



**In the Matter of:**

**CLAUDIO OCCHIONE,**

**ARB CASE NO. 13-061**

**COMPLAINANT,**

**ALJ CASE NO. 2011-AIR-012**

**v.**

**DATE: November 26, 2014**

**PSA AIRLINES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Christopher A. Hudson, Esq.; *Law Offices of Christopher A. Hudson*; Charlotte, North Carolina**

***For the Respondent:***

**Thomas C. French, Esq.; *Ford & Harrison, LLP*; Atlanta, Georgia**

**BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge***

## **DECISION AND ORDER OF REMAND**

Claudio Occhione filed a complaint with the Department of Labor's Occupational Safety and Health Administration alleging that his former employer, PSA Airlines, Inc., retaliated against him in violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century<sup>1</sup> and its implementing regulations.<sup>2</sup> On May 9, 2013, an Administrative Law Judge

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson/West 2007) (AIR 21).

<sup>2</sup> 29 C.F.R. Part 1979 (2013).

(ALJ) issued a Decision and Order denying relief because, while Occhione established that he engaged in AIR 21 protected activity and that PSA took adverse action against him, he failed to establish that his protected activity contributed to his termination.<sup>3</sup> Although we affirm several of the ALJ's findings discussed fully below, we reverse several others, vacate the denial of relief, and remand for findings consistent with this opinion.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated to the ARB his authority to issue final agency decisions under AIR 21 and its implementing regulations.<sup>4</sup> The ARB reviews an ALJ's findings of fact under the substantial evidence standard.<sup>5</sup> The ALJ's legal conclusions are reviewed de novo.<sup>6</sup>

### **BACKGROUND**

Occhione began working for PSA in 2004 as a first officer. A first officer's job is to assist the captain. A first officer may attempt to become a captain in a process called "upgrading." After a period of training including a ground component, simulator component, and a line operational component, an upgrade candidate goes through test called a "check ride." Check rides take place in a simulator.<sup>7</sup>

Check rides are administered by Aircrew Program Designees (APDs), also known as "check airmen." APDs are pilots that the FAA has approved to act for the FAA during a check ride. PSA recommends its best pilots to become APDs, but the FAA selects APDs. The FAA trains the APDs and monitors their performance. The FAA has the right to observe any check ride. APDs are paid by PSA, not by the FAA. When APDs administer check rides, they follow the Practical Test Standards (PTS). APDs must adhere to the federal regulations and the PTS when administering check rides. APDs are also governed by the Flight Standards Information

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<sup>3</sup> *Occhione v. PSA Airlines, Inc.*, ALJ No. 2011-AIR-012 (May 9, 2013) (D. & O.).

<sup>4</sup> Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110(a).

<sup>5</sup> 29 C.F.R. § 1979.110(b).

<sup>6</sup> *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

<sup>7</sup> D. & O. at 2, 4.

Management System (FSIMS), known as the inspector's handbook, when administering upgrade check rides.<sup>8</sup>

Upgrade candidates are given two attempts to pass each upgrade bid. If a first officer fails his first attempt to upgrade to captain, the FAA requires that he be retrained and rechecked before he can return to work as a first officer. After six months, he may attempt to upgrade a second time. First officers can attempt to upgrade to captain two times according to PSA's collective bargaining agreement. If a first officer fails the second upgrade attempt, the collective bargaining agreement states that they are dealt with at the company's discretion. In this situation, it is PSA's company policy to terminate the first officer's employment or allow him to resign in lieu of termination.<sup>9</sup>

In October 2007, Occhione requested to upgrade to become a captain and successfully completed the ground portion of testing. On October 12, 2007, Occhione undertook his first check ride, which APD Jeff Gilliam administered. Following the test, Gilliam informed Occhione that he did not pass the check ride. After the check ride, Occhione told Gilliam that he was going to the FAA. The following day, Occhione also notified Randy Fusi, PSA's Director of Flight Standards, that he intended to contact the FAA. On October 18, 2007, Occhione took his second check ride which APD Darren Harris administered. On this ride, Matt Christner, another APD, acted as Occhione's first officer on the check ride. Harris reported that Occhione failed this check ride. After failing the second check ride, Occhione re-qualified as a first officer for PSA.<sup>10</sup>

