U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

STIRLING MAZENKO,

COMPLAINANT,

v.

PEGASUS AIRCRAFT MANAGEMENT, LLC; HENRY AIR II TRUST; AND HENRY AIR II, LLC,

RESPONDENTS.

ARB CASE NO. 2021-0032

ALJ CASE NO. 2019-AIR-00001
ALJ SCOTT R. MORRIS

DATE: June 18, 2024

Appearances:

For the Complainant:
Stephen L. Brischetto, Esq.; *Law Office of Stephen L. Brischetto*; Portland, Oregon

For the Respondents:
Douglas L. Stuart, Esq.; *Aerlex Law Group*; Los Angeles, California

Before HARTHILL, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge

ORDER REVERSING IN PART AND REMANDING IN PART

HARTHILL, Chief Administrative Appeals Judge:

This case arises under the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21).[1] Stirling Mazenko (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) on May 9, 2018, alleging that Respondents terminated his

[1] 49 U.S.C. § 42121 (amended 2020), as implemented by the regulations at 29 C.F.R. Part 1979 (2023).

employment in retaliation for his protected activity.[2] On October 26, 2020, a United States Department of Labor (Department) Administrative Law Judge (ALJ) issued a Decision and Order Denying Relief (D. & O.).

The ALJ held that Respondent Pegasus Aircraft Management, LLC (PAM) was an air carrier subject to AIR21,[3] but Respondents Henry Air II Trust and Henry Air II, LLC were not air carriers subject to AIR21.[4] The ALJ found that Complainant did not engage in protected activity and that even if his concerns could be construed as protected activity, they were not a contributing factor in PAM's decision to terminate his employment.[5] Complainant filed a Petition for Review with the Administrative Review Board (ARB or Board). For the reasons explained below, we reverse in part and remand in part for further proceedings consistent with this opinion.

BACKGROUND AND PROCEDURAL HISTORY

1. Background Facts and Relationships Between the Parties

Complainant is a pilot with over forty years of experience, having flown for a legacy carrier prior to retiring in 2012.[6] After retiring, Complainant flew corporate jets for private operators (called Part 91 operators) and charter operators (called Part 135 operators).[7]

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[2] Decision and Order Denying Relief at 1, 6, 37.

[3] D. & O. at 45-47. In the Consolidated Appropriations Act, 2021 (CAA), Congress replaced "air carrier or contractor or subcontractor" with "[a] holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder . . . ." Congress also replaced the language about providing information "relating to air carrier safety" with "relating to aviation safety." The pre-amendment language applies to the events in 2017-2018 that gave rise to Mazenko's claim and therefore we use the term "air carrier" herein. We note, however, that our analysis also applies to the amended text.

[4] D. & O. at 56.

[5] *Id.* at 68.

[6] *Id.* at 7. The ALJ found Complainant to be credible. *Id.* at 39; *see also infra* note 98.

[7] D. & O. at 7. Part 91 and Part 135 refer to those portions of the Federal Aviation Regulations (FAR), under which a given flight is conducted. *Id.* at 7 n.24. Private flights are subject to the rules under Part 91 and are the least rigorous, while Part 135 governs charter flights and has additional requirements. *Id.*

Michael Evans is the President of the Alibaba Group.[8] In 2016-2017, Evans managed his travel with Jet Aviation, an aviation management company.[9] Complainant served as a contract pilot at Jet Aviation for Evans.[10] Jet Aviation also had three other pilots for Evans: Jay Young, Ben Izzie, and David Westcott.[11] In 2017, Evans decided to end his relationship with Jet Aviation and find a new aircraft management company.[12]

On September 28, 2017, Evans retained PAM to manage a new Gulfstream 650 ER (G650) aircraft for Evans.[13] PAM hired Complainant as a pilot on October 13, 2017.[14] In addition, PAM hired Young, Westcott, and Izzie, who all left Jet Aviation to continue to fly for Evans.[15] On December 1, 2017, PAM personnel picked up the new G650 aircraft, and began to operate it.[16] The G650 aircraft transported passengers between U.S. states and internationally.[17]

PAM has three members, who all own one-third of the business: (1) Tony Yoder,[18] (2) David Mendelson,[19] and (3) Tim Prero.[20] PAM's scheduler was Emilio Lopez.[21] Lopez served as PAM's liaison between the pilots and Evans' staff, and

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8 *Id.* at 5-6. Alibaba Group is a Chinese multinational technology company. *Id.* at 8 n.27.

9 *Id.* at 8.

10 *Id.* at 8-9.

11 *Id.* at 8.

12 *Id.* at 9.

13 *Id.* at 9, 19. PAM is a flight management company organized in February 2017. *Id.* at 6, 12.

14 *Id.* at 6; Joint Exhibit (JX) 1.

15 D. & O. at 17.

16 *Id.* at 22. All flights were conducted following the FAR requirements for private operators in 14 C.F.R. Part 91. D. & O. at 6, 22.

17 *Id.* at 6, 43.

18 *Id.* at 12. Yoder is the CEO and managing partner of PAM. *Id.* at 12 n.45. Yoder noted that the decision to terminate Complainant and Westcott's employment was "collaborative," involving both Mendelson and Yoder. Hearing Transcript (Tr.) at 1442-43. The ALJ found Yoder to be credible. D. & O. at 41.

19 D. & O. at 12. Mendelson is PAM's Chief Operating Officer. *Id.* at 12-13. Mendelson and Yoder decided to terminate Complainant and Westcott's employment. Tr. at 1442-44. The ALJ found Mendelson's testimony to be not credible. D. & O. at 40.

20 D. & O. at 12.

21 *Id.* at 18. The ALJ found Lopez not credible. *Id.* at 40.

Lopez coordinated with Evans' personal assistant regarding the aircraft's schedule.[22]

The other two Respondents are Henry Air II Trust and Henry Air II, LLC.

2. Complainant's Alleged Protected Activity—Missing Letters of Authorization

The Federal Aviation Administration (FAA) issues Letters of Authorization (LOAs), which approve the use of certain types of equipment and operations.[23] Between November 2017 and February 2018, Complainant expressed concerns to PAM's management that the G650 aircraft was operating without certain LOAs.[24] In these communications, Complainant claimed the LOAs were required under International Civil Aviation Organization (ICAO) requirements and identified foreign airspaces he believed required the missing LOAs.[25] Complainant claimed he engaged in protected activity when he sent these communications because he reasonably believed that operating the aircraft without these particular LOAs "placed the aircraft in non-compliance with FAA requirements," including 14 C.F.R. § 91.703(a).[26]

The LOAs at issue on appeal[27] are: (1) LOA D195, which authorizes an aircraft operator to operate an aircraft under a Minimum Equipment List (MEL);[28]

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[22] *Id.* at 18.

[23] *Id.* at 6. An FAA Principal Operations Inspector (POI) is authorized to issue LOAs to an operator. *Id.* at 23 n.101. The FAA office that houses the POIs is the Flight Standards District Office. *Id.* at 23 n.102.

[24] *Id.* at 6; Complainant Post Hearing Brief (Comp. Post Hearing Br.) at 25.

[25] Comp. Post Hearing Br. at 25-28.

[26] *Id.* at 24-28. 14 C.F.R. § 91.703(a) requires that each person operating a civil aircraft of U.S. registry operating outside of the U.S. shall: "(1) [w]hen over the high seas, comply with Annex 2 (Rules of the Air) to the Convention on International Civil Aviation . . . ; and (2) [w]hen within a foreign country, comply with the regulations relating to the flight and maneuver of aircraft there in force . . . ."

