

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 &

21. However, if parties go beyond a date the FSIP established for binding arbitration to resolve a bargaining impasse, an agency need not return to the bargaining table even if members voted against ratification of a tentative agreement. Decision 19. Once an agency or employer has been notified by a union that the tentative agreement has been ratified, the agency or employer may not challenge that notification by citing irregularities in the ratification process. Decision 21.

Since the issue presented in this case has not been addressed by the Authority, and the provisions of the Statute applicable to this case are similar to provisions of the National Labor Relations Act (“Act”), guidance can be found in the decisions of the National Labor Relations Board (“NLRB”) and the courts interpreting and applying those provisions of the Act. Decision 19.

While the procedures a union uses in a contract ratification vote concern internal union business, and the NLRB has refused to scrutinize or second-guess a union declaration that a contract has been ratified (Decision 21-22), decisional law under the Act shows that the duty to bargain in good faith is applicable to the process by which a union conducts ratification in two circumstances: a union must seek a ratification vote promptly for an agreement that is subject to ratification, and a union may not allow persons outside the bargaining unit to participate in the ratification vote (Decision 25 & 31). NLRB decisional law also demonstrates that unions commonly reach tentative agreement with employers and then submit the agreement to a member ratification vote with recommendations to vote against the agreement. Decision 24. In none of those cases did the NLRB “even consider the possibility that the unions were guilty of bad faith bargaining.” Decision 25.

The PASS campaign to have members vote against ratification of the tentative agreement was legitimate, and not based on the improper motive of hindering negotiations. Decision 25, 28,

29 & 31. PASS devised and implemented the campaign to exert the political pressure of a large vote by members against ratification. That pressure is analogous to different types of economic pressure (strikes, work stoppages, etc.) unions use in the private sector, but may not be used in the federal sector. Decision 30. Economic pressure exerted by unions in private sector negotiations is lawful when it furthers, rather than destroys, the bargaining process. Decision 30.

The PASS campaign against ratification of the tentative agreement was not an attempt to avoid the bargaining deadline the FSIP established, or a device that would destroy the bargaining process. Decision 28. The Judge explained:

I believe the Union's decision to accept the FAA's proposal on March 30, rather than some date closer to July 21, was motivated at least in part by its hope to obtain a membership vote and to return to the bargaining table in advance of July 21. That timetable was delayed slightly by the difficulties of disseminating information to a membership spread out across the country and by the Agency's refusal to allow PASS to conduct briefings with employees on official time.

Thus, there is no basis for concluding that the PASS campaign "could force the Agency to continue bargaining after July 21 any longer than it wanted, or that it was a tactic 'designed to hinder, rather than foster, negotiations'." Decision 29. PASS had a lawful purpose for its campaign, unlike the union in United Paperworkers Internat'l Union Eriez Local Union No. 620, 309 NLRB 44 (1992), in which the NLRB held that the union breached its duty to bargain in good faith by, in effect, allowing persons who were not in the bargaining unit to participate in the ratification vote. Decision 31.

The ALJ suggested that because the PASS campaign consisted entirely of speech, it was protected by section 7116(e) of the Statute. He also suggested that PASS' speech also was protected by the First Amendment of the U.S. Constitution because PASS had a lawful purpose

in speaking. The ALJ did not present a full analysis or final conclusions with respect to the statutory and constitutional protections PASS asserted its campaign enjoyed. Decision 31-32.

The ALJ recommended that the complaint be dismissed. Decision 33.

#### IV. ARGUMENT

**A. 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.**

A full description of the PASS VOTE NO campaign, which the Judge did not describe, shows that PASS as an institution took a position that the tentative agreement had to be rejected by members in order to prevent the FAA from implementing unilaterally a term contract that was unfair to the members, and that PASS effectively advised the members they had no option other than voting against ratification if they wanted to avoid such a contract and force the FAA to return to the bargaining table.

That VOTE NO campaign commenced on March 30, 2006, when Brantley, or PASS employees at Brantley's instruction, sent a message electronically to members, and disseminated a press release, stating that the FAA had not negotiated in good faith, and intended to declare an impasse and use an impasse procedure under which the FAA would obtain the term agreement it wanted. GCE 5 & 6. Brantley stated in his message to employees that "**it is imperative that the agency hear a resounding NO**" (emphasis added). GCE 6, unnumbered first page. This language certainly conveys to employees they had no choice other than voting against ratification.

