baloney, all of it.” He recalled reviewing the letter point by point for a few days, and found maintenance documentation to refute all of the maintenance issues raised. Based on his interaction with Complainant, what he knew of Complainant’s tenure at Respondent, and the fact that Complainant had been terminated from a lot of programs in Alaskan aviation, Mr. Coon opined that Complainant is a pathological liar. Tr. at 762-67.

Mr. Coon explained that his knowledge of Complainant’s untruthfulness while at Respondent was based on Bill Ryan’s assertion that Complainant’s letter regarding Respondent was almost the same as the safety report he drafted about Evergreen in 2006. In Mr. Coon’s opinion, both letters represented Complainant’s attempt to “assassinate the company” because of his negative experiences there. However, Mr. Coon admitted that he had never seen Complainant’s one-page email to Mr. Porter in 2012, nor did he know of its contents. Tr. at 769-70.

While researching Complainant’s safety report, Mr. Coon testified that he called several people at Embry-Riddle to ask whether Complainant had worked as a professor for the university, who all told him that they had never heard of Complainant. However, Mr. Coon could not identify the name or title of the person or persons he talked to at Embry-Riddle, and could not affirm that they had worked at the university during the period that Complainant purportedly did. Tr. at 764, 777-78.

Mitch Stanaland (Tr. at 840-69) (via telephone)

Mr. Stanaland worked as the program manager for LifeFlight for Alaska Regional Hospital from 2008 until April 2014.⁵⁷ ARH had a contract with Respondent, and Complainant was Respondent’s primary point of contact with ARH. Mr. Stanaland recalled that Complainant was an active participant in ARH’s program and attended their monthly meetings. He described

⁵⁷ Mr. Stanaland is a recreational pilot with time in helicopters and small fixed-wing planes. He is a registered nurse and has been involved with aviation and medicine since 1993. Tr. at 869.

Complainant as an asset, a good pilot, a team player, and safety conscious. Tr. at 857. Mr. Stanaland did not have any problems with Complainant during the contract, and he was well liked by all the nurses. Mr. Stanaland did not enjoy dealing with Mr. Lee because he felt Mr. Lee was untruthful. After “a hundred days” of trying to get Respondent to set up its safety program, Mr. Stanaland finally just dealt with Mr. Porter, who was difficult at best to deal with. He found it difficult to believe Mr. Porter after working with him for a while, as he “couldn’t depend on the information coming from him.” Tr. at 841-46.

Mr. Stanaland met Mr. Roberts when Mr. Porter hired him to establish a safety management system. In the beginning, Mr. Roberts was very enthusiastic, but after a few months he became adversarial. Mr. Stanaland believed that Mr. Roberts would do things to get back at ARH for bothering him, such as filing a frivolous complaint to force ARH to perform a costly, unnecessary investigation. Tr. at 846-47.

During the ARH contract, Mr. Stanaland had frequent telephonic contact with Complainant. Mr. Stanaland found Complainant to be “absolutely reachable”; Complainant would answer the phone anytime of the day or night.⁵⁸ When trying to reach Mr. Porter and Mr. Lee, Mr. Stanaland would usually have to leave a message and wait for them to call him back. Mr. Stanaland did recall an incident where one of Complainant’s flights was late returning from Seattle; however, one of his nurses had caused the delay. He could not recall having any similar issues with Complainant. The nurses did not complain about Complainant.⁵⁹ In fact, when the contract changed, they requested that Complainant be retained by ARH.

The week after Thanksgiving of 2012, Mr. Porter notified Mr. Stanaland that he had terminated Complainant’s employment. At a later time, probable in early December, Mr. Porter said Complainant was a disgruntled employee and all of his allegations to the FAA were untrue. Complainant wanted to join ARH as part of the team that replaced Respondent for the medevac contract. Mr. Stanaland and his team recommended that ARH hire him; however, the hospital administrators declined to hire Complainant because he was then involved with the FAA’s active investigation of Respondent. Tr. at 848-52.

Mr. Stanaland contacted the FAA with concerns about Respondent’s safety on December 19 or 20, 2012. He had been “hearing things” that concerned him, 40 pilots went through Respondent in nine months, and Respondent had no documentation of maintenance on its aircraft. Mr. Stanaland stated that it was common knowledge that Respondent’s employees would write maintenance notes on a legal pad and leave them on the top of the toolbox rather than complete the maintenance logs. He believed that this practice is shown in the NSTB report, but he only had second-hand information at the time he called the FAA. The hospital also hired Mr. Kobelnyk, an auditor with decades of aviation safety experience, to audit their operation. Tr. at 853-55.

⁵⁸ See also Tr. at 859.

⁵⁹ Mr. Stanaland later elaborated that no LifeFlight employees brought a complaint about Complainant to his attention. Tr. at 853.

On cross-examination, Mr. Stanaland stated that he could not recall whether he flew with Complainant as part of the medical crew. He admitted that he had no personal knowledge of Complainant as a pilot; he had not sat in the cockpit next to him. In December 2011, prior to Complainant's employment with Respondent, the point of contact for administration of the ARH contract with Respondent was Mr. Lee and Mr. Porter. Tr. at 860-67.

Dennis Giese (Tr. at 871-931) (via teleconference)

Mr. Giese testified via teleconference from Laredo, Texas. He was employed by Respondent from July 2011 until the spring of 2013. His first assignment was Respondent conducting marine mammal survey flights in a Twin Otter, and after that contract ended he transitioned into flying the King Air for a medevac contract with ARH. That contract started around the first week of September 2011, which is when he met Complainant. At that time, Complainant was a captain for the King Air medevac, and they flew together dozens of times.

For the first half of the ARH contract Complainant was a line pilot, and he was easy to get along with. But when Complainant became the Assistant Chief Pilot, around the first of the year 2012, Mr. Giese noticed a change in his behavior. Complainant displayed a lot of forcefulness in dispatching flights and second guessed many of decisions made by pilots. This affected the flight crew's operational control authority. Complainant would often "push" pilots, pressuring them to fly when they declined a flight. If a flight was turned down, the pilot would immediately get a call. Complainant had "supreme power" over the ARH flights; he did the scheduling, was the check airman, and controlled the record keeping and training logs.⁶⁰ Tr. at 871-81.

At times, there was a lot of friction between Complainant and the line pilots, while at other times it was smooth. The line pilots were sometimes upset about Complainant questioning their decisions. There was a lot of grumbling when pilots wanted to take time off because it was hard to find other pilots to cover shifts in a small organization. Mr. Giese felt that he had to stay in Complainant's good graces, which suppressed open communication. He could not say that Complainant used his authority over scheduling or vacation requests to punish people, but he thought that he held it over their heads. Tr. at 881-84. Mr. Giese talked about these concerns with Mr. Lee and Mr. Roberts.

The day before Thanksgiving 2012, Mr. Giese received a call telling him not to come in because of some issue with the hospital. Mr. Porter called all the pilots to a meeting the next day and explained that Respondent had been turned into the FAA. Complainant did not attend this meeting, which was very uncommon. Mr. Porter asked where Complainant was, but no one in attendance knew. Tr. at 886-87.

In Mr. Giese's opinion, the maintenance on the King Air was very good. He denied ever receiving instruction to write down maintenance issues on sticky notes to avoid grounding a plane. He has seen this practice ("pocket squawks") at Respondent, as with every other Part 135

⁶⁰ Mr. Giese stated that both Complainant and Mr. Lee had access to pilot records. Each pilot had one-inch binders for their records in a little room upstairs at the Anchorage hanger.

operator that he has worked for, most of the time it pertained to issues that were not critical to flight safety. Tr. at 888.

Mr. Giese did not recall if he was ever notified that Complainant was no longer the point of contact for the ARH contract. Nor did he remember anyone making derogatory or disparaging remarks about Complainant. However, by two weeks after the meeting at the Anchorage hangar, it was known that Complainant was the one that had gone to the FAA. Tr. at 890-91. Mr. Giese left Respondent's employ around the end of May 2013, when its contract with ARH ended, but continued flying for ARH with a different vendor. Tr. at 892-93.

On cross-examination, Mr. Giese acknowledged that Complainant gave him all of his checkrides to fly PIC. Mr. Giese explained that, in his experience in the aviation industry, pocket squawks were generally used for lesser problems that often could not be duplicated. This would bring the issue to someone's attention, though bigger issues would generally be written up. He could not recall Respondent ever using pocket squawks for safety-related issues. While he was not a mechanic, Mr. Giese thought that Respondent's practices were acceptable under FAA guidelines. Tr. at 894-906.

Mr. Giese did recall that Ms. Witt had used Mr. Giese's cell phone to send a graphic text and he was pretty upset that she used his phone to do so. Tr. at 909-10. He had not heard that Mr. Porter had suspended Complainant prior to his hearing testimony. If he had a question as a pilot when he worked for Respondent, he would first call Complainant. He did not recall how it was communicated to him that he should no longer communicate with Complainant. Tr. at 910-13.

Mr. Giese was told that the FAA had inspected the signatures of paperwork at Respondent's headquarters around November 23, 2012. Mr. Giese had looked at his pilot file, but he never saw any documents that were falsified or forged. He does not know about other pilots' records, but he knows that there were no forgeries to his pilot's records. Some of those records were completed by Complainant. Tr. at 913-17.

On re-direct, Mr. Giese opined that it was common practice that when an airplane comes in for maintenance, a mechanic uses a note pad to write down items when doing the inspection. He did not believe this practice was intended to hide anything, it was just for the mechanic to create a list of items that needs to be fixed. Mr. Giese later clarified that this did not include maintenance items reported from pilots to mechanics, which may not have been written down at all. Tr. at 921-23.

Michael Makar (Tr. at 932-1027)

Mr. Makar is a commercial pilot, holds an ATP, has approximately 8,500 hours total time and is currently flying as a first officer on a Boeing 737 for a Part 121 air cargo carrier. He previously worked for Respondent and knows Complainant. Complainant lives straight across the street from him. He also worked with Complainant both at a prior company and while at Respondent. When Complainant headed Respondent's medevac program, he recruited Mr. Makar to work for Respondent. Tr. at 932-35.

In 2010, Mr. Makar lost his FAA medical certificate due to a DUI. Eventually he was able to go through the FAA process and prove that he was worthy of getting his medical certificate back. That process cost him thousands of dollars and included AA attendance and random drug testing. Mr. Makar eventually regained his first-class medical certificate⁶¹ in December 2013. Tr. at 935-37.

In February 2012, Respondent hired Mr. Makar as a medevac first officer, with an understanding that after a short period of training he would become a captain. Complainant was his point of contact for flights, and was aware of his medical license issues. As part of the requirements to regain his first-class medical, his Aviation Medical Examiner (“AME”)⁶² required a direct update from Mr. Makar’s supervisor every couple of months. In November 2012, Mr. Makar went in to renew his medical with his AME and happened to see a handwritten letter with Complainant’s name on it. The letter contained many untrue allegations: that Mr. Makar missed drug tests three times, that he had declined a flight because he had slurred speech and seemed to be intoxicated, and that Mitch—the point person at ARH—wanted Mr. Makar fired. Complainant had never communicated directly with Mr. Makar about these allegations. Tr. at 938-41.

Mr. Makar had a general idea of the root of those allegations. In August 2012, he came back from a vacation and saw that he had received a few emails while he was out asking him to come in for a random drug test. He immediately contacted Complainant, telling him that attending the drug test would start his duty time earlier than his scheduled shift. Complainant told him to take the drug test, so he did. As for the flight he declined, Complainant woke up to a call at about 2 a.m. and remembered being extremely tired. Due to a number of risk factors, Mr. Makar ultimately turned the flight down. He adamantly denied being intoxicated when he received the call. Mr. Makar could not recall if Complainant contacted him about turning down this flight. Tr. at 941-45.

When Mr. Makar saw those notes in the AME’s office he was completely blindsided and upset. He believed that Complainant had lied about him, which caused him to question Complainant’s integrity. Mr. Makar also felt that Complainant had a very strong desire to have pilots take flights and not consider the whole safety picture. Other pilots, such as Mrs. Witt, had similar concerns. Mr. Makar stated that Complainant would often contact him directly regarding declined flights. After one such decline due to 50 mph winds and a dirt runway, Complainant immediately called him, encouraging him to go just take a look. Mr. Makar declined, and was frustrated that Complainant would second-guess his judgment on safety. He felt that he was constantly under scrutiny, being micro-managed. Tr. at 945-54.

⁶¹ Mr. Makar initially indicated that he received a first-class medical certificate, but when the Tribunal asked him about this he corrected himself and stated that at that time he was issued a second-class medical certificate through a special issuance back in 2012. See Tr. at 973.

⁶² For the criteria for issuance of the various airman medical certificates see 14 C.F.R. Part 67 and 2017 *Guide for Aviation Medical Examiners*, available at https://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/media/guide.pdf.

Mr. Makar thinks that he brought concerns to Mr. Roberts about the way Complainant filled out paperwork. On one occasion, Complainant had him sign paperwork which was accurate but there was a box that was not filled in. This occurred about a week after the check ride, and it should have been completed at the time of the checkride. Mr. Makar understood that Complainant was responsible for keeping those records. He usually interacted with Complainant via text messaging and it would be unusual for Complainant not to respond to a text in a matter of minutes. Tr. at 954-56.

Mr. Makar recalled FAA inspectors arriving at Respondent's Anchorage hangar to do an inspection the day after Thanksgiving. Complainant had asked him to conduct a maintenance flight, and when he arrived the FAA inspectors asked for the crew's credentials and the aircraft's credentials. He also recalled the pilots' meeting on November 24, 2012 with the other hospital contract pilots. He did not recall Complainant being at that meeting, because Mr. Porter asked where he was. Tr. at 956-60.

After Respondent's contract with ARH ended, Mr. Makar worked for Eagle Med, the carrier that picked up the hospital contract. He was told that Eagle Med had a list of individuals produced by ARH for interviews. He asked and was told that Complainant was not on that list. Mr. Makar stated that he would not have taken the job if Eagle Med had hired Complainant. Tr. at 960-61.

On cross-examination, Mr. Makar noted that Complainant's wife works as a nurse at Goldenview Middle School, and he expressed concerns that his children would receive a lesser standard of care because of his testimony against Complainant's case. When pressed, Mr. Makar admitted he had no proof that has ever happened, but maintained that was a concern of his. Tr. at 963-65.

