

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON REGIONAL OFFICE

Case Number WA-CO-06-0356

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

(Respondent)

-AND-

FEDERAL AVIATION ADMINISTRATION

(Charging Party)

GENERAL COUNSEL'S EXCEPTIONS TO  
DECISION AND RECOMMENDED ORDER  
OF ADMINISTRATIVE LAW JUDGE  
AND BRIEF IN SUPPORT OF EXCEPTIONS

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## EXCEPTIONS

Pursuant to section 2423.40(a) of the Authority's Regulations, Counsel for the General Counsel respectfully takes the following exceptions to the Decision and Recommended Order of Administrative Law Richard A. Pearson dated July 31, 2007, OALJ 07-020:

- (1) The finding that PASS intended to complete its ratification vote and return to the bargaining table before July 21, 2006;
- (2) The failure to find that PASS, not merely its leaders, took the position, and did not merely have an opinion, that the tentative agreement should not be ratified;
- (3) The failure to find that PASS advocated that, not merely encouraged, members vote against ratification of the tentative agreement;
- (4) The failure to describe the campaign PASS implemented to ensure members would vote against ratification of the tentative agreement;
- (5) The failure to find that PASS intended to delay reaching an agreement with the FAA;
- (6) The failure to find that PASS implemented its intent to delay reaching an agreement with the FAA by, in past, avoiding the bargaining deadline established by the FSIP;
- (7) The finding that the reason PASS campaigned against ratification of the tentative agreement was to exert political pressure on the FAA to induce it to modify its bargaining posture;
- (8) The finding that unions in the private section commonly submit tentative agreements to members with the advice they vote against ratification; and
- (9) The conclusion that the conduct of PASS during the ratification process involving the tentative agreement with the FAA did not constitute bad faith bargaining.

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## I. STATEMENT OF THE CASE

This is a proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (“Statute”). The Federal Aviation Administration (“FAA”) initiated this proceeding by filing an unfair labor practice charge on March 31, 2006, with the Washington Regional Office of the Federal Labor Relations Authority (“Authority”). (General Counsel Exhibit (“GCE”) 1(a)).<sup>1</sup> The FAA alleged that the Professional Airways Systems Specialists (“PASS”) violated section 7116(b)(5) of the Statute by ending negotiations over a successor term contract for up to two months to conduct a ratification vote by members who will be advised to vote against ratification. GCE 1(a). The FAA filed an amended charge on June 9, 2006, alleging that PASS engaged in bad faith by repeatedly encouraging members to vote against ratification of the tentative agreement, by implementing a media campaign designed to ensure members would vote against ratification of the tentative agreement, and by delaying negotiations in order to avoid the effect of a ruling by the Federal Service Impasses Panel (“FSIP”). GCE 1(b).

The Regional Director issued a Complaint and Notice of Hearing on January 10, 2007, alleging that PASS violated section 7116(b)(1) and (5) of the Statute by making several statements, through or under the authority of PASS President Thomas Brantley (“Brantley”), to members and the FAA Administrator concerning the then-scheduled member ratification vote concerning the tentative agreement. GCE 1(c). The Regional Director issued a First Amended and Notice of Hearing on February 7, 2007, alleging that PASS violated section 7116(b)(1) and (5) of the Statute through a campaign to convince members to vote against ratification of the tentative agreement. GCE 1(i).

PASS filed an Answer to the Complaint and Notice of Hearing on February 12, 2007, admitting virtually all of the factual allegations in the Complaint, but denying that PASS violated the Statute. GCE 1(j). PASS also raised several affirmative defenses in that Answer. PASS filed an Answer to the First Amended Complaint and Notice of Hearing on March 5, 2007, admitting all of the factual allegations in that Complaint, with exception to the completeness of quotes from an electronic mail message in paragraph 21 and the allegation that PASS implemented a campaign to convince members to vote against ratification of the tentative agreement. PASS again denied it violated the Statute, and raised several affirmative defenses.

A hearing was held before Administrative Law Judge Richard A. Pearson (“Judge”) on March 27, 2007, in Washington, DC. The Judge issued a Decision and Recommended Order (“Decision”) on July 31, 2007, in which he concluded that PASS had not violated the Statute by failing to bargain in good faith, and recommended that the Amended Complaint be dismissed.

## **II. STATEMENT OF THE ISSUES**

- A. Whether PASS took a position as an institution that its members should vote against ratification of the tentative agreement, and used its power and influence to effectively instruct members to vote in accordance with that position.**
- B. Whether PASS delayed reaching an agreement with the FAA, in part by avoiding being at impasse and at the bargaining table on the date the ground rule imposed by the FSIP established as the terminal date for negotiations.**
- C. Whether the Judge had a basis for finding that unions in the private sector commonly submit tentative term contracts to members with advice they vote against ratification.**
- D. Whether PASS bargained in bad faith by implementing the vote no campaign.**

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<sup>1</sup> Exhibits of the General Counsel will be referred to as GCE. Exhibits of the VAMC will be referred to as RE. Citation to a page

### **III. DECISION OF ADMINISTRATIVE LAW JUDGE**

#### **A. Facts**

PASS is the exclusive representative of a nationwide bargaining unit of approximately 7,000 employees of the FAA assigned to Technical Operations. Decision 2-3. PASS and the FAA have a term contract covering the unit that became effective in July 2005, and will remain effective until replaced by a successor agreement. Decision 3.