[27] Complainant raised concerns regarding other LOAs, but before the Board Complainant has only properly appealed his concerns related to LOA A153 and LOA D195. For example, on appeal, Complainant does not contest the ALJ's objectively reasonable finding related to LOA A056 (CPDLC). *See* Complainant's Opening Brief (Comp. Br.) at 25-28. Accordingly, we do not address the issue on appeal.

[28] D. & O. at 23; Respondents' Exhibit (RX) 69 at 4-5. For clarity purposes, we will often refer to LOA D195 as: "LOA D195 (MEL)."

and (2) LOA A153, which authorizes an operator to use Automatic Dependent Surveillance-Broadcast (ADS-B).[29]

Complainant expressed concerns that PAM was using LOA D095, instead of LOA D195 (MEL). An aircraft cannot take off with inoperable instruments or equipment, unless the aircraft has an LOA authorizing the use of a MEL, which is an aircraft-specific list that provides "for the operation of the aircraft with the instruments and equipment in an inoperable condition."[30] LOA D095 authorizes an operator to operate an aircraft with a *Master* Minimum Equipment List (MMEL), a manufacturer's list for the type of aircraft.[31] The FAA allows a MMEL to be used as a MEL.[32] However, Complainant communicated his concerns to PAM that operating abroad with LOA D095 (MMEL) would not meet ICAO or foreign requirements requiring an aircraft-specific LOA D195 (MEL).[33]

Prior to PAM taking possession of and operating the aircraft on December 1, 2017,[34] Complainant asked Mendelson, "do we have a[ ] MEL LOA on request as well? I believe ICAO does not accept MMEL's [sic] anymore and an aircraft specific MEL requires an LOA."[35]

After taking possession of the aircraft, Complainant advised Mendelson that the LOA D095 (MMEL) was "not valid in Europe"[36] and that "Europe now requires an aircraft specific MEL with an accompanying LOA."[37] Complainant researched the issue and sent an article to PAM from Aviation International News, titled "EASA: U.S. Operators Can't Use MMEL in Europe" (Aviation Article),[38] that explained the need for LOA D195 (MEL) to operate in Europe:

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29 D. & O. at 23; *see also* Tr. at 851. For clarity purposes, we will often refer to LOA A153 as "LOA A153 (ADS-B)." Complainant explained in his testimony that ADS-B is a "way of communicating with Air Traffic Control [sic] can see your altitude and your air speed and your position." Tr. at 196.

30 14 C.F.R. § 91.213; *see also* D. & O. at 63; RX 69 at 4-5.

31 JX 11; RX 69 at 4. For clarity purposes, we will often refer to LOA D095 as "LOA D095 (MMEL)."

32 JX 11; RX 69 at 5.

33 Comp. Post Hearing Br. at 25-28.

34 On December 1, 2017, PAM personnel picked up the new G650 aircraft, and PAM began operating it. D. & O. at 22. The ALJ incorrectly noted that the "[e]xchange of custody of the aircraft occurred on November 30, 2018." *Id.* at 21.

35 Complainant's Exhibit (CX) 10 (Complainant's e-mail on November 19, 2017).

36 CX 13 at 4; *see also* Comp. Br. at 21.

37 CX 13 at 3.

38 *Id.* at 5.

> US Part 91 twin turboprops and jets flown *in Europe must now operate* with a Minimum Equipment List (MEL) developed for that specific aircraft under Letter of Authorization (LOA) D195, rather than with a manufacturer's aircraft model Master MEL (MMEL) approved by the FAA under LOA D095. Laurent Chapeau, head of the ramp inspection office of the French Safety Oversight Authority, which administers SAFA ramp inspections for third-country operators in France, has affirmed EASA's recent recognition of the ICAO standard. . . .
>
> Under ICAO guidelines, LOA D095 doesn't provide the oversight or approval process required for a valid MEL.[39]

On December 7, 2017, Complainant e-mailed Mendelson again and identified four outstanding LOAs, including D195 (MEL) and A153 (ADS-B).[40] On December 22, 2017, Mendelson told the pilots via e-mail he would "tackle the FAA open items right after they return from holiday."[41] However, from December 22, 2017, to January 17, 2018, Mendelson did not provide an update regarding the LOAs.[42]

On January 17, 2018, Complainant e-mailed Mendelson and asked whether there was any progress on the remaining LOAs.[43] On January 20, 2018, Complainant e-mailed Mendelson: "[t]he ADS and CPDLC LOAs are fairly significant since we are required to have both in our daily operating environment. It's just a matter of time before we are questioned about this."[44] On January 21, 2018, Complainant e-mailed Mendelson in bold red lettering asking about the LOAs, including A056, A153, C052 and D195.[45] On January 26, 2018, Complainant e-mailed Mendelson asking for an update regarding the LOAs.[46]

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39 *Id.* at 6 (emphasis added).

40 CX 11 at 2; Comp. Br. at 7. The ALJ incorrectly noted the date as December 7, 2018. D. & O. at 22.

41 D. & O. at 23; CX 16.

42 D. & O. at 23. On January 6, 2018, Mendelson learned that his brother had passed away. As a result, Mendelson took about 10 days off work. *Id.* at 23 n.103.

43 *Id.* at 23; CX 21 at 1.

44 CX 26 at 3.

45 D. & O. at 23; CX 26 at 2.

46 CX 26 at 1 (e-mailing "[a]ny update from the POI . . . ?"); *see also* Comp. Br. at 33-34.

On January 27, 2018, Complainant e-mailed Mendelson advising that the G650 aircraft was going to Hong Kong, which "require[d] ADS-B" but it was not on board the plane.[47] Finally, on February 8, 2018, Mazenko e-mailed Mendelson again stating, "[a]ny progress on disseminating the LOA's [sic] to us that were approved 2 weeks ago? (CPDLC, ADS-B, LPV and MEL)."[48]

The following day, Mendelson terminated Complainant's employment.[49]

3. Incidents Allegedly Related to the Termination of Complainant's Employment

PAM terminated Complainant's and Westcott's employment on February 9, 2018, identifying three incidents as the basis for its decision.[50] The first incident, during the week of January 7, 2018, involved a conversation between Complainant and Jon Wells, an employee at International Trip Planning Services (ITPS).[51] Complainant allegedly asked Wells not to tell Lopez that Complainant had called Wells to discuss trips or share what they discussed.[52] Wells nevertheless informed Lopez of his conversation with Complainant.[53] Lopez then informed Mendelson and Yoder that Complainant had asked Wells to undermine him and take Lopez out of the picture.[54]

The second incident occurred during the week of January 21, 2018, at a Teterboro airport hangar.[55] Complainant admitted that he told a mechanic named Jorge Alva: "sometimes you've got to be an asshole" to get work done.[56] Lopez reported this to Mendelson and Yoder.[57]

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47 CX 34 at 2.

48 CX 37; *see also* Comp. Br. at 34. There had been confusion regarding whether the LOAs had been approved. *See* CX 82; CX 33 at 1; CX 34 at 2-3.

49 D. & O. at 36.

50 *Id.* at 6, 36-37.

51 *Id.* at 27-28. ITPS provides international flight service support. *Id.* at 28.

52 *Id.*

53 *Id.*

54 *Id.* at 28-29; Tr. at 1153-56.

55 D. & O. at 30-33.

56 *Id.* at 31.

57 *Id.* at 32.