When shown an email from Complainant to Respondent's coordinator of its drug program at CX 31, page CX 0673, Mr. Makar agreed that virtually everything in the email supported Mr. Makar's position about his drug testing incident. Further, he agreed that Complainant was not in charge of Respondent's drug and safety program. Though he initially maintained that Complainant was not supporting him in this email, when pressed, Mr. Makar acknowledged that Complainant's email appeared supportive of his position. Tr. at 969-78.

As for the FAA inspection, to the best of his knowledge the pilots' files had always been upstairs in a black case. He agreed that Complainant administered a complete checkride to him, asking him to sign for it a few days later. He did not know that Mr. Lee was doing checkrides and filing out the forms months later. Nor was he aware the Mr. Lee was forging signatures for checkrides. Mr. Makar learned after the FAA raid that Respondent had suspended Complainant's employment, but did not know when he was terminated. He could not remember the exact date when he was told that he was no longer to report to Complainant. Tr. at 979-89.

Mr. Makar maintained that Complainant claimed that he was intoxicated when he turned down the flight. He reiterated that Complainant told his AME that Complainant had great concerns that he was intoxicated and that the hospital wanted him fired, and that he had skipped drug tests for three weeks. However, Mr. Makar did not know that the hospital had recorded the

telephone call with him at 1:30 a.m. and forwarded it to Complainant. None of his shifts were taken away and he continued to serve as PIC. Mr. Makars did not know if Complainant had ever disciplined any pilot for not taking flights. Tr. at 992-96.

On redirect, Mr. Makar said that the first time he knew Complainant had been communicating with his AME was when he learned about the intoxication allegation from the notes he saw around August 24 or 25. Prior to the day of his testimony, he had never seen that email Complainant's counsel asked him about. Even while reading this email he did not feel that Complainant was supporting him and that his medical would be in danger. Mr. Makar turned down the flight in August because he was unable to complete the drug test and fly to and from Dutch Harbor within the limits of a 14-hour flight duty day. Tr. at 1004-09.

On recross, Mr. Makar said he did not have a copy of the notes he was referring to that he observed were part of his medical file where they reflect Complainant's comments about his intoxication. However, he had a copy of the note on his telephone.⁶³ Upon review of the note, it references "Mitch" from LifeFlight, Mr. Lee, and Mr. Porter—not Complainant. Tr. at 1013-24.

William Ryan (Tr. at 1027-1072)

Mr. Ryan is Respondent's Director of Maintenance and consultant, and has been in business for 30 years. He graduated from Embry Riddle with a Master's degree and holds an Airframe and Powerplant Mechanics certificate. He wrote Respondent's maintenance manuals for them in 2002 and became its Director of Maintenance in a quality assurance capacity in 2008. To his knowledge, Respondent has operated within the guidelines of its maintenance and safety FAR⁶⁴ regulations. As the Director of Maintenance, he supervises the Required Inspection Item ("RII") Inspectors⁶⁵ and he qualifies the mechanics and maintenance vendors. He is physically present at Respondent's locations about once a month or once every two months. In addition to his normal rotation to Respondent's facilities, he likes to vacation in Homer, where Respondent's primary base is located, so he usually tries to combine vacation and business into one trip. Tr. at 1027-29.

From late 2011 until 2013, Mr. Ryan often worked out of the Signature East hangar because he had previous experience with King Airs. He had many conversations with Mr. Lee about how taking on a medevac program was going to impact the maintenance department. He understood that the King Air 200 was going to be utilized somewhere between 350 and 400 hours per year for that contract. Instead, the aircraft was used about 1,200 hours per year. Use of the aircraft to such an extent affected the hourly maintenance schedule, and the aircraft required maintenance and inspections in shorter time intervals.

⁶³ A copy of this photograph was produced and admitted as RX 29.

⁶⁴ FAR is the abbreviation for Federal Aviation Regulations.

⁶⁵ See generally, 14 C.F.R. §§ 135.425, 135.427 and 135.429 for general information about RII inspection requirements for Part 135 operators.

Mr. Ryan denied seeing any use of yellow stickies (pocket squawks) to document maintenance problems or hearing of anyone directing pilots to do that. He did not think it make sense to do that because it is too easy to follow the rules. Respondent operates per its instructions in its manuals, and sometimes a pilot's reported issues were merely the result of pilot error. Tr. at 1029-31, 1051-52.

Mr. Ryan interacted with Complainant once or twice a week at Respondent. Complainant is the only pilot at which Mr. Ryan has ever yelled, once for complaining about maintenance issues without writing up the issue for maintenance to address. Tr. at 1032-35. Complainant was Mr. Lee's assistant and he managed the hospital contract. He also oversaw the Anchorage base and took care of pilot records. Mr. Ryan had seen Complainant often "holding court" with other pilots, lecturing them about some situation. Tr. at 1035-37.

Mr. Ryan observed Complainant bad-mouth the company to the other pilots. He criticized management, Respondent's pay, the operating conditions, the flight schedule, and other things like that. Mr. Ryan recalled a heated meeting with Complainant, Mr. Lee, and Mr. Porter in August 2012. Mr. Ryan found out later that Complainant had taken control of the medevac contract after that meeting, as Mr. Porter wanted to separate Complainant and Mr. Lee so they did not have so much interaction with each other. Tr. at 1038-40.

Mr. Ryan was shown RX 18, and explained that it references an average corporate aircraft flying between 400 and 600 hours per year. The King Air 200 is not designed to fly 1,200 hours per year. Because Respondent's King Air 200 was flying so much, it required maintenance in closer time schedules, which meant the aircraft was down twice a month instead of once. The hospital was not happy with this because it was lucrative for ARH to fly the King Air 200 that much. Mr. Ryan did not think ARH understood maintenance. He was part of the effort to renegotiate the ARH contract and held a discussion about using the King Air 350 with Mr. Stanaland, but he was not going to commit to additional finances needed to operate the more expensive King Air 350. Mr. Ryan never had concerns that the King Air 200 was being flown in an unairworthy condition. Tr. at 1040-46.

Mr. Ryan became aware that Complainant had sent an email to Mr. Porter regarding maintenance irregularities as Mr. Porter provided him with the email. He also later became aware that the FAA was at Respondent's hangar in Anchorage looking at the King Air 200, when a mechanic called him on the day after Thanksgiving 2012 saying the FAA was looking at maintenance records. By the time he arrived at the hangar, the FAA inspectors were already done. Tr. at 1047-50.

After a couple of weeks of FAA inspections, it became blatantly clear that someone from inside Respondent had been talking to the FAA. The FAA inspectors were looking at specific records and areas on the plane. About two weeks after the initial FAA inspection, Mr. Ryan went to Mr. Porter and asked if he thought that Mr. Moss was the inside employee. After talking to Mr. Porter, Mr. Ryan called Mr. Moss and asked if he was the person that went to the FAA. Mr. Moss told him that he was not the person, but knew who was. Tr. at 1050-53.

On cross-examination, when asked whether it was appropriate for Mr. Lee to sign another pilot's name on two separate checkrides, Mr. Ryan responded: "I'm not a pilot." He maintained that, to the best of his knowledge, Respondent did not commit any maintenance violations. He claimed no knowledge of an engine fire incident at Merrill Field on September 22, 2011 or the subsequent flights without an approval of return to service, both of which the FAA documented in its investigation. See CX 1, at CX0129-30. Mr. Ryan stated that Mr. Kirby incorrectly recounted in his February 1, 2013 letter to the FAA⁶⁶ that this event had occurred on September 22, 2011. He also denied Mr. Kirby's representations in this letter that: (1) Mr. Ryan instructed Mr. Kirby to reset the engine fire detection circuit breaker and perform an engine run up, (2) Mr. Porter and Mr. Lee had decided to remove and not replace the air condition belt because it was not needed in the winter, and (3) that Mr. Ryan disagreed with this decision for many reasons, including the fact that the aircraft did not have an MEL approved at that time,⁶⁷ stating "but it's not our aircraft and Gary knows about it." Tr. at 1055-61.

Mr. Ryan also disagree with the FAA findings in paragraphs 13 and 14 of CX 1, pages CX0130. Mr. Ryan laughed and said "There was no documented proof of any of this occurring." Tr. at 1068.

The Tribunal asked Mr. Ryan if a mechanic can sign off for work he did not actually perform. Mr. Ryan said no. Tr. at 1071.

Randy Roberts (Tr. at 1072-1175)

Mr. Roberts is an Air Force Academy graduate with a degree in Astronautical Engineering. He flew the F-15, did one tour flying the King Air, and was also a squadron commander. He earned a degree in National Security Strategy and an M.B.A. at the National Defense University. After that, he came to Alaska and served as the Director of Operations for a flying wing. After leaving the Air Force in 2007 he worked for Continental Airlines. He also taught at the University of Alaska Anchorage Aviation. He was one of the first 150 pilots to be type rated in the Boeing 787, which he currently flies for United Airlines out of Houston. Mr. Roberts worked for Respondent from October 2012 to May 2013. Tr. at 1072-77, 1156.

Mr. Roberts first met Mr. Lee and Mr. Porter in Homer around the first week of August 2012. He asserted that the meeting focused primarily on the problems with Respondent's ARH contract: its supervisor (Complainant), the paperwork, and compliance with FAA record keeping. Mr. Lee and Mr. Porter did not know what records they had because communication with Complainant was sparse to non-existent. At this time, Mr. Porter felt that Complainant had

⁶⁶ CX 1, pages CX0147-0148.

⁶⁷ Mr. Ryan later testified that at the time of the air conditioner belt issue, the aircraft was not on Respondent's certificate, which explained why there was no paperwork of this event. He believed that this happened before the airplane was on the certificate, so it would have been "run as Part 91 under a separate flight log, under a separate discrepancy sheet." However, Mr. Ryan acknowledged that Respondent started flying the hospital contract on September 15, 2011, that this belt incident occurred a week later on September 22, 2011, and that the King Air 200 was on Respondent's certificate when they began the hospital contract. Tr. at 1064-65.

Respondent over a barrel because they could not find anybody to go in there and clean things up. Mr. Roberts accepted a position at Respondent to help “clean things up,” though he did not get started until October 1. At that time, he did not know Complainant, but subsequently met him at ARH during a safety meeting while Complainant was still nominally in charge. Tr. at 1075-78.

From the meeting in Homer, Mr. Roberts felt it was pretty evident that Respondent needed a leadership change for the ARH contract. The paperwork was also a priority because of Part 135 record keeping requirements. Mr. Roberts immediately started to look for pilots that had King Air experience, and interviewed a few from Richmond. Shortly thereafter, Respondent found a pilot—Les Bouma—to run the ARH operation and be the Assistant Chief Pilot and check airman in Anchorage. Tr. at 1078-79.

Mr. Roberts recalled Complainant’s October 16, 2012 email to Mr. Porter regarding falsifications and maintenance irregularities. He did not believe that he received a copy of that email, but he talked to Mr. Porter about it.⁶⁸ Mr. Roberts asserted that these issues appeared simply to not have been handled the way the “Three Amigos” (Complainant, Mr. Moss, and a person whose name he could not recall) preferred. He opined that the ARH operation was not well-run—the “inmates were running the asylum.” Tr. at 1079-80.

It took Mr. Roberts a week to get his feet on the ground and determine his priorities. His number one priority became getting the paperwork into compliance with FAA standards. Most of the records were kept in Homer with a few maintained at the Anchorage office. Mr. Lee brought those records to Anchorage for review and correction, storing them on a bookcase at Respondent’s hangar space. As he started to dig into the records and find discrepancies—even gross discrepancies—he could tell that Respondent would never pass an FAA inspection. Tr. at 1080-81. Mr. Roberts recognized that Respondent is responsible for its recordkeeping, but asserted that Complainant was tasked with keeping these records as Respondent’s flight instructor and check airman. He referenced Mr. Lee’s December 2011 welcome email, which laid out Complainant’s responsibilities for pilot recordkeeping. Tr. at 1082-83.

The day after the FAA inspected the Anchorage hanger, Mr. Roberts came into the office. He had kept the records in alphabetical order, and someone had clearly tampered with them. Both Complainant’s and Mr. Moss’s records were out of place. After that, Mr. Porter and Mr. Roberts decided to lock the records in a file cabinet, as they were not sure whose records were the subject of the FAA’s inspection. Their main theory at that time was that the FAA was inspecting Complainant, who “was grabbing [his] records to make sure they’re up to snuff.” Tr. at 1081-82.

Mr. Roberts testified that most ARH contract problems emanated from personnel conflicts between Mr. Lee and Complainant; there was simply no communication between them. Mr. Roberts interviewed several pilots on the hospital contract, who told him about various deficiencies in their records. When asked to identify these pilots, Mr. Roberts could only recall talking with Mr. Giese (checkrides with incomplete paperwork), and Mr. Makar and Robby Sheehy (flying with expired checkrides). Mr. Roberts stated that “it didn’t take a rocket

⁶⁸ Mr. Roberts later admitted to receiving a forward of this email from Mr. Porter. Tr. at 1117-19.

scientist” to figure out that Respondent hired Les Bouma to take over Complainant’s job managing the hospital contract. Referring back to the August meeting, “it was no secret that [Mr. Porter] wanted [Complainant] out . . .”, though he did not want to fire Complainant without having “somebody waiting in the wings” to perform his duties for Respondent. Tr. at 1084-92.

Mr. Roberts became aware of the FAA’s November 23, 2012 inspection of Respondent’s Anchorage hangar when Mr. Porter called him that morning. Mr. Porter asked him to go to their hangar, and he was upstairs in the hangar when the FAA arrived. That morning, Mr. Porter also called all the ARH pilots in for a meeting around lunchtime. Mr. Porter told the eight or ten pilots in attendance that the FAA was conducting an inspection for unknown reasons, but that Respondent was going to cooperate with the inspectors. Complainant did not attend that meeting, and the big question on everyone’s mind was: where is the guy in charge of the Anchorage operation? The group had a small discussion about the records, which looked like they had been rearranged. Complainant’s records also appeared rearranged; leading to assumptions that the FAA inspection concerned something he did or did not do. Tr. at 1092-95.

