

**UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY**

**In re the Matter of:**

Federal Aviation Administration,

Charging Party,

and

Professional Airways System Specialists, AFL-CIO,

Respondent.

Case No. WA-06-0356

**FEDERAL AVIATION ADMINISTRATION'S  
EXCEPTIONS TO THE ALJ'S DECISION  
AND  
BRIEF IN SUPPORT OF EXCEPTIONS**

Dated this 14<sup>th</sup> day of September, 2007

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	3. The NLRB has never held that the duty to bargain in good faith does not apply to union conduct during a ratification vote, especially when the vote is required by a ground rules agreement.	15

- a. The ALJ's reliance on, and interpretation and application of, private sector cases is misplaced. None of the private sector decisions relied upon by the ALJ hold that a union's conduct during a ratification vote is not subject to the good faith requirement where, as here, the vote is required by a ground rules agreement.
 

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- b. Should the Authority find that the good faith standard applies to union conduct during the ratification process, especially when ratification is required by the negotiated ground rules, the Authority need not define exactly how that good faith standard would apply to every potential factual situation, but rather hold only that the totality of the circumstances dictates satisfaction of the standard.
 

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- c. The ALJ incorrectly allowed his personal view of the fairness of the FAA statutory impasse resolution scheme to influence his interpretation and application of existing private sector case law discussing various aspects of union ratification.
 

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- B. The ALJ Erred By Failing To Conclude That Pass's Conduct In The Totality Of The Circumstances Of This Case Did Not Satisfy The Duty To Bargain In Good Faith.
 

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  - 1. In determining whether a party has fulfilled the good faith standard, the totality of the circumstances in a case must be considered.
 

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  - 2. PASS did not meet the good faith standard in the particular and totality of the circumstances in this case because: a) the parties' negotiated ground rules required ratification; b) PASS signed off on the tentative contract with the intent of never having the agreement ratified; c) PASS signed off on the tentative contract with the intent of avoiding the Panel imposed termination date for negotiations and as part of its bargaining strategy to frustrate and avoid the triggering of the statutory impasse resolution process; and, d) PASS took action to realize its intent.
 

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I.

EXCEPTIONS

The Administrative Law Judge's decision in this matter, issued on July 31, 2007<sup>1</sup>, is riddled with error, the most egregious error being his failure to grasp the essence of the allegations that constitute the unfair labor practice charge in this case.

At the center of the allegations is the statutory duty to bargain in good faith with a sincere resolve to reach agreement. Conduct that is antithetical to that resolve constitutes bad faith bargaining, and bad faith bargaining is an unfair labor practice under the Federal Service Labor-Management Relations Statute. Whether particular conduct is antithetical to a sincere resolve to reach agreement is determined based on the totality of circumstances in a given case.

The question here is whether the agreement that resulted from PASS'S action in withdrawing its bargaining proposals and accepting FAA's initial proposals reflected a sincere resolve to reach agreement under the circumstances of this case. Those circumstances include (i) an "evergreen" provision in the 2000-2005 collective bargaining agreement extending its duration until a successor agreement takes effect; (ii) provisions in the negotiated ground rules requiring ratification of a successor agreement; (iii) a provision in the successor agreement providing for the agreement to take effect upon ratification; (iv) an FSIP-imposed end date for substantive negotiations of July 21; (v) a PASS-imposed return date of July 31 for the ratification ballots; and (vi) a four-month "vote no" campaign carried out by PASS to ensure defeat of the agreement it created when it withdrew its proposals and accepted FAA's initial proposals. Because the ALJ did not grasp the essence of FAA's allegations against PASS, the ALJ evaluated PASS'S actions independently rather than as part of a course of conduct.

Thus, pursuant to §2423.40(a) of the Authority's Regulations, the Federal Administration respectfully takes the following exceptions to the Decision and Recommended Order of Administrative Law Judge Richard A. Pearson dated July 31, 2007, OALJ 07-020:

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<sup>1</sup> An unsigned copy of that decision was immediately released via facsimile to NATCA, a union representing several bargaining units at FAA but not the bargaining unit involved in the case at hand. NATCA, in turn, immediately forwarded a copy of the unsigned decision to Michael Derby, legal counsel to and chief negotiator for PASS. A signed copy of the decision was served via certified mail on FAA, and FAA received the signed copy on August 6. Security protocols for screening incoming mail delayed delivery of the signed copy to FAA labor relations personnel for several additional days.

- 1 1. The determination that “it was the campaign speech itself that constitutes the unlawful act being  
2 alleged.” ALJD at 32, lines 30-33. *Grounds:* The unlawful act alleged was not the speech itself but  
3 the course of conduct, namely the “vote no” campaign in the context of this case. The speech was  
4 simply the means by which the Union breached its duty to bargain in good faith by avoiding  
5 agreement. FAA Brief at 19-21.
- 6 2. The determination that “the Union’s speech and literature were the essence of the unlawful acts  
7 being alleged, and that the only unlawful purposes attributed to PASS’S conduct are delay and  
8 avoidance of reaching agreement” neither of which was proven. ALJD at 33, lines 1-5. *Grounds:*  
9 The unlawful act alleged was neither the speech nor the literature in and of themselves. Rather, both  
10 were simply the means by which the Union avoided reaching agreement with FAA.
- 11 3. The determination that General Counsel and FAA “urge that a union negotiating in good faith must  
12 not only conduct a ratification vote, but also affirmatively support ratification (or at least that it must  
13 not discourage ratification).” ALJD at 24, lines 3-7. *Grounds:* Neither GC nor FAA has argued in  
14 this case that the Union was legally obligated to “affirmatively support” ratification. To the contrary,  
15 FAA specifically noted that “[t]he Authority need not decide the full reach of the duty of good faith  
16 that attaches when ratification is a condition precedent to a collective bargaining agreement in order  
17 to find that PASS breached that duty in this case.” FAA argued that whatever the reach of the duty of  
18 good faith, the duty under the facts of this cases “encompasses at the very least an obligation to  
19 refrain from taking action to impede, hamper or otherwise prevent ratification.” See FAA’s Post-  
20 Hearing Brief at 29, lines 6-15.
- 21 4. The finding that the Union “demonstrated at all times a ‘sincere resolve to reach a collective  
22 bargaining agreement with the FAA as it is required under [S]ection 7114(b)(1). ALJD at 29, lines  
23 22-25. *Grounds:* Where, as here, actions are inherently destructive of collective bargaining rights,  
24 the party engaged in those actions has the burden of explaining, justifying or otherwise  
25 characterizing the actions as something different from what they appear on their face. *NLRB v. Erie*  
26 *Resistor Corp.*, 373 U.S. 221, 228 (1963). If, as here, the counter explanation, justification or  
27 characterization fails, the actions were taken in bad faith. *Id.* at 28. FAA Post-hearing Brief at 22-  
28 29.
- 29 5. The finding that ratification of a collective bargaining agreement under the totality of circumstances  
30 present in this case was not inextricably intertwined with the collective bargaining process and  
therefore not subject to the duty of good faith that attaches to the bargaining process. ALJD at 23.  
*Grounds:* The ALJ’s finding is inconsistent with the facts and reflects a misapplication of precedent.
6. The legal conclusion that the Union’s duty *vis-à-vis* ratification of an agreement is limited to the  
ministerial act of submitting the agreement for ratification within a reasonable period of time.  
ALJD at 23. *Grounds:* The ALJ’s legal conclusion is inconsistent with well-know precepts of  
contract law regarding a party’s duty *vis-à-vis* conditions that are within the party’s exclusive  
control.
7. The legal conclusion that the NLRB, if presented with the facts in this case, would “definitely reject”  
the contention that the Union, in order to discharge its duty to bargain in good faith, must not  
discourage ratification. ALJD at 24. *Grounds:* The legal conclusion is inconsistent with a well-  
known precept of contract law regarding a party’s duty *vis-à-vis* conditions that are within the  
party’s exclusive control, and the Board traditionally adopts contract law principles with respect to  
the formation of a collective bargaining agreement and defining the rights and obligations of the  
parties. *Sierra Publishing Co.*, 296 NLRB 477 n.12 (1989)(concurring opinion).