Brantley effectively reiterated that lack of real choice in the March/April 2006 PASS newsletter. GCE 9. At page two of that letter, Brantley asserted that the FAA was intent on imposing its unfair contract terms on all bargaining units. He told members that:

[A] “Yes” vote will mean that you accept the terms that the agency has proposed and are willing to work under them for the next seven years. A “No” vote will mean that you reject the agency’s proposal and will send the parties back to the negotiating table. Hopefully, it will also educate FAA management about what PASS members are not willing to accept simply because the agency feels it is in complete control of the bargaining process.

Any doubt that the quoted language again tells employees that they had to vote against ratification because the tentative agreement was unacceptable was dispelled in the subsequent PASS newsletter in an article by Brantley aptly entitled “NOW IT’S YOUR TURN TO SAY NO.” GCE 12, pp.2-4, 5. He stated in the article that “[i]t is very important that the FAA get and unmistakable message from PASS members that the agency’s insulting offer and prehistoric labor relations philosophy are not acceptable to PASS.” Similarly, in a message to members dated May 12, 2006, Brantley stated “that every member vote when they receive a ballot, and that the vote they cast is ‘NO!’.” PASS even created buttons for members to wear that read “VOTE NO” (GCE 16), and distributed posters to the work locations of members telling them, not simply advising them, to “VOTE NO.” GCE 17 & 18.

While Brantley devised the VOTE NO campaign, it was effectively endorsed by the PASS Executive Board because every member of the Board communicated the VOTE NO message. TR 68. In furtherance of that position, every leader of PASS, from the national to the local level, similarly participated in the VOTE NO campaign. TR 69. Thus, the campaign was not simply Brantley’s, or even just PASS leadership’s. Rather, the VOTE NO campaign was a position PASS adopted as an institution. TR 68.

Finally, PASS members were exhorted to VOTE NO in the literature PASS sent to them along with the ballot they used in the ratification vote. In a letter accompanying each ballot, which was from Brantley and the National and Regional Vice Presidents, members were told that

the elected PASS leadership opposed the tentative agreement, and were urged to “send a loud and clear message to Administrator Marion Blakely by VOTING NO (emphasis in original).” FAA Exhibits 19 & 20.

As described above, members were not merely encouraged to vote against ratification of the tentative agreement. Rather, PASS essentially told members they had to vote against ratification.

**B. 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.**

PASS considered it imperative to extend the bargaining period beyond that established by the FSIP. Thus, PASS opposed a ground rule establishing a bargaining period of six months because PASS knew it needed more time to obtain an acceptable contract. When Derby concluded that further bargaining beyond March 30, 2006, would not result in a meaningful agreement, his view was based on a bargaining period of six months. PASS was aware that negotiations over a term contract in 2006 would be more difficult than negotiations over the parties’ current contract had been because of the change in national political power since that contract became effective. TR 187-88. Negotiations over the current contract took three to four years.

PASS saw the VOTE NO campaign as the tool that would provide PASS with more time to negotiate over a term contract. The campaign ensured that the parties were not at impasse on July 21, 2006, making impossible the use of impasse procedures, whether they were those used by the FSIP under the Statute or by Congress pursuant to other legislation. As explained above, it also was designed and implemented to ensure members would vote against ratification. PASS hoped, and told members repeatedly, that a vote against ratification would require the FAA to

return to the bargaining table and commence negotiations anew, because that vote would occur after the bargaining deadline established by the FSIP, making the ground rule establishing that deadline effectively inapplicable.

The Judge's finding that PASS initially intended to conclude the ratification vote process in sufficient time to return to the bargaining table before July 21, 2006, is clearly erroneous. He rests that finding primarily on his belief that the ratification vote was delayed by the FAA's refusal to allow PASS to conduct its briefings of members on official time. PASS never stated as much, either before or in testimony during the hearing in this case. Most persuasive is the fact that the ratification vote process for the current contract took as long to complete as did the ratification vote process for the tentative agreement. There is no evidence that PASS ever considered a shorter period for the tentative contract.