The third alleged incident occurred on January 27 or 28, 2018, at the reception area for Signature Flight Support (Signature) at Teterboro airport.[58] There are varying accounts of what occurred when Complainant, Westcott, and another pilot, Dave Coburn, were present when the aircraft was pulled out of the hangar to leave for a scheduled flight.[59] Lopez said he witnessed Complainant being rude to a support representative at the reception desk, which Lopez reported to Mendelson and Yoder.[60] Complainant denied ever berating anyone about the plane not being ready, and that if he had, Coburn and Westcott "would have been in a position to see it."[61] Westcott testified that he had "no knowledge of Complainant berating a Signature employee."[62] Coburn likewise stated that "[i]f such an incident had occurred and the Signature front desk personnel were upset, I would have been aware of such an incident."[63]

Mendelson and Yoder made the decision to terminate Complainant's employment in a "collaborative" process.[64] The ALJ noted, however, that Mendelson and Yoder "reli[ed] on Mr. Lopez's reporting of incidents without conducting their own investigation . . . ."[65] Yoder testified that he did not talk to Complainant about the alleged incidents because "Dave Mendelson is our director of operations. And so, I put that on him."[66] Yoder further testified that "if there wasn't a communication [with Mazenko,] there should have been for sure."[67]

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58 *Id.* at 33-34; Tr. at 1073.

59 D. & O. at 34.

60 *Id.* at 33-35.

61 *Id.* at 34.

62 *Id.* Westcott denied that Lopez came up to him and Complainant regarding an issue with the Signature representative. *Id.* The ALJ found Westcott somewhat credible. *Id.* at 39.

63 CX 76 at 2, ¶ 5 (Declaration of Dave Coburn, dated May 26, 2019).

64 Tr. at 1442-44.

65 D. & O. at 67. As noted earlier, the ALJ found both Mendelson and Lopez to be not credible and gave their versions of events little weight. *Id.* at 40.

66 Tr. at 1433.

67 *Id.* at 1434.

4. Procedural History

Following OSHA's dismissal of his AIR21 complaint, Complainant requested a formal hearing before the Office of Administrative Law Judges (OALJ).[68] The ALJ held a hearing from June 3-7 and July 11-12, 2019.[69]

Complainant argued that he engaged in protected activity when he sent communications to Mendelson about operating the aircraft with missing LOAs,[70] which he believed violated FAA rules, regulations, and orders.[71] Complainant also claimed that his protected conduct was a contributing factor in PAM's termination of his employment,[72] and Respondents Henry Air II, LLC and Henry Air II Trust were liable as air carriers or joint employers.[73]

The ALJ issued his D. & O. on October 26, 2020.[74] First, the ALJ ruled that PAM was an air carrier and therefore a covered employer subject to AIR21.[75] However, the ALJ ruled that Respondents Henry Air II Trust and Henry Air II, LLC were not air carriers subject to AIR21.[76]

Next, the ALJ found "no instances of protected activity in this case."[77] To engage in protected activity, complainants must prove that they believed in the existence of a violation, which belief "must be subjectively held and objectively reasonable."[78] The ALJ found that Complainant did not have a good faith subjective belief or objectively reasonable belief that Complainant had reported violations when he provided information to Mendelson regarding missing LOAs.[79]

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68 D. & O. at 1-2. Complainant requested an OALJ hearing on October 3, 2018. *Id.* at 2.

69 *Id.* at 3.

70 Comp. Post Hearing Br. at 25.

71 D. & O. at 37.

72 *Id.*; Comp. Post Hearing Br. at 32-44.

73 Comp. Post Hearing Br. at 16-24; D. & O. at 37-38.

74 D. & O. at 1.

75 *Id.* at 45-47. The ALJ found that "Respondent PAM is subject to the Act because it held itself out as holding a Part 135 air carrier certificate." *Id.* at 47.

76 *Id.* at 56.

77 *Id.* at 65.

78 *Petitt v. Delta Airlines*, ARB No. 2021-0014, ALJ No. 2018-AIR-00041, slip op. at 12 (ARB Mar. 29, 2022) (citation omitted); *see Burdette v. ExpressJet Airlines, Inc.*, ARB No. 2014-0059, ALJ No. 2013-AIR-00016, slip op. at 5 (ARB Jan. 21, 2016).

79 D. & O. at 58-65. On appeal, Complainant argues that "Complainant is unable to locate a finding of fact as to whether Complainant's concerns were objectively reasonable."

The ALJ also found that Complainant's reporting of missing LOAs was not a contributing factor in PAM's termination of Complainant's employment.[80] Complainant filed this appeal with the Board.[81]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and to issue agency decisions in cases arising under AIR21.[82] In AIR21 cases, the Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual findings if they are supported by substantial evidence.[83] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[84] An ALJ thus must "adequately explain why he credited certain evidence and discredited other evidence."[85] And although an ALJ "need not address every aspect of [a party's claim] at length and in detail," the findings "must provide enough information to ensure the Court

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Comp. Br. at 17. We construe the ALJ's ruling as finding that Complainant's beliefs were not objectively reasonable.

[80] D. & O. at 66-68.

[81] Although Complainant filed an untimely Petition for Review, the Board equitably tolled the limitations period because Complainant was provided inadequate notice that prevented Complainant from filing a timely Petition for Review. Order Accepting Complainant's Appeal and Setting Briefing Schedule at 4.

[82] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 1979.110(a).

[83] 29 C.F.R. § 1979.110(b); *Yates v. Superior Air Charter LLC*, ARB No. 2017-0061, ALJ No. 2015-AIR-00028, slip op. at 4 (ARB Sept. 26, 2019) (citation omitted). Complainant argues that the standard of review should be de novo for the ALJ's finding regarding protected activity. Comp. Br. at 17-19. However, the ALJ's protected activity finding is a factual determination, which we review to determine whether it is supported by substantial evidence. 29 C.F.R. § 1979.110(b) ("The Board will review the factual determinations of the [ALJ] under the substantial evidence standard."); *Petitt*, ARB No. 2021-0014, slip op. at 13 (finding the ALJ's protected activity finding was supported by substantial evidence). Nonetheless, as discussed in Discussion, Section 2(B)(ii) *infra*, the ALJ improperly applied the objectively reasonable standard to Complainant's beliefs regarding LOA A153 (ADS-B). Because that is a question of law, we reviewed the ALJ's application de novo.

[84] *Printz v. STS Aviation Grp.*, ARB No. 2022-0045, ALJ No. 2021-AIR-00013, slip op. at 30 (ARB Dec. 15, 2023) (citation omitted); *Henrich v. Ecolab, Inc.*, ARB No. 2005-0030, ALJ No. 2004-SOX-00051, slip op. at 7 (ARB June 29, 2006) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

[85] *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (citations omitted).

that he properly considered the relevant evidence underlying [the party's] request."[86] The failure to address evidence or resolve conflicts in the evidence thus requires remand; ultimately, a reviewing court must be able to "discern what the ALJ did and why he did it."[87]

In addition, the Board must, under substantial evidence review, consider whether the "evidence is so strong that remand is unnecessary" and reversal is required.[88] The Board will reverse when no further factual development remains and remand would be "futile because the ALJ's evidence leads to one conclusion," i.e., no reasonable fact finder could come to any other determination.[89]

DISCUSSION

1. AIR21 Legal Standards

AIR21 states a complainant engages in protected activity if he or she:

> [P]rovided, 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

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86 *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013) (citations omitted).

87 *Printz*, ARB No. 2022-0045, slip op. at 30 (citation omitted).

88 *Bobreski v. J. Givoo Consultants*, ARB No. 2013-0001, ALJ No. 2008-ERA-00003, slip op. at 19 (ARB Aug. 29, 2014).

89 *Id.* at 30; *see also id.* at 22 n.76 (stating a complainant is entitled to a finding as a matter of law under the substantial evidence standard where they present "a case so strong that the fact finder cannot disbelieve it and the only reasonable conclusion is to rule in his favor"); *Singh v. Garland*, 843 F. App'x 632, 633 (5th Cir. 2021) (stating that "factual findings are reviewed under the substantial evidence test, reversing only when the evidence is so compelling that no reasonable fact finder could fail to find" any other way) (citations omitted); *Nguyen v. Holder*, 763 F.3d 1022, 1029 (9th Cir. 2014) ("We will reverse, under the substantial evidence standard, if the evidence in the record compels a reasonable factfinder to conclude that the BIA's decision is incorrect.") (citations and quotations omitted); *Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187 (4th Cir. 2014) (stating that while factual determinations are the province of the ALJ, reversal is warranted when further factual development is unnecessary, and the party was entitled to judgment as a matter of law); *Menendez-Donis v. Ashcroft*, 360 F.3d 915, 918 (8th Cir. 2004) ("[B]efore we can reverse [factual findings] we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by the [fact-finder].") (citation omitted).