The parties began bargaining over ground rules for a new term contract in 2005. Decision 3. At that time, and continuing, the parties have disagreed over how bargaining impasses are resolved because of a disagreement over legislation that gave Congress a role in resolving impasses: while the FAA has interpreted that legislation as providing that impasses reached in term contract negotiations are to be submitted to Congress for resolution, PASS has interpreted the legislation as creating a role for Congress in resolving impasses only over changes to the FAA's personnel management system. Decision 3-6.

The parties reached an impasse in ground rules negotiations that the FAA submitted to the FSIP. Decision 5. The FSIP ordered the parties to adopt a ground rule establishing July 21, 2006, as the terminal date for term contract bargaining, absent an agreement extending negotiations beyond that date. Decision 5-6. The parties agreed to six bargaining sessions, each of two weeks duration, between early February and July 21, 2006. Decision 5.

They exchanged full sets of proposals before the first session commenced on February 6. Decision 6. Many of the FAA's proposals sought to curtail rights employees had in their current contract, and, according to estimates by PASS, to make a significant percentage of employees ineligible for pay raises in the first of the proposed seven-year term of the contract, and nearly

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in the hearing transcript will appear as TR.

80% ineligible near the end of the term. Decision 6. In addition, the FAA declared approximately 350 PASS proposals to be nonnegotiable, that is, they concerned either prohibited or permissive subjects of bargaining. Decision 6. Some of those proposals are contained in the parties' current term contract and had been accepted in term negotiations with the National Air Traffic Controllers Association. Decision 6-7.

On March 30, 2006, near the end of the second bargaining session, Brantley accepted Derby's assessment that the FAA was not expected to make any movement on issues of major concern to PASS members, and that further bargaining would not result in a more meaningful agreement. Decision 7. That assessment was based on statements by FAA negotiators that the pendulum had swung to management, so management was going to take things back. Decision 7. PASS reached the conclusion that the FAA was not bargaining sincerely, that it simply wanted to get all proposals on the table so the FAA could implement a term contract unilaterally if an agreement was not reached by the July 21 deadline imposed by the FSIP. Decision 6-7. Brantley was concerned that the FAA would implement a contract without giving PASS members an opportunity to participate in the process by casting a vote on whether to ratify the term contract. Decision 7. The PASS constitution requires a ratification vote. Decision 7.

Brantley then devised a bargaining strategy that would provide for a ratification vote, a vote that would send a message to the FAA that PASS wanted the FAA to bargain, not just ram a new contract down the throats of PASS members. Decision 7. He instructed his PASS chief negotiator Michael Derby ("Derby") to withdraw all outstanding PASS bargaining proposals and to accept all outstanding FAA bargaining proposals. Decision 8. Derby acted as directed by Brantley, and the parties reached a tentative agreement that was codified on April 4 when the chief negotiators for both parties placed their initials on the tentative agreement. Decision 8.

The PASS bargaining strategy was a response to the FAA's insistence that it would unilaterally implement its proposals without oversight by the FSIP, and an attempt to convince the FAA to soften its bargaining demands. Decision 26.

PASS issued a press release and sent an electronic mail message to members on March 30 stating that it did not think the FAA proposal was fair, but accepting it would give members an opportunity to vote on ratification. Decision 8. He stated that the FAA was not concerned with whether members could vote on ratification, and had recently implemented a contract covering 11 NATCA bargaining units without giving NATCA members an opportunity for a ratification vote. Decision 8-9. Brantley stated further that he was confident members would vote against the contract offer so the PASS could return to the bargaining table with an FAA that had learned a lesson and would begin bargaining in good faith. Decision 8-9.

PASS then began a concerted campaign to educate members about the proposed contract and to persuade them to vote against ratification. Decision 9. PASS prepared an analysis of each term of the proposed contract, comparing it to the current contract. Decision 9. That analysis was sent to all members of PASS. Decision 9. PASS also conducted briefings for members on the proposed contract from May 24 through June 14. Decision. Ratification ballots were sent to members initially on June 15 or 16, and cast ballots had to be received by PASS no later than July 31. Decision 9. PASS had hoped to complete the ratification vote in time to return to the bargaining table before July 21, 2006, but the timetable was delayed by difficulties in disseminating information across the country and the FAA's refusal to allow PASS to conduct the briefings for employees on official time, as had been done with the current term contract. Decision 28.

In all communications to members, PASS leadership made clear its opposed the tentative contract and strongly encouraged members to reject it because the members' rejection hopefully would send the FAA a message that it should return to negotiations and agree to a more favorable term contract. Decision 9.

PASS ran a significant risk that the FAA might implement that tentative agreement on July 22 that even if the tentative agreement was ratified, in light of: the FSIP decision leaving open what would occur on July 22 if no agreement was reached; the FAA's assertion that it was free to pursue "whatever course of action is legal" on July 22 if the parties did not have an agreement at that time; the FAA's dealings with NATCA in term contract bargaining; and the Authority's decision in Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va., 13 FLRA 571 (1984). In that case, the FSIP had ordered the parties to bargain for 30 days, and to submit unresolved issues to an interest arbitrator, but the parties reached a tentative agreement in less than 30 days, and the union membership voted against ratification after the 30-day period had run. The agency then refused to return to negotiations. The Authority ruled that the FSIP order prevailed, which resulted in the agency having no obligation to bargain after the 30-day period had run. Decision 28.

PASS announced the members' vote on August 3, 2006. Approximately 2,000 ballots were cast, with 98% cast against ratification. Decision 10.

## **B. Conclusions and Recommended Order**

Unions have the right to subject an agreement with an agency to a membership ratification vote, if the agency is advised in advance of reaching a tentative agreement that a vote will be conducted. Decision 19. If the members vote against ratification, the agency must return to the bargaining table, unless the union waived its right to reopen negotiations. Decision 19 &