- 1 8. The failure to find that the negotiated ground rules in this case expressly provided for ratification of  
2 any agreement reached at the bargaining table. GC Exh 3, Sections 5 and 17 (Ground Rules  
3 Agreement). *Grounds*: There is a distinction to be drawn between the legal obligations that flow  
4 from a self-imposed ratification process and those that flow from a negotiated one (see ALJD at 20,  
5 lines 3-41). Because the ALJ omitted this critical fact from his analysis, he reached an incorrect  
6 legal conclusion, namely, that ratification of the agreement in this case was a self-imposed  
7 requirement, not a “true condition precedent” negotiated by the parties.
- 8 9. The failure to find that the agreement reached at the table, like the predecessor agreement, expressly  
9 provided for the agreement to “become effective on the date it is approved by the FAA  
10 Administrator or designee and ratified by the membership of PASS.” Exhs. 26(a) (2000-2005  
11 Agreement, Article xx) and 24 (2006 Tentative Agreement, Article 58). *Grounds*: See 8 above.
- 12 10. The failure to find that Union’s Chief Negotiator had “full, complete and unconditional authority to  
13 bind [the Union] regarding any aspect of the negotiations.” GC Exh. 3 (Ground Rules, Section 2)  
14 *Grounds*: This fact is critical to the determination of the status of the agreement reached when PASS  
15 withdrew its proposals and accepting in full FAA’s bargaining proposals. As noted in both 8 and 9,  
16 because the ALJ omitted this fact from his analysis, he reached an incorrect legal conclusion, namely  
17 that ratification of the agreement in this case was a self-imposed requirement, not a “true condition  
18 precedent” negotiated by the parties.
- 19 11. The failure to find that the Union’s Chief Negotiator, by his actions in initialing each article in the  
20 agreement, entered into a binding agreement, the effective date of which was subject to ratification.  
21 GC Exhs. 3 (Ground Rules, Sections 10, 17), 26(a) (2000-2005 Agreement), and 24 (2006  
22 Agreement). *Grounds*: See 8-10, above.
- 23 12. The finding that ratification was a not a “true condition precedent” to the agreement (specifically, its  
24 effective date). *Grounds*: See 8-12 above.
- 25 13. The finding that the Union’s actions in this case were “the functional equivalent of a private sector  
26 union rejecting a company’s offer but agreeing to submit the offer to its [sic] membership for  
27 approval or rejection.” ALJD at 29, lines 40-43. *Grounds*: An offer is not an agreement, and an  
28 agreement is not an offer. Rather, “[a]n offer, as an element of a contract, is a proposal to make a  
29 contract.” BLACK’S LAW DICTIONARY 1233 (4<sup>th</sup> ed. 1968). An offer “creates a power of acceptance  
30 permitting the offeree by accepting the offer to transform the offeror’s promise into a contractual  
obligation.” JOHN D. CALAMARI AND JOSEPH M. PERILLO, CONTRACTS §15 (1970).
14. The conclusion that the Union’s actions in this case were “an attempt to find some way of  
convincing the Agency to soften its bargaining demands.” ALJD at 26 (bottom) and 27 (top).  
*Grounds*: For the Union’s actions to have been such an attempt, the Union had to have a reasonable  
expectation of returning to the bargaining table. The Union had no such expectation here. As the  
ALJ noted,

while the Union may have hoped that a resounding vote against ratification would  
motivate the FAA to return to the bargaining table in a more conciliatory mood, *by  
allowing the ratification process to continue until August 3*, PASS was running the  
distinct risk of losing its window for further bargaining and of having the contract  
imposed on it.

ALJD at 28, lines 24-30 (emphasis added).

- 1 15. The finding that the ratification process was “delayed slightly ... by the Agency’s refusal to allow  
2 PASS to conduct briefings with employees on official time.” ALJD at 29(bottom) – 30 (top).  
3 *Grounds:* FAA conceded that it refused to allow PASS to conduct briefings with employees on  
4 official time. However, that fact does not, in and of itself, establish that the ratification process was  
5 delayed, whether slightly or otherwise, by FAA’s refusal.
- 6 16. The finding that “the Union’s decision to accept FAA’s proposal on March 30, ... , was motivated at  
7 least in part by its hope to obtain a membership vote and to return to the bargaining table in advance  
8 of July 21.” ALJD at 28, lines 38-42. *Grounds:* The ALJ’s factual conclusion as to the Union’s  
9 motive is at odds with two critical, uncontested facts, namely, the FSIP-imposed July 21 end date for  
10 substantive negotiations between the parties and the Union-imposed July 31 return date for the  
11 ratification ballots. Had the Union intended to return to the bargaining table in advance of July 21,  
12 the Union had the means to do so.
- 13 17. The legal conclusion that FAA has the ability “to implement a CBA unilaterally.” ALJD at 5, n. 2.  
14 *Grounds:* FAA has no such ability. It matters not whether collective bargaining impasses at FAA  
15 are subject to the impasse procedures of 49 U.S.C. §40122(a)(2) or those set forth in 5 U.S.C. §7119,  
16 for both procedures require submission of the matter to a third party for resolution: Congress under  
17 §40122(a)(2) or FSIP under §7119. Congress, unlike FSIP, is not required to take affirmative action  
18 to resolve any impasse submitted to it but may resolve the matter through inaction. If Congress acts  
19 affirmatively to resolve the impasse, FAA is bound by that resolution. If Congress declines to take  
20 affirmative action, that inaction resolves the impasse by empowering FAA to implement the terms  
21 and conditions as set forth in FAA’s contract proposals. To characterize implementation following  
22 Congressional inaction as “unilateral” action on the part of FAA is inaccurate and misleading. The  
23 ALJ’s mistaken belief that FAA has the ability to unilaterally implement its bargaining proposal is a  
24 reflection of the ALJ’s misunderstanding of the applicable law, a misunderstanding that is fatal to his  
25 decision.
- 26 18. The finding that FAA insisted in its dealings with PASS that FAA “could unilaterally implement its  
27 proposals without oversight by the Panel.” ALJD at 26, lines 35-37. *Grounds:* As the record  
28 indicates, FAA maintained throughout the negotiations that in the event the parties were unable to  
29 reach agreement by the FSIP-imposed July 21 end date for substantive negotiations FAA would  
30 pursue “whatever course of action is legal.” Tr. 161. ALJD at 28, lines 3-5. The ALJ’s mistaken  
belief that FAA has the ability to unilaterally implement its bargaining proposal is a reflection of the  
ALJ’s misunderstanding of the applicable law.
19. The finding that FAA had “already noted its willingness to submit its proposals to Congress and then  
implement them.” ALJD at 31, lines 19-20. *Grounds:* As the ALJ noted, FAA previously  
submitted a bargaining impasse with NATCA to Congress for resolution. When Congress failed to  
affirmatively act to resolve the impasse, FAA implemented terms and conditions consistent with its  
proposals for the bargaining units involved in the impasse. Having taken that action in the past does  
not mean that FAA would follow the same course of action in the event of a bargaining impasse with  
PASS. As noted above, FAA stated that it would pursue “whatever course of action is legal.” Tr.  
161. More specifically, FAA stated that in the event of impasse, FAA would submit the matter to  
“the appropriate third party.” Indeed, and as the ALJ even noted, FAA “could have chosen to  
modify its earlier position in the NATCA v. FSIP case and to submit itself to the Panel’s impasse  
resolution procedures, as it had done earlier in this case with regard to the ground rules.” ALJD at  
31, lines 21-24.
20. The finding that “FAA management was on the offensive and PASS was on the defensive during  
contract negotiations.” ALJD at 6, lines 12-13. *Grounds:* Whether FAA management was on the