> Administration or any other provision of Federal law relating to air carrier safety . . . .[90]

To prevail in a retaliation case under AIR21, complainants must prove by a preponderance of the evidence that they engaged in protected activity and that the protected activity was a contributing factor in the adverse employment action taken against them.[91] If the complainant meets this burden of proof, the respondent may avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[92]

Before the ALJ, Complainant claimed that he engaged in protected activity by reporting missing LOAs, including D195 (MEL) and A153 (ADS-B).[93] Complainant claims that he reasonably believed that because operating the aircraft without these LOAs violated foreign country regulations or ICAO standards, he was reporting a violation of an FAA rule, 14 C.F.R. § 91.703(a).[94] That FAA rule requires that each person operating a civil aircraft of U.S. registry outside of the U.S. shall:

> (1) When over the high seas, comply with Annex 2 (Rules of the Air) to the Convention on International Civil Aviation . . . ; and
> (2) When within a foreign country, comply with the regulations relating to the flight and maneuver of aircraft there in force . . . .[95]

The ALJ found that because Complainant did not hold a good faith subjective and objectively reasonable belief that he had reported violations of FAA regulations, he did not engage in protected activity when he provided information about the missing LOAs.[96] Regardless of Complainant's beliefs, the ALJ further

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90 49 U.S.C. § 42121(a)(1) (amended 2020). As noted, *supra* note 3, the CAA amendment to AIR21 changed "air carrier" language from "relating to air carrier safety" to "relating to aviation safety." 49 U.S.C. § 42121.

91 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *Dolan v. Aero Micronesia, Inc.*, ARB Nos. 2020-0006, -0008, ALJ No. 2018-AIR-00032, slip op. at 4 (ARB June 30, 2021) (citation omitted).

92 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *Dolan*, ARB Nos. 2020-0006, -0008, slip op. at 4-5 (citations omitted).

93 D. & O. at 37-38, 61.

94 Comp. Post Hearing Br. at 25-28; Comp. Br. at 20-25 (subjective belief), 25-28 (objectively reasonable belief).

95 14 C.F.R. § 91.703(a).

96 D. & O. at 58-65.

held the reports did not in any way contribute to the termination of his employment. We agree, in part, with Complainant's arguments on appeal that the ALJ erred in making these determinations.[97]

First, the ALJ found Complainant credible.[98] Complainant's explicit statements convey the straightforward belief that the lack of LOAs violated FAA regulations. Given that the ALJ's speculation on Complainant's state of mind alone supports his determination that Complainant did not hold that belief, we find the ALJ's conclusion unreasonable on these facts. We therefore reverse the ALJ's subjective belief determination regarding LOA D195 (MEL) and LOA A153 (ADS-B).

Second, in light of unaddressed evidence and unresolved conflicts in the evidence, we remand for further consideration the ALJ's objective belief finding regarding LOA D195 (MEL) and LOA A153 (ADS-B) and the ALJ's contributing factor determination.[99]

2. The ALJ's Protected Activity Analysis

A. Subjective Belief: The ALJ Erred as a Matter of Law in Finding that Complainant Did Not Have a Subjective Belief Regarding Missing LOAs—LOA D195 (MEL) and LOA A153 (ADS-B)

A complainant engages in protected activity under AIR21 if they provide information relating to a violation or *alleged* violation of a regulation, order, or

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[97] Complainant also argues on appeal that the ALJ erred in declining to decide Complainant's claim that Henry Air II LLC and Henry Air II Trust were liable as joint employers. Comp. Br. at 38-39. We decline to consider this issue on appeal because joint employer status is only relevant if the ALJ finds, on remand, that PAM retaliated against Complainant for AIR21 whistleblowing activity. *Cf. Printz,* ARB No. 2022-0045, slip op. at 24-29. Therefore, on remand, we instruct the ALJ to consider the issue if the ALJ finds that Complainant engaged in protected activity and the protected activity was a contributing factor to the termination of his employment.

[98] The ALJ found "Complainant's rendition of facts surrounding his efforts to obtain the LOAs for [the G650 aircraft] . . . to be generally credible" and noted the "record before the Tribunal supports Complainant's accounts." D. & O. at 39. After reviewing the record, we affirm those findings.

[99] Outside of these findings that we reverse or remand, we do not disturb the rest of the ALJ's findings related to Complainant's subjective belief and the objective reasonableness of Complainant's beliefs regarding other LOAs not under consideration by the Board.

standard of the FAA or federal law relating to air carrier safety.[100] Although a complainant "need not prove an *actual* FAA violation,"[101] a complainant's "belief that a violation occurred must be subjectively held and objectively reasonable."[102] "To prove subjective belief, a complainant must prove that [they] held the belief in good faith."[103] In these circumstances, Complainant thus need only demonstrate he held a good faith belief foreign authorities or ICAO required the LOAs.[104]

i. LOA D195 (MEL)

The ALJ ruled that Complainant's inquiries regarding the LOAs "were consistent with seeking to maximize the abilities of the aircraft by continuing to monitor which LOAs were in effect," rather than evidencing his subjective belief "that the failure to have them [was] a violation of any FAA rules, regulations, or standards."[105] The ALJ's only support for that proposition however, was the postulation that Complainant testified he would not operate an unlawful or unsafe aircraft and he continued to operate the G650 despite the missing LOA D195 (MEL).[106]

But whether Complainant operated the G650 even if he thought it was unlawful or unsafe is not the standard in assessing Complainant's subjective belief of a violation. Rather, as the ALJ initially acknowledged, that belief must only "relate to violations of FAA orders, regulations or standards (or any other violations of federal law relating to aviation safety.)"[107] And the record completely belies any

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100 49 U.S.C. § 42121(a); *Sewade v. Halo-Flight, Inc.*, ARB No. 2013-0098, ALJ No. 2013-AIR-00009, slip op. at 7 (ARB Feb. 13, 2015) (citing 29 U.S.C. § 42121(a)).

101 *Sewade*, ARB No. 2013-0098, slip op. at 8 (citing 29 U.S.C. § 42121(a)).

102 *Petitt*, ARB No. 2021-0014, slip op. at 12; *see also Burdette*, ARB No. 2014-0059, slip op. at 5.

103 *Burdette*, ARB No. 2014-0059, slip op. at 5 (citation omitted).

104 *See id.*; *Petitt*, ARB No. 2021-0014, slip op. at 12.

105 D. & O. at 60.

106 *Id.* In his one paragraph subjective belief finding, the ALJ was also "mindful" that: (1) when Complainant raised the MELs issue, management acted upon it; and (2) Complainant was aware of the FAA's position that one can use the MMEL as a MEL. *Id.* These facts, even if established, are irrelevant to whether at the time Complainant reported the issue he subjectively believed the lack of the LOAs related to a violation of safety regulations. And even if they were relevant to deducing his state of mind at that time, they could not rationally outweigh Complainant's direct contemporaneous statements of what he actually believed, given that the ALJ found him to be a credible witness.

107 *Id.* at 58 (citation omitted); *accord id.* at 60 (finding Complainant's testimony that he would not conduct an "unsafe" flight is "not the standard," but nonetheless reflective "of his state of mind toward safety.").

suggestion Complainant did not in good faith believe the lack of LOA D195 (MEL) violated foreign, and therefore FAA, regulations.

