



**In the Matter of:**

**CLAUDIO OCCHIONE,**

**ARB CASE NO. 15-090**

**COMPLAINANT,**

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

**v.**

**DATE: July 26, 2017**

**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:***

**Leanne C. Mehrman, Esq.; *Ford & Harrison, LLP*; Atlanta, Georgia**

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

**FINAL DECISION AND ORDER**

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 August 26, 2015, an Administrative Law Judge (ALJ) issued a Decision and Order denying relief because, while Occhione proved his protected activity contributed to his employment termination, PSA Airlines proved by clear and convincing evidence that it would have terminated his employment absent Occhione's protected activity. We affirm.

### 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>3</sup> The ARB reviews an ALJ's findings of fact under the substantial evidence standard.<sup>4</sup> The ALJ's legal conclusions are reviewed de novo.<sup>5</sup>

### DISCUSSION

This case is before us for a second time following a remand to the ALJ.<sup>6</sup> On remand, the ALJ considered whether "any or all of the protected acts were a contributing factor to any or all

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<sup>1</sup> 49 U.S.C.A. § 42121 (Thomson Reuters 2016) (AIR 21).

<sup>2</sup> 29 C.F.R. Part 1979 (2016).

<sup>3</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>4</sup> 29 C.F.R. § 1979.110(b).

<sup>5</sup> *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

<sup>6</sup> For a summary of the background of this case, see our prior decision. *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ No. 2011-AIR-012, slip op. at 2-6 (ARB Nov. 26, 2014). Following our remand, the ALJ, who presided at Occhione's hearing, retired and ALJ Morgan was assigned to the case. In his Petition for Review, Occhione argued that ALJ Morgan could not fairly evaluate the evidence since he was not at the hearing and that consequently a de novo hearing should be granted. We disagree. Following our remand, ALJ Morgan asked the parties whether additional hearing dates were needed to admit additional evidence. Preliminary Order on Remand (ALJ Feb. 6, 2015) at 6. Occhione responded as follows: "Complainant believes that, on balance, ample evidence has been adduced here and that new testimony will make a large volume of material merely larger and not clearer." Occhione's Brief in Response to the Preliminary Order on Remand at 15 (Apr. 9, 2015). Occhione should have addressed any concerns about the reassignment of his case to ALJ

of the adverse actions taken against [Occhione],” and if so, “whether PSA has demonstrated by clear and convincing evidence that it would have undertaken adverse action in the absence of protected activity.”<sup>7</sup> With regard to the question of whether Occhione proved that his protected activity contributed to PSA’s decision to take adverse actions against him, the ALJ found that Occhione proved his case with respect to his termination, but failed to prove his case with respect to Occhione’s failed upgrade test attempts.<sup>8</sup> With regard to the upgrade attempts, the ALJ found that no causation was possible with respect to the first upgrade attempt because no protected activity occurred prior to that initial attempt.<sup>9</sup> The ALJ further reasoned that because this check ride occurred before any possible effect from protected activity, it served as a baseline for which the following three check rides could be measured. The ALJ found generally that the APDs for each check ride administered the tests consistently and in conformance with objective FAA standards.<sup>10</sup>

With respect to the three check rides that *followed* protected activity, the ALJ found that the three PSA representatives, who administered the upgrade tests, were each experienced pilots that the FAA trained and approved to administer the upgrade testing and all three determined that Occhione performed unsatisfactorily.<sup>11</sup> Further, the ALJ found that FAA officials and a union representative objectively confirmed that Occhione had not performed satisfactorily on the last two upgrade attempts.<sup>12</sup>

The ALJ also addressed an inconsistency in the evidence surrounding whether the APDs who administered the last three check rides knew of Occhione’s protected activity.<sup>13</sup> The ALJ concluded that APD Harris, who administered the second check ride, did not know of

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Morgan following his Preliminary Order on Remand. Occhione waived any right he may have had to request additional hearing opportunities.

<sup>7</sup> *Occhione*, ARB No. 13-061, slip op. at 15.

<sup>8</sup> *Occhione v. PSA Airlines, Inc.*, ARB No. 13-061, ALJ No. 2011-AIR-012, slip op. at 28, 30 (ALJ Aug. 26, 2015). Occhione attempted to pass a test to upgrade as a pilot from a First Officer to a Captain four times and PSA did not upgrade him after any of these attempts.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 12, 13, 17, 24.