During this time, Mr. Roberts and Mr. Porter stayed in close contact. Mr. Porter stood the ARH operation down and notified the hospital. Mr. Porter decided to suspend Complainant, though Mr. Roberts thought that Respondent should have gotten rid of Complainant well before then. Mr. Roberts stated that he had recommended Complainant’s termination “all the time.” Between the paperwork and pilot feedback, he could tell the morale was low. Mr. Porter informed Mr. Roberts that he had attempted to contact Complainant after the FAA inspectors arrived, though Mr. Roberts could not recall the details. He could not fathom that Complainant did not know that the FAA was performing an inspection. Tr. at 1095-97.

RX 15 is an email that Mr. Roberts drafted for Mr. Porter to send to Complainant. Mr. Roberts stated that he drafted it after Complainant did not show up for work during the FAA inspection, “which was the primary reason that I drafted the document and talked about terminating him.” Mr. Porter emailed it to Complainant on Tuesday, November 27, 2012. Due to Complainant’s failure to keep appropriate records under Part 135.63, Respondent had to have its ARH pilot’s complete notarized affidavits. Mr. Roberts stated that he expected Complainant to at least come in and help fix the recordkeeping problems he caused. Respondent was able to have its pilots receive checkrides, ground training, and ground testing. Tr. at 1098-1103.

Since then, Mr. Roberts has learned about the FAA’s action against Mr. Lee. He stated that “it’s conceivable that part of [the recordkeeping problem] was [Mr. Lee’s] responsibility,” though he admitted that he did not know all the facts surrounding the FAA’s action against Mr. Lee. Tr. at 1103-06.

On cross-examination, Mr. Roberts agreed that, after corresponding with Mr. Lee and Mr. Porter in August and September, he did not start working for Respondent until Friday, October 5, 2012. He spent this first day at the Anchorage facility reviewing systems and processes with Mr. Lee. Mr. Porter introduced him as a new employee during a telephonic safety meeting on October 8, 2012. From October 5 through October 16, Mr. Roberts never attempted to interview Complainant or any Respondent employee. When asked with whom he talked during this time period, Mr. Roberts could not say. He suspected that he talked to

anybody that came wandering into Respondent's Anchorage facility, and those conversations would have been personal introductions and possibly delving into issues that the employee was having. Mr. Roberts acknowledged that he had never worked for a Part 135 air carrier before Respondent, though he taught Part 135 operations for two years as an associate professor at the University of Alaska. He could not recall what specific "holes" were present in Complainant's records. When asked to identify any deficient record in the 12 binders of evidence at the witness stand for which Complainant was responsible, Mr. Roberts did not know if he could, but maintained that the records back in 2012 were missing. Tr. at 1109-17.

On October 16, 2012, Complainant wrote to Mr. Moss and Mr. Porter a letter regarding deficiencies within the company, including fraudulent entries, safety problems, the culture and other matters. Mr. Porter forwarded that email to Mr. Roberts. Mr. Roberts testified that he did not investigate those allegations because they were not within his charter. His "marching orders" and "single focus" from Mr. Lee were to get the files "back up to snuff and in compliance with the FAA." Mr. Roberts stated that the rest of the issues identified in Complainant's letter fell to Mr. Porter, Mr. Lee, and "everybody else," who were "aggressively engaged" and "fixing those problems." Tr. at 1117-19. When asked why he did not raise these allegations with Mr. Porter to sort through the forgeries that Complainant alleged, Mr. Roberts responded: "Not my company." He also stated that the documents Complainant alleged were falsified were not part of the ARH contract. Mr. Roberts recalled Mr. Porter saying something to him in passing about his meeting with Complainant in the Millennium Hotel, but could not recall what he said. Tr. at 1123-24.

CX 39 shows the bookcase in the Anchorage facility where Mr. Roberts put the files after he finished working with them every day. CX 39A shows the rest of the files, including Mr. Lee's pilot log. Tr. at 1119-24.

Mr. Roberts met Mr. Stanaland around the end of October, first of November 2012, at a safety meeting. This occurred after Complainant sent his October 16, 2012 email to Mr. Porter. When asked if he had ever called Complainant in to discuss the missing checkrides he says he found, Mr. Roberts said "Nope. But I did give that information to [Mr. Lee] to relay to [Complainant]." He never called Complainant himself, but said he emailed him about his findings. When asked to find any of his purported emails to Complainant in Respondent's exhibits, Mr. Roberts could not. He indicated that the "gray books" showed all of Complainant's deficiencies, but acknowledged that none of Respondent's exhibits showed these. When asked to review safety meeting notes from November 12, 2012, Mr. Roberts acknowledged that they discussed the ARH contract without mentioning Complainant, but opined that a safety meeting would not be the place to discuss personnel problems. See RX 9, page 21; Tr. at 1124-34.

Mr. Roberts could not recall if Complainant was at Respondent's Anchorage facility on November 23, 2012. Mr. Roberts does not know how many times Mr. Porter called Complainant between November 23 and 27, but Mr. Porter told Mr. Roberts that he did try to call. When confronted with the statement that Mr. Porter never tried to call Complainant, he suggested that maybe he misunderstood Mr. Porter. He had assumed that "contact" meant Mr. Porter tried to call Complainant, when Mr. Porter might have tried to contact Complainant by text or email instead. Tr. at 1136-39.

Mr. Roberts agreed that he taught Mr. Porter how to capture a screenshot of his phone's call history so he would have proof that he called Complainant. RX 14 is his November 25, 2012 email to Mr. Porter with these instructions. Tr. at 1139-41.

According to Mr. Roberts, Complainant was suspended because he did not show up at the pilot meeting after the FAA inspection. There were two pilot meetings that he recalled: one on the Friday after Thanksgiving, and another on the following Sunday for ground academics and fixing deficiencies in the gray books. When asked if he would sign a document for another pilot that he took on a checkride, he indicated that he would not, and if he did he would indicate that he was signing for that pilot, not as the pilot. Tr. at 1141-44.

Mr. Roberts meet with Mr. Stanaland on "too many" occasions. Respondent had enjoyed good relations with the hospital, but as soon as Complainant left the relationship went downhill quickly. Mr. Roberts suspected that the operations with the hospital were good under Complainant because if Mr. Stanaland asked Complainant to do something, he would do it regardless of whether the pilots were qualified for the assignment, and that Complainant pushed the crew and airplane into places that they should not be. Mr. Roberts acknowledged that he might have been the person that told Mr. Stanaland in a mid-December 2012 meeting that Complainant went to the FAA. He recalled Mr. Porter relaying the same thing to Mr. Stanaland at that meeting. Tr. at 1147-50.

RX 15 is the email that Mr. Roberts drafted at the direction of Mr. Porter to send from Mr. Porter to Complainant. Mr. Roberts did not recall learning that Complainant called Mr. Porter back and emailed Mr. Porter as requested in that email. And Mr. Roberts did not remember how Mr. Porter terminated Complainant's employment, or being told by Mr. Porter that he terminated Complainant's employment. But Respondent had surmised by late December that Complainant was the whistleblower, based on Complainant's October 16 letter and his failure to come to work when the FAA arrived for inspection.⁶⁹ Tr. at 1151-55.

Upon the Tribunal's questioning, Mr. Roberts stated that Mr. Giese's pilot's records were in order when he reviewed them. He reiterated that his task for Respondent was to focus on the pilots that flew the ARH contract.

⁶⁹ Mr. Roberts later stated that, at the time of the FAA inspection, Complainant's absence made Respondent suspect that the FAA was there to inspect Complainant's records as a check airman. Tr. at 1164.

C. Summary of the Documentary Evidence⁷⁰

In support of his case, Complainant presents the following evidence, as summarized below:

Exhibit	Description
CX 1	FAA FOIA Documents
CX 2	NTSB Documents
CX 3	Safety Report Dated November 7, 2012
CX 4	Airman Competency/Proficiency Check December 12, 2012
CX 6	E. Lee Gmail December 13, 2011
CX 7	Safety Report October 16, 2012
CX 8	G. Porter Text November 25, 2012
CX 9	G. Porter Text November 25, 2012
CX 10	G. Porter Text November 25, 2012
CX 11	B. Bell Gmail November 27, 2012
CX 15	BMAS Safety Manual
CX-18 (CX0507)	Falsified / Forged Documents
CX-18 (CX0508)	Falsified / Forged Documents
CX-18 (CX0515)	Falsified / Forged Documents
CX-18 (CX0517)	Falsified / Forged Documents
CX18 (CX0518)	Falsified / Forged Documents
CX 19 (CX0519)	Check Ride with Accurate Signature

⁷⁰ The following exhibits (or portions of exhibits) were specifically admitted at hearing:

- CX 1 (CX0005-0011). Tr. at 246.
- CX 2. Tr. at 172.
- CX 3 (CX0193). Tr. at 258.
- CX 3 (CX0194-0195). Tr. at 261.
- CX 4. Tr. at 199
- CX 15. Tr. at 95
- CX 18 (CX0507-CX0518). Tr. at 106, 108, 110, 111.
- CX 19 (CX0519). Tr. at 105.
- CX 28 (CX0633-0653). Tr. at 136.
- CX 33. Tr. at 17.
- CX 34. Tr. at 17.
- RX 1-28. Tr. at 18, 19.

Exhibit	Description
CX 28 (CX0633-0653)	Gmail re Shell and Investigation Documents November 30, 2012
CX 33	G. Porter Deposition Transcript September 23, 2016
CX 34	J. Porter Deposition Transcript September 29, 2016

In support of its position, Respondent presents the following evidence, as summarized below:

Exhibit	Description
RX 1	Transcript of B. Bell Deposition September 22, 2016
RX 2	B. Bell Resume August 30, 2011
RX 3	Pilot Job Description undated
RX 4	Eric Lee email to Brian Bell re A.C.P. December 13, 2011
RX 5	Eric Lee email to employees re Brian Bell A.C.P. December 13, 2011
RX 6	Eric Lee email to ARH re Brian Bell A.C.P. December 16, 2011
RX 7	Safety Report re: Beluga prop damage July 23, 2012
RX 8	Various emails between Eric Lee and Brian Bell August 10, 2012 to November 18, 2012
RX 9	Safety Meeting Minutes July 23, 2012 to December 12, 2012
RX 10	Eric Lee email to Randy Roberts re: employment
RX 11	Randy Roberts Resume
RX 12	BMAS Emergency Notice – Randy Roberts A.C.P.
RX 13	Gary Porter email to Brian Bell re: safety November 10, 2012
RX 14	Randy Roberts email to Gary Porter re: Suspension Notice
RX 15	Gary Porter email to Brian Bell re: Job Abandonment December 19, 2012
RX 16	North Slope Borough employment packet 2013
RX 17	Brian Bell email re: Erin Witt Schedule April 15, 2012
RX 18	Bill Ryan email to Brian Bell re: Aircraft maintenance issues August 31, 2012
RX 19	Evergreen Safety Report by Brian Bell
RX 20	Randy Roberts email to Mitch Stanaland re: Brian Bell contact February 20, 13
RX 21	Email Brian Bell acting as AirSafety News November 10, 2015
RX 22	Exhibit A to Bell Response to First Discovery Request June 22, 2016
RX 23	Bell Employment History Matrix
RX 24	Bell Resume ACDC Consulting Flight Crew April 6, 2014
RX 25	Bell Resume History December 28, 2012
RX 26	Bell Letter of Employment Charter Air August 26, 2013
RX 27	Bell Resume History April 15, 2014
RX 28	Bell Emails Seeking Employment 2013-2014

III. ISSUES⁷¹

1. Did the Complainant engage in protected activity?
2. Did the Respondent take an unfavorable personnel action against Complainant?
3. Was the protected activity a contributing factor in the unfavorable personnel action?
4. In the absence of the protected activity, would the Respondent have taken the same adverse action?
5. What relief, if any, is warranted?

A. Summary of Complainant's Position

Complainant asserts that the evidence shows the following: Respondent first employed Complainant as a line pilot, later promoting him to manager of the ARH medevac contract in August 2011. Complainant emailed Mr. Porter on October 16, 2012 about numerous perceived safety issues at Respondent, and later discussed these concerns with Mr. Porter at the Millennium Hotel. Mr. Moss forwarded Complainant's email to Mr. Porter on October 26, 2012, agreeing with Complainant's stated concerns and urging Mr. Porter to take action. On November 19, 2012, Mr. Porter admitted to Complainant over the phone that Mr. Lee had falsified CFIT records. Complainant insisted that other records were also falsified, and Mr. Porter said he would get back to Complainant by the end of the day. Mr. Porter never did.

Complainant filed a safety complaint with the FAA on November 21, 2012. FAA inspectors subsequently conducted an inspection of Respondent's Anchorage facility on November 23, 2012. Mr. Porter filled out safety reports for this surprise inspection, erroneously (or deliberately) backdating the report to November 7, 2012. Based on their findings, the FAA took action against Mr. Lee and Respondent for, among other things, forging pilot checkrides. When Mr. Porter learned that Mr. Lee had been forging checkrides, he took no action against him. In fact, Mr. Porter continued paying Mr. Lee even after the FAA issued an emergency suspension of his certificates, until after his FAA hearing and final revocation in June 2014.

By contrast, Mr. Porter suspended Complainant on November 25 and then terminated his employment on November 27. Both Mr. Porter and Mr. Roberts had deduced that Complainant was the whistleblower, since he had raised safety issues prior to the FAA inspection and did not show up for work when the FAA arrived. In fact, Mr. Porter told Mr. Stanaland in early- to mid-December 2012 that Complainant had gone to the FAA because he was a disgruntled employee.

Respondent also took adverse employment action towards other whistleblowers. Two other BMAS employees—Mr. Siegel and Mr. Moss—who had expressed safety concerns were also dismissed around the time that Complainant was fired. Mr. Roberts referred to them as the “three Amigos.” Mr. Porter stated that as of November 25, 2012, he believed several employees had gone to the FAA, and used the term “disgruntled employee” on different occasions to separately describe Complainant and the “several employees” who he believed had reported to

⁷¹ Respondent conceded in its Pre-Hearing Position Statement that Complainant's complaint was timely.

the FAA. In sum, Respondent stood behind the employee (Mr. Lee) who was responsible for numerous FAA violations, while ousting those who brought those violations to light.

