In the Matter of:

ANTHONY BERROA, **ARB CASE NO. 15-061**

COMPLAINANT, **ALJ CASE NO. 2013-AIR-021**

v. **DATE: March 9, 2017**

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

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Nathaniel J. Kaleefey, Esq.; *Kaleefey Law, PLLC*, Grand Rapids, Michigan

For the Respondent:
Anthony R. Comden, Esq.; *Miller Johnson*, Grand Rapids, Michigan

Before: E. Cooper Brown, *Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Leonard Howie, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21)[1] and its implementing regulations.[2] Complainant Anthony Berroa filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent Spectrum

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[1] 49 U.S.C.A. § 42121 (Thomson Reuters 2015).

[2] 29 C.F.R. Part 1979 (2016).

Health Hospitals d/b/a Aero Med (Aero Med), violated AIR-21's employee protection provisions when it terminated his employment in retaliation for reporting a trainee pilot's situational awareness and aeronautical decision-making violations.

Following OSHA's dismissal of Berroa's complaint and subsequent hearing before a Department of Labor Administrative Law Judge (ALJ), on May 19, 2015, the presiding ALJ issued a Decision and Order (D. & O.) in which he found that Berroa engaged in AIR-21 protected activity that was a contributing factor in the loss of his employment with Respondent Aero Med. The ALJ nevertheless dismissed Berroa's complaint upon finding that Aero Med established by clear and convincing evidence that it would have terminated Berroa's employment absent his protected activity. Berroa timely petitioned the Administrative Review Board (ARB or Board) requesting review of the ALJ's D. & O. For the following reasons, the Board affirms the ALJ's dismissal of Berroa's complaint.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction over this appeal pursuant to Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012), and 29 C.F.R. § 1979.110. On appeal, the Board reviews an ALJ's factual findings to determine whether they are supported by substantial evidence.[3] The ALJ's legal conclusions are reviewed de novo.[4] The Board generally defers to an ALJ's credibility determinations, unless they are inherently incredible or patently unreasonable.[5]

DISCUSSION

AIR-21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

> provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the

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[3] 29 C.F.R. § 1979.110(b). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[4] *Rooks v. Planet Airways, Inc.,* ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006); *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004)).

[5] *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

> 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 [subtitle VII of title 49 of the United States Code] or any other law of the United States . . . .[6]

To prevail upon hearing before an ALJ under AIR-21, a complainant must prove by a preponderance of the evidence that (1) he engaged in protected activity; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[7] If the complainant proves that his protected activity was a contributing factor in the personnel action, he is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.[8]

The ALJ concluded that Berroa engaged in AIR-21 protected activity when he complained about the pilot trainee's aeronautical competencies, which the parties do not dispute on appeal. The ALJ found that Berroa suffered an unfavorable personnel action when Respondent terminated his employment. The ALJ further determined that Berroa's protected activity was a contributing factor in the termination of his employment. This finding is also not disputed on appeal. However, the ALJ also found that Aero Med established by clear and convincing evidence that it would have terminated Berroa's employment for permitting the trainee pilot under his supervision to undertake a dangerous helicopter takeoff in inclement weather even if Berroa had not engaged in protected activity.

Substantial evidence supports the ALJ's findings of fact supporting the ALJ's ultimate conclusion that Respondent established an affirmative defense thereby avoiding liability for violating AIR-21's whistleblower protection provisions. Critical in this regard is the ALJ's finding, supported by the substantial evidence of record, that Aero Med clearly and convincingly would have terminated Berroa's employment in the absence of any protected activity because the pilot trainee flight that Berroa allowed to take place was unnecessary for training purposes, demonstrated poor judgment, and placed at risk both the flight crew and a patient who was being transported. See D. & O. at 100; see also RX-7 (independent report finding that Berroa's actions

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[6] 49 U.S.C.A. § 42121(a). An employer also violates AIR-21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

[7] *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 4 (ARB June 15, 2012); *Clark v. Pace Airlines, Inc.*, ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006).

[8] *Id.*

were "reckless and careless" and violated FAA standards). Accordingly, the Board affirms the ALJ's Decision and Order dismissing Berroa's complaint for the reasons articulated by the ALJ.[9]

SO ORDERED.

E. COOPER BROWN
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE
Administrative Appeals Judge

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[9] In affirming the ALJ's dismissal of Berroa's complaint, the Board limits its holding to the ALJ's determination that Respondent established its affirmative defense by clear and convincing evidence and does not endorse nor address other collateral legal rulings in the ALJ's Decision and Order. Berroa makes several additional arguments on appeal. In light of the Board's resolution of this case, it is also unnecessary to address other arguments raised by Berroa on appeal challenging the ALJ's decision, as they are rendered moot by the Board's disposition of this appeal.