<sup>11</sup> *Id.* at 31.

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.* at 20, 29.

Occhione's protected activity, since the undisputed FAA inquiry to Harris regarding Occhione's complaints did not occur until *after* the second check ride.<sup>14</sup> However, with respect to whether the evidence supported knowledge on the part of the APDs on the third and fourth check rides, the ALJ erred legally in his determination that a finding of "knowledge" of protected activity requires "*specific* knowledge of Occhione's complaints and whether the complaints involved protected activity."<sup>15</sup> Applicable precedent does not support this specificity requirement for a finding of knowledge.<sup>16</sup> But the ALJ's error requiring specific knowledge was harmless since the ALJ made an alternative finding in which he assumed knowledge of Occhione's protected activity during the third and fourth check rides. The ALJ nevertheless found that, since there was no temporal proximity between the APDs' knowledge and the failed upgrade attempts, no inference of causation was applicable.<sup>17</sup> The ALJ also explicitly considered and addressed Occhione's evidence of animus and found it insufficient to support any inference of pretext.<sup>18</sup> The ALJ concluded "that there is no credible evidence which 'tends to support' a relationship between the protected activity and PSA's adverse actions in the administration of Occhione's four check rides."<sup>19</sup>

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<sup>14</sup> *Id.* at 22.

<sup>15</sup> *Id.* at 21.

<sup>16</sup> The ALJ conceded that the APDs were aware of Occhione's complaints about the check rides but were not aware that the complaint involved a specific violation of an FAA regulation. The ALJ wrongly concluded that this distinction precluded a finding that the APDs knew of Occhione's "protected activity." In *Knox v. DOL*, 434 F.3d 721, 725 (4th Cir. 2006), the Fourth Circuit ruled, in a case arising under the Clean Air Act, that when a complainant has to prove that she had a reasonable belief that she was engaging in protected activity, she does not have to prove that she conveyed her reasonable belief to management. Further, a complainant is not required to cite to a specific rule or regulation for her disclosure to be protected. See *Simpson v. United Parcel Svc.*, ARB No. 06-065, ALJ No. 2005-AIR-031, slip op. at 5 (ARB Mar. 14, 2008) ("A complainant need not cite to a specific violation, [but] allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety))." Similarly, a respondent's knowledge of the protected activity need not be specific, and a complainant need not prove that a respondent knew that the complaint involved a violation of a particular FAA regulation.

<sup>17</sup> D. & O. at 29.

<sup>18</sup> *Id.* at 25, n. 13; 28, n.17.

<sup>19</sup> *Id.* at 28.

With respect to Occhione's termination, the ALJ found that the deciding official's constructive knowledge of Occhione's protected activity combined with temporal proximity was sufficient to demonstrate contribution. Nevertheless, the ALJ ultimately concluded that PSA Airlines proved that it would have terminated Occhione's employment absent his protected activity.<sup>20</sup> The findings the ALJ relied on in making this determination are: 1) that PSA had a policy that was applied to all pilot employees who attempted to upgrade from First Officer to Captain such that pilots who fail two upgrade attempts (of two attempts each) are always terminated or permitted to resign, 2) Occhione's employment termination was automatic after he failed his fourth and final attempt, and 3) that Occhione's unsatisfactory grades on the four attempts to upgrade to Captain were objectively supported.<sup>21</sup>

While we may have viewed the evidence differently, we affirm the ALJ's findings as they are supported by substantial evidence in the record.<sup>22</sup>

### CONCLUSION

Accordingly, we **AFFIRM**.

**SO ORDERED.**

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

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

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

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<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.* at 30-31.

<sup>22</sup> “[T]he ARB will uphold an ALJ’s findings of fact to the extent they are supported by substantial evidence even if there is also substantial evidence for the other party, and even if the Board ‘would justifiably have made a different choice’ had the matter been before us de novo.” *White v. Action Expediting, Inc.*, ARB No. 16-024, ALJ No. 2011-STA-011, slip op. at 2, n.3 (ARB Jan. 26, 2017) (quoting *Hirst v. Southeast Airlines, Inc.*, ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-047, slip op. at 6 (ARB Jan. 31, 2007)).