The Judge also erred in finding that the campaign was devised to induce the FAA to modify its bargaining posture. First, PASS believed that the FAA had implemented a term contract covering employees represented by NATCA without giving its members an opportunity for a ratification vote. If the FAA was unconcerned about whether members liked or disliked the term contract with NATCA, it would not have been reasonable for PASS to conclude from that lack of concern that a large PASS membership vote against ratification would alter the FAA's bargaining posture. Second, PASS could not have believed the FAA would learn enough from a large vote against ratification to alter its bargaining strategy. The tentative agreement was reached very early in negotiations; the parties had completed only a third of their scheduled bargaining, and had reached agreement on less than three dozen relatively unimportant articles. GCE 8, 1<sup>st</sup> & 2<sup>nd</sup> pp. They had not discussed wages, a PASS job security proposal like the one in the parties' current contract, or watch schedules, the three subjects about which members had

expressed the greatest concern about during the ratification process. TR 154-58. All the FAA could have learned from a vote against ratification is that PASS members opposed the FAA's proposals before they were discussed at the bargaining table.

**C. The Judge had no basis for finding that unions in the private sector commonly submit tentative term contracts to members with advice they vote against ratification.**

The Judge's finding that unions in the private sector commonly advise members to vote against ratification of tentative contract with their employer is based entirely on a misreading of NLRB decisional law. The Judge cites the following cases to support his finding: In each of those cases, the **union had not reached a tentative agreement** with the employer. Rather, the union submitted the employer's **proposal** to members. Thus, the facts in the cases decided under the Act are significantly different from the facts in this case: the existence of a tentative agreement affects a union's duty in the ratification process. "[T]here is an implied covenant of good faith and fair dealing between the parties to a [tentative] contract." Teamsters Local 287, Internat'l Brotherhood of Teamsters, 347 NLRB No. 32 (May 31, 2006) (slip decision at 7).

**D. PASS bargained in bad faith by implementing the VOTE NO campaign.**

The Judge erred in describing the General Counsel's position in this case. He asserted that the General Counsel took the position that PASS had a duty to affirmatively support ratification of the tentative agreement, and failure to do so constituted a breach of the statutory duty to bargain in good faith. Decision 24. Counsel for the General Counsel made it quite clear in his opening statement that the complaint was not based on a theory that PASS had an obligation to actively support the tentative agreement. TR 33-34. Rather, he made clear that the theory was that PASS had a duty to not actively oppose the tentative agreement. TR 35.

The Statute contemplates that parties to a collective bargaining relationship will attempt to reach negotiated agreements expeditiously. Ground rules designed to hinder, rather than foster, negotiations are not acceptable. United State Dep't of the Air Force, HQ, Air Force Logistics Command, Wright-Patterson AFB, Ohio, 36 FLRA 912 (1990). When bargaining over proposed changes to employees' working conditions, bargaining proposals must relate solely to the proposed changes. Unites States Dep't of the Treasury, Customs Serv., Wash., DC, 59 FLRA 703, 709 (2004). Parties must enter into bargaining with a sincere resolve to reach agreement. United State Dep't of the Air Force, HQ, Air Force Logistics Command, Wright-Patterson AFB, Ohio, 36 FLRA 524, 531 (1990). They are required to meet to bargain at reasonable times and places. Id. A party demonstrates bad faith by causing unreasonable delays or attempting to avoid reaching an agreement. Id. It is well settled that the Authority considers the totality of the circumstances in determining whether a party has fulfilled its statutory bargaining responsibility. See, e.g., United States Dep't of Justice, Exec. Office for Immigration Review, N.Y, N.Y., 61 FLRA 460, 465 (2006).

The duty to bargain in good faith imposed by the Statute is not limited to the give and take at the bargaining table. Prior to implementing a change in unit employees' conditions of employment, an agency must give the employee's union notice an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. United States Penitentiary, Leavenworth, Kan., 55 FLRA 704, 715 (1999). If the union submits a request to bargain, the statutory duty to bargain in good faith requires the agency to respond to the request. Army and Air Force Exchange Serv., McClellan Base Exchange, McClellan AFB, Cal., 35 FLRA 764, 769 (1990). If the parties reach agreement and either of them requests the other to execute the agreement, the statutory duty to bargain in good faith requires compliance with that request.

Internat'l Organ. of Masters, Mates and Pilots, 36 FLRA 555, 560-61 (1990). Finally, after an agreement is reached, the statutory duty to bargain in good faith requires each party to take steps to implement the agreement. Id.