Indeed, Complainant sent repeated communications to Mendelson explicitly stating foreign authorities and ICAO required LOA D195 (MEL) to operate. On November 19, 2017, for example, Complainant e-mailed Mendelson, sharing his belief that ICAO required LOA D195 (MEL): "do we have a[ ] MEL LOA on request as well? I believe ICAO does not accept MMEL's [sic] anymore and an aircraft specific MEL requires an LOA."[108]

Complainant also shared research with Mendelson regarding requirements for LOA D195 (MEL). On December 1, 2017, Complainant e-mailed Mendelson, advising him that "LOA D095 (MMEL for MEL) *is not valid in Europ*e. See my link below."[109] The Aviation Article link explained the need for LOA D195 (MEL) to operate in Europe.[110] After sending the Aviation Article to Mendelson, Complainant e-mailed Mendelson again that same day, reiterating that "Europe now requires an aircraft specific MEL with an accompanying LOA."[111]

Subsequently, Complainant and Mendelson emailed back and forth on the question of whether and when PAM would obtain the MEL and other outstanding LOAs.[112] In his January 21, 2018, e-mail to Mendelson, Complainant wrote in bold red letters regarding four missing LOAs, including "D195: MEL."[113]

Although finding Complainant credible, the ALJ ignored these explicit communications and evidence. On their face, however, they convey the good faith belief that lack of LOA D195 "relates" to the violation of an FAA regulation. And given the only evidence the ALJ relied on was his own speculation about Complainant's continued operation of the aircraft despite the missing LOAs, we hold no reasonable factfinder could conclude Complainant did not genuinely believe the lack of LOA D195 (MEL) violated FAA regulations.[114] We therefore reverse the ALJ's determination.[115]

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108 CX 10; *see also* Comp. Br. at 21.

109 CX 13 at 4 (emphasis added); *see also* Comp. Br. at 21.

110 *See supra* Background and Procedural History, Section 2; CX 13 at 6; *see also* Comp. Br. at 21.

111 CX 13 at 3.

112 *See supra* Background and Procedural History, Section 2.

113 CX 26 at 2; Comp. Br. at 33.

114 *Supra* note 106.

115 *Bobreski*, ARB No. 2013-0001, slip op. at 30 (stating that the Board will reverse a factual finding when remand would be "unnecessary and futile because the ALJ's evidence

ii. LOA A153 (ADS-B)

The ALJ similarly held that Complainant did not have a "good faith subjective belief concerning the use of certain communication or navigation instruments or procedures."[116] The ALJ, however, did not provide any specific analysis of whether Complainant had a good faith subjective belief regarding LOA A153 (ADS-B). And, in finding Complainant did not hold such a belief, the ALJ once again ignored Complainant's extensive communications and explicit hearing testimony directly stating the aircraft was operating in violation of foreign standards, thereby violating 29 C.F.R. § 91.703(a).[117]

First, the record shows that Complainant sent several contemporaneous communications to his employer regarding the missing LOA A153 (ADS-B). On January 20, 2018, Complainant e-mailed Mendelson, stating: "The ADS and CPDLC LOAs are fairly significant since we are *required* to have both in our *daily operating environment*. It's just a matter of time before we are questioned on this."[118] Subsequently, on January 21, 2018, Complainant e-mailed Mendelson in bold red letters regarding the four missing LOAs, including "A153: ADS-B."[119] On January 27, 2018, Complainant e-mailed Mendelson the following: "We are flying to HKG tomorrow. They *require ADS-B*. We don't have the LOA. Any suggestions?"[120] A plain reading of Complainant's e-mails thus establishes he held a good faith subjective belief that certain airspaces required LOA A153 (ADS-B). And, because Complainant understood the FAA regulations incorporate those requirements, the only reasonable way to interpret his e-mails is to conclude Complainant subjectively believed flying without the LOA constituted an FAA violation.

Second, Complainant testified several times in the hearing about his subjective beliefs regarding requirements for LOA A153 (ADS-B). For example, Complainant responded to the ALJ's questioning about ADS-B by testifying that ADS-B is "*required* in -- in certain airways, in Hong Kong, Singapore, all of

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leads to one conclusion"); *see also Menendez-Donis*, 360 F.3d at 918 ("[B]efore we can reverse [factual findings] we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by the [fact-finder].") (citation omitted).

116 D. & O. at 59.

117 Comp. Br. at 20, 22-23.

118 CX 26 at 3 (emphasis added); Comp. Br. at 22.

119 CX 26 at 2; Comp. Br. at 33.

120 CX 34 at 2 (emphasis added).

Europe."[121] Complainant also testified that, "[t]he Canadian regulations *require* [ADS-B] just like in Europe, [where] European regulations *require* it."[122]

In addition, Complainant testified under cross examination that, when he was employed by PAM, he had researched the requirements for LOA A153 (ADS-B) in Europe and Canada:

> Q: Now you testified yesterday that it was your understanding based on some research you had done that there were certain countries that required ADS-B. Do you recall that testimony?
> A: Yes.
> Q: Okay. And you referenced Canada as one of those countries.
> A: From what I read, yes. . . .
>
> Q: Okay. And how about Europe? It was your understanding . . . based on research you did, that ADS-B was required in Europe as of *the time you were employed by PAM*?
> A: Yes.
> Q: Okay. And -- and you did research to determine this.
> A: Well, I mean, I -- again, it wasn't my job. I was doing my best. And from the research I -- from the searching I did, that's what I got . . . .[123]

Complainant's Counsel also questioned Complainant about his understanding at the time of LOA A153 (ADS-B) requirements in Europe and Canada:

> Q: [W]as it your understanding at the time that if you were going to fly to Europe, or you were going to fly to Canada, and you don't have [ADS-B], *you're violating ICAO and FAA regs*?
> A: Yes.[124]

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121 Tr. at 195 (emphasis added).

122 *Id.* at 294 (emphasis added).

123 *Id.* at 559-60 (emphasis added). In addition, Complainant testified that ADS-B was required for Hong Kong in certain "airways." *Id.* at 561.

124 *Id.* at 734 (emphasis added).

Notably, the ALJ found Complainant to be a credible witness at the top of his profession, and we have affirmed the ALJ's credibility findings.[125] Since the ALJ has not identified (and we have not found) any evidence countering these direct statements regarding Complainant's subjective beliefs, we reverse the ALJ's finding concerning LOA A153 (ADS-B).[126]

B. *Objectively Reasonable Belief: The ALJ's Analysis Does Not Demonstrate that the ALJ Properly Considered or Weighed the Evidence in the Record Regarding LOA D195 (MEL) and LOA A153 (ADS-B)*

The ALJ found that Complainant did not have an objectively reasonable belief that he was reporting violations when he provided information to Mendelson that the aircraft required LOA D195 (MEL) and LOA A153 (ADS-B). To determine whether a complainant's belief was objectively reasonable, the Board assesses their 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."[127] Under the substantial evidence standard,[128] we review whether the ALJ conducted "an appropriate analysis of the evidence to support his findings."[129]

A finding of fact lacks contextual strength if the fact finder ignores, or fails to resolve, a conflict created by countervailing evidence.[130] Moreover, the ALJ "must provide enough information to ensure . . . he properly considered the relevant evidence[.]"[131]

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125 *See supra* note 98. The ALJ also noted how "Complainant is a highly experienced and qualified professional pilot, who is arguably at the apex of the corporate aviation ladder. He is a former airline pilot and holds an airlines transport pilot certificate with several ratings." D. & O. at 60.