1 offensive and PASS was on the defensive during contract negotiations is a value judgment reflecting  
2 a party's perspective, not a finding of fact. Here, the ALJ adopted the Union's perspective, and in so  
3 doing, disregarded a critical fact in this case that does not support the value judgment, namely, the  
4 impact of the evergreen clause in the 2000-2005 Agreement on the negotiations. GC Exh. 26(a)  
5 [2000-2005 Agreement, Article 80 (Duration)]. If the ALJ viewed the matter from the FAA's  
6 perspective, the ALJ would conclude that PASS was on the offensive and FAA on the defensive  
7 during the brief negotiations. After all, if PASS considered itself unable to negotiate the deal it  
8 wanted, it could keep the deal it had by and endless cycle of reaching agreement, renege on the  
9 agreement by tanking ratification, and renegotiating – all while reaping the benefits of the “more  
10 generous” provisions of the 2000-2005 Agreement. FAA Post-hearing Brief at 17, line 15 – 18, line  
11 2 and 32 n.65. Indeed, the ALJ noted that negotiations for the 2000-2005 Agreement took “roughly  
12 three or four years” to complete. ALJD 5, n.4.

- 13
- 14 21. The failure to find that given the Union's choice not to avail itself of the legal procedures available  
15 to it, namely, the negotiability proceedings set forth in 5 CFR Part 2424, the Union's protestations of  
16 good faith in connection with its actions (reaching agreement only to renege on the agreement using  
17 the “vote no” campaign to do so) ring hollow. *Grounds*: In evaluating whether PASS has fulfilled its  
18 statutory obligation to bargain in good faith, the ALJ is required by Authority precedent to consider  
19 the totality of the circumstances. *See, e.g., United States Department of Justice, Executive Office for*  
20 *Immigration Review, NY, NY, 61 FLRA 460, 465 (2006)*. A party's choice to pursue a particular  
21 course of action can only be understood in light of the objective to be achieved, whether the course  
22 of action would achieve the stated objective, and the availability of other means to achieve the  
23 objective. The ALJ's failure to find a material fact is fatal to his decision.
- 24 22. The failure to find that given the Union's choice not to avail itself of the legal procedures available  
25 to it, namely the unfair labor practice proceedings set forth in 5 CFR Part 2423, the Union's  
26 protestations of good faith in connection with its actions ring hollow. *Grounds*: See 21 above.
- 27 23. The failure to find that the Union's bargaining strategy was intended to avoid impasse and thereby  
28 prevent FAA from utilizing the statutory impasse resolution process. *Grounds*: The ALJ found that  
29 “the Union's actions did not deprive the Agency of its ability to take whatever steps it considered  
30 necessary in the absence of an agreement.” ALJD at 31, lines 14-17. That, however, was precisely  
the intended consequence of the Union's strategy. Tr. 162 (Brantley); FAA's Post-Hearing Brief  
25, lines 3-20. The ALJ's failure to so find defies explanation and is fatal to his decision.
- 24 24. The failure to find that the Union's bargaining strategy was intended to circumvent the FSIP-  
imposed end date for substantive negotiations between the parties for a successor agreement.  
*Grounds*: That, however, was precisely the intended consequence of the Union's strategy. Tr. 165  
(Brantley). The ALJ's failure to so find defies explanation and is fatal to his decision.
- 25 25. The failure to find that given the evergreen clause in the 2000 collective bargaining agreement  
between the parties, the Union's bargaining strategy was intended to avoid meaningful negotiations  
for a successor agreement and thereby preserve indefinitely the terms of that agreement which were  
more favorable to the Union than were any terms that the Union thought it could negotiate while the  
political pendulum was on the FAA's side. GC Exh. 26(a) (2000-2005 Agreement, Article 80); Tr.  
141-42, 144, 148-49, 154-55, 159 173-76, 178, 181, and 201. *Grounds*: The evidence supports this  
finding, and the ALJ's failure to so find defines explanation and is fatal to his decision.
- 26 26. The failure to find that the Union's bargaining strategy in general and the “vote no” ratification  
campaign in particular were undertaken to delay bargaining with FAA. *Grounds*: Where, as here,

1 actions are inherently destructive of collective bargaining rights, the party engaged in those actions  
2 has the burden of explaining, justifying or otherwise characterizing the actions as something  
3 different from what they appear on their face. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228  
(1963). If, as here, the counter explanation, justification or characterization fails, it necessarily  
4 follows as a matter of law the actions were taken in bad faith. *Id.* at 28.

- 5 27. The failure to find that the Union's bargaining strategy in general and the "vote no" ratification  
6 campaign in particular were undertaken to avoid reaching an agreement with FAA. *Grounds:*  
7 Where, as here, actions are inherently destructive of collective bargaining rights, the party engaged  
8 in those actions has the burden of explaining, justifying or otherwise characterizing the actions as  
9 something different from what they appear on their face. *NLRB v. Erie Resistor Corp.*, 373 U.S.  
10 221, 228 (1963). If, as here, the counter explanation, justification or characterization fails, it  
11 necessarily follows as a matter of law the actions were taken in bad faith. *Id.* at 28.
- 12 28. The legal conclusion that "[w]hile PASS negotiators may have said that they 'accepted' the FAA's  
13 proposals, rather than saying that they would simply submit them to the membership, this is a  
14 distinction without a difference." ALJD at 29, lines 43-46. *Grounds:* The ALJ's legal conclusion  
15 reflects the ALJ's flawed analysis of and resulting misapplication of precedent to the facts of this  
16 case.
- 17 29. The legal conclusion that NLRB precedent establishes that when a collective bargaining agreement is  
18 negotiated subject to ratification, a union "is not required to recommend approval of the agreement."  
19 ALJD at 25, lines 1-4. *Grounds:* The ALJ's legal conclusion reflects the ALJ's flawed analysis of  
20 and resulting misapplication of precedent to the facts of this case.
- 21 30. The legal conclusion that the Union's conduct in this case was a justified response to "the unique  
22 system of impasse resolution that exists at FAA." ALJD at 26, lines 21-39. *Grounds:* The ALJ's  
23 legal conclusion reflects his preconceived notions, not the principled application of legal principles  
24 to the facts.
- 25 31. The legal determination that the absence of an allegation charging the Union with violating  
26 §7116(b)(6) by circumventing the FSIP-imposed end date of July 21 precludes a finding that the  
27 Union's actions in using ratification to circumvent the end date were taken in bad faith in violation.  
28 ALJD at 28 (bottom). *Grounds:* The operative fact in the analysis is whether PASS used ratification  
29 to circumvent the end date for negotiations. In analyzing PASS'S actions, it matters not whether the  
30 end date was negotiated by the parties or imposed by FSIP. While PASS'S conduct would arguably  
constitute an independent violation of §7116(b)(6), an independent violation of that section is not a  
necessary element of the unfair labor practice alleged, namely, the failure to approach the  
negotiations with a sincere resolve to reach agreement.
32. The determination that FAA "has interpreted and applied its unique bargaining statute to *deprive* the  
Panel of jurisdiction to resolve bargaining disputes." ALJD at 30, lines 39-41 (emphasis added).  
*Grounds:* The Administrative Law Judge's determination reflects his preconceived notion that  
bargaining impasses in the federal sector are to be resolved by the Federal Service Impasse Panel  
("Panel"). His determination reflects his bias, not the principled application of legal principles to the  
facts.
33. The determination that FAA's "interpretation [of Title 49] invited a response by the Union, and the  
Union's response in this case appears to me to be entirely lawful." ALJD at 31, lines 3-4. *Grounds:*  
The Administrative Law Judge's determination reflects his preconceived notion that bargaining  
impasses in the federal sector are to be resolved by the Federal Service Impasse Panel ("Panel").