The NLRB does not second-guess the process a union uses in deciding whether a tentative agreement with an employer has been ratified. Internat'l Longshoremen's Ass'n, Local 1575, AFL-CIO, 332 NLRB 1336 (2000). It does so because the process is internal union business that does not concern a condition of employment, absent an agreement making ratification a condition precedent to the agreement. Id. Similarly, the Authority will not decide whether a union followed its constitution and bylaws in conducting a ratification vote, because section 7120 of the Statute places on the Assistant Secretary of Labor for Labor-Management Relations the responsibility for addressing allegations that a union failed to comply with its constitution and bylaws. American Fed. Of Gov't Employees, Local 2000, AFL-CIO, 8 FLRA 718 (1982).

Nonetheless, union conduct during the contract ratification process can constitute bad faith bargaining in violation of the Act, even if that conduct is consistent with the union's constitution. See, e.g., United Paperworkers Internat'l Union Eriez Local Union No. 620, 309 NLRB 44 (1992). The submission of a tentative agreement to union membership for a ratification vote is a crucial aspect of the collective bargaining process. See Long Island Day Care Services, Inc., 303 NLRB 112 (1991) (the NLRB reasoned that where an employer obtained the right to submit a tentative agreement to the board of directors for its approval, submission of the agreement was a crucial aspect of the bargaining process). "Under common law principles, there is an implied covenant of good faith and fair dealing between the parties to a [tentative] contract." Teamsters Local 287, Internat'l Brotherhood of Teamsters, 347 NLRB 32 (May 31,

2006) (slip opinion at 8). Thus, when a union has the right to submit a tentative agreement to a ratification vote, it must submit the agreement in a timely manner or be held to have breached its duty to bargain in good faith. Id.; Local 554, Graphic Communications Internat'l Union, 306 NLRB 844 (1992).

PASS failed to fulfill that covenant of good faith by implementing a campaign that was designed to ensure members would vote against ratification so the tentative agreement would not become effective. The Judge's belief that such conduct is common in the private sector is based entirely on NLRB decisional law in cases that involve a union submitting an employer's proposal, not a tentative agreement, to a ratification vote. Those decisions are irrelevant because absent an agreement, there is no covenant of good faith.

The Judge's finding that PASS had a lawful purpose in conducting the VOTE NO campaign is factually erroneous, as explained above. In addition, the Judge draws an untenable analogy between the VOTE NO campaign and a private sector union's use of lawful economic pressure to induce an employer to change its position at term contract negotiations. Again, the private sector unions in the cases cited by the Judge did have tentative agreements with the employers involved when economic pressure was applied.

PASS bargain in bad faith by taking steps to ensure that the tentative agreement reached with the FAA would not become effective. The VOTE NO campaign was not a lawful bargaining tactic because it was intentionally designed to delay reaching a final term contract until bargaining conditions became more favorable to PASS, that is, after the limited bargaining period imposed by order of the FSIP no longer was applicable.

## V. REMEDY

The Authority has broad remedial authority: section 7118(a)(7) of the Statute sets forth specific remedies for unfair labor practices, and empowers the Authority to order “such other action as will carry out the purposes of this chapter.” Fed. Bureau of Prisons, Wash., DC, 55 FLRA 1250, 1256 (2000). The Authority has an obligation to “repair and restore the effects of statutory violations . . . . The Statute provides the Authority the discretion to fashion remedies as long as such remedies are consistent with the purposes and policies of the Statute.” Id.

The Authority has developed traditional remedies, “including a cease-and-desist order accompanied by the posting of a notice to employees . . . which are provided in virtually all cases where a violation is found.” Id. There is no basis for not providing some of these traditional remedies in the instant case.

In determining where notices must be posted, consideration is given to the two purposes served by a notice to employees. United States Dep’t of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C., 55 FLRA 388, 394 (1999). Notices provide to employees evidence: (1) that rights under the Statute will be vigorously enforced and (2) that a respondent recognizes and intends to fulfill its statutory obligations. Id. All bargaining unit employees in Technical Operations are affected by the bargaining at issue in this case. They should be informed that PASS has not fulfilled its statutory bargaining obligation with respect to a successor to their term agreement, and that PASS will fulfill its statutory duty to bargain in good faith in the future. Thus, PASS should be ordered to post a Notice to All Members and Employees (“Notice”) in all places where notices to unit employees customarily are posted. The evidence does not suggest a narrower scope of posting would be appropriate.

The Authority “typically directs the posting of a notice signed by the highest official of

the activity responsible for the violation.” United States Dep’t. of Transportation, FAA, Standiford Air Traffic Control Tower, Louisville, Ky., 53 FLRA 312, 322 (1997). There is no evidence that the instant case is not typical. PASS President Brantley should be ordered to sign the Notice.

The Authority also uses non-traditional remedies where necessary to repair and restore the effects of statutory violations. See Fed. Bureau of Prisons, Wash., DC, 55 FLRA at 1258; Dep’t of Veterans Affairs Med. Ctr., Phoenix, Ariz., 52 FLRA 182 (2000); United States Dep’t of Justice, Fed. Bureau of Prisons, Safford, Ariz., 35 FLRA 431, 444 (1990) (citing PATCO v. FLRA, 685 F.2d 547 (D.C. Cir. 1982). Non-traditional remedies must, of course, serve the same purposes as traditional remedies, which are to effectuate the purposes and policies of the Statute, F.E. Warren AFB, Cheyenne, Wyo., 52 FLRA 149, 161 (1996), and “to restore, as far as possible, the status quo that would have obtained but for the wrongful act and to deter future misconduct,” Fed. Bureau of Prisons, Wash., DC, 55 FLRA at 1258.

The appropriate remedy in this case includes the non-traditional remedy of disallowing PASS to rely on the ratification vote and to conduct another ratification, which would result in the tentative agreement being the parties’ final agreement as of April 4, 2006, just as if PASS had not reserved the right to submit the tentative agreement to a ratification vote because it accomplishes the statutory purposes of remedial relief. First, a lesser remedy would leave PASS with precisely the goal it sought to achieve through the unlawful VOTE NO campaign. A remedy should “withhold from the wrongdoer the ‘fruits of its violation.’” Internat’l. Union of Electrical., Radio and Machine Workers v. NLRB, 426 F.2d 1243 (D.C. Cir. 1970) (citation omitted), cert. den., 400 U.S. 950 (1970). Second, this remedy would deter PASS, and other unions, from repeating the unlawful conduct at issue here. If the remedy is not ordered, unions

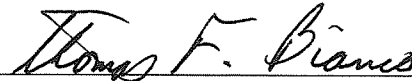
could effectively delay bargaining indefinitely until they obtained exactly the term agreement they want by having members vote against ratification of any lesser agreement. For example, PASS could employ a VOTE NO campaign until the FAA adopted the job security provision in the parties' current contract, even though bargaining over that provision is permissive, not mandatory, under section 7106(b)(1) of the Statute. In addition, agencies would not place any significance in reaching a tentative agreement with a union if it can use its power and influence to ensure the agreement will be eliminated through a ratification process. PASS should be required to be bound by the agreement it made with the FAA before PASS engaged in conduct that violated the Statute.

While the Authority has not yet been called upon to consider this nontraditional remedy, the NLRB has denied a union the right both to rely on a ratification vote that was not conducted properly and the opportunity to conduct a second vote. In General Teamsters Union Local 442, 339 NLRB 893 (2003), enfd, 368 F.3d 741, 745 (7<sup>th</sup> Cir. 2004), the NLRB held that Local 442 acted in bad faith, and thereby violated section 158(b) and (d) of the Act, by refusing to sign an agreement with the employer. Local 442 argued that it had no duty to sign because the tentative agreement the parties had reached was rejected in a ratification vote by members. The Board found that the ratification vote was not binding because Local 442 had not submitted to members all provisions of the tentative agreement. The NLRB ordered Local 442 to execute the tentative agreement, thereby making it a final and binding agreement.

PASS has argued that this nontraditional remedy is not appropriate because it would deprive PASS members of their right to a ratification vote, and the General Counsel has not established the tentative agreement would have been ratified if PASS had not conducted the VOTE NO campaign, that is, the remedy would not return the parties to the *status quo*. Both

arguments conflict with the order of the NLRB in the case cited in the preceding paragraph. The second argument is refuted by Teamsters Local 287, Internat'l Brotherhood of Teamsters, 347 NLRB No. 32 (2006), in which the NLRB held that doubts about the certainty of an event should be resolved against the wrongdoer. Finally, it is not unusual for a union's misconduct in dealings with management to have an adverse effect on members of the bargaining unit represented by the Union.

Respectfully submitted this 4<sup>th</sup> day of September 2007 by



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**CERTIFICATE OF SERVICE  
CASE NO. WA-CO-06-0356**

I hereby certify that on September 4, 2007, I served the foregoing GENERAL COUNSEL'S EXCEPTIONS TO DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE upon the interested parties in this action by certified mail, return receipt requested.

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