126 *Bobreski*, ARB No. 2013-0001, slip op. at 30 (stating that the Board will reverse a factual finding when remand would be "unnecessary and futile because the ALJ's evidence leads to one conclusion"); *see also Menendez-Donis*, 360 F.3d at 918 ("[B]efore we can reverse [factual findings] we must find that it would not be possible for any reasonable fact-finder to come to the conclusion reached by the [fact-finder].") (citation omitted).

127 *Burdette*, ARB No. 2014-0059, slip op. at 5 (inner quotations omitted); *see also Sylvester v. Parexel Int'l LLC*, ARB No. 2007-0123, ALJ Nos. 2007-SOX-00039, -00042, slip op. at 16 (ARB May 25, 2011) ("[A] reasonable, but mistaken, belief that the employer's conduct constitutes a violation of" the applicable law can constitute protected activity.).

128 29 C.F.R. § 1979.110(b); *see also Printz,* ARB No. 2022-0045, slip op. at 30.

129 *Clem v. Comput. Scis. Corp.*, ARB No. 2016-0096, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 17 (ARB Sept. 17, 2019).

130 *Printz,* ARB No. 2022-0045, slip op. at 30 (citations omitted).

131 *Mori*, 917 F. Supp. 2d at 65 (citation omitted).

We find that the ALJ's objectively reasonable findings suffer from unaddressed evidence and unresolved conflicts. Given that evidence could support a finding that Complainant's subjective beliefs were objectively reasonable, these errors are not harmless.

i. LOA D195 (MEL)

The ALJ found that Complainant's belief that he reported an FAA violation related to LOA D195 (MEL) was not objectively reasonable for several reasons: (1) Mendelson communicated to Complainant that LOA D095 (MMEL) was sufficient and the FAA POI said so;[132] (2) there would or could only be a violation if the aircraft were flown with inoperative equipment and needed to use LOA D095 (MMEL);[133] and (3) Complainant presented no evidence that a foreign nation could take action against him or the aircraft for operating the aircraft without a MEL.[134]

Complainant argues that the ALJ erred by inappropriately relying on these findings, and ignoring or failing to address evidence that Complainant's views were objectively reasonable.[135] Furthermore, Complainant argues that the ALJ "appears to be offering expert testimony regarding his own personal views of what an experienced pilot should know or think."[136] We agree with Complainant: the ALJ did not adequately analyze the evidentiary record, failed to adequately support his findings, and at times relied on sources outside the record, including his own opinion.[137] Moreover, the ALJ failed to resolve certain conflicts created by countervailing evidence or explain why he credited certain evidence and discredited other evidence.

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132 D. & O. at 63.

133 *Id.* at 64.

134 *Id.* at 64-65. The ALJ also found PAM's POI refused to issue LOA D195 (MEL) and there was nothing PAM could do to force the FAA to do so, any alleged violations concerning an aircraft's LOA D195 (MEL) would be regulated by the FAA, and any alleged violations of foreign regulations would be referred to the FAA. *Id.*

135 Comp. Br. at 26-28.

136 *Id.* at 27.

137 D. & O. at 63-65. In other contexts, Courts have clarified that ALJs cannot substitute their own expert opinions over expert testimony. *Ortiz v. Comm'r of Soc. Sec.*, 659 F. Supp. 3d 301, 311 (E.D.N.Y. Mar. 7, 2023) ("[T]he ALJ cannot arbitrarily substitute his own judgment for a competent medical opinion . . . he is not free to set his own expertise against that of a physician.") (citations and quotations omitted). Similarly, here, the ALJ cannot substitute his own opinion over the opinions of the expert witnesses and evidence in the record.

First, the ALJ found that Mendelson communicated to Complainant that LOA D095 (MMEL) was sufficient and the FAA POI said so.[138] The ALJ's reliance on Mendelson's representations, however, creates a conflict because he found Mendelson not credible, including determining that Mendelson "repeatedly misrepresented his interactions with the POI to the crew."[139] On remand, the ALJ must resolve this conflict if, on the evidence as a whole, he once again finds Complainant's beliefs objectively unreasonable based, in part, on Mendelson's testimony.

Second, the ALJ found there could only be a violation if the aircraft was flown with inoperative equipment and needed to use D095 (MMEL).[140] Complainant, however, shared with Mendelson his belief that Europe required LOA D195 (MEL) at all times and, in support of his belief, Complainant provided an Aviation Article that discussed the issue. The Aviation Article noted that aircraft "flown in Europe *must now operate*" with a MEL under LOA D195.[141] The ALJ did not explain why he did not credit the article as evidence that a pilot in Complainant's position would have reasonably believed compliance with European rules required a LOA D195 (MEL) to be on board at all times of operation.

Third, the ALJ found that any alleged violations concerning an aircraft's MEL would be regulated by the FAA, any alleged violations of foreign regulations would be referred to the FAA, and Complainant presented no evidence that a foreign nation could take action against him or the aircraft for operating the aircraft without a MEL.[142] But to satisfy the objective belief requirement, a complainant is not required to establish that a governing body would act against an air carrier (or employer); Complainant instead need only establish that a reasonable person of the same training and experience would objectively believe a violation occurred.[143]

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138 D. & O. at 63.

139 *Id.* at 21 n.94; *see also id.* at 40 ("The Tribunal finds Mr. Mendelson's testimony less credible and gives it little weight."). In addition, on January 21, 2018, Complainant e-mailed Mendelson in bold red letters regarding the four missing LOAs, including "D195: MEL." CX 26 at 2; Comp. Br. at 33. Mendelson testified that he did not know "what the significance of the red font would be." D. & O. at 23; Tr. at 1963. The ALJ found Mendelson's testimony on this issue to not be credible. D. & O. at 23 n.104.

140 D. & O. at 64.

141 CX 13 at 6 (emphasis added).

142 D. & O. at 64-65.

143 *Burdette*, ARB No. 2014-0059, slip op. at 5 ("To determine whether a subjective belief is objectively reasonable, one assesses a complainant's 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.") (citations and quotations omitted).

The ALJ thus erred to the extent he required Complainant to establish the FAA or a foreign nation would or could enforce the regulation in determining whether Complainant satisfied this element.[144]

Regardless, Complainant *did* present evidence that France required a MEL and that French authorities *were* enforcing compliance. The Aviation Article Complainant shared with Mendelson states that the French Safety Oversight Authority "has noted a lack of compliance during ramp inspections in the last few months. . . . [I]nspectors did raise Category 2 findings, which . . . require operators to take follow-up preventative action."[145] The ALJ erred by not weighing this evidence in his objective belief analysis.

In addition to the issues addressed above with the ALJ's findings, a review of the evidentiary record shows that the ALJ did not sufficiently evaluate the following evidence.[146]

a. Complainant's Communications to Mendelson, and Pilots' Testimony

As detailed above, Complainant sent numerous emails to Mendelson from November 19, 2017, until PAM terminated his employment in February 2018, sharing his belief that ICAO and foreign authorities required LOA D195 (MEL).[147] The ALJ found Complainant to be "at the apex of the corporate aviation ladder."[148] The Aviation Article is evidence that at least one other aviation source believed the absence of a LOA D195 (MEL) was a violation of French requirements or ICAO guidelines.[149] Laurent Chapeau, the head of the ramp safety inspection office in France, was quoted stating France both adopted and was enforcing the new requirement.[150]

The ALJ must also consider Westcott and Coburn's testimony in determining whether Complainant's beliefs were objectively reasonable. Westcott stated: "I was

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144 *See id.*

145 CX 13 at 6.

146 Some of the evidence listed below is considered above in addressing the ALJ's findings, but we have included it again to clearly indicate the evidence that requires further review by the ALJ.

147 *Supra* Background and Procedural History, Section 2. On November 19, 2017, Complainant e-mailed Mendelson "do we have a[ ] MEL LOA on request as well? I believe ICAO does not accept MMEL's [sic] anymore and an aircraft specific MEL requires an LOA." CX 10.