On November 8, 2007, Occhione sent a letter to Tom Arline, PSA's Chief Pilot, stating that he had concerns about the two failed check rides and how they had been administered. Occhione requested that the letter be considered a formal notice of grievance and sent copies of the letter to FAA officials William Best and Fanny Rivera. In the letter, Occhione stated that he had performed to FAA PTS captain standards in both of his check rides.<sup>11</sup>

On June 3, 2008, Occhione submitted a complaint to the FAA Hotline asserting that the APDs did not administer his first and second check rides in accordance with PTS.<sup>12</sup>

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<sup>8</sup> D. & O. at 4. See also Tr. at 602-603, 664.

<sup>9</sup> D. & O. at 4.

<sup>10</sup> *Id.* at 2, 5, 7, 8, n.13. See also Tr. at 280.

<sup>11</sup> D. & O. at 2-3, 8.

<sup>12</sup> *Id.* at 8.

Sometime around July 2008, Ellen Tom from the FAA contacted APD Christner about Occhione's second October 2007 check ride. She asked him if he was present at the check ride, if the ATP test standards were adhered to, and if he saw anything unusual about the ride. Tom also contacted APD Harris requesting a statement from him as to how he conducted the October 2007 check ride.<sup>13</sup>

In May of 2009, Occhione entered an upgrade class and passed the oral portion of testing. On May 16, 2009, Occhione took his third check ride, which APD Matthew Christner administered. In addition to Occhione and Christner, also present in the simulator were Lewis Sain (FAA Inspector), Joseph Connolly (ALPA representative), and Silvin Blackstock (Occhione's partner for simulator test). Blackstock acted as first officer on Occhione's check ride and was also attempting to upgrade to captain. Christner reported that Occhione failed this check ride. Christner issued a notice of disapproval on May 16, and then issued a revised notice on May 28, 2009. The ALJ found that the only change that Christner made on the second notice was to list items that Occhione did not complete; the first form only listed items that Occhione performed unsatisfactorily.<sup>14</sup>

FAA Inspector Sain was present at the third check ride to observe APD Christner, not to evaluate Occhione. He testified that he believed the ride to have been administered unfairly. However, he conceded that the check ride was administered in general compliance with PTS. Connolly believed that check ride three was administered fairly and that APD Christner properly failed Occhione. Blackstock felt that Occhione was being targeted because Christner changed the order of testing so that Occhione would fly first and because Christner instructed Blackstock not to help Occhione during the check ride. Blackstock did not observe Occhione making any errors during the check ride that gave him concern.<sup>15</sup>

On May 26, 2009, Occhione's counsel, Chris Hudson, sent a letter to Gary Dybdal, PSA Director of Training, arguing that Occhione's performance during check ride three met practical test standards, which the ALJ found suggested by implication that the APD failed Occhione in violation of federal standards.<sup>16</sup>

On May 29, 2009, Occhione took his fourth and final check ride, which was administered by APD Harris (who had also administered Occhione's second check ride). In addition to Occhione and Harris, William Best (FAA Inspector), Joseph Connolly (ALPA representative),

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<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 3, 5, 14, 19-20. See also Tr. at 109, 142.

<sup>15</sup> D. & O. at 16-17. Like Occhione, Blackstock failed two upgrade attempts and his employment was terminated. Tr. at 1008; CX 31.

<sup>16</sup> D. & O. at 3, 9.

and Mike Darr (pilot monitoring and also a PSA check airman) were present at this check ride.<sup>17</sup> Harris reported that Occhione failed this check ride. Best agreed with APD Harris's evaluation that Occhione had failed the check ride. So did Connelly, who opined that the check ride was administered properly and fairly and that there was nothing abnormal about the maneuvers Harris asked Occhione to perform.<sup>18</sup>

Because Occhione failed the two upgrade attempts (all four check rides), PSA terminated Occhione's employment on June 1, 2009. J. Rose, Director of Operations signed the termination letter and it was copied to Mark Zweidinger, PSA Vice President of Operations, and Gary Dybdal, among others. The ALJ found that Zweidinger was the ultimate decision-maker regarding Occhione's employment termination.<sup>19</sup> He had no direct knowledge about Occhione's complaints, but instead had constructive knowledge of them through Rose and Dybdal. Rose knew that Occhione had alleged that check rides were not consistent with federal regulations, and Dybdal knew about Occhione's internal complaints and Occhione's attorney's letter asserting that check ride three was not administered in accordance with federal regulations.<sup>20</sup>

Between April and June 2009, six employees, including Silvin Blackstock, went through upgrade training, failed two upgrade attempts, and were either fired or given the option to resign.<sup>21</sup>

The final check ride failure caused the FAA to demand that Occhione undergo a reexamination of his competency, known as a "709 ride." Occhione refused to take the 709 ride, so the FAA issued an emergency order suspending his pilot certificates. Complainant appealed the order to an ALJ of the National Transportation Safety Board, who issued a decision in the FAA's favor. Occhione appealed that decision, but he was unsuccessful. Occhione undertook

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<sup>17</sup> *Id.* at 10, 21; David Anderson, an expert witness for Occhione, testified that each of these four (Harris as APD for the FAA, Best as an inspector for the FAA, Connelly (also a PSA employee) as a check airman and Darr (also a PSA employee) as first officer and check airman, were representatives of the FAA. Tr. at 82. Occhione also testified that Connelly and Darr were check airmen for PSA. Tr. at 424.

<sup>18</sup> D. & O. at 3, 9-10, 21-22.

<sup>19</sup> *Id.* at 11. The ALJ elicited a concession from Dybdal, however, that the APD's evaluations of Occhione's check rides were critical to Zweidinger's decision to fire Occhione; that is, if the APDs failed Occhione, Zweidinger would terminate his employment. Tr. at 669-70.

<sup>20</sup> D. & O. at 3, 5, 11-13.

<sup>21</sup> Tr. at 171, 648-52, 1008-110.

the reexamination on July 7, 2012, and he passed. After he passed the reexamination, he was recertified.<sup>22</sup>

Occhione filed an AIR 21 complaint with the Department of Labor on July 30, 2009. D. & O. at 3.

## DISCUSSION

To prevail on his whistleblower complaint Occhione must prove by a preponderance of the evidence that (1) he engaged in activity protected by AIR 21, (2) that PSA took unfavorable personnel action against him, and (3) that the protected activity was a contributing factor in the unfavorable personnel action PSA took.<sup>23</sup>

### 1. Protected Activity

The ALJ concluded that Occhione engaged in protected activity on a number of separate occasions. On November 8, 2007, Occhione sent a letter to Tom Arline, Chief Pilot of PSA Airlines, claiming that his October 2007 check rides had been improperly administered in violation of FAA standards.<sup>24</sup> He sent copies of this letter to David Glenn, PSA Director of Human Resources, as well as FAA Chief Inspector William Best and FAA administrator Fanny Rivera.<sup>25</sup> The ALJ explicitly found the allegations contained in the letters to be “objectively reasonable, as [Occhione] apparently did not receive a pre-flight briefing on check rides one and two, contrary to the requirements set forth in the federal standards.”<sup>26</sup> On June 3, 2008, Occhione submitted a complaint to the FAA Safety Hotline alleging that the APDs did not administer his first and second check rides in accordance with PTS (practical test standards). On May 26, 2009, Occhione’s attorney sent a letter to Gary Dybdal, PSA’s Director of Training, arguing that Occhione’s performance during check ride three met PTS standards.<sup>27</sup> The record

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<sup>22</sup> D. & O. at 3, 5-6. See also Tr. at 454, 459-460.

<sup>23</sup> 49 U.S.C.A. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a).

<sup>24</sup> D. & O. at 8.

<sup>25</sup> Decision and Order Denying Respondent’s Motion for Summary Decision (D. & O. Denying S.D.), slip op. at 2 (Oct. 18, 2012).

<sup>26</sup> D. & O. at 8.

<sup>27</sup> *Id.* at 8-9.

clearly shows that each of these activities occurred and each constitutes protected activity.<sup>28</sup> We affirm these findings of protected activity.