Taken as a whole, the evidence shows that Complainant's protected activity was a contributing factor to Respondent's adverse actions against him. Respondent spoke glowingly about Complainant when it promoted him to manager of the ARH medevac contract, as did ARH's medevac contract manager, Mr. Stanaland. Respondent produced no negative written reviews or complaints about Complainant's performance, and its witnesses on this issue (Mrs. Witt and Mr. Makar) suffered from credibility issues. Mr. Porter suspended Complainant two days after the FAA initiated its inspection, stating that he would consider his job abandoned if Complainant did not reply by the end of the day. Despite the fact that Complainant responded to Mr. Porter's email by phone, email, and text, Mr. Porter failed to reply and terminated Complainant's employment.

Respondent also failed to develop a consistent narrative concerning its handling of Complainant's safety concerns. Mr. Porter asserted that he had turned the investigation of Complainant's October 16 safety report to Mr. Roberts; however, Mr. Roberts testified that investigating this safety report "was not in my charter." Respondent has failed to credibly explain its termination of Complainant on grounds unrelated to his protected activities, which shows that his protected activities were a contributing factor to his termination.

Circumstantial evidence further demonstrates that Respondent blacklisted Complainant for his whistleblowing. He had unusual difficulty getting a job after leaving Respondent, as did Mr. Siegel and Mr. Moss. After finding a temporary medevac pilot position, the owner of the outfit told Complainant that he knew Mr. Porter and had heard about Complainant's reporting to the FAA. Mr. Siegel also heard from a prospective employer that it had received a poor recommendation from Respondent.

B. Summary of Respondent's Position

In its brief, Respondent asserts the following: Complainant's termination was the result of mounting performance issues and his choice to cease communicating with BMAS in a meaningful way. After Respondent hired Complainant in August 2011, it enlisted him to spearhead the ARH contract in December 2011. By February 2011, Complainant also started to serve as Respondent's King Air 200 check airman for medevac operations. Complainant worked a flexible, on-call schedule, and was expected to handle anything in the ARH operation that needed attention. For these services, Respondent paid Complainant \$350 per day, or approximately \$145,000 annually.

Complainant headed the ARH contract as a controlling micromanager who questioned pilots' decisions and "pushed" them to make unsafe decisions. He would lash out at subordinates and use his authority over scheduling in an authoritarian and retributive manner. Complainant demonstrated open animosity towards his supervisor, Chief Pilot Mr. Lee, which resulted in significant disruptions to the ARH operation. In response to increase medevac demand, Respondent purchased the King Air 350 in July 2012, and paid approximately \$25,000 to have Complainant type-rated. After Complainant and Mr. Roe conducted a familiarization

flight in the aircraft to Beluga, in which damage to the propeller occurred, Respondent reassigned Mr. Roe as captain of the King Air 350 and Complainant as the first officer. In response, Complainant demanded that he be taken off the flight schedule for the King Air 350, and refused to meaningfully assist Mr. Roe on the flights to which he was assigned. At this time, it became apparent that Complainant was vying for Mr. Lee's job.

As a result of Complainant's behavior, many of Respondent's pilots became extremely frustrated with Complainant's leadership and flying practices. Mr. Giese and Mr. Makar reported their frustrations about Complainant to Respondent sometime in 2012, Ms. Witt had recommended that Complainant be terminated as early as June 2012, and Mr. Roe brought his concerns to Respondent on a weekly basis starting in August 2012. Mr. Roe testified that Complainant should have expected termination given his response to the King Air 350 reassignment and his general performance as the ARH contract manager.

By August 2012, Respondent decided to hire a consultant to address paperwork issues and prepare for an orderly transition and replacement for Complainant. Mr. Roberts met with Respondent that month, and immediately opined that Respondent needed a change in leadership for the ARH operation. Respondent officially hired Mr. Roberts in September 2012, who testified that Respondent was "actively working to replace Complainant as soon as possible." Respondent found a pilot named Les Bouma, whom it planned to take over Complainant's role when he was hired.

Respondent notified Complainant on October 7, 2012 that Mr. Roberts would be taking over a number of his responsibilities, including record management, pilot paperwork, training, tracking, and handling safety issues. Complainant testified that over the next week, he observed Mr. Roberts auditing Respondent's records in the Anchorage office and informally meeting with pilots to discuss their concerns. Mr. Roberts never interviewed Complainant.

On October 16, 2012, Complainant emailed Mr. Porter, advising of systematic companywide failures. By this time, Respondent had already taken steps to address these general concerns. Complainant testified that Respondent's operation was "shaky" from the beginning of his employment in August 2011, including numerous FAA violations, yet failed to raise any of these concerns until October 2012.

As of November 7, 2012, Respondent had not determined the exact date on which Complainant's employment would end. Les Bouma was hired at least prior to November 15 to fly the King Air 350, and by November 18, Complainant was notified that his duty schedule, authority, and compensation were all being reduced. On November 19, 2012, Complainant met with Mr. Porter in the basement of the Alaska Regional Hospital regarding his safety concerns. The next day, Complainant secretly contacted the FAA.

On November 23, 2012, the FAA initiated an inspection of the Anchorage hangar, stating that it was "some routine stuff." Complainant alleged that he arrived at the hangar immediately after the FAA left, but made no attempt to assist or communicate with Mr. Porter or Mr. Lee. Respondent made numerous attempts to contact Complainant over the next few days, via telephone, email, and text, which is how Complainant usually communicated. On November 25,

Respondent convened a late-morning pilot meeting. Complainant did not attend, prompting Mr. Porter to ask, “where’s Brian Bell?”

Following Complainant’s failure to attend this meeting, Mr. Porter acted on the advice of Mr. Roberts and sent Complainant a suspension notice via text and email at 11:44 a.m. The notice requested that Complainant contact Mr. Porter at his earliest convenience. Complainant acknowledged receipt of both messages, yet decided not to contact Mr. Porter because he “felt that there was no need to immediately respond without thinking things through.” He spoke with Mr. Moss and Mr. Siegel several times over the next few days. Complainant also testified that he had not spoken with anyone in management from Respondent since November 19, and that he was already looking for another job at that point.

By November 27, 2012, Respondent had not received a response from Complainant to its suspension text and email, and no one had seen or heard from Complainant in nine days. The FAA inspection was continuing, and Mr. Porter again emailed Complainant requesting specific information and an explanation for his lack of communication. Complainant attempted to contact Mr. Porter later than day by phone and email, though Mr. Porter testified that he did not receive Complainant’s email or phone message for several days. Neither his email nor his phone message contained an explanation for eight straight days of zero communication, and Complainant was deemed terminated for abandoning his position.

Respondent argues that Complainant has failed to meet his burden to show that his protected activity contributed to his termination. Complainant’s employment with Respondent was under scrutiny for several months prior to his decision to raise safety concerns, thus attenuating any inference of retaliation from the temporal proximity of Complainant’s FAA reporting and his subsequent termination. Further, the evidence fails to show that Respondent had any knowledge that Complainant contacted the FAA on November 20, 2012. Respondent did not realize that Complainant was the FAA informant until mid-December—three weeks after he was terminated.

Respondent also notes that Complainant’s two acts of protected activity closely follow Respondent’s steps to sever his employment. Complainant emailed Mr. Porter with general safety concerns soon after Mr. Roberts had been hired and taken over many of Complainant’s duties. And Complainant reported Respondent to the FAA following Respondent’s reduction of his hours and pay and hire of Les Bouma to fly the King Air 350. Further, Complainant admitted that he perceived blatant safety violations in Respondent’s operations from the very beginning of his employment. Thus, Complainant’s safety reports were merely attempts to insulate his position from the consequences of his poor performance.

Even if Complainant could show that his protected activity was a contributing factor to his termination, Respondent contends that it has shown by clear and convincing evidence that it would have taken the same adverse action. Five pilots testified that Complainant was a controlling micromanager, and by August 2012 Respondent was taking active steps to replace Complainant as the assistant chief pilot and remove him from the company. Mr. Roberts explained the reason for Respondent’s delay; namely, that Respondent needed to keep a second pilot on the King Air 350 and was in the process of recruiting another individual to take over as

assistant chief pilot. With the addition of Les Bouma and Mr. Roberts to the team, Respondent no longer needed Complainant to handle the administration of the ARH contract or fly the King Air 350. Respondent initially reduced Complainant's salary, duty hours, and assignments, then completed the process by terminating his employment following his failure to communicate with Respondent for nine days. Given Complainant's open hostility and his inability to effectively manage the ARH program, Respondent's termination was inevitable and well-justified.

Lastly, Respondent argues that the evidence is insufficient to prove that Respondent engaged in blacklisting. Unable to produce any witnesses to testify to Respondent's alleged blacklisting, Complainant relies solely on hearsay and speculation. Complainant's failure to secure employment following his dismissal at Respondent was a function of his past employment history, his poor reputation in the aviation industry, and his personal choices.

IV. CONCLUSIONS OF LAW

To prevail on his whistleblower complaint under AIR 21, Complainant bears the initial burden to demonstrate the following elements by a preponderance of the evidence: (1) he engaged in activity protected; (2) Respondent took unfavorable personnel action against him; and (3) the protected activity was a contributing factor in the unfavorable personnel action. *See Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, slip op. at 6 (Nov. 26, 2014) (citing 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a)). If Complainant establishes this *prima facie* case, the burden shifts to Respondent to demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of the protected activity. *Mizusawa v. United States Dep't of Labor*, 524 F. App'x 443, 446 (10th Cir. 2013) (citing 49 U.S.C. § 42121(b)(2)(B)(iv)).

A. Credibility

In deciding the issues presented, this Tribunal considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, this Tribunal has taken into account all relevant, probative and available evidence and assessed its cumulative impact on the record contentions. *See Frady v. Tennessee Valley Authority*, Case No. 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995).

The ARB has stated its preference that ALJs "delineate the specific credibility determinations for each witness," though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. *Johnson v. Rocket City Drywall*, ARB No. 05-131, ALJ

No. 2005-STA-024 (Jan 31, 2007); *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14, n.5 (3d Cir. 1975).

This Tribunal's credibility determinations are explained in connection with specific witness testimony below.

B. Complainant's Prima Facie Case

1. Protected Activity

Under the Act, no air carrier, or contractor or subcontractor of an air carrier, may discriminate against an employee because the employee:

(1) 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; (2) 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; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a)(1)-(4).

The Board has explained, "As a matter law, an employee engages in protected activity any time [h]e 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, where the employee's belief of a violation is subjectively and objectively reasonable." *Sewade v. Halo-Flight, Inc.*, ARB No. 13-098, slip op. at 7-8 (Feb. 13, 2015) (citing 49 U.S.C. § 42121(a)) (emphasizing that "an employee need not prove an *actual* FAA violation to satisfy the protected activity requirement") (emphasis in original)). Thus, the "complainant must prove that he reasonably believed in the existence of a violation," which entails both a subjective and an objective component. *Burdette v. ExpressJet Airlines, Inc.*, ARB No. 14-059, slip op. at 5 (Jan. 21, 2016).

To prove subjective belief, a complainant must show that he "held the belief in good faith." *Id.* To determine whether a complainant's subjective belief is objectively reasonable, an ALJ must assess his belief "taking into account the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Id.* (internal quotation marks omitted) (evaluating the reasonableness of a pilot's belief in light of his training and experience). Though the complainant "need not cite to a specific violation, his complaint must at least relate to violations of FAA orders, regulations, or

standards (or any other violations of federal law relating to aviation safety).” *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, slip op. at 9 (July 2, 2009).

Discussion of Protected Activity

Based on the uncontroverted evidence of record, the Tribunal finds that Complainant engaged in numerous instances of protected activity. First, Complainant emailed Mr. Porter on October 16, 2012, expressing concerns about “alleged safety violations, maintenance irregularities, falsification, shortcuts, and other improper activities.”⁷² CX 7; Tr. at 364-71. Second, Complainant followed up this email by meeting with Mr. Porter at the end of the month for 45 minutes at the Millennium Hotel in Anchorage. Though Complainant and Mr. Porter’s testimonies diverge regarding some of the specifics of this conversation, at minimum Mr. Porter acknowledged that Complainant asserted there were forgeries in Respondent’s records. Tr. at 318. Third, Complainant contacted Mr. Porter on November 19, 2012 in a last-ditch attempt to resolve his concerns internally. Tr. at 389-96. Fourth, after Mr. Porter failed to get back to him by the end of the day, Complainant called the FAA on November 20, 2012. *Id.* He went into the FAA office the next day, bringing copies of the documents that he believed were forgeries and falsifications. *Id.*

Each of these communications constitutes protected activity under AIR 21. There is no reason to question Complainant’s assertion that, at the time he reported his concern, he believed that some of Respondent’s practices violated FAA standards.⁷³ Indeed, a subsequent FAA investigation validated his beliefs by finding numerous violations in Respondent’s records related to pilot training and airplane maintenance. *See* CX 1 at 5-13.⁷⁴ An NTSB hearing also resulted in a finding that Mr. Lee had intentionally falsified Respondent’s records. CX 2 at 560-73. Respondent does not dispute the existence of actual FAA violations that Claimant referenced

⁷² The Tribunal noted at the hearing that this email references potential violations of specific FAA regulations; namely, 14 C.F.R. §§ 61.59 (falsifications) and 135.65 (mechanical irregularities). Tr. at 488-490.

⁷³ Rather than argue that Complainant’s reporting did not constitute protected activity, Respondent primarily notes that the circumstances call his motives into question. Respondent alleges that Complainant knew of these issues since the beginning of his tenure, yet delayed reporting any perceived violations of Federal aviation law until after Respondent was considering taking action against him in an attempt to insulate his job from termination. *See* Resp. Br. at 25.

The undersigned finds Respondent’s allegations to be immaterial. While Respondent correctly notes that protected activity will not shield a worker from the consequences of his poor performance, *see McLean v. American Eagle Airlines, Inc.*, ARB No. 12-005, ALJ No. 2010-AIR-16, slip op. at 9 (ARB Sept. 30, 2014), an employee’s motive for blowing the whistle is irrelevant to the question of liability under the Act. Should a covered employer operate in such a manner that leads an employee to have a reasonable, good faith belief in the existence of a possible violation of federal aviation law, then his reporting of that perceived violation will constitute protected activity. And an employer may not take adverse action against that employee because of such reporting, regardless of when the employee first became aware of the alleged violation or his motive for coming forward.