148 D. & O. at 60.

149 CX 13 at 6.

150 *Id.*

concerned we were going to get ramp checked on some European or Asian airport, and they were going to say, 'Let me see your LOAs' at which point they were going to say, 'You flew into our country illegally and the airplane is now grounded.'"[151] From there, "I'd have to say to Mr. Evans, 'I'm sorry. But we've been flying this airplane illegally, unbeknownst to you, and now we are stuck here . . . .'"[152] Coburn stated that "[t]he emails that Mr. Mazenko was sending to PAM management were necessary because PAM was not providing the pilots with the proper tools (i.e. LOA's) [sic] to lawfully and properly perform their job."[153]

b. Complainant's Expert, J. Bruce Huffman Testimony

The ALJ did not weigh the testimony of J. Bruce Huffman, Complainant's expert.[154] Huffman testified regarding a white paper by the Air Safety Group titled, "Minimum Equipment List: Validity of the MMEL as an MEL in Domestic and Foreign State Airspace" (White Paper).[155]

Respondents' Counsel asked Huffman if he found the following statement in the White Paper to be accurate: "Variations in individual interpretations or perspectives, pertaining to MMEL, as an MEL, applicability in foreign state airspace, are highly subjective and absent of evidence to support that position. Short of an interpretation by an Administrative Law Judge, the legal responsibilities will likely remain undetermined until tested."[156] In response, Huffman testified that the White Paper statement was accurate.[157]
The White Paper also provided a "Strategic Recommendation," stating:

> Mitigation of the potential risk of being found in non-compliance with a foreign state MEL requirement, and to support the objective of ensuring complete confidence of regulatory compliance, anywhere in the world, Air Safety Group recommends that U.S. non-commercial operators develop an MEL specific to an individual aircraft and obtain a D195 Letter of Authorization for its use.[158]

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151 Tr. at 418.

152 *Id.* Although the ALJ only found Westcott somewhat credible, he did not question the credibility of this statement.

153 CX 76 at 2, ¶ 6.

154 The ALJ found Huffman to be credible. D. & O. at 39.

155 Tr. at 845-47. The White Paper is in the record at RX 69.

156 Tr. at 846-47.

157 *Id.* at 847.

158 RX 69 at 7.

On remand, the ALJ must consider whether the White Paper and related testimony reasonably supports a conclusion there could be a violation for using a MMEL as a MEL.

c. Respondents' Expert, Charles O'Dell Testimony

The ALJ similarly did not consider relevant testimony from Respondent's expert, Charles O'Dell.[159] O'Dell testified regarding France's requirements, noting: "My understanding is France has objection to it, the [LOA D0]95 [(MMEL)]. They want the [LOA D]195 [(MEL)]."[160] Although O'Dell acknowledged that France "want[s]" LOA D195 (MEL), he also opined that a LOA D195 (MEL) was *not* required,[161] but the ALJ did not adequately explain this apparent discrepancy.

We therefore conclude that the ALJ did not adequately analyze the evidentiary record in finding that Complainant's beliefs were not objectively reasonable related to LOA D195 (MEL). Accordingly, we remand to the ALJ to reconsider his objectively reasonable finding regarding LOA D195 (MEL), considering these identified facts and any other facts the ALJ identifies as relevant.

ii. LOA A153 (ADS-B)

The ALJ found it objectively unreasonable for Complainant to believe that he reported a violation when he communicated with Mendelson about the missing LOA A153 (ADS-B).[162] In so doing, however, the ALJ both misapplied the standard and failed to address relevant evidence.

First, instead of focusing on the reasonableness of Complainant's belief, the ALJ based his determination on whether Complainant had the ability to prevent a violation or whether the employer required Complainant to violate FAA rules.[163] The ALJ found, for example, that the "failure to have [LOA A153 (ADS-B)] onboard

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159 The ALJ found O'Dell to be credible. D. & O. at 39.

160 Tr. at 1018.

161 *Id.* at 1021-22.

162 D. & O. at 61-63.

163 A complainant engages in protected activity under AIR21 if they provide information relating to a violation or *alleged* violation of a regulation, order, or standard of the FAA or federal law relating to air carrier safety. 49 U.S.C. § 42121(a). Complainants must prove that they believed in the existence of a violation, which belief "must be subjectively held and objectively reasonable." *Petitt*, ARB No. 2021-0014, slip op. at 12.

has nothing to do with whether or not the aircraft can operate."[164] The ALJ further reasoned that "[i]f Complainant or the flight crew opted to operate the aircraft in a manner that required LOA approval, but did not have LOA approval on board, they *violated* the regulations."[165] And in response to Complainant's e-mail that the LOA was required, the ALJ held: "[T]he remedy for the pilot is simple – one does not operate in the environment that requires [LOA A153 (ADS-B)] approval."[166] The ALJ also concluded, in part, that Complainant's reports to Mendelson were not protected activity because "[n]o one from PAM ever told Complainant to violate the regulations or threatened him with discipline if he did not."[167]

But the proper question is not whether Complainant had the ability to prevent a violation or whether the employer required Complainant to violate FAA rules. Rather, the proper question is whether Complainant had an objectively reasonable belief that he had reported a violation. Complainant raised concerns about flying in certain airspaces without LOA A153 (ADS-B), telling Mendelson "we are *required* to have [it] in our *daily operating environment*."[168] Complainant also credibly testified that, based on his research, he believed Canada and Europe required LOA A153 (ADS-B).[169] The G650 aircraft indisputably flew into Europe and Canada.[170]

On remand, the ALJ must determine whether Complainant's beliefs were objectively reasonable, not whether Complainant had the ability to prevent a violation or whether the employer required Complainant to violate FAA rules.

Second, the ALJ did not adequately analyze Complainant's communications to Mendelson and the other pilots' testimony in finding that Complainant did not reasonably believe he was reporting a violation relating to the missing LOA A153 (ADS-B). The ALJ must address Complainant's research and opinion at the time he reported the need for LOAs, and his testimony at the hearing, particularly since the

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164 D. & O. at 61. The ALJ was referring to three LOAs—A056, A153, and C052—but for our purposes here, we only need to discuss LOA A153.

165 *Id.* at 63 (emphasis added).

166 *Id.* at 62.

167 *Id.* at 63.

168 CX 26 at 3 (emphasis added).

169 Comp. Br. at 27; Tr. at 294-95, 559-60. Complainant also believed that Hong Kong required LOA A153 (ADS-B), but clarified that Hong Kong only required LOA A153 (ADS-B) in certain airways. *Id.* at 560-61.

170 Complainant testified that "[w]e flew into France almost every trip." Tr. at 164. Complainant testified that they flew into Canada, Europe, and Hong Kong without LOA A153 (ADS-B) on board. *Id.* at 292-93.

ALJ found Complainant to be a credible witness "at the apex of the corporate aviation ladder."[171]

On January 20, 21, and 27, 2018, Complainant e-mailed Mendelson stating that the LOA A153 (ADS-B) was required to operate, and specifically required for an upcoming flight into Hong Kong.[172] Mazenko also testified that he researched the issue and found that certain countries require LOA A153 (ADS-B), including Canada for new planes.[173] Furthermore, based on his research, Mazenko testified how he believed Europe required ADS-B at the time he was employed by PAM,[174] and Complainant believed that Hong Kong required ADS-B in certain "airways."[175]

Under questioning from his Counsel, Complainant agreed with the statement that "if you're going to fly to Europe, you need [ADS-B]," and "if you're going to fly to Canada, you need [ADS-B]."[176] Complainant also agreed that, "at the time," he believed that if you fly to Europe or Canada without ADS-B, you violate "ICAO and FAA Regs."[177] The ALJ further must weigh Westcott and Coburn's testimony in determining whether Complainant's beliefs were objectively reasonable.[178]

Accordingly, we remand to the ALJ to reconsider his finding that Complainant's beliefs were not objectively reasonable regarding LOA A153 (ADS-B), considering these and any other relevant facts under the proper standard.

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171 D. & O. at 60.

172 On January 20, 2018, Complainant e-mailed Mendelson: "The ADS and CPDLC LOAs are fairly significant since we are required to have both in our *daily operating environment*. It's just a matter of time before we are questioned on this." CX 26 at 3 (emphasis added). On January 21, 2018, Complainant e-mailed Mendelson in bold red letters regarding the four missing LOAs, including "A153: ADS-B." *Id.* at 2; Comp. Br. at 33. Mendelson testified that he did not know "what the significance of the red font would be." D. & O. at 23; Tr. at 1963. The ALJ found Mendelson's testimony on this issue to be not credible. D. & O. at 23 n.104. On January 27, 2018, Complainant e-mailed Mendelson the following: "We are flying to HKG tomorrow. They require ADS-B. We don't have the LOA. Any suggestions?" CX 34 at 2.

173 Tr. at 559-60.

174 *Id.* at 560.

175 *Id.* at 560-61.

176 *Id.* at 730.

177 *Id.*

178 *Supra* Discussion, Section 2(B)(i)(a); Tr. at 418; CX 76 at 2, ¶ 6.

3. The ALJ's Contributing Factor Analysis Does Not Demonstrate that the ALJ Considered or Properly Weighed All the Evidence in the Record

Complainant has the burden to prove, by a preponderance of the evidence, that his protected activity was a contributing factor to the employer's adverse action.[179] "A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'"[180] Employees may meet their evidentiary burden to establish contributing factor with circumstantial evidence, such as temporal proximity.[181]

The ALJ found Complainant did not meet his burden on this element.[182] He acknowledged that "PAM handled the termination of Complainant poorly," and noted how Mendelson and Yoder relied on Lopez's reporting of Complainant's alleged misconduct without conducting their own investigation or allowing Complainant "to present his version of the facts."[183] Nonetheless, the ALJ found since "being a poor manager is not what this Tribunal must decide,"[184] this "is not the type of evidence that assists Complainant in meeting his burden."[185] The ALJ thus concluded: "In sum, the Tribunal is not convinced by a preponderance of evidence that Complainant's reporting of LOAs had anything to do with his termination. If there is a contributing factor here, it was management's failure to investigate the nature of the alleged events that led to Complainant's termination."[186]

On appeal, Complainant argues the ALJ erred relying on Mendelson's representations because the ALJ found Mendelson generally lacked credibility and because he "lied" regarding the LOAs in his communications with Complainant.[187] Complainant also alleges the ALJ did not address arguments that undermine the ALJ's assumptions about the termination including the temporal proximity of

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179 *Petitt*, ARB No. 2021-0014, slip op. at 18.

180 *Id.*

181 *Williams v. QVC, Inc.*, ARB No. 2020-0019, ALJ No. 2018-SOX-00019, slip op. at 12 (ARB Jan. 17, 2023) (citation omitted). "Circumstantial evidence may include, but is not limited to, temporal proximity, inconsistent application of an employer's policies, pretext, shifting explanations by the employer, or antagonism." *Id.* (citations omitted).

182 D. & O. at 68.

183 *Id.* at 67.

184 *Id.*

185 *Id.* at 68.

186 *Id.*

187 Comp. Br. at 35-37.

Complainant's reports to his firing and Respondent's failure to follow the proper procedures in the termination process.[188]

For its part, Respondents counter that the ALJ's decision should be affirmed for the reasons the ALJ held, but also for an argument the ALJ did not address: Respondents argue that Westcott—who was not involved in any of the LOA reports—was terminated on the same day for the same reasons as Complainant, thereby establishing the LOAs played no role in Complainant's termination.[189] We agree with both parties, in part, and instruct the ALJ on remand to address the following issues.

First, as Complainant argues, the ALJ did not weigh the evidence of temporal proximity.[190] On appeal, Complainant reiterates he sent six messages to Mendelson in January and February 2018 regarding the missing LOAs.[191] Complainant argues that the close temporal proximity between his communications and the termination of his employment could establish a link between his protected conduct and his termination that the ALJ did not address.[192] We agree and remand to the ALJ to evaluate Complainant's argument.

Second, we agree with Complainant that the ALJ did not explain why he credited Mendelson's explanation of the termination, despite finding Mendelson's testimony "less credible and giv[ing] it little weight."[193] We further agree with Complainant that Mendelson's decision not to talk to Mazenko was inconsistent with his training and practice, and that Yoder testified that Mendelson should have communicated with Mazenko as part of an investigation.[194] On remand, we therefore instruct the ALJ to address Mendelson's credibility and to explain how the ALJ concluded "management's failure to investigate the nature of the alleged events" does not weigh in favor of Complainant's position he was terminated for engaging in protected activity.[195]

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188 *Id.* at 33-35.

189 Respondents' Response Brief at 23.

190 Comp. Br. at 33-34. The ALJ did not analyze Complainant's temporal proximity argument, but he did acknowledge it. *See* D. & O. at 37-38.

191 Comp. Br. at 33-34.

192 *Id.*

193 D. & O. at 40.

194 Comp. Br. at 35; Tr. at 1433-34. Complainant argues that Mendelson "was trained to document performance issues so there is a record of what he has done and of the employee's response to issues," but "Mendelson made no documentation with respect to Lopez'[s] complaints . . . ." Comp. Br. at 35; s*ee also* Tr. at 1954-56, 1981.

195 D. & O. at 67.

Finally, the ALJ did not evaluate the evidence concerning PAM's termination of Westcott's employment on the same day as Complainant's employment termination. Respondents argued before the ALJ that PAM terminated Complainant's and Westcott's employment because of their conduct, and Westcott had "never said a word about LOAs and couldn't have cared less about them."[196] Similarly, on appeal, Respondents argue that "[t]here were *two* employees terminated on the same day for the same reason. They were not a good fit for the company. . . . [I]f the LOA issue w[as] the cause of [Complainant's] termination, why was the other employee terminated?"[197] Complainant, in turn, supplies a possible pretextual reason: "The termination of Westcott . . . is easily reconciled. If Mendelson wished to use Lopez'[s] complaints as a pretext to terminate Mazenko, he also needed to terminate Westcott since Lopez'[s] complaints extended to both individuals."[198] We remand this issue for the ALJ to address in the first instance as part of his contributory factor analysis.

As noted, an ALJ does not need to address every aspect of a complainant's claim at length or in detail.[199] But the ALJ must explain the relevant evidence in a manner that allows the Board to understand "what the ALJ did and why he did it."[200] For the reasons stated, we simply cannot. Accordingly, we remand to the ALJ to reconsider his contributing factor analysis, taking into account these identified facts and any other facts the ALJ identifies as relevant.

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196 Respondents' Post Hearing Brief at 51.

197 Respondents' Response Brief at 23 (emphasis in original).

198 Complainant's Reply Brief at 17-18.

199 *Mori*, 917 F. Supp. 2d at 65 (citation omitted).

200 *Printz*, ARB No. 2022-0045, slip op. at 30 (citation omitted).

CONCLUSION

We **REVERSE** the ALJ's subjective belief ruling regarding LOA D195 (MEL) and LOA A153 (ADS-B). In addition, we **REMAND** the ALJ's objective belief ruling regarding LOA D195 (MEL) and LOA A153 (ADS-B), and we **REMAND** the ALJ's contributing factor ruling for additional consideration, fact-finding, and analysis in accordance with our instructions.

SO ORDERED.

SUSAN HARTHILL
Chief Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge