

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: August 11, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

Respondent

and Case No. WA-
CA-05-0095

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION Respondent	
and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION Charging Party	Case No. WA-CA-05-0095

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 11, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: August 11, 2006
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION Respondent	
and NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION Charging Party	Case No. WA-CA-05-0095

Gary W. Stokes, Esquire
Greg A. Weddle, Esquire
For the General Counsel

Patrick Daniel McGlone, Esquire
For the Respondent

Marc S. Shapiro, Esquire
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On November 16, 2004, the National Air Traffic Controllers Association (Union) filed an unfair labor practice charge against the U.S. Department of Transportation, Federal Aviation Administration (Respondent or FAA) (GC Ex. 1(a)). On January 27, 2006, the Regional Director of the Chicago Office of the Federal Labor Relations Authority (Authority)¹ issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by informing its employee Scott

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The case was transferred from the Washington Regional Office of the Authority to the Chicago Regional Office by Order dated December 16, 2004 (GC Ex. 1(b)).

Odle that he was disqualified from flying as a crew member because of his protected activities on behalf of the Union. It was further alleged that the Respondent committed a second unfair labor practice in violation of §7116(a)(1) and (2) of the Statute by disqualifying Odle from flying as a crew member because of his protected activities on behalf of the Union (GC Ex. 1(d)). The Respondent filed a timely answer denying that it had violated the Statute as alleged (GC Ex. 1(f)).

A hearing was held in Chicago, Illinois on June 7, 2006. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by each of the parties.

Positions of the Parties

The General Counsel and the Union

The General Counsel maintains that Odle, a Union steward, was disqualified as an aircrew member because he had communicated with other Union representatives by an e-mail message that was not addressed to any management representative of the Respondent. The e-mail message was protected activity under the Statute. Furthermore, Odle's supervisor, who initiated his disqualification, informed Odle that his message was the cause of the action. According to the General Counsel, she has presented a *prima facie* case of unlawful discrimination.

The General Counsel further maintains that the Respondent has failed to support an affirmative defense because the evidence does not show that its action against Odle was justified and that it would have disqualified him regardless of his protected activity.

The General Counsel also argues that the Respondent committed a separate unfair labor practice by virtue of the statement of Patrick Power, Odle's immediate supervisor and a management representative of Respondent, informing Odle that he was being disqualified from his status as an aircrew member because of his e-mail to Union representatives. Regardless of Power's intent or Odle's perception, that statement would tend to coerce or intimidate a reasonable employee and discourage the employee from engaging in protected activity.

As a remedy the General Counsel proposes an order directing the Respondent, among other actions, to make Odle whole for the loss of a 25 percent pay differential which he would have earned had he not been disqualified from participation in the Adam Aircraft Company project in which he was scheduled to participate at the time of his disqualification. The General Counsel also proposes that the Respondent be directed to post a notice at its facility in Lakewood, California to which Odle was assigned.

The Union, which filed a separate post-hearing brief, has espoused a position identical to that of the General Counsel with regard to the allegedly unlawful conduct of the Respondent. However, the Union proposes that the Respondent be directed to post an appropriate notice at its facilities nationwide, that any record of Odle's disqualification be expunged from his personnel file and that he be awarded the 25 percent pay differential for all flying assignments which he missed since the time of his disqualification.²

The Respondent

The Respondent emphasizes the importance of effective medical screening of aircrew members to maintain safety. According to the Respondent, Power had incorrectly told Odle that a doctor's note would be sufficient to establish that he could safely perform his duties as an aircrew member. Power later corrected his mistake and informed Odle that he would need to obtain a third class medical certificate. Power's action was not in retaliation for Odle's e-mail to other Union representatives. All similarly situated employees have third class medical certificates and Odle had previously been disqualified for the same reason by a different supervisor. That supervisor had also disqualified another employee because he did not have a third class medical certificate.

According to the Respondent, Power's statement to Odle that a note from his doctor would be acceptable might have been made on the assumption that his doctor had been certified by the FAA to perform medical screening. If that had been true, the doctor would have performed the tests which were necessary to determine Odle's fitness for service as an aircrew member. As soon as Power became aware that Odle had not been properly screened he disqualified him until such time as Odle could be properly certified. The

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It is undisputed that Odle has not attempted to obtain a third class medical certificate or otherwise qualify for flight status since the incident which gave rise to the unfair labor practice charge upon which this case is based.

Respondent maintains that Odle's disqualification was justified and was necessary to preserve his safety as well as the safety of his fellow crew members.

The Respondent also maintains that Power's statement to Odle regarding his disqualification did not create a reasonable basis for an inference of coercion. Even if Powers had, as claimed by Odle, stated that Odle's e-mail had "pissed off" a number of the Respondent's managers, it was no more than a statement of his personal opinion which did not include either a threat or promise of future benefit. The lack of coercive effect is corroborated by the fact that similarly situated employees were grounded by other supervisors for the same reason and that Odle himself had previously been grounded for the same reason by another supervisor.

Findings of Fact

The Respondent is an agency within the meaning of §7103 (a) (3) of the Statute. The Union is a labor organization as defined by §7103(a) (4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining. Odle is an employee of the Respondent as defined by §7103(a) (2) of the Statute and is a member of the bargaining unit represented by the Union. At all times pertinent to this case, Odle was a representative of the Union (GC Exs. 1(d) and 1(f)).

Odle's Status with the Respondent and the Union

Odle was employed as an Aerospace Engineer at the Respondent's facility in Lakewood, California (Tr. 16); at the same time he served as the Transport Airplane Directorate Representative and as one of two Los Angeles Aircraft Certification Office Facilities Representatives for the Union (Tr. 19). Odle was one of 25 or 26 Aerospace Engineers employed by the Respondent throughout the country