The ALJ erred, however, in his finding that no protected activity occurred on October 12, 2007, when Occhione informed APD Gillam that he intended to contact the FAA because he failed the check ride that day. Both Gilliam and Occhione testified that, after the check ride, Occhione told Gilliam that he was going to the FAA.<sup>29</sup> The following day, Occhione also notified Randy Fusi, PSA’s Director of Flight Standards, that he intended to contact the FAA because the check ride did not conform to practical test standards.<sup>30</sup> According to Occhione, Fusi said he would call Gilliam to discuss Occhione’s concerns. Occhione then called PSA’s chief pilot, Tom Arline, and explained that he intended to notify the FAA that Gilliam had improperly administered his test ride. According to Occhione, Arline warned him not to notify the FAA because Fusi would not like the FAA involved.<sup>31</sup>

The ALJ ruled that Occhione’s statements to APD Gillam and Fusi—that he was going to the FAA—failed to allege specific safety violations and were too vague to be considered protected activity.<sup>32</sup> The AIR 21 whistleblower provision, however, explicitly provides protection to employees “about to provide or cause to be provided to . . . the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration.” 49 U.S.C.A. § 42121(a)(1). “About to provide” language in other DOL-administered whistleblower statutes has been interpreted as protecting employees who threaten to file complaints with federal authorities regardless of whether the employee has actually filed a complaint.<sup>33</sup> AIR 21 also provides protection for an employee who “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 a violation of any FAA standard. 49 U.S.C.A. § 42121(a)(2). Similar language is contained in the SOX whistleblower statute, which protects employees who “file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be

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<sup>28</sup> Complainant’s Exhibit (CX) 3; CX 12; CX 14.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> D. & O. at 7 & n.12, 8 & n.13; Tr. at 251.

<sup>31</sup> Tr. at 251.

<sup>32</sup> D. & O. at 7-8.

<sup>33</sup> See, e.g., *Mandreger v. Detroit Edison Co.*, No. 1988-ERA-017, slip op. at 8 (Sec’y Mar. 30, 1994) (“Mandreger’s threat to report safety issues to the NRC also was a protected activity. . . . The report Mandreger made to the NRC clearly is protected as well.”); *Saporito v. Cent. Locating Servs., Ltd.*, ARB No. 05-004, ALJ No. 2004-CAA-013, slip op. at 10 (ARB Feb. 28, 2006) (“Threatening to report violations of the environmental acts to federal agencies can be protected activity.”).

filed.” This language has been interpreted to protect an employee’s anticipated testimony before the SEC even if the employee’s comments failed to tie the testimony to a specific violation or otherwise disclose the nature of the testimony.<sup>34</sup> In light of this precedent in parallel whistleblower statutes, we find that Occhione’s statements to Gilliam and Fusi about “going to the FAA” constituted protected activity under AIR 21.

We recognize that the ALJ declined to find Occhione’s verbal threat to go to the FAA as protected activity based on prior ARB decisions holding that under AIR 21, protected complaints, whether oral or in writing, must be specific.<sup>35</sup> However, more recent ARB precedent as well as Fourth Circuit law leads us to conclude that this specificity standard is inappropriate and inconsistent with the AIR 21 whistleblower statute.<sup>36</sup>

In *Sylvester v. Paraxel Int’l LLC*,<sup>37</sup> and numerous subsequent decisions, the ARB ruled that the “definitive and specific” standard that the ARB employed in earlier decisions was inconsistent with SOX’s statutory language, which prohibits retaliation against employees for reporting information that they *reasonably believe* violate SOX.<sup>38</sup> We have repeatedly held that

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<sup>34</sup> *Romanek v. Deutsche Asset Mgmt.*, No. C-05-2473, 2006 WL 2385237, \*5 (N.D. Cal., Aug. 17, 2006) (plaintiff’s comments about anticipated testimony before the SEC might be protected activity under SOX even if the nature of testimony was not disclosed).

<sup>35</sup> See, e.g., *Simpson v. United Parcel Serv.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 13 (ARB Jan. 30, 2004).

<sup>36</sup> We note also that AIR 21’s protected activity clause, 49 U.S.C.A. § 421219(a), does not contain the word “specific.” Further, the clause repeatedly uses broad words and phrasing, rather than narrow and strict words like “specific.” The protected activity clause refers to “any violation” of the FAA or “any other provision of Federal law relating to air carrier safety.” (emphasis added) The word “relating” is a broad term, simply meaning to “have some connection to.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1993).

<sup>37</sup> ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 17-19 (ARB May 25, 2011).

<sup>38</sup> See *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op. at 8, n.33 (ARB Mar. 28, 2012) (“[T]he ‘definitive and specific’ standard employed in prior ARB cases is inconsistent with the statutory language of Section 806.”); *Prioleau v. Sikorsky Aircraft Corp.*, ARB No. 10-060, ALJ No. 2010-SOX-003, slip op. at 7, n.3 (ARB Nov. 9, 2011) (“In *Sylvester*, we made clear that the “definitive and specific” standard that the ARB had employed in prior ARB cases . . . was inconsistent with Section 806’s statutory language.”); *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 4, n.3 (ARB July 21, 2011) (noting that the ARB “has criticized the use of ‘definitively and specifically’ as a standard for an employee’s reasonable belief of a violation of the laws listed under Section 806”); *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-047, slip op. at 7 (ARB June 28, 2011) (finding error in the ALJ’s use of the “definitive and specific” standard because it is inconsistent with the statutory language of



AIR 21 likewise contains a “reasonable belief” standard: “[a]s a matter law, an employee engages in protected activity any time he or she provides or attempts to provide information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, so long as the employee’s belief of a violation is subjectively and objectively reasonable.”<sup>39</sup> As we explained in *Sylvester*, “[t]he reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities.”<sup>40</sup> Our reasoning in *Sylvester* was based upon a Fourth Circuit case, which reversed the ARB’s misapplication of the reasonable belief standard in an earlier case. Contrary to our holding in that case, the court in *Knox v. U.S. Dep’t of Labor* held that the inquiry into the “reasonable belief” of a complainant does not require that the complainant *convey* his reasonable belief to management.<sup>41</sup>

As long as Occhione “reasonably believed” that he was “about to provide” the FAA with “information relating to any violation or alleged violation of any [FAA] order, regulation, or standard,” his communications to Gilliam and Fusi were protected regardless of whether Occhione conveyed his reasonable belief to his employer. The relevant question is whether Occhione reasonably believed that the check ride Gilliam administered violated an FAA standard when he told both Gilliam and Fusi that he was “going to the FAA.”

With respect to the November 8, 2007 letter that Occhione wrote to the FAA and PSA, the ALJ explicitly found Occhione’s “belief to be objectively reasonable, as he apparently did not receive a pre-flight briefing on check rides one and two, contrary to the requirements set

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Section 806); *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-018, slip op. at 9 (ARB June 28, 2011) (same). *See also* *Wiest v. Lynch*, 710 F.3d 121, 129-34 (3d Cir. 2013).

<sup>39</sup> *Benjamin v. Citationshares Mgmt., LLC*, ARB No. 12-029, ALJ No. 2010-AIR-001, slip op. at 5-6 (ARB Nov. 5, 2013); *see also* *Blount v. Northwest Airlines, Inc.*, ARB No. 09-120, ALJ No. 2007-AIR-009, slip op. at 10 (ARB Oct. 24, 2011) (a complainant must show that he “subjectively believed that his employer was engaged in unlawful practices and his belief must be objectively reasonable in light of the facts and record presented.”).

<sup>40</sup> *Sylvester*, ARB No. 07-123, slip op. at 15.

<sup>41</sup> *Knox v. U.S. Dep’t of Labor*, 434 F.3d 721, 725 (4th Cir. 2006). Similarly, in *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12 (1st Cir. 1998), a Surface Transportation Assistance Act (STAA) case, the court opined that while an employer’s due process concern of adequate notice would not necessarily be accomplished if the employee’s communiqué is “too generalized,” adequate notice was afforded where the employee’s communication was “sufficiently definite to put Clean Harbors on notice that [the employee] was engaging in protected activity.” 146 F.3d at 22.

forth in the federal standards.”<sup>42</sup> Although Occhione did not communicate the details of why he intended to go to the FAA on October 12 and 13, when he informed his supervisors of his intent, it is logical to assume that it was for the same reasons as specified in his protected communication sent a month later. If Occhione’s belief was reasonable on Nov. 7, 2007, when he wrote the FAA, it was reasonable a month earlier when he first informed his supervisors that he was going to the FAA, despite his failure to convey the reasonableness of his belief to his supervisors. As a matter of law, Occhione engaged in protected activity on October 12, 2007, when he informed Gilliam that he was going to the FAA, as well as on October 13, 2007, when he called Fusi.

## 2. Adverse Action

The ALJ properly found that Occhione suffered an adverse employment action when PSA terminated his employment effective June 1, 2009, and neither party disputed this finding.<sup>43</sup> We also agree with the ALJ’s conclusion that, given the 90-day statutory filing deadline under AIR 21, Occhione’s only actionable adverse actions are those that occurred on or after May 1, 2009 (90 days before Occhione filed his AIR 21 complaint).<sup>44</sup> However, as we explain below, all four failed check rides constitute adverse employment actions. Although the first and second check ride failures are not separately actionable, the second check ride may constitute evidence of retaliation (since it occurred shortly after protected activity).

The ALJ correctly recognized that the check rides were potentially adverse since two failures to upgrade to captain based on failure to pass the check rides could lead directly to termination. “[A]dverse 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.”<sup>45</sup> However, the ALJ ultimately determined that Occhione’s third and fourth check rides were not adverse actions after concluding that they were fairly administered.<sup>46</sup> An adverse action, however, is simply something unfavorable to an employee, not necessarily unfair,

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<sup>42</sup> D. & O. at 8. The ALJ appeared to presume that Occhione’s belief was subjectively reasonable, and we agree.

<sup>43</sup> D. & O. at 13.

<sup>44</sup> *Id.* at 9.

<sup>45</sup> *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 (ARB Dec. 29, 2010) (referencing *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010) (minor acts of retaliation can be sufficiently substantial and actionable when viewed together)).

<sup>46</sup> D. & O. at 14.

retaliatory or illegal.<sup>47</sup> The ALJ improperly imported a notion of fairness into his analysis of “adverse action.”<sup>48</sup> However, the question of whether the check rides were administered fairly has no bearing on whether they may be considered “adverse.” While the *administration* of a performance appraisal (or check ride) is not in itself an “adverse action,” when an employee receives a low or unsatisfactory evaluation of his performance appraisal (or check ride), it is clearly an unfavorable employment action and should be considered an “adverse action” within the meaning of AIR 21.<sup>49</sup>

Each of Occhione’s four check ride failures were adverse actions and, though his first and second check rides were not actionable given that they occurred outside AIR 21’s limitations period for filing a claim, they may provide background evidence. In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002), the Supreme Court held that discrete adverse actions that occur outside the statutory filing period are not actionable. Nevertheless, the Court explicitly stated that such acts may be used as background evidence in support of a timely claim.

Under the circumstances of the case before us, each of the four single check rides has attributes constituting both discrete adverse actions as well as part of a single actionable act. Certainly, like a poor performance appraisal, the failure of a check ride is a single actionable act. However, given PSA’s automatic termination (or involuntary resignation) policy whereby two

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<sup>47</sup> See *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-005, slip op. at 29 (ARB Sept. 13, 2011).

<sup>48</sup> The operative question is whether Occhione’s protected activity played *any* role in his failure to satisfactorily complete any or all of the check rides. The ALJ stated that “if administered in a neutral manner, then these check rides could not have been ‘act[s] of deliberate retaliation.’” D. & O. at 23. We do not agree. Evidence that the check rides were fairly administered does not preclude finding that Occhione’s protected activity was a contributing factor in his check ride failures. Moreover, even if the rides were technically “fair” and administered in conformance to practical test standards, the evidence indicates that the evaluators exercised discretion, independent judgment, and had latitude in their evaluations. Tr. at 100, 352, 616. Subjective assessments like the “leadership qualities” by which Occhione was measured are inherently open to bias. Tr. at 663, 732, 798, 805. Appellate courts have observed that “subjective criteria can be a ready vehicle for [discrimination].” *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005); see also *Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective evaluations provide supervisors with a mechanism to indulge in bias, which cannot be objectively rebutted). Subjective standards are difficult for courts to evaluate and difficult for plaintiffs to prove and their use in employment decisions should be viewed with suspicion. See *Hill v. Seaboard Coast Line R. Co.*, 885 F.2d 804, 808-09 (11th Cir. 1989).

<sup>49</sup> See *Williams v. Am. Airlines, Inc.*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 13-14 (ARB Dec. 29, 2010)(an action may be considered adverse if it would dissuade a reasonable employee from engaging in protected activity or if it is the first step in a progressive discipline policy).

failures to upgrade to captain leads to automatic discharge, each of the four check rides provided to Occhione were part and parcel of the single adverse action constituting his termination. In any event, it is clear that at least the last two check ride failures, whether as discrete actions or as part of the ultimate termination of Occhione's employment, occurred within the AIR 21 statute of limitations period.

### 3. Contributing Factor Causation

The ALJ concluded that Occhione failed to prove by a preponderance of the evidence that his protected activity under AIR 21 was a contributing factor to the termination of his employment.<sup>50</sup> The ALJ noted that there was temporal proximity between Occhione's May 26, 2009 protected activity complaining about check ride three and his termination six days later on June 1, 2009.<sup>51</sup> The ALJ also found that Zweidinger constructively knew about Occhione's protected activity.<sup>52</sup> The ALJ concluded however that Occhione's failure of the fourth check ride was an intervening act that severed the inference of retaliation since historically, PSA automatically terminated the employment of pilots who failed two check ride attempts on a second attempt to upgrade.<sup>53</sup> We reverse this finding.

As we explained above, Occhione's failure of his fourth check ride was itself an "adverse action" that should have been analyzed as such. His final failure was not an "intervening act" which "independently could have caused the adverse action" but was instead the last of the series of four adverse actions in the form of check ride failures that automatically led to Occhione's employment termination. The ALJ's assumption that the fourth check ride failure was an intervening event negating Occhione's protected activity as a contributing factor in his employment termination was thus reversible error. Accordingly, upon remand a redetermination is required of whether Occhione's protected activity contributed to his employment termination. A determination is also required upon remand of whether Occhione's protected activity was a contributing factor in either or both of his last two check ride failures."<sup>54</sup>

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<sup>50</sup> D. & O. at 24-25.

<sup>51</sup> *Id.* at 24.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> In any event, the occurrence of an "intervening event" does not necessarily cancel the inference of causation resulting from temporal proximity but may merely compromise it. "[O]ther evidence may establish the link between" the protected activity and adverse action despite the intervening event. *Tracanna v. Arctic Slope Inspection Serv.*, ARB No. 98-168, ALJ No. 1997-WPC-001, slip op. at 8 (ARB July 31, 2001). Whether an intervening act will break causation may be decided one way or the other depending on "how proximate the events actually were, and the context in which the issue" arose. *Id.* (quoting *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000)).

#### 4. Request for Clarification

Finally, since the Board is remanding this case to the ALJ for reconsideration in light of the legal error identified above, we additionally note the need for clarification of two material findings regarding Respondent's knowledge of the protected activity that appear contrary to documentary evidence in the record on appeal, given the significance of knowledge to the question of whether Occhione's protected activity was a contributing factor in any or all of the adverse actions taken against him. The Addendum to the ALJ's October 18, 2012 D. & O. Denying Summary Decision contains two exhibits identified as CX-6 and CX-7. CX-6 contains a July 2, 2008 e-mail from APD Christner to Randy Fusi and Darren Harris. The e-mail states: "Here is a copy of the statement I sent to Ellen upon her request concerning Claudio Occhione." Attached to this e-mail is a letter from Christner to the FAA, Cincinnati Flight Standards District Office stating that the October 18, 2007 check ride administered to Occhione was conducted "with adherence to all applicable ATP practical test standards as well as company procedures." CX-7 similarly contains a July 2, 2008 e-mail from APD Harris to FAA inspector Ellen Tom with an attached letter from Harris to the FAA, Cincinnati Flight Standards District Office stating that Harris conducted the October 18, 2007 check ride in accordance with FAA standards. The subject line of the letter states: "RE: Complaint from Claudio Occhione."

The ALJ expressly noted in his D. & O. Denying Summary Decision that these documents constituted "evidence that APDs Christner and Harris knew not only that Complainant had lodged an FAA hotline complaint in 2008, but that his complaint raised questions as to whether Complainant's check rides complied with FAA Standards and regulations."<sup>55</sup> This finding is in stark contrast to the ALJ's conflicting findings in the Decision and Order on appeal that Occhione failed to establish knowledge on the part of either APD Christner or Harris of his protected activity.<sup>56</sup> Based on the existence of the documentary evidence, it is unclear to this reviewing body how the ALJ's conflicting findings are reconcilable.<sup>57</sup> It is unclear to us whether the ALJ inadvertently failed to consider CX-6 and

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<sup>55</sup> D. & O. Denying S.D. at 9. The ALJ further stated that, given evidence that Dybdal, PSA Director of Training, received the May 26, 2009 letter from Occhione's attorney, "I find that APDs Christner and Harris constructively knew about this letter, considering that Mr. Dybdal presumably oversaw the execution of the check rides." D. & O. Denying S.D. at 9-10.

<sup>56</sup> D. & O. at 10.

<sup>57</sup> Respondent asserts on appeal that the ALJ did not admit the documents into evidence during the course of the trial. However, given the Board's current disposition of this case, whether the documents in question were part of the evidentiary record or not is a matter we need not decide. We consider the documents properly a part of the record on appeal, see FED. R. APP. P. 10(A)(1), and thus subject to the Board's consideration at least insofar as we bring this seeming evidentiary conflict to the attention of the ALJ upon remand. *See also, Sandwich Chef of Texas, Inc. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 216-17 (5th Cir. 2003) (district court may opt to consider prehearing

CX-7 in his final decision, since he clearly considered them in ruling on the motion for summary decision. This requires clarification upon remand, particularly since a determination whether APDs Christner and Harris knew of Occhione's protected activity takes on added significance given our ruling that the check ride failures constituted adverse employment action within the meaning of AIR 21. Since one or both of these individuals were not only present at three of the four check rides, but actually administered the check ride and failed Occhione,<sup>58</sup> a determination of their knowledge may prove critical to the outcome of this case.<sup>59</sup>

## CONCLUSION

The substantial evidence of record supports the ALJ's findings of fact that Occhione engaged in protected activity: (1) on November 8, 2007, when he sent copies of a letter to PSA Chief Pilot, PSA Director of Human Resources, FAA Chief Inspector, and FAA Administrator claiming that his October 2007 check rides had been improperly administered in violation of FAA standards; (2) on June 3, 2008, when he submitted a complaint to the FAA Safety Hotline alleging that the APDs did not administer his first and second check rides in accordance with practical test standards (PSAs) and (3) on May 26, 2009, when his attorney sent a letter to Dybdal, PSA Director of Training, arguing that Occhione's performance during check ride three met PTS standards. We reverse the ALJ's findings that no protected activity occurred on October 12, 2007, when Occhione informed Gilliam that he was going to the FAA and on October 13, 2007, when he complained to Fusi, PSA Director of Flight Standards.

With regard to adverse action, we affirm the ALJ's finding that Occhione's employment termination was an adverse action, but reverse the ALJ's findings that the check ride failures did not constitute adverse action.

We vacate the ALJ's findings that Occhione's protected activity was not a contributing factor in the adverse action taken against him. This case is returned to the ALJ for

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evidentiary submissions not admitted in evidence during the hearing). Were we not remanding this case, and thus required to address this evidentiary conflict, we would take heed of the ARB's admonition in *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 7 (ARB Sept. 24, 2009) (quoting *Universal Camera Corp.*, 340 U.S. at 477-78) that an ultimate finding of fact should be vacated where the Board "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes."

<sup>58</sup> Harris administered the second check ride on October 18, 2007, and Christner acted as first officer. Christner administered the third check ride on May 16, 2009, and Harris administered the fourth check ride on May 29, 2009.

<sup>59</sup> To this end, the ALJ may take additional evidence or briefing in connection with consideration of CX-6 and CX-7, should he deem it necessary to do so.

redetermination of the question of whether Occhione's protected activity (any or all) was a contributing factor in the adverse actions (any or all) taken against him. Should the ALJ determine on remand that any or all of the protected acts were a contributing factor to any or all of the adverse actions taken against him, the ALJ should further determine whether PSA has demonstrated by clear and convincing evidence that it would have undertaken adverse action in the absence of protected activity.

Accordingly, we **AFFIRM**, in part, and **REVERSE**, in part, the ALJ's Decision and Order issued May 9, 2013, and **REMAND** for further proceedings consistent with this opinion.

**SO ORDERED.**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**