⁷⁴ As part of the settlement with the FAA, Respondent agreed that it had violated numerous safety-related FAA regulations, and paid a \$50,000 fine. *See* CX 1 at 5, 8-10, 13.

in his reports. Thus, the Tribunal finds that Complainant's four instances of reporting his safety concerns—three times to his employer, once to the FAA—each constitutes protected activity.

2. Adverse Action

The Act provides, “No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee” engaged in protected activity. 49 U.S.C. § 42121(a). In *Vannoy v. Celanese Corp.*, the Board observed, “An adverse action, however, is simply an unfavorable employment action, not necessarily retaliatory or illegal. Motive or contributing factor is irrelevant at the adverse action stage of the analysis.” ARB No. 09-118, slip op. at 13-14 (Sept. 28, 2011).

The Board has held “that the intended protection of AIR 21 extends beyond any limitations in Title VII and can extend beyond tangibility and ultimate employment actions.” *Menendez*, ARB Nos. 09-002, 09-003 at 17 (citing *Williams v. American Airlines*, ARB No. 09-018, slip op. at 10-11 n.51 (Dec. 29, 2010)). The Board elaborated: “Under this standard, the term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Id.* at 17 (internal quotation marks omitted). Ultimately, an employment action is adverse if it “would deter a reasonable employee from engaging in protected activity.” *Id.* at 20. Accordingly, “the list of prohibited activities in Section 1979.102(b) [is] quite broad and intended to include, as a matter of law, reprimands (written or verbal), as well as counseling sessions by an air carrier, contractor or subcontractor, which are coupled with a reference of potential discipline.” *Williams*, ARB No. 09-018 at 10-11. The Board further observed that “even *paid* administrative leave may be considered an adverse action under certain circumstances.” *Id.* at 14 (citing *Van Der Meer v. Western Ky. Univ.*, ARB No. 97-078, slip op. at 4-5 (Apr. 20, 1998) (holding that “although an associate professor was paid throughout his involuntary leave of absence, he was subjected to adverse employment action by his removal from campus)).

Notably, the implementing regulations specifically mention blacklisting as a “prohibited act.” 29 C.F.R. § 1979.102(b). A “blacklist” is defined as “a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate.” *Pickett v. Tennessee Valley Authority*, ARB Nos. 02-056 and 02-059, slip op. at 5 (Nov. 28, 2003). An employer engages in blacklisting when takes action intended to “disseminate damaging information that affirmatively prevents another person from finding employment.” *Id.* To rise to the level of blacklisting under the Act, the communication “must be motivated at least in part by protected activity.” *Odom v. Anchor Lithkemko/Inter'l Paper*, ARB Case No. 96-189, 96-WPC-0001, slip op. at 11 (Oct. 10, 1997) (finding a complainant's allegations of blacklisting “without merit because he did not prove” that the employer's criticism of his work performance and his ineligibility for rehire were “based on or motivated even in part by any of his protected activity, including this complaint”); *Gaballa v. The Atlantic Group*, 94-ERA-9 (Sec'y Jan. 18, 1996) (upholding an ALJ's finding of a violation of the Energy Reorganization Act's whistleblower protection provisions when a complainant's former employer discussed complainant's discrimination complaint with a putative employer). Anti-blacklisting legislation is designed to preclude an employer from making “improper

references [about] an employee's protected activity" to future employers. *Pickett*, ARB Nos. 02-056 and 02-0596 at 6.

Discussion of Adverse Action

Respondent does not dispute that it took adverse employment action against Complainant by suspending and ultimately terminating his employment. Complainant has therefore established the element of adverse action with respect to his suspension and termination. However, Respondent argues that Complainant has failed to prove that it engaged in blacklisting following his termination. This Tribunal agrees.

Complainant primarily relies on circumstantial evidence to support his allegation of blacklisting. He asserts that each of the "three amigos"—himself, Mr. Moss, and Mr. Siegel (*see* Tr. at 1080)—experienced unexpected difficulties finding work as a pilot following their termination from Respondent's employ. Compl. Br. at 10-12; *see also* Tr. at 420-22, 738. Further, Complainant alleged hearing from a subsequent temporary employer that Mr. Porter had told him about Complainant's reporting to the FAA. Tr. at 421-25. Mr. Siegel likewise testified to hearing from a prospective employer that it had received a poor recommendation from Respondent. Tr. at 739.

This evidence is insufficient to establish that Respondent blacklisted Complainant due to his protected activities. Complainant failed to call any witnesses that could have substantiated this claim with first-hand knowledge, and relies solely on hearsay and speculation to confirm his blacklisting allegation. The Tribunal need not discern the true cause of Complainant's failure to obtain employment easily after his dismissal from Respondent's employ; it is sufficient to find that Complainant has failed to prove that Respondent inappropriately commented on his protected activities to potential employers when asked about his performance.

Accordingly, the Tribunal finds that Complainant has established adverse action only in relation to Respondent's suspension and subsequent termination of his employment in November 2012.

3. Contributing Factor Analysis

The Tribunal must next determine whether Complainant's protected activity was a contributing factor in Respondent's decision to take unfavorable personnel action against him. *See* 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). The Board has held that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Williams v. Domino's Pizza*, ARB 09- 092, ALJ No. 2008-STA-52, slip op. at 5 (Jan. 31, 2011). The level of causation that a complainant needs to show is "extremely low," and an ALJ "should not engage in any comparison of the relative importance of the protected activity and the employer's nonretaliatory reasons." *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ Case No. 2014-FRS-154, slip op. at 15 (Sept. 30, 2016). Therefore, the complainant "need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and

another [contributing] factor is the complainant's protected activity." *Hutton v. Union Pacific R.R.*, ARB No. 11-091, ALJ No. 2010-FRS-00020, slip op. at 8 (May 31, 2013). Put another way, a trier of fact must find the contributing factor element fulfilled when the following question is answered in the affirmative: "did the protected activity play a role, *any* role whatsoever, in the adverse action?" *Palmer*, ARB No. 16-035, slip op. at 52.

A complainant may prove this element through direct evidence or circumstantial evidence. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, slip op. at 6-7 (Feb. 29, 2012). Though "[t]emporal proximity between protected activity and adverse personnel action 'normally' will satisfy the burden of making a *prima facie* showing of knowledge and causation," and "may support an inference of retaliation, the inference is not necessarily dispositive." *Barker v. Ameristar Airways, Inc.*, ARB No. 05-058, slip op. at 7 (Dec. 31, 2007); *see also Powers*, ARB No. 13-034, slip op. at 23 (explaining that at times, temporal proximity alone may be sufficient to demonstrate the element of contributing factor). "Also, where an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." *Barber v. Planet Airways, Inc.*, ARB No. 04-056, slip op. at 6-7 (Apr. 28, 2006). "The ALJ is thus *permitted* to infer a causal connection from decisionmaker knowledge of the protected activity and reasonable temporal proximity." *Palmer*, ARB No. 16-035, slip op. at 56.

To succeed in a whistleblower action, a complainant must also show that the employer had knowledge of the protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). This requirement stems from the statutory language prohibiting employers from taking adverse action against an employee "because" the employee has engaged in protected activity. *Id.* (citing 49 U.S.C. § 42121(a)). Accordingly, a complainant bears the burden of showing that the person making the adverse employment decision knew about the employee's past or imminent protected activity. *Id.*

Discussion of Contributing Factor Analysis

The record contains no direct evidence that Respondent retaliated against Complainant when it suspended him on November 25, 2012 and constructively fired him on November 27, 2012; however, the temporal proximity between Claimant's protected activities and Respondent's adverse action provides circumstantial evidence of Respondent's knowledge of Complainant's protected activities and its retaliatory motive.

As noted above, Complainant engaged in four instances of protected activities in 2012. Complainant emailed his concerns to Mr. Porter on October 16 (CX 7), met with him at the Millennium Hotel to discuss his concerns in detail (Tr. at 141-48, 318, 364-71), called Mr. Porter on November 19 to try to resolve these issues one last time internally (Tr. at 389-96), and finally contacted the FAA on November 20 (Tr. at 389-96). The FAA conducted an inspection of Respondent's Anchorage facility on November 23. CX 3 at 195. Respondent suspended Complainant two days later on November 25, and constructively fired him two days after that on November 27. Thus, assuming that Respondent could not have inferred that Complainant reported his concerns to the FAA until at least November 23, when the FAA conducted its

surprise inspection, the temporal proximity of Complainant's suspension (two days) and termination (four days) supplies an initial evidentiary inference that Respondent retaliated against Complainant for reporting his concerns to the FAA. *See Svendsen v. Air Methods, Inc.*, ARB No. 03-074, slip op. at 8 (Aug. 26, 2004) (holding in dicta that a nine-day period between the complainant's protected activity and his firing would support the complainant's theory of temporal proximity).

Respondent argues that this inference is displaced by two key factors: (1) there is no evidence that Mr. Porter knew that Complainant had gone to the FAA when he suspended and fired Complainant, and (2) Mr. Porter had good grounds to suspend and fire Complainant; namely, that Complainant had effectively abandoned his position since the FAA inspection and Respondent was planning to fire him anyway. The Tribunal recognizes that these counter-factors have some merit. As explained below, there is good evidence that Respondent was taking steps to find a new Assistant Chief Pilot to replace Complainant as the head of the ARH contract in the months prior to his protected activities. And it is reasonable to conclude that Complainant's unexplained lack of communication following the surprise FAA inspection gave Mr. Porter an impetus to impose some additional discipline. Nevertheless, this Tribunal perceives numerous irregularities with Mr. Porter's actions during this time period, and his testimony on this subject lacked credibility. Both of these problems tend to undermine Mr. Porter's assertions that (1) he was not aware of Complainant's report to the FAA, and (2) this knowledge played no role in his decision to suspend and fire Complainant.

a. Whether Respondent Had Knowledge of Complainant's Protected Activity

This Tribunal finds that temporal proximity—together with the context of the events leading to the FAA's November 23 inspection and what Mr. Porter did know—is sufficient to impute knowledge of Complainant's FAA reporting to Mr. Porter.

At the hearing, Mr. Porter testified that he believed Complainant was the subject of the FAA investigation, rather than the whistleblower, because the FAA was also inspecting records for which Complainant was responsible. Tr. at 175. But such a professed assumption strains credulity in light of Complainant's repeated attempts to draw Mr. Porter's attention to alleged forgeries in these very records. *See* Tr. at 318. Complainant had thrice communicated his concerns to Mr. Porter about these records in the weeks leading up to the FAA November 23 inspection: an October 16 email detailing "alleged safety violations, maintenance irregularities, falsification, shortcuts, and other improper activities" (CX 7; Tr. at 364-71); a meeting at the end of October where Complainant again maintained that Respondent's records contained forgeries (Tr. at 318.); and a phone conversation on November 19 where Mr. Porter stated that he felt that Complainant was "holding [him] hostage" by pressing these concerns. Tr. at 390.

Only four days later, the FAA conducted a surprise inspection of Respondent's Anchorage hanger, focusing in part on the very records that Complainant had told Mr. Porter contained forgeries. Under these circumstances, it seems that Mr. Porter would have assumed that Complainant was the whistleblower—not the subject of the FAA investigation. Indeed, Mr.

Roberts confirmed that he and Mr. Porter used this line of reasoning in forming the belief that Complainant was the whistleblower.⁷⁵ Tr. at 1156.

Moreover, as detailed below, Mr. Porter's testimony on this subject lacked credibility. Therefore, the Tribunal discounts his assertion that he did not believe that Complainant had gone to the FAA at the time he fired him.

b. Respondent's Alleged Grounds to Fire Complainant

i. Poor Performance as Assistant Chief Pilot and ARH Contract Manager

Respondent has adequately demonstrated that it was preparing to replace Complainant with another Assistant Chief Pilot to head the ARH contract and fly the King Air 350 in the months leading up to Complainant's protected activities. Numerous pilots working the ARH contract testified that they found Complainant's managerial style to be abrasive and controlling. Mrs. Witt stated that she communicated these concerns about Complainant to Mr. Lee or Mr. Porter up to twice a month, and recommended that they terminate him prior to going on maternity leave in June 2012. Tr. at 647-49. Mr. Giese similarly found Complainant's leadership to be frustrating, opining that his continual criticism of pilot decisions degraded the performance of the group. Tr. at 878-83. He brought these concerns to Mr. Lee and talked "in length" with Mr. Roberts about them. Tr. at 885. Mr. Roe was assigned to fly PIC with Complainant in the King Air 350, and testified that Complainant became despondent and refused to assist with many cockpit duties after Respondent placed him in SIC for all King Air 350 flights. Tr. at 693-700, 785-90. Though he did not recommend Complainant's termination, Mr. Roe did communicate his frustrations with Complainant's disengagement to Mr. Lee and Mr. Porter on a weekly basis, and felt that Complainant "should have expected nothing less than to be terminated." Tr. at 802-03.

⁷⁵ During cross-examination, Mr. Roberts disingenuously attempted to distance himself from the apparent conclusion that this line of reasoning would have immediately permitted himself and Mr. Porter to infer that Complainant was the whistleblower following the November 23 FAA inspection.

Q Well, you both told Mitch Stanaland in December of 2012 that you believed that Brian Bell was the whistleblower.

A Yeah. The emphasis was on "believe" though. That was the theory.

Q What was the basis of the belief?

A Brian didn't show up for work on the day after the FAA or the day after Thanksgiving when the FAA came in.

Q And he had written a letter on October 16th complaining about all of the problems that Bald Mountain Air Service, which was repeated by Jim Moss 10 days later. It was pretty easy to figure out who the whistleblower was. Wasn't it?

A No. Not really.

Q Well, who else could it have been?

A It could have been Santa Claus for all we knew.

Tr. at 1156.

In his testimony, Mr. Porter stated that he was aware of these reports about Complainant. Tr. at 200-01. He alleged that, upon the suggestion of either Mr. Lee or Mr. Roberts, he had decided to fire Complainant sometime in November 2012.⁷⁶ However, Complainant was still the head of the ARH contract at the time, and Mr. Porter stated that he had not yet determined the exact date on which Complainant's employment would end. Tr. at 322-25. Mr. Roberts similarly testified that he was recommending Complainant's termination "all the time" because he perceived Complainant to be the cause of the problems with the ARH contract. Tr. at 1075-78, 1095-97. He stated that Respondent had hired Les Bouma to be the Assistant Chief Pilot and take over Complainant's oversight of the ARH contract, and that Mr. Porter did not want to fire Complainant without having "somebody waiting in the wings" to perform his duties for Respondent. Tr. at 1079, 1091.