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34. The finding that “[n]o similar, or comparable, unlawful purpose on the Union’s part has been shown in this case.” ALJD at 31, lines 41-42. *Grounds:* The ALJ’s finding reflects his failure to make appropriate findings based on the evidence, not a failure of proof.
  35. The determination that the Union “met its statutory obligations under [S]ections 7114(b) and 7116(b)(5).” ALJD at 32, lines 4-6. *Grounds:* The ALJ’s determination reflects the ALJ’s failure to make appropriate findings based on the evidence and his subsequent failure to consider the totality of circumstances.
  36. The determination that GC failed to prove that the Union delayed negotiations. *Grounds:* The ALJ’s determination reflects the ALJ’s failure to make appropriate findings based on the evidence and his subsequent failure to consider the totality of circumstances. ALJD at 33, lines 3-5.
  37. The determination that GC failed to prove that the Union sought to avoid reaching an agreement ALJD at 33, lines 3-5. *Grounds:* The ALJ’s finding reflects his failure to make appropriate findings based on the evidence, not a failure of proof, and his subsequent failure to evaluate the Union’s actions in light of the totality of circumstances.
  38. The conclusion that the Union “did not violate its duty to bargain in good faith, or otherwise commit an unfair labor practice, by engaging in its campaign to defeat ratification of the proposed contract.” ALJD at 33, lines 10-12. *Grounds:* The ALJ’s finding reflects his failure to make appropriate findings based on the evidence, not a failure of proof, and his subsequent failure to evaluate the Union’s actions in light of the totality of circumstances.
  39. To the ALJ’s legal conclusion that the Authority’s decision in *Norfolk Naval Shipyard*, 9 FLRA 36 (1981) (*Norfolk I*), does not support the proposition that the duty to bargain in good faith applies to a union’s conduct during the ratification process where, as here, ratification is required by the ground rules. ALJD at 25. *Grounds:* The ALJ’s conclusion is based upon a misreading of the case.
  40. To the ALJ’s legal conclusion that the Authority’s decision in *Norfolk Naval Shipyard, Portsmouth, VA*, 13 FLRA 571 (1984) (*Norfolk II*), requires a determination that the good faith obligation does not attach to a union’s conduct during the ratification process. ALJD at 28, lines 9-30. The ALJ’s conclusion is based upon a misreading of the case.
  41. To the ALJ’s failure to make a legal conclusion that an Order should issue requiring FAA to: cease and desist from its illegal conduct in the future; post a remedial notice signed by the PASS President and posted by PASS and FAA; grant FAA the benefit of its bargain by requiring PASS to execute and implement retroactively the bargain it struck when it withdrew its proposals and accepted FAA’s proposals; and apply the agreed upon contract consistent with its terms. ALJD at 33. *Grounds:* See 1-40 above.

1 II.

2 SIGNIFICANCE OF THE CASE

3 The Administrative Law Judge (ALJ) held in this case that the statutory duty to bargain in good faith  
4 does not apply to union conduct during a union contract ratification process, even when ratification is part of  
5 the negotiated ground rules and the negotiated agreement. This is an issue of first impression for the FLRA.

6 Despite the ALJ's citation to numerous National Labor Relations Board (NLRB) decisions and some  
7 appellate decisions discussing various aspects of the union contract ratification process in the private sector,  
8 none of those cited decisions addressed the particular legal issue in this case. Indeed, if there had been any  
9 NLRB precedent on point, or if the NLRB case law easily led to the ALJ's conclusion, the FLRA General  
10 Counsel would not have issued an unfair labor practice complaint.<sup>2</sup>

11 If the rule pronounced for the first time by this ALJ is accepted by the Authority, it would apply to  
12 all agencies and unions covered by the Federal Service Labor-Management Relations Statute (Statute), not  
13 just the FAA with its unique statutory impasse resolution scheme. Although the ALJ emphasized throughout  
14 his decision the unique statutory impasse resolution process employed at FAA,<sup>3</sup> that process is irrelevant to a  
15 legal determination as to whether the duty to bargain in good faith extends to the conduct of the Professional  
16 Airways Systems Specialists (PASS) during the contract ratification process. However, the ALJ's ruling  
17 reflects his preconceived notion that bargaining impasses in the federal sector are best resolved by the  
18 Federal Services Impasse Panel ("Panel"):

19 [A]t least one significant reason for the contrast [between collective bargaining in  
20 the private and federal sectors] is the presence, in the [Federal Service Labor  
21 Relations] Statute, of provisions for binding third-party resolution of impasses by  
22 the Panel. .... However, one conspicuous difference between this case and most  
23 Federal labor disputes is the unique system of impasse resolution that exists at the  
24 FAA; specifically, as the labor relations provisions of [T]itle 49 have been  
25 interpreted and applied by the FAA, those provisions "divest the Panel of  
26 jurisdiction over collective bargaining disputes between the FAA and its unionized  
27 employees" and permit the Agency to implement its final contract proposals unless  
28 Congress affirmatively acts to stop it from doing so. PASS, of course, is still  
29 prohibited from striking, but if the Agency's reading of the law is correct, the Union  
30 cannot even hope for assistance from the Panel.

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29 <sup>2</sup> Decision of the ALJ (ALJD) at page 11, note 6: "[T]he General Counsel's express basis for issuing complaint in this  
30 case was the lack of Authority precedent on this precise issue."

30 <sup>3</sup> The FAA statutory impasse resolution process is summarized at ALJD, at page 3. The ALJ referred to this process  
numerous times (ALJD at pages 3,4,5,7,9,26,27,28,29,30,31) in his decision.

1 ALJD at 26. However, the FAA, unlike most other federal employers, is subject to a statutory schema that  
2 does not mandate submission of bargaining impasses to the Panel. 49 U.S.C. § 40122 (a)(1).

3 In enacting that statutory schema, Congress retained jurisdiction over collective bargaining impasses  
4 between FAA and its unions regarding proposed changes to the FAA's Personnel Management System (i.e.,  
5 to wages, hours and other terms and conditions of employment). 49 U.S.C. § 40122 (a)(2). Given the ALJ's  
6 preconceived notion of how things should be in the federal sector, he is unwilling to accept that the statutory  
7 language divests the Panel of jurisdiction over bargaining impasses between FAA and its unions.<sup>4</sup> That  
8 unwillingness manifests itself in the ALJ's insistence that FAA has "deprived" the Panel of jurisdiction by  
9 means through FAA's unilateral interpretation and application of the statutory language. ALJD at 26.  
10 According to the ALJ,

11 The FAA may be correct in its interpretation of [T]itle 49, but such an interpretation  
12 invited a response by the Union, and the Union's response in this case appears to me  
13 to be entirely lawful.

14 ALJD at 31. Appearances can be deceiving, and the ALJ was deceived by his preconceived notion of the  
15 FAA statutory impasse resolution scheme. A rule of law should not be pronounced merely because the  
16 decision maker is sympathetic to a union's political strategy and finds it reasonable in view of the statutory  
17 impasse resolution scheme under which the parties operate.

### 18 III.

#### 19 ISSUES PRESENTED

20 **Issue 1:** Does the statutory duty to bargain in good faith apply to union conduct  
21 during a ratification vote, especially when ratification is required by a  
22 negotiated ground rules agreement?

23 **Issue 2:** If the good faith standard applies, did PASS violate that duty in the  
24 totality of the circumstances of this particular case?

25 **Issue 3:** If PASS committed an unfair labor practice, what is the appropriate  
26 remedy?

27 <sup>4</sup> The FAA requests the Authority to take official notice under § 2429.5 of its regulations of the FLRA Office of the  
28 General Counsel July 25, 2007, decisions in Case Nos. WA-CA-06-0563 and WA-CA-06-0648 concluding that FAA  
29 has properly interpreted and applied the statutory impasse resolution process and did not commit a ULP when it  
30 followed the statutory impasse resolution process and implemented a contract with the National Air Traffic Controllers  
Association (NATCA) (Appendix A).

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**IV.**  
**STATEMENT OF FACTS**

PASS developed a bargaining strategy to avoid FAA's utilization of the unique statutory impasse resolution process. After the expiration of a date for the termination of contract negotiations, a date that had been imposed by the Federal Service Impasses Panel (FSIP) contrary to PASS's position not to have a set termination date, FAA could utilize a statutory impasse resolution process which could result in imposition of contract terms if Congress did not timely act. After four weeks of the scheduled 12 weeks of bargaining, PASS withdrew its outstanding proposals, agreed to all FAA outstanding proposals, signed a tentative agreement, and engaged in a concerted effort to reject ratification by the membership, resulting in a 98% no vote. PASS's intent was crystal clear: Once PASS agreed to the contract, there could be no impasse and thus no triggering of the unique statutory impasse resolution process and the parties would need to start bargaining anew after the no vote.

The material facts are not in dispute:

- The parties agreed in their ground rules for union ratification.<sup>5</sup>
- The FSIP ruled, contrary to PASS's position seeking open ended negotiations, that there would be an end date to negotiations.<sup>6</sup>
- FAA's initial proposals were not viewed favorably by PASS.<sup>7</sup>
- PASS at no time filed an unfair labor practice charge or grievance alleging that FAA bargained in bad faith or otherwise engaged in any unfair labor practice or violation of the parties existing contract by its conduct at the bargaining table.
- PASS strongly opposed the statutory impasse resolution process that governed its negotiations with FAA. As the ALJ noted, "[t]hroughout the period leading up to and including the CBA negotiations, PASS was also lobbying heavily in Congress to amend the statutes governing the FAA collective bargaining process in ways that would restrict the Agency's ability to implement a CBA unilaterally."<sup>8</sup>

<sup>5</sup> ALJ Findings of Fact, ALJD, at page 5, lines 17-20.

<sup>6</sup> ALJ Findings of Fact, ALJD, at page 5, lines 21-28 and at 6, lines 1-2.

<sup>7</sup> ALJ Findings of Fact, ALJD, at page 6, lines 12-35.

<sup>8</sup> ALJ Findings of Fact, ALJD, at page 5, note 2.

- 1 • PASS was concerned that it would be unable to obtain FAA agreement on its proposals by the July  
2 21, 2006, termination date for negotiations and that FAA would utilize the statutory impasse  
3 resolution process.<sup>9</sup>
- 4 • To avoid the possibility of FAA’s utilization of the statutory impasse resolution process, after 19  
5 days of negotiations PASS (i) withdrew its pending proposals, (ii) affirmatively agreed to all of  
6 FAA’s pending proposals, and (iii) signed off on each article of the resulting agreement.<sup>10</sup>
- 7 • The statutory impasse resolution scheme cannot be triggered if there is no impasse.<sup>11</sup> Since PASS  
8 agreed to FAA’s outstanding proposals, there was no impasse, and thus the statutory impasse  
9 resolution scheme could not be triggered.<sup>12</sup>
- 10 • After agreeing to a tentative contract, PASS engaged in a “concerted campaign to educate its  
11 members about the proposed contract and to persuade them to vote against ratification.”<sup>13</sup> As the  
12 ALJ found, “[i]n all of its communications to members, and in its many forms, the PASS leadership  
13 made it very clear to members that it, the exclusive representative, opposed the tentative contract and  
14 strongly encouraged members to reject it.”<sup>14</sup>
- 15 • The PASS strategy was to engage in a concerted “vote no” campaign to avoid the July 21 FSIP-  
16 imposed date for the termination of contract negotiation and to avoid an impasse that would allow  
17 FAA to invoke the statutory impasse resolution process.<sup>15</sup>
- 18 • The PASS strategy was an attempt to avoid the utilization of the statutory impasse resolution scheme  
19 which allows FAA, after impasse, to submit its final contract proposals to Congress and, if Congress  
20 has not acted within a 60-day period, to implement its contract proposals.<sup>16</sup>
- 21 • The PASS membership voted 98% against ratification.<sup>17</sup> The ratification results were announced on  
22 August 3, 2006,<sup>18</sup> after the July 21, 2006, date for the termination of contract negotiations that had  
23 been ordered by the FSIP.

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23 <sup>9</sup> ALJ Findings of Fact, ALJD, at page 7, lines 9-31.

24 <sup>10</sup> ALJ Findings of Fact, ALJD, at page 7, lines 13-45 and page 80, lines 1-4.

25 <sup>11</sup> ALJ Findings of Fact, ALJD, at page 4, lines 12-35.

26 <sup>12</sup> The parties stipulated that they were not at impasse at the close of negotiations on March 30, 2006.

27 <sup>13</sup> ALJ Findings of Fact, ALJD, at page 9, lines 18-20.

28 <sup>14</sup> ALJ Findings of Fact, ALJD, at page 9, lines 36-40.

29 <sup>15</sup> ALJ Findings of Fact, ALJD, at page 7, lines 9-31.

30 <sup>16</sup> ALJD, at page 26, lines 34-38.

<sup>17</sup> ALJ Findings of Fact, ALJD, at page 10, lines 1-3.

<sup>18</sup> ALJ Findings of Fact, ALJD, at page 10, line 2.

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V.

ARGUMENT

**A. The ALJ Erred In Concluding That The § 7114(b) Duty To Bargain In Good Faith Does Not Apply To Union Conduct During A Ratification Vote Of A Negotiated Agreement Where, as Here, The Negotiated Ground Rules Requires Ratification (Exceptions 1 thru 22 and 31 thru 35)**

**1. The specific language of the Statute and the Statute’s legislative history that impose a duty to bargain in good faith as part of the collective bargaining process extends to union conduct during a ratification vote, especially when the vote is required by a ground rules agreement.**

**a. Although the Statute’s language and legislative history do not specifically address all aspects of the collective bargaining process, such as union ratification of a tentative contract, the Statute and its legislative history provide a clear and compelling requirement that all labor-management activities, especially collective bargaining, are engaged in good faith.**

The duty to bargain in good faith permeates the Statute and the Federal sector labor-management relations program. § 7103(a)(12) of the Statute requires a “good faith effort at the bargaining table.”<sup>19</sup> § 7114(a)(4) of the Statute requires agencies and exclusive representatives to bargain in good faith.<sup>20</sup> § 7114(b)(1) and (3) delineate characteristics of the duty to bargain in good faith.<sup>21</sup> § 7116(a)(5) and (b)(5) make a failure to bargain in good faith an unfair labor practice. The duty to furnish information under §

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<sup>19</sup> § 7103(a)(12) of the Statute defines collective bargaining as the “performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]”

<sup>20</sup> § 7114(a)(4) of the Statute requires agencies and exclusive representatives, “through appropriate representatives, [to] meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement.”

<sup>21</sup> § 7114(b)(1) and (3) states that “[t]he duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation . . . to approach the negotiations with a sincere resolve to reach a collective bargaining agreement . . . [and] . . . to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]”

1 7114(b)(4) is premised on the duty to bargain in good faith.<sup>22</sup> Unilateral changes in conditions of  
2 employment without fulfilling the duty to bargain are violations of the duty to bargain in good faith.<sup>23</sup>

3 Section 7103(a)(8) provides that a collective bargaining agreement is the result of collective  
4 bargaining,<sup>24</sup> and collective bargaining requires good faith. A holding that union ratification may in  
5 accomplished in bad faith equates union ratification to a matter that is not an integral part of collective  
6 bargaining. Such a holding is contrary to the Statute's overriding purpose of promoting collective  
7 bargaining.

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9 **b. Lawful provisions contained in ground rules are an integral part of the collective bargaining process and are subject to the good faith standard.**

10 Ground rules are an integral part of the collective bargaining process.<sup>25</sup> The repudiation of a  
11 ground rules agreement is a ULP.<sup>26</sup> The Authority has found a party to have violated the duty to  
12 bargain in good faith by its conduct in ground rules negotiations.<sup>27</sup> Providing for union ratification  
13 in a ground rules agreement requires that union conduct during the ratification process meet the  
14 good faith standard since the parties have expressly agreed that union ratification is an integral part  
15 of the collective bargaining process.<sup>28</sup>

16 Although the good faith requirement should apply to all union ratification since ratification  
17 is integrally related to the collective bargaining process, in this particular case, it is not necessary  
18 for the Authority to so rule since the parties specifically negotiated ratification into their ground  
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20 <sup>22</sup> *Internal Revenue Service, Wash. DC.*, 50 FLRA 661 (1995) (the obligation to bargain in good faith includes the right  
21 to request and the obligation to furnish information).

22 <sup>23</sup> See e.g., *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9 (1981) (the duty to bargain in good faith  
23 requires that a party meets its obligation to negotiate prior to making changes in established conditions of employment  
24 during the term of a collective bargaining agreement).

24 <sup>24</sup> § 7103(a)(8) states that a collective bargaining agreement means "an agreement entered into as a result of collective  
25 bargaining ...."

26 <sup>25</sup> Ground rules are an integral part of the collective bargaining process and, at a minimum, must be designed to further,  
27 not impede, the bargaining for which the ground rules are proposed. *U.S. Dep't of the Air Force, HQ, Air Force  
28 Logistics Command, Wright Patterson AFB, Ohio (Wright-Patterson AFB)*, 36 FLRA 524, 533-34 (1990)

29 <sup>26</sup> *Dep't of Defense, Warner Robins Air Logistics Center, Robins AFB, GA.*, 40 FLRA 1121 (1991) (breach of one  
30 provision of the ground rules agreement "went to the heart of the [ground rules] agreement and the collective bargaining  
relationship itself").

<sup>27</sup> *Wright-Patterson AFB*, 36 FLRA 524 (1990).

<sup>28</sup> Please note that this segment of our argument is limited to whether the duty to bargain in good faith applies to union  
ratification. Whether or not the PASS conduct at issue meets or violates the good faith standard is discussed in  
argument V.B.

1 rule of law to the particular facts of this case where the parties negotiated ratification into their  
2 ground rules.

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4 **2. When the Authority is reviewing an issue of first impression that is not specifically**  
5 **addressed in the Statute itself or in its legislative history, the Authority looks to the**  
6 **purposes and policies of Statute.**

7 The Authority has not yet had the opportunity to address the specific issue in this case<sup>29</sup>. Although  
8 the Authority has had a few occasions to address specific fact situations involving ratification under the  
9 Statute, none of those decisions have addressed the issue in this case, namely whether the §7114(b) duty to  
10 bargain in good faith applies to union conduct during a ratification vote of a negotiated agreement when the  
11 negotiated ground rules requires ratification. Neither the language of the Statute nor its legislative history  
12 specifically discusses ratification of collective bargaining agreements. However, as noted above<sup>30</sup>, the  
13 Statute is founded on the concept of good faith dealings between agencies and unions. The purposes and  
14 policies of the Statute would be defeated if the Authority were to agree with the ALJ rule that the duty to  
15 bargain in good faith does not extend to union conduct during a ratification vote, especially a ratification vote  
16 that is required by the parties' negotiated ground rules. Rather, all aspects of the collective bargaining  
17 process should be regulated by the good faith standard.

18 For example, there is no specific language in the Statute requiring § 7114(c) agency head review to  
19 be accomplished in good faith. Yet, a holding that ratification is not subject to good faith could legitimize  
20 an agency strategy to agree to nonnegotiable proposals at the bargaining table in exchange for union  
21 concessions on negotiable matters, and then approve the contract on § 7114(c) review knowing that the  
22 agency will lawfully repudiate the agreed upon and approved nonnegotiable provisions after the contract is  
23 effective. Just as this conduct would be subject to the good faith requirement, so must ratification.

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26 <sup>29</sup> None of the Authority decisions cited by the ALJ decided the issue in this case. None of those decisions even  
27 indicated that the good faith standard is inapplicable to the ratification process. Rather, the issue of whether the good  
28 faith standard regulates the ratification process has specifically been left open since the *Griffiss* decision in 1987. *Dep't*  
29 *of the Air Force, Griffiss AFB, Rome, NY*, 25 FLRA 579 (1987) (Authority adopted without comment the ALJ's finding  
30 that "[a]ssuming that the Union's ratification process is subject to a good faith standard, as urged by Respondent,  
Respondent has not shown that the Union acted in bad faith in conducting the ratification proceedings." (footnote  
omitted)).

<sup>30</sup> Argument V. A.1.a.

1 Collective bargaining promotes stability in the work place.<sup>31</sup> If the ALJ rule is adopted by the  
2 Authority, there would be no objective standards regulating the improper use of a ratification process. For  
3 example, in the particular facts of this case where there is a unique statutory impasse resolution scheme,  
4 PASS could continue to agree to contracts that it does not intend to ratify merely to avoid an end date for  
5 negotiations and to avoid an impasse, and thus preclude triggering the statutory impasse resolution process.  
6 As to the rest of the government, when contract provisions are ordered by the Panel, without the requirement  
7 of good faith, a union could threaten and implement a “bargaining” strategy to continually fail to ratify  
8 negotiated contract provisions unless and until the agency agrees to change the Panel decision on the ordered  
9 articles that are not subject to ratification.<sup>32</sup> In short, absent a good faith requirement for ratification, there is  
10 the real, not merely speculative possibility that unions and agencies alike may employ, without risk, bad  
11 faith “bargaining strategies” that conflict with good faith bargaining and the purpose of obtaining stability in  
12 the work place through collective bargaining.

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14 **3. The NLRB has never held that union conduct during the ratification process where**  
15 **ratification is required by a ground rules agreement is not subject to the duty to bargain in**  
16 **good faith.**

17 **a. The ALJ’s reliance on, and interpretation and application of, private sector cases is**  
18 **misplaced. None of the private sector decisions relied upon by the ALJ held that a**  
19 **union’s conduct during a ratification vote where ratification is required by a ground**  
20 **rules agreement is not subject to duty to bargain in good faith.**

21 Despite a litany of NLRB citations by the ALJ, the NLRB simply has never ruled that the duty to  
22 bargain in good faith does not apply to the ratification process. On the other hand, even the ALJ’s own  
23 summary of NLRB precedent provides support for an argument that good faith does apply to a union’s  
24 conduct during the ratification process; otherwise what is the genesis for the obligation of a union to  
25 “promptly present an agreement to its membership for ratification.”<sup>33</sup>

26 <sup>31</sup> See e.g., *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47  
27 *FLRA* 1004 (1993) (the “covered by” doctrine serves the Statute’s purpose of “stability and repose”) and *NTEU v.*  
28 *FLRA*, 810 F. 2d 295, 300 (D.C. Cir. 1987) (collective bargaining, including midterm bargaining, is in the public  
29 interest because it “contributes to stability in Federal labor-management relations and effective government midterm  
30 bargaining”).

<sup>32</sup> A union has no right to ratify or fail to ratify contract clauses imposed by an FSIP order. *U.S. Dep’t of the Air Force,*  
*Air Force Materiel Command and AFGE, Council 214*, 98 FLRR 1-4019 (Oct. 22, 1998)

<sup>33</sup> ALJD, at 25, lines 1-4

1 Reliance on these decisions is misplaced, and their holdings are not on point to the specific issue in  
2 this case:

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4 • *International Longshoremen's Ass., Local 1575*, 332 NLRB 1336 (2000), cited by the ALJ  
5 at 19, was a duty of fair representation case. The NLRB merely found no duty of fair  
6 representation violation by the union's conduct. The holding was only that ratification is a  
7 permissive subject and an employer cannot require a union to seek ratification. Moreover,  
8 factually, the parties never agreed to ratification in negotiated ground rules. The NLRB  
9 never held that the duty to bargain in good faith does not extend to the ratification process.
- 10 • In *North Country Motors LTD.*, 146 NLRB 671 (1964), cited by the ALJ at 19, the NLRB  
11 merely found that a union didn't agree to ratification, and even if it had, it fulfilled that  
12 requirement. The case did not hold that the duty to bargain in good faith does not extend to  
13 the ratification process.
- 14 • *Houchens Market of Elizabethtown, Inc. v NLRB*, 375 F.2d 208 (6<sup>th</sup> Cir. 1967), cited by the  
15 ALJ at 19, held only that ratification cannot be forced on a union by an employer. It has no  
16 bearing on the issue in this case.
- 17 • *Beautrice/Hunt-Wesson*, 302 NLRB 224 (1991) (*Beautrice/Hunt*), cited by the ALJ at 20,  
18 held that a union's failure to properly seek ratification as agreed upon by the parties excused  
19 the employer's refusal to be bound by the agreement. The concurring opinion cited by the  
20 ALJ did not hold that when ratification is contained in agreed upon ground rules it may  
21 nonetheless be accomplished in bad faith. Rather, the concurrence focused on the fact  
22 pattern where the union expressly agreed to ratification by the unit and not just union  
23 members. Neither the majority nor the concurring opinion supports the ALJ's rule in this  
24 case.
- 25 • *Williamhouse-Regency of Delaware, Inc.*, 297 NLRB 199 (1989), cited in note 1 of the  
26 concurring opinion in *Beautrice/Hunt*, and cited by the ALJ at 20, held only that when a  
27 union provides for ratification on its own accord, and not by agreement, it is not a condition  
28 precedent. That holding is inapposite to this case since here, PASS and FAA negotiated for  
29 ratification into their ground rules. Moreover, neither that decision nor the concurring  
30 opinion relied upon by the ALJ deal with the good faith requirement, only whether  
ratification is a condition precedent. Similarly, *Sierra Publishing Co.*, 296 NLRB 477  
(1989), and its concurring opinion, also cited by the ALJ at 20, dealt with the issue of unit  
versus unit ratification and a situation where there was no negotiated, written, ground rules  
agreement calling for ratification.
- *Teamsters Union Local 662*, 339 NLRB 893 (2003), cited by the ALJ at 21, was cited by  
FAA to show that the NLRB has found a duty to promptly submit a tentative agreement for  
ratification. That decision, relied upon by the ALJ to support his rule in this case, does not  
hold that union ratification is not subject to a good faith standard. Indeed, that decision finds  
a duty to act promptly, one indicia of good faith, and supports a conclusion that a union's  
conduct during the ratification process is subject to the good faith requirement.

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- *Long Island Day Care Services, Inc.* 303 NLRB 112 (1991). cited by the ALJ at 22, similarly was cited by FAA to show that the NLRB has found a duty to promptly submit a tentative agreement for ratification. The ALJ cites this decision for the proposition that the NLRB has held that the duty to bargain in good faith does not extend to recommending ratification. When one actually reads the decision, it is clear the NLRB ALJ only held that the employer (not the union) had not agreed to support the contract: “I do not read into the memorandum an intention by Coates to bind Simmons to make a positive recommendation on the proposed contract to the board of directors. For one thing, such a commitment was clearly not part of the ground rules of the negotiations.” Moreover, this allegation was not even addressed in the NLRB decision. The ALJ’s reliance on this decision is an example of the need to carefully read the cases relied upon by the ALJ. Although the cases may deal with some aspect of ratification in the private sector based on a specific fact situation, none of them even suggest, yet alone hold, that ratification is not subject to a good faith standard, especially when ratification is required by the negotiated ground rules.
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- *Graphic Communications Int’l Union*, 306 NLRB 844 (1992), *enfd*, 991 F. 2d 1302 (7<sup>th</sup> Cir. 1993), and *Teamster Local 28*, 347 NLRB No. 32 (2006), cited by the ALJ at 22, establish a duty to seek ratification promptly when ratification is required. Neither of these decisions, nor *Long Island Day Care*, holds that good faith does not apply to the concept of union ratification, especially when ratification is contained in negotiated ground rules. It was the ALJ in this case alone who sculpted onto these decisions the observation that “the Board narrowly limited the union’s obligation to simply conducting a vote.”<sup>34</sup> The Board in those cases was never presented with the issue, or even a similar fact pattern, that is squarely presented in this case. Again, it is important to actually read the entire cases cited by the ALJ in order to differentiate between what the NLRB actually was presented with, its real holding and what issues were not raised, and how the ALJ has interpreted those NLRB cases.
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Another example of the ALJ’s inability to differentiate between the holding and application of a NLRB case to the facts of this case is the line of string cited NLRB cases that deal with a union submitting a final “proposal” to its membership for a vote. The ALJ simply finds that the fact that PASS actually accepted the FAA proposals and signed off on the proposals, rather than saying it was going to submit them to the membership for a vote without agreement and signing off “is a distinction without a difference.”<sup>35</sup> This ALJ statement is an excellent example of the ALJ’s reliance on NLRB cases that are not on point and language that is taken out of context. There is a distinct difference between submitting an employer proposal for a membership vote and agreeing and signing off and seeking ratification under a negotiated ground rules. Had PASS merely sought its membership vote before acceptance, there would have been no ULP charge. But, by agreeing to the proposals, PASS precluded an impasse, avoided the lapse of the time

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<sup>34</sup> ALJD, at 23, line 32 and at 24, lines 1-2.

<sup>35</sup> ALJD, at 29.

1 limit for negotiations, and most significantly, precluded FAA from triggering the statutory impasse resolution  
2 process. The cases cited by the ALJ at page 24 deal with final, unaccepted **proposals**, and not agreed upon  
3 and signed off **tentative agreements**. *White Cap, Inc.*, 325 NLRB 1166 (1998) (union presented the  
4 employer's "contract proposal" for ratification which had not been agreed to, or signed off by, the union  
5 bargaining committee); *Teamster Local 703*, 320 NLRB 1184 (1996) (the employees reviewed the  
6 employer's "final offer" before voting); *Auto Workers Local 365*, 307 NLRB 189 (1992) (the employees  
7 voted on the employer's final offer; "Cecilware's Final Offer").

8 Moreover, *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463 (9<sup>th</sup> Cir. 1992) is a case under  
9 the Labor Management Reporting and Disclosure Act and deals with the relationship between union  
10 members and their union.<sup>36</sup> The ALJ incorrectly failed to discern the significant difference between a union  
11 not agreeing to an employer's proposal but submitting it to the membership for a vote, and what occurred in  
12 this case, a union actually agreeing to an employer's offer, signing a tentative agreement, and submitting the  
13 bargained tentative agreement to the membership for a ratification vote as required by the negotiated ground  
14 rules. This was not a "distinction without a difference," as found by the ALJ. Rather, this was a carefully  
15 planned bargaining strategy developed by PASS at the time of the agreement at the bargaining table to avoid  
16 the FSIP-imposed end date and to thwart the statutory impasse resolution scheme.

17 *NLRB v M&M Oldsmobile, Inc.*, 377 F.2d 712 (2<sup>nd</sup> Cir.) (*M&M*), cited by the ALJ at 25-26, did  
18 not hold that when ratification is contained in negotiated ground rules ratification may nonetheless be  
19 accomplished in bad faith. Rather, the case only held an employer could not challenge a union's report of  
20 ratification. It is interesting that in discussing the employer's attempted good faith defense, the Court  
21 noted that good faith includes,

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23 not only a state of mind but also objective facts. There are situations in which it is  
24 not enough that an employer is convinced he is right; in such circumstances an  
25 employer's state of mind is irrelevant and he acts at his peril.

26 *M&M*, at 716.

27 Whether PASS, or the ALJ, thought PASS was acting reasonably in view of the statutory impasse  
28 procedure has absolutely no bearing on whether PASS was acting in good faith. PASS's conduct, not the  
29 perceived reasonableness or effectiveness of its strategy, is what is at issue.

30 <sup>36</sup> This is another example of the ALJ citing private sector cases that have nothing to do with the issue in this case.

1 In *NLRB v Insurance Agent's International Union*, 361 U.S. 477 (1960), cited by the ALJ at 30, the  
2 Supreme Court held that slow-downs designed to put economic pressure on the employer during negotiations  
3 were not a ULP. This decision is not on point since in the Federal sector there is no provision for economic  
4 slowdowns or economic pressure.<sup>37</sup> Instead, PASS engaged in the conduct challenged in this case.  
5 Similarly, *NLRB v Katz*, 369 U.S. 736 (1962), cited by the ALJ at 30, held that employer changes during  
6 negotiations over the same matters that were being negotiated was a ULP. Again, the Court's references to  
7 economic pressure do not apply to the Federal sector. *McClatchy Newspapers, Inc.* 321 NLRB 1386  
8 (1996), quoting *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1981), also cited by the ALJ at  
9 30, similarly deal with private sector economic pressure and have nothing to do with the issue of whether a  
10 good faith standard attaches to ratification in the Federal sector, especially when ratification is contained in  
11 the negotiated ground rules. What the ALJ failed to recognize is that there is no economic pressure in  
12 Federal sector bargaining, there is no right to strike and no right to lockout. In the Federal sector, the  
13 impasse resolution process, whether § 7119 of the Statute or the unique FAA statutory impasse resolution  
14 process, is the *quid pro quo* for economic pressure. There is no threat of a strike or lockout when a union  
15 fails to ratify, only the "threat" of a statutory impasse, the operation of which PASS thwarted by its conduct.  
16 Moreover, any "political" pressure is limited to that authorized by the Statute; the § 7102 right to "present the  
17 views of the labor organizations to ... the Congress....." Indeed, that is exactly what PASS had lawfully  
18 done.<sup>38</sup> Manipulating the bargaining process to avoid an end date and to thwart the use of a statutory impasse  
19 resolution process, however, is not authorized by the Statute.

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21 **b. Should the Authority find that the good faith standard applies to union conduct during**  
22 **the ratification process where ratification is required by the negotiated ground rules,**  
23 **the Authority need not define exactly how that good faith standard would apply to**  
24 **every potential factual situation. Rather, the Authority need only hold only that the**  
25 **totality of the circumstances dictates satisfaction of the standard.**

26 The Authority need not establish a rule that a union must support a tentative contract during the  
27 ratification process. The Authority need even not establish a rule that a union must not criticize a tentative

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29 <sup>37</sup>Federal employees are, however, allowed to engage in informational picketing. 5 U.S.C. §7116.

30 <sup>38</sup> ALJD, at note 2 at 5.

1 contract during the ratification process.<sup>39</sup> Rather, FAA only requests the Authority to rule that the duty to  
2 bargain in good faith applies to union conduct during the ratification process where ratification is required by  
3 a negotiated ground rules agreement. As more fully explored in Argument V.B., the Authority consistently  
4 looks to the totality of the circumstances when evaluating good faith bargaining.<sup>40</sup> That statement is equally  
5 applicable to union ratification. Moreover, as noted above in Argument A.2.b., the fact that parties actually  
6 negotiated the ratification requirement into their ground rules allows the Authority to limit its holding to  
7 those particular circumstances.

8         Were the Authority to rule that the duty of good faith extends to the ratification process where  
9 ratification is required by negotiated ground rules, the Authority would not be required to “police” a union’s  
10 internal ratification process to seek out irregularities in order to find that the standard of good faith has been  
11 satisfied. The duty of good faith that attaches to the ratification process as a result of the statutory duty to  
12 bargain in good faith is a duty owed by the union to the employer, not by the union to the bargaining union  
13 members.<sup>41</sup> PASS’s attempt to deter the Authority from finding that the good faith standard applies to a  
14 union’s conduct during the ratification process by speculating “massive confusion” as to just what is and is  
15 not permissible misses the point. The good faith standard has been around since the birth of collective  
16 bargaining, and there has never been “massive confusion.” In this case, as discussed in Argument V.B.  
17 below, PASS knew exactly what it was doing in thwarting the statutory impasse resolution scheme. This  
18 case has nothing to do with PASS’s ratification procedures, but everything to do with its bargaining strategy  
19 and conduct during the ratification process.

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21         **c. The ALJ incorrectly allowed his personal view of the fairness of the FAA statutory**  
22         **impasse resolution scheme to influence his interpretation and application of existing**  
23         **private sector case law discussing various aspects of union ratification.**  
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26 <sup>39</sup> FAA does not support a rule that a union may oppose a tentative contract that it just agreed to at the bargaining table  
27 unless that opposition option is part of the negotiated ground rules. Yet, as argued next in Argument V.B., even  
28 allowing for such opposition, under the totality of the circumstances in this case, PASS still acted in bad faith and  
committed a ULP since it never intended to be bound by what it had agreed, since its agreement, at least in part, was  
intended to thwart the statutory impasse resolution process.

29 <sup>40</sup> *U.S. Department Of Justice, Executive Office for Immigration Review, New York, New York*, 61 FLRA 460 (2006) (in  
30 determining whether a party has fulfilled its bargaining responsibility in a particular case, the Authority considers the  
totality of the circumstances). See *Wright-Patterson AFB*, 36 FLRA at 531.

<sup>41</sup> Whatever duties a union may owe to its members regarding ratification are not part of what this case is about.

1           The ALJ incorrectly interpreted and applied existing private sector case law that deals with various  
2 aspects of union ratification, but not the specific issue in this case, because he applied those principles to the  
3 environment in which PASS found itself under the statutory dispute resolution scheme at FAA. The ALJ  
4 never attempted to apply the Statute, its purposes and policies, and the collective bargaining mechanism  
5 which provides for no economic weapons, but rather statutory impasse resolution processes.

6           The ALJ clearly was influenced by the FAA impasse resolution scheme. The ALJ openly  
7 sympathized with PASS's concern over (i) the FAA statutory impasse resolution process, (ii) the previous  
8 use of that system in the NATCA negotiations, and (iii) the specifics of FAA's initial bargaining proposals.  
9 The ALJ found the PASS bargaining strategy to avoid the statutory impasse resolution and to force FAA to  
10 accept its proposals to be understandable and even reasonable under the circumstances, rather than  
11 addressing its legality under the Statute. The FAA statutory impasse resolution scheme, however, was the  
12 process that Congress had enacted for bargaining impasses at FAA. While PASS could attempt to lobby  
13 Congress to change that process, as it did, PASS could not lawfully take action to prevent the process from  
14 working. The fact that PASS and the ALJ did not find the statutory impasse resolution process fair is  
15 irrelevant. The fact that PASS may indeed have adopted an effective strategy to thwart the statutory impasse  
16 resolution scheme, does not make that conduct legal.

17           The ALJ's reference<sup>42</sup> that FAA could still have attempted to trigger the statutory impasse resolution  
18 process even after the PASS no ratification vote and even after the expiration of the end date for bargaining  
19 is irrelevant to a legal determination as to whether PASS's conduct was sanctioned by the Statute. How FAA  
20 reacted to PASS's unlawful conduct - trigger the statutory impasse resolution process or file a ULP charge -  
21 is totally irrelevant to the legality of PASS's conduct. Rather, the focus should be on PASS's conduct and  
22 not speculation about what FAA's reaction to that conduct might have been. The ALJ's reasoning again  
23 demonstrates the ALJ's preoccupation with the PASS bargaining strategy and whether it was reasonable  
24 under the existing law that PASS was trying to change.

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30 <sup>42</sup> ALJD, at 27, lines 37-45.