The documentary evidence partially corroborates Mr. Porter and Mr. Roberts's testimonies on this subject. Respondent had promoted Complainant to Assistant Chief Pilot on December 13, 2011, and it gave him authority over much of the ARH contract. *See* RX 5. But by September 18, 2012, a month before Complainant had engaged in any protected activity, Respondent was offering this position to Randy Roberts. *See* RX 10.⁷⁷ Respondent announced the hiring of Mr. Roberts to its pilots on October 8, 2012 (RX 9 at 13), and specifically welcomed him as the Assistant Chief Pilot on November 12, 2012 (RX 9 at 21). Complainant appears to have been aware of this transition. Mr. Lee informed Complainant on October 7, 2012 that he had hired Mr. Roberts for help with management of pilot paperwork, training, tracking, and safety issues. RX 8 at 14. Mr. Lee notified Complainant that he would reduce some of Complainant's work days under the ARH contract and redistribute his duties of pilot flight scheduling on November 11, 2012. RX 8 at 17. Though Complainant had been working an on-call, 24/7 schedule as overseer of the ARH contract (Tr. at 170, 342), Mr. Lee reduced Complainant's December schedule to a "20 on and 10 off" rotation. RX 8 at 18.

In addition, the documentary evidence supports a finding that Respondent had hired Les Bouma to replace Complainant on the King Air 350. Complainant had indicated that he wanted off the King Air 350 pilot schedule on August 15, 2012, and Mr. Lee stated that it would take some time to find another pilot to replace him. RX 8 at 2. Respondent announced an opening for the SIC position for the King Air 350 to its pilots on October 8, 2012, and announced Les Bouma's hiring on October 29, 2012. RX 9 at 13, 15.

Together as a whole, the documentary and testimonial evidence minimally establish that, because of Respondent's perception that Complainant performed poorly as an Assistant Chief Pilot, Mr. Porter had decided to hire a new Assistant Chief Pilot and demote Complainant prior

⁷⁶ Mr. Porter initially testified that his safety reports dated November 7, 2012 (CX 3 at 193-94) evidenced a date by which he had decided to terminate Complainant's employment. Tr. at 322-25. However, on cross-examination, in light of the similarities between this report and the FAA report of its November 23, 2012 inspection (CX 3 at 195-96), he acknowledged that he could have put the wrong date on these safety reports when he dated them "November 7, 2012." Tr. at 264-65.

⁷⁷ This email does not state that Mr. Roberts would be the Assistant Chief Pilot for Respondent, but the duties contained therein substantially mirror those assigned to Complainant when he received his promotion. *Compare* RX 10 with RX 5.

to any of his protected activity. Respondent was in the process of finding other employees to fill Claimant's roles, and Mr. Roberts and Les Bouma seemed to be the employees that Respondent hired to oversee the ARH contract and fly the King Air 350, respectively. Nevertheless, the documentary evidence does not support Mr. Porter's testimony that he was planning to fire—rather than simply demote—Complainant. In fact, it appears that despite welcoming Les Bouma as a King Air 350 pilot on October 29, 2012 and Mr. Roberts as the Assistant Chief Pilot on November 12, 2012, Respondent was still planning to utilize Complainant with a “20 on, 10 off” schedule in the month of December when Mr. Porter suspended and fired Complainant in late November.

For these reasons, the Tribunal grants that Respondent's issues with Complainant's job performance may have been a factor in Mr. Porter's decision to terminate Complainant's employment. Mr. Porter testified that he knew of the poor reports coming from other ARH pilots, and had perceived that Complainant's relationship with Mr. Lee, his supervisor, had “totally deteriorated.”⁷⁸ Tr. at 147, 200-01. Given Complainant's poor performance as Assistant Chief Pilot and the animus between him and Mr. Lee, it would be reasonable for Mr. Porter to consider termination, especially when combined with other grounds for discipline. But even if Mr. Porter had come to believe that he should terminate Complainant instead of simply demoting him, the evidence shows that Respondent was not planning to do so until at least after December 2012. Thus, the undersigned finds that Complainant's performance as the ARH contract manager and Assistant Chief Pilot played a minimal role in Mr. Porter's decision to terminate Complainant's employment on November 27.

ii. Abandonment of Position

Mr. Porter's primary proffered reason for the date of Complainant's termination—his unresponsiveness—resonates with some validity. Mr. Porter explained at the hearing that Complainant's schedule had him “on call,” 24/7, so he expected Complainant to be around whenever assistance was needed. Tr. at 170-175. Mr. Porter felt like Complainant was there “every time anything was going on,” and thought Complainant was “suspiciously absent” when the FAA showed up to take pictures of the paperwork for which Complainant was responsible. Tr. at 175. After suspending Complainant via text (CX 8) and email (CX 9) on November 25, he emailed Complainant again on November 27. CX 10. Citing Complainant's “inexplicable” non-responsiveness to Mr. Porter's alleged attempts to contact Complainant via phone, text, and email that weekend, Mr. Porter stated that he would assume that Complainant intended to abandon his position at Respondent if he did not contact Mr. Porter by the end of the day. CX 10.

Complainant's testimony confirms that he did not attempt to contact Mr. Porter from the time of the FAA investigation until November 27. Though Mr. Porter's suspension text and email both requested that Complainant contact Mr. Porter at his “earliest convenience,” Complainant declined to do so because he was laying low as a whistleblower. He did not believe it would serve any purpose because “all hell was breaking loose with the FAA.” Tr. at 396-405.

⁷⁸ Complainant's lack of responsiveness to Mr. Lee's emails could support this assertion. See RX 8 at 7, 12.

Assuming *arguendo* that Mr. Porter truly believed that Complainant was the subject of the FAA investigation (rather than the whistleblower),⁷⁹ such lack of communication from a key manager would certainly be grounds for discipline. Further, Mr. Porter knew Complainant had been at the hanger during the FAA inspection, and Complainant did not respond to Mr. Porter's request for prompt communication.⁸⁰ Claimant's apparent abandonment of his duties seems a plausible factor in initiating some form of discipline.

However, Mr. Porter's testimony regarding his motives for suspending and firing Complainant contains several problems that erode its credibility. First, his email to Complainant on November 27 misrepresents his prior efforts to reach Complainant. Noting that Complainant had been at the Anchorage hanger during the FAA investigation and had yet to contact Mr. Porter, he stated: "I have further been trying to contact you the past weekend by phone, text, and email, to no avail." CX 10. Mr. Porter goes on to state that due to Complainant's "non-responsiveness," he "had no choice but to suspend you from further duties." CX 10. Thus, Mr. Porter alleges in this email that he tried to reach Complainant by phone, text, and email *before* he suspended him.

This is false. Mr. Porter admitted at the hearing that he made no attempt to contact Complainant between the FAA's November 23 inspection and his November 25 suspension. Tr. at 173. The Tribunal need not discern Mr. Porter's true motive for this misrepresentation, though it appears that, at minimum, he was attempting to exaggerate the context of Complainant's unresponsiveness to justify his November 25 suspension.⁸¹ The blatant misrepresentation in this email undercuts Mr. Porter's credibility—both as to his representations therein and to his testimony as a witness. And Mr. Porter's professed reason for terminating Complainant stems from his alleged rationale for the suspension: that Complainant had been unresponsive and effectively abandoned his position. Though granting the kernel of truth therein—that Complainant was incommunicado during this period—Mr. Porter's misrepresentation gives the undersigned reason to question whether Complainant's unresponsiveness was the prime motivator in Mr. Porter's decision to terminate Complainant's employment.⁸²

Second, Mr. Porter appears to have already determined to fire Complainant by the time he sent this November 27 email despite indicating a desire to hear an explanation for Complainant's lack of communication. Mr. Porter wrote:

⁷⁹ As noted above, such an assumption seems implausible in light of Complainant's repeated contacts with Mr. Porter concerning the falsifications that he had found in Respondent's records. It seems unlikely at best that Complainant would want to draw attention to Respondent's records if he was responsible for the falsifications therein.

⁸⁰ These requests are located in Mr. Porter's suspension text and email. See CX 8; CX 9.

⁸¹ Mr. Porter also testified that he suspended Complainant "because we didn't want him goofing with the records." Tr. at 227. Yet Mr. Porter later acknowledged that the FAA had already secured the records it came to inspect, since either Mr. Ryan or Mr. Roberts told him that the FAA inspectors had taken photographs of these records. Tr. at 293-94.

⁸² The undersigned recognizes that Mr. Roberts drafted this email; however, Mr. Porter reviewed the email with Mr. Roberts before sending it out under his own email address. Tr. at 1098-99. Thus, the Tribunal assumes that Mr. Porter's representations therein constitute his own considered assertions.

. . . Please contact me as soon as possible as I would appreciate an explanation and an opportunity to determine if there are extenuating circumstances that would shed light on this situation. If I do not hear from you by the end of the day, I must assume that you intend to abandon your position at BMAS.

CX 10. Complainant returned Mr. Porter's call that afternoon and left a voicemail. Tr. at 401-05. When Mr. Porter did not return his call, Complainant also sent him an email. Tr. at 401-05; CX 11. Mr. Porter never responded to either, alleging that he received them a few days later and was "probably busy." Tr. at 235-36. When asked why he fired Complainant without returning his call or email, Mr. Porter explained that he expected Complainant to come to the hanger to talk to him in person. Tr. at 236-38. Mr. Porter also stated that he assumed Complainant would have known that he was in Anchorage despite signing his email "Gary Porter, Homer, Alaska." Tr. at 237-38, 272-73.

The Tribunal finds these explanations unpersuasive. If Mr. Porter had truly wanted Complainant to contact him by the end of the day, he would have checked his phone or email for any attempt by Complainant to do so. That he ignored Complainant's messages until a few days later instead suggests that he had no interest in hearing Complainant's explanation. Together with the misrepresentation just noted, the incongruence between Mr. Porter's words and actions additionally undermines the trustworthiness of Mr. Porter's email related to his purported basis for Complainant's suspension and termination.

Further, Mr. Porter's explanation that he was too busy with the FAA to take the time to call Complainant (*see* Tr. at 272-73) seems to conflict with his November 27 email. Therein, Mr. Porter informed Complainant that "There remain very important questions regarding the records maintained at the Anchorage base, including the location of some records, and I would have anticipated your immediate assistance in light of your role with regards to regulatory compliance for BMAS." CX 10. It seems odd then, that after requesting Complainant's assistance in locating these records, Mr. Porter would testify that he was too busy with (among other things) the FAA inspection of those very records to return Complainant's call. Each of these noted issues tend to show that Mr. Porter had already determined to fire Complainant despite professing a desire to discuss possible reasons for his unresponsiveness.

Third, this Tribunal perceived Mr. Porter's testimony to be evasive concerning a key piece of evidence. Mr. Porter discussed his two handwritten "Safety Reports" dated November 7, 2012, one of which contains a "suggestion" that Complainant be dismissed from his duties in response to an FAA inspection that uncovered deficient pilot records. *See* CX 3 at 193-94. After reviewing this Safety Report, Mr. Porter testified that he had indeed decided by November 7 that Complainant should be fired. Tr. at 322-25. However, he also acknowledged the similarity between the FAA inspections described in these "Safety Reports" and a letter from the FAA describing its November 23 inspection. Tr. at 263. But when twice directly asked if he had backdated and falsified these reports to suggest that his decision to terminate Complainant originated by November 7 rather than after November 23, Mr. Porter stated only that that he

could not remember doing that.⁸³ This Tribunal finds it evasive and potentially telling that Mr. Porter was unable to deny a clear accusation of this nature.⁸⁴

In summation, Mr. Porter's professed motivation for firing Complainant lacks credibility and therefore appears pretextual. Thus, while one of Mr. Porter's stated reasons for terminating Complainant on November 27—his lack of communication—would justify some discipline, his story as a whole fails to displace the inference of retaliation supplied by the four-day temporal proximity between the November 23 FAA inspection⁸⁵ and Complainant's termination on November 27.⁸⁶

For all these reasons, the undersigned finds that Complainant has established that Mr. Porter knew of his protected activity—including his FAA reporting—and that protected activity played a role in Mr. Porter's decision to fire him on November 27, 2012.⁸⁷

⁸³ See Tr. at 263 (cross examination of Mr. Porter by Complainant's counsel):

Q You backdated and falsified your safety report. Didn't you, sir?

A I don't remember doing that. Why would I have done that?

Q This was all the same incident. These three pages are all the same incident. The November 23rd and November 27th visit by the FAA to Anchorage and Homer. And you predated safety reports suggesting the termination of Brian Bell back to November 7th.

A Oh, I can't remember that. I don't remember doing that.

⁸⁴ The Tribunal also notes that, whatever the cause, it appears the dates on Mr. Porter's "Safety Reports" were erroneous. The narratives contained in the first Safety Report (CX 3 at 193) and the FAA inspection letter (CX 3 at 195) both describe a crewmember at Respondent's Anchorage hanger who incorrectly told the FAA inspector that BMAS records were stored electronically and not immediately accessible. Given the size of Respondent's company, it seems implausible that another employee would have reported identical misinformation to the FAA only 16 days after the first incident, particularly in light of Mr. Porter's suggestion that further training concerning record keeping was needed. See CX 3 at 193.

And while the Safety Report that contains Mr. Porter's "suggestion" that Complainant be dismissed from his duties details a different unannounced inspection, it too appears to be backdated. In particular, it states that an FAA inspection found incomplete pilot records, which led to subsequent audits finding deficiencies in every folder. See CX 3 at 194. No witness has testified to the existence any other bellwether FAA inspection related to pilot record deficiencies other than the one on November 23. Accordingly, the evidence indicates that this Safety Report was also composed sometime after the FAA inspection on November 23.

⁸⁵ This is the first day on which Respondent could have likely inferred that Complainant reported his concerns to the FAA.

⁸⁶ See *Florek v. Eastern Air Cent., Inc.*, ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (ARB May 21, 2009) ("once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation [for adverse action]").

⁸⁷ Even if Mr. Porter did not know of Complainant's FAA reporting at this time, the Tribunal would still find that the element of contributing factor has been established. The temporal proximity between Complainant's final attempt to work through the alleged forgeries with Mr. Porter on November 19 and Respondent's adverse actions on November 25 and 27 would supply a similar evidentiary inference that Complainant's protected activity played a role in Respondent's decision to suspend and terminate his employment.

4. Conclusion: Complainant's Prima Facie Case

To summarize the findings above: Complainant and Respondent are subject to the Act, Complainant's three communications with Mr. Porter and his report to the FAA were protected activities, Respondent's suspension and termination of Complainant were adverse actions, and Complainant has established that his protected activities were a contributing factor to Respondent's decision to take adverse employment action against him. Thus, after evaluating all relevant evidence, Complainant has established a *prima facie* case of retaliation. The burden now shifts to the Respondent to show that it would have taken the same adverse employment action in the absence of Complainant's protected activities.

5. Whether Respondent Would Have Taken the Same Unfavorable Action Absent Complainant's Protected Activity

After Complainant establishes a *prima facie* case, the Act provides: "Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(iv). "Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain." *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11 (May 26, 2010). "Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability."⁸⁸ *Id.*; see also *Palmer v. Canadian National Railway*, ARB No. 16-035, slip op. at 56-57 (Sept. 30, 2016).

However, where an employer proffers shifting explanations for its adverse action, or engages in disparate treatment of similarly situated employees, the employer's "explanations do not clearly and convincingly indicate that it would have" taken the same unfavorable action absent the protected activity. See *Negron*, ARB No. 04-021 at 8; *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070 and 08-074 (Sept. 30, 2009). "An employer's shifting explanations for its adverse action may be considered evidence of pretext, that is, a false cover for a discriminatory reason." *Douglas*, ARB Nos. 08-070 and 08-074, at 16. Disparate treatment may also constitute evidence of pretext where similarly situated employees are disciplined in different ways. *Id.* at 17; see also *Clemmons*, ARB No. 08-067, slip op. at 11 (finding that the administrative law judge's credibility determinations and "factual findings regarding temporal proximity, pretext, and shifting defenses . . . thus preclude any determination that [the employer] could establish by clear and convincing evidence that it would have fired [the complainant] absent his protected activity").

Discussion of Respondent's Same Decision Defense

⁸⁸ Respondent incorrectly states that a three-part burden shifting framework applies in AIR 21 cases to shift the burden back to a complainant to prove that an employer's articulated reason for adverse employment action is pretextual. See Resp. Br. at 34.

The Tribunal's analysis of the contributing factor element above forecloses a finding that Respondent would have fired Complainant in the absence of his protected activities. The undersigned finds Mr. Porter's testimony regarding his rationale for firing Complainant to lack credibility and appeared pretextual. Therefore, Respondent has not provided this Tribunal with a credible reason for terminating Complainant's employment on November 27, 2012. Accordingly, it is unable to show that Complainant's termination would have occurred in the absence of his protected activities.⁸⁹ See *Clemmons v. Ameristar Airways, Inc.*, ARB No. 08-067, slip op. at 11-12 (May 26, 2010) (noting that an ALJ's findings of employer's pretext, lack of credibility, and shifting defenses in the element of contributing factor precluded a finding that the employer could establish by clear and convincing evidence that it would have fired the complainant absent his protected activity).

V. CONCLUSION

For the reasons provided, the Tribunal finds Complainant has established a *prima facie* case of retaliation, and Respondent has failed to escape liability by showing that it would have taken the same adverse action in the absence of Complainant's protected activities. Only the question of relief remains.

VI. RELIEF

The Office of Administrative Law Judges "Rules of Practice and Procedure," 29 C.F.R. Part 18, Subpart A, apply in this case. 29 C.F.R. § 1979.107(a). Under those rules, the complainant is obligated, within 21 days of entry of an initial notice or order acknowledging the case has been docketed (29 C.F.R. §18.50(c)(i)(iv)), and without awaiting a discovery request (29 C.F.R. §18.50(c)(1)(i)), to disclose to Respondent, *inter alia*:

A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under §18.61 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

⁸⁹ Even assuming that Respondent would have credibly showed that it had planned to fire Complainant (rather than simply demote him) for his performance as ARH contract manager and interpersonal conflict with Mr. Lee, it failed to produce a date—or even a date range—on which this termination would occur. If anything, Respondent had delayed firing Complainant at least through the end of December 2012 to avoid disruptions to its business. See RX 8 at 18. This also forecloses a finding that Respondent would have fired Complainant on November 27, 2012 in the absence of his protected activities.

The Tribunal also recognizes that Mr. Porter had stood the ARH contract down following the FAA surprise inspection (Tr. at 1095-97), and this time could have been a logical point to effectuate a personnel switch. But tellingly, neither Mr. Porter nor Mr. Roberts referenced this fact as a reason to terminate Complainant.

29 C.F.R. § 18.50(c)(1)(i)(C). Furthermore, under 29 C.F.R. §18.53, the complainant has a continuing duty throughout the litigation to supplement or correct that disclosure if, at any time, the complainant learned it has become incomplete or incorrect in some material respect.

AIR 21 provides that if a violation is found, the administrative law judge shall order the person who committed the violation to: (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with compensation, including back pay, and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages. 49 U.S.C. § 42121(b)(3)(B); *see also Evans v. Miami Valley Hospital*, ARB No. 07-118, slip op. at 19 (Jun. 30, 2009); 29 C.F.R. § 1979.109(b).

A. The Parties' Arguments

Both Complainant and Respondent make arguments concerning damages that are unsubstantiated by the record.

Complainant seeks reinstatement together with “all rights, seniority, and benefits that Complainant would have enjoyed had he never been discharged.” Compl. Br. at 14. He does not explain or provide evidence of what “rights, seniority, and benefits” are due him. Complainant argues that OSHA’s finding that Respondent paid Complainant \$350 per day should control since this figure is referenced by Mr. Porter’s testimony (*see* Tr. at 233), though no other evidence of Complainant’s wages has been submitted. He argues that back pay is due from the date of his suspension to the present date at this \$350 daily rate plus interest, minus interim earnings, totaling \$553,202.65 as of January 30, 2017. To this total Complainant seeks an additional \$350 per day until the date of this decision.

Complainant seeks compensatory damages in the amount of \$100,000 for pain and suffering, including mental distress. He also requests an order directing Respondent to: (1) expunge Complainant’s employee records of any reference to his exercise of rights under AIR 21 and to adverse actions taken against him, (2) not retaliate or discriminate against him for instituting this proceeding under AIR 21, (3) not communicate to a third party any mention of his protected activity or anything that could be construed as damaging his name, character, or employment, (4) permanently post the OSHA fact sheet entitled “Whistleblower Protection for Employees in the Aviation Industry” in a conspicuous place in its facilities for a period of at least 60 days. Compl. Br. at 14-15.

Respondent argues that Complainant has offered no proof of his damages, relying only upon the interim OSHA order that is neither an admitted exhibit nor a document for which any foundation had been laid. Respondent asserts that reinstatement is unavailable because the ARH contract was terminated in June 2013, and it no longer has a pilot position for which Complainant is qualified nor the managerial position that he held at the time of his termination. Respondent further alleges that the “numerous other pilot positions associated with [the ARH] contract” were also eliminated when it ended in June 2013, though it does not identify any evidence that supports this proposition. Respondent points out that pilot positions in Alaska do not translate into long-term employment opportunities because contracting arrangements are cyclical.

B. Reinstatement

Reinstatement is a mandated remedy under AIR 21, though the regulations mollify this directive with the phrase “where appropriate.” See 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). The ARB has recognized that “circumstances may exist in which reinstatement is impossible or impractical and alternative remedies are necessary.” *Nagle v. Unified Turbines, Inc.*, ARB No. 13-010, ALJ No. 2009-AIR-24, slip op. at 5 (ARB May 31, 2013).⁹⁰ In such circumstances, “economic reinstatement” is an appropriate remedy, which entitles a complainant to “receive the same pay and benefits that he received prior to his termination, but not actually return to work.” *Id.* (quoting 68 Fed. Reg. 14,099, 14,104 (Mar. 21, 2003)).

Respondent argues that, since the ARH contract has been terminated, neither the ARH pilot nor managerial positions that Complainant held exist at Respondent for reinstatement. Should front pay be awarded to Complainant, Respondent notes that an ALJ must set reasonable parameters. Resp. Br. at 37-38. Complainant’s brief simply asserts that reinstatement should be ordered, and Complainant noted during the hearing that he would have considered working for Respondent again if it had offered him a position in response to the OSHA interim order. Tr. at 416.

The Tribunal finds that reinstatement is the appropriate remedy on the facts of this case. Even if the specific ARH contract positions at Respondent that Complainant performed no longer exist, there are certainly other comparable line pilot positions for which he would be qualified. In particular, the Tribunal notes that Respondent had at least twice paid for Complainant to receive training and certification on new aircraft: first for the King Air 200 and next for the King Air 350. Tr. at 277-78, 351-52. Respondent has offered no evidence that it is unable to train Complainant for the airplanes that it uses in its current contracts. Further, Complainant holds an ATP certificate, so he is already qualified to fly any certificated aircraft, except for those which require a type rating. See 14 C.F.R. § 61.167.⁹¹ The record establishes that Complainant conducts air operations in aircraft where a type rating is not required. For example, evidence from the record establishes that at the time of the hearing Respondent was operating at least both single engine and twin engine Otters, neither of which require a type rating.⁹² See Tr. at 146. Thus, the Tribunal finds that Respondent has not presented sufficient evidence to warrant an alternative remedy to reinstatement. See *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, slip op. at 15 (ARB Jan. 31, 2012) (noting that reinstatement is the “express and presumptive statutory remedy”).

⁹⁰ Citing *Clemmons v. Ameristar Airways*, ARB No. 08-067, ALJ No. 2004-AIR-011; slip op. at 12 (May 26, 2010); *Rooks v. Planet Airways*, ARB No. 04-092, ALJ No. 2004-AIR-092, slip op. at 9 (June 29, 2006).

⁹¹ See also, FAA Order 8900.1 thru chg 451, vol. 5, ch. 3 (Mar. 24, 2016), available at http://fsims.faa.gov/wdocs/8900.1/v05%20airman%20cert/chapter%2003/05_003_001rev1.htm

⁹² See 14 C.F.R. §61.31. A Twin Otter does not require a type rating as its maximum takeoff weight is not more than 12,500 pounds. See Type Certificate Data Sheet No. A9EA available at [http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/b90a6b79bdf2fea7862573690071be50/\\$FILE/A9ea.pdf](http://www.airweb.faa.gov/Regulatory_and_Guidance_Library/rgMakeModel.nsf/0/b90a6b79bdf2fea7862573690071be50/$FILE/A9ea.pdf).

Three additional items must be addressed. First, Respondent must offer a bona fide offer of employment to Complainant as a line pilot only. As noted by this Tribunal above, the evidence showed that Respondent was about to demote⁹³ Complainant from Assistant Chief Pilot for his perceived poor performance in that role and his interpersonal conflict with Mr. Lee—not his protected activity. There is little, if any evidence, that Respondent intended to terminate Complainant’s employment prior to FAA raid that resulted from Complainant’s protected activity. Thus, Complainant’s mandatory reinstatement shall be to the same position that Complainant would have held if not for Respondent’s retaliatory termination.

Second, Complainant seeks reinstatement together with “all rights, seniority, and benefits that Complainant would have enjoyed had he never been discharged,” yet does not provide evidence of what “rights, seniority, and benefits” are due him. Compl. Br. at 14. Accordingly, other than any seniority that would have naturally accrued to Complainant as a line pilot who worked for Respondent since August 2011, no other benefits are due. Complainant bears the burden to prove damages, and has failed to demonstrate entitlement to any specific rights or benefits beyond the simple fact of additional seniority.⁹⁴

Finally, the Tribunal notes that while Respondent must immediately provide Complainant with a bona fide offer of employment as a line pilot,⁹⁵ his reinstatement ultimately will be contingent upon his acquisition of a current medical certificate. To conduct commercial operations, a pilot must possess a current airman’s medical certificate.⁹⁶ Claimant stated that his medical certificate had lapsed, and he had not sought a new one due to its expense. Tr. at 478-80. Accordingly, Complainant shall provide Respondent with proof of a current medical certificate that authorizes him to operate aircraft used by Respondent in the conduct of its operations within 45 days of the date of this Order, unless issuance is deferred by the airman medical examiner for additional testing or evaluation.⁹⁷ If Complainant cannot obtain a valid medical certificate, Respondent shall not be required to reinstate Complainant because forcing Respondent to use Complainant as a pilot without a medical certificate would violate 14 C.F.R.

⁹³ As explained above, evidence of the impending demotion can be seen from 1) Mr. Lee’s emails to Complainant indicating a reduction in his duties, (2) assignment of Complainant’s ACP duties to Mr. Roberts when he was hired, (3) Mr. Lee’s email to Complainant indicating that he would be placed on a “20 on, 10 off” schedule for ARH (like the other line pilots, and in place of the 24/7 schedule he had), and (4) Porter’s credible testimony that he was unhappy with Complainant’s performance as the ARH contract manager and sought to replace him in that role.

⁹⁴ The Tribunal notes that line pilots for Respondent seemed to work under contracts for specific jobs; thus, specific benefits may not have accrued to each pilot.

⁹⁵ See 29 C.F.R. § 1979.109(c) (“Any administrative law judge’s decision requiring reinstatement . . . shall be effective immediately upon receipt of the decision by the named person, and may not be stayed.”).

⁹⁶ In all likelihood, Complainant will be required to possess a first class or second class airman’s medical certificate to conduct operations for Respondent. See 14 C.F.R. Part 67.

⁹⁷ If Complainant requires a special issuance medical certificate, the 45 days shall not begin until he has received notification of the final decision on whether to issue a medical certificate by the Federal Air Surgeon, Manager, Aeromedical Certification Division, or a Regional Flight Surgeon. See 14 C.F.R. §§ 67.401, 67.409.

§§ 61.2 and 61.23(a). Respondent shall reimburse Complainant for the appropriate airman's medical examination regardless of whether Complainant is successful in obtaining his medical certificate.

C. Back Pay

Complainant has the burden to prove the back pay he has lost. The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99STA-5, slip op. at 13 (Dec. 30, 2002). An award of back pay must completely redress the economic injury, and therefore should account for salary, including any raises which the employee would have received, sick leave, vacation pay, pension benefits, and other fringe benefits that the employee would have received but for the discrimination. *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983).

While a non-working employee has the duty to mitigate his damages by seeking suitable employment, it is well established that the employer has the burden of establishing that the backpay award should be reduced because the employee did not exercise diligence in seeking and obtaining other employment. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (Mar. 29, 2000).

There is no fixed method for computing a back pay award; calculations of the amount due must be reasonable and supported by evidence, but need not be rendered with "unrealistic exactitude." *Ass't Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 2004-STA-14, ALJ No. 2003-STA-36, slip op. at 5-6 (Jun. 30, 2005). Any ambiguity is resolved against the discriminating employer. *Rasimas*, 714 F.2d at 628. Back pay awards are not reduced by the amount of income and social security taxes that would have been deducted from the wages the complainant would have received. *Id.* at 627. Interim earnings at a replacement job are deducted from back pay awards. *Id.* at 623. Although a terminated employee has a duty to mitigate damages by diligently seeking substantially equivalent employment, the respondent bears the burden of proving that the complainant failed to properly mitigate damages. *Id.*; *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-30, slip op. at 32 (Feb. 9, 2001).

As noted above, Complainant argues that OSHA's finding that Respondent paid Complainant \$350 per day should control since this figure is referenced by Mr. Porter's testimony. *See* Tr. at 233. Complainant has submitted no other evidence of his wages. He requests that back pay be assessed from the date of his suspension to the present date at this \$350 daily rate plus interest, minus interim earnings.⁹⁸ Compl. Br. at 14. Respondent argues that Complainant has failed to prove his damages sufficiently. Resp. Br. at 37.

The Tribunal finds that Complainant has sufficiently proven that he earned \$350 per day when his employment was terminated on November 27, 2012. Complainant credibly notes that this figure is documented in OSHA's findings, and Mr. Porter references this figure with

⁹⁸ Complainant alleged that this amount totaled \$553,202.65 as of January 30, 2017. To this total Complainant seeks an additional \$350 per day until the date of this decision.

apparent acceptance.⁹⁹ See Tr. at 233-34. However, the evidence also shows that Respondent had reduced Complainant's schedule to a "20 on, 10 off" schedule as of December 2012. See RX 8 at 18. And this Tribunal found that Respondent did not retaliate against Complainant for his protected activity when it demoted him from Assistant Chief Pilot to a line pilot, which entailed this lower salary. Thus, Complainant's back pay from December 2012 to the date of this Decision and Order is limited to \$233.34 per day.¹⁰⁰

D. Non-Economic Compensatory Damages

1. Emotional pain and suffering

Complainant seeks damages of \$100,000 for pain, suffering, and mental distress. Compl Br. at 14. "Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby*, ARB No. 98-166. Complainant has the burden to prove that he has suffered from mental pain and suffering and that the discriminatory discharge was the cause. *Evans v. Miami Valley Hospital*, ALJ No. 2006-AIR-22, slip op. at 52 (Jun. 30, 2009) (citing *Crow v. Noble Roman's Inc.*, ALJ No. 95-CAA-8 (Feb. 26, 1996)); *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-047, slip op. at 7 (Aug. 31, 2011) (citing *Smith v. Lake City Enters., Inc.*, ARB Nos. 09-033, 08-091, ALJ No. 2006-STA-032 (Sep. 24, 2010)) (affirming an ALJ's award of \$50,000 in compensatory damages for emotional distress); *Bailey v. Consolidated Rail Corp.*, ARB Nos. 13-030, -033, ALJ No. 2012-FRS-012, slip op. at 2-3 (Apr. 22, 2013). Reasonable emotional distress damages may be based solely upon the employee's testimony. *Ferguson*, ARB No. 10-075, slip op. at 7-8.¹⁰¹ Nonetheless, a key step in determining the amount of non-economic compensatory damages is a comparison with awards made in similar cases. *Hobby*, ARB Nos. 98-166, -169, slip op at 32. The Tribunal has reviewed AIR 21 and other whistleblower cases that included compensation for emotional distress for comparison with the facts of this case.

⁹⁹ Mr. Porter also referenced \$140,000 and \$145,000 when discussing Complainant's annual salary, which, if accurate, would have resulted in a daily rate of closer to \$400. See Tr. at 232, 273. The Tribunal finds that \$350 per day is best supported by the evidence. It is Complainant's burden to prove back pay, Complainant submitted no concrete evidence of his wages, and Complainant himself argues that \$350 per day is the appropriate wage to use. See Compl. Br. at 17.

¹⁰⁰ $((20 \text{ days of work}) / (30 \text{ days})) \times (\$350 \text{ per working day}) = \233.34 per day . Additionally, Complainant has failed to demonstrate that this wage rate would have increased, or that he would have accrued sick leave, vacation pay, pension benefits, or other fringe benefits if he had not been terminated.

¹⁰¹ "Although psychiatric or medical testimony makes it easier to prove damages, a complainant can still receive those damages without such testimony." *Evans v. Miami Valley Hospital*, ALJ No. 2006-AIR-22, slip op. at 52 (Jun. 30, 2009)(\$100,000) citing *Smith v. Littenberg*, 92-ERA-52 (Sec'y Sept. 6, 1995); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013)(\$75,000); *Anderson v. Timex Logistics*, ARB No. 13-016, ALJ Case No. 2012-STA-11 (Apr. 30, 2014)(\$50,000); *Carter v. Marten Transport, Ltd.*, ARB Nos. 060101, 06-159, ALJ Case No. 2005-STA-35 (June, 30, 2008)(\$10,000); *Hobson v. Combined Transport, Inc.*, ARB Nos. 06-016, 06-053, ALJ No. 2005-STA-35 (Jan 31, 2008)(\$5,000); *McMullen v. Figeac Aero North America*, 2015-AIR-00027 (Jan. 13, 2017)(\$5,000).

Initially, the Tribunal finds credible Complainant's testimony that being terminated for reporting safety violations was stressful, disappointing, and depressing. Tr. at 420; *see also* Tr. at 488-89, 492-93 (Mrs. Bell's corroborating testimony). Complainant also noted the difficulties that he experienced finding a job subsequent to his termination from Respondent, which resulted in additional depression. Tr. at 421. Such hardships, and the mental stress they caused, are a direct result of Respondent's unlawful conduct. Similar to *Evans v. Miami Valley Hospital*, ARB 07-118, -121, ALJ Case No. 2006-AIR-022 (June 30, 2009), slip op. at 22, although Complainant's testimony of harm was not supported by medical evidence, it is unrefuted and corroborated by his wife. However, unlike *Evans*, Complainant's testimony lacked much detail concerning the effects that Complainant's termination had upon his emotional state. Only at one point during the hearing did Complainant state—with minimal elaboration—that his termination was “disappointing,” “devastating,” “depressing,” and “stressful.” Tr. at 420-21. Mrs. Bell's testimony similarly illustrated only minor mental distress, namely depression and stress. Tr. at 488-89, 492-93.

A determination of non-economic damages is a subjective one. *Id.* The Tribunal acknowledges that other Tribunals have awarded damages between \$3,000¹⁰² and \$250,000 for emotional distress, but each case hinges on its unique facts. In *Hobby*, ARB No. 98-166 ALJ Case No. 1990-ERA-30, slip op. at 31, the Board acknowledged that there is no upward limit that can be awarded for compensatory damages. It must be equally true that there is no downward limit. This explains the wide range of awards. And although the testimony of the Complainant and his spouse only may be sufficient to establish emotional pain and suffering damages, the cases that have awarded damages in those situations tend to award them on the lower end of the spectrum. Given the facts of this case and the minimal evidence provided, this Tribunal finds that damages for emotional pain and suffering are warranted only in the lower range of comparable cases. Accordingly, this Tribunal awards \$10,000 in damages for emotional pain and suffering.

2. Other non-economic remedies

Complainant seeks five other non-economic remedies: (1) expungement of any personnel records Respondent may possess related to the exercise of his AIR 21 rights and the adverse actions taken against him; (2) that Respondent shall not retaliate or discriminate against him in any manner for instituting or causing to be instituted any proceeding under or related to AIR 21; (2) that Respondent not convey to a third party any mention of Complainant's protected activity or anything that could be construed as damaging the name, character, or employment of Complainant; (4) that Respondent permanently place the OSHA fact sheet entitled, *Whistleblower Protection for Employees in the Aviation Industry*, in a conspicuous place in or about its facilities; and (5) that Respondent place a copy of this Tribunal's Decision and Order in a conspicuous place in or about its facilities for 60 days.¹⁰³

¹⁰² *See Brian v. American Airlines*, 2007-AIR-004 (Oct. 23, 2008), at 61, *remanded on other grounds*, ARB No. 09-018 (Dec. 29, 2010). This case ultimately settled following the remand.

¹⁰³ Complainant's brief references a “Notice to Employees,” which this Tribunal interprets as a copy of this Decision and Order. *See* Compl. Br. at 15.

The Act also authorizes the Department of Labor, in part, “to take affirmative action to abate the violation.” See 49 U.S.C. § 42121(b)(3)(B)(i). Complainant’s remaining requests for non-economic compensatory damages are appropriate in light of the record before this Tribunal. He requests expungement of Respondent’s personnel records related to the exercise of his rights under AIR 21 and the adverse actions taken against him, an order that Respondent not retaliate or discriminate against him for instituting this proceeding under AIR 21, and an order barring Respondent from conveying any damaging information about him or his employment to a third party. These requests will help make Complainant whole and are therefore warranted. Complainant also requests that this Tribunal issue an order requiring Respondent to permanently post the OSHA whistleblower fact sheet in its facilities, as well as posting a copy of this Tribunal’s decision in its facilities for 60 days. The undersigned finds that these postings will help forestall future violations of the Act, and are therefore warranted.

This Tribunal, therefore, **ORDERS** Respondent to:

- expunge any personnel records Respondent may possess related to Complainant’s exercise of his AIR 21 rights and Respondent’s adverse actions taken against Complainant, and
- refrain from retaliating or discriminating against Complainant for bringing this AIR 21 claim, and shall not disseminate any information to third parties concerning Complainant’s protected activity or the adverse actions taken against him.

Furthermore, this Tribunal **ORDERS** Respondent to:

- transmit via email copies of this Decision and Order¹⁰⁴ to all of its employees, officers, and directors in furtherance of the Respondent’s duty to provide additional training in AIR 21’s whistleblowing protections to all of its employees;
- effectuate this required email transmission within 21 days of the date of this Order;
- permanently place the OSHA fact sheet entitled, *Whistleblower Protection for Employees in the Aviation Industry*,¹⁰⁵ in a conspicuous place in or about its facilities; and
- within 30 calendar days of the date of this Order, provide to this Tribunal¹⁰⁶ an attestation by a corporate officer that it has accomplished the above duties and requirements.

¹⁰⁴ Respondent shall also provide to its employees a summary of the Decision and Order; placing the summary in the body of the email, with the full Decision and Order attached thereto. Respondent is further **ORDERED** to provide to this Tribunal a draft version of such a summary as well as its plans to effectuate further training concerning AIR 21’s whistleblower provision. Respondent must receive this Tribunal’s approval of such a summary before transmittal to its employees, officers, and directors.

¹⁰⁵ A copy of “*Whistleblower Protection for Employees in the Aviation Industry*,” is available at https://www.osha.gov/OshDoc/data_General_Facts/factsheet-whistleblower-aviation-industry.pdf.

¹⁰⁶ A copy of this attestation will simultaneously be sent to Complainant’s counsel.

E. Interest

A prevailing complainant is entitled to interest on an award of back pay. *See EEOC v. Ky. St. Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, slip op. at 17-19 (May 17, 2000).¹⁰⁷ Compounding interest is calculated quarterly, and the proper rate is the federal short-term rate, determined under 26 U.S.C. § 6621(b)(3), plus three percentage points. *Doyle*, slip op. at 17-19 (citing 26 U.S.C. §6621(a)(2)). Complainant shall also receive post-judgment interest on his back pay award, which is calculated by the identical formula set forth in *Doyle*.

F. Attorney Fees and Costs

Complainant may submit a Fee Petition within 30 days of this decision detailing the aggregate amount of all costs and expenses that were reasonably incurred by Complainant in this case. Supportive documentation must be attached. Thereafter, Respondent shall have 21 days within which to challenge the payment of costs and expenses sought by Complainant; and Complainant shall then have 14 days within which to file any reply to Respondents' response.

VII. ORDER

Respondent shall provide Claimant with the following:

- \$500,397.60 in back wages,¹⁰⁸ plus interest, minus interim earnings;¹⁰⁹
- \$10,000 in emotional damages; and
- Immediately following Complainant's submission of proof of a current medical certificate, a bona fide offer of employment as a line pilot.¹¹⁰

Respondent's pre-interest liability totals at least \$510,397.60, from which Complainant's interim earnings shall be subtracted. Additionally, Respondent is **ORDERED** to expunge Complainant's employment record as it relates to his protected activity and his discriminatory suspension and firing, and to publish the OSHA whistleblower fact sheet and this Decision and Order according to the parameters discussed above.

¹⁰⁷ *See also Cefalu v. Roadway Express, Inc.*, ARB No. 09-070 (Mar. 17, 2011); *Pollock v. Cont'l Express*, ARB Nos. 07-073, 08-051 (Apr. 10, 2010); *Murray v. Air Ride, Inc.*, ARB No. 00-045, slip op. at 9 (Dec. 29, 2000).

¹⁰⁸ This figure reflects the sum of \$350 per day from November 28-30, 2012 (\$1050) and \$233.34 per day from December 1, 2012 to October 10, 2018 (2140 days) (\$499,347.60).

¹⁰⁹ These interim earnings were never submitted to this Tribunal, though they appear to have been submitted to OSHA.

¹¹⁰ Respondent's failure to comply with this provision will result in additional liability to Complainant, at the rate of \$233.34 for each additional day that it does not provide Complainant with a bona fide job offer.

SO ORDERED

SCOTT R. MORRIS
Administrative Law Judge

Cherry Hill, New Jersey

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).

The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1979.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. 29 C.F.R. § 1979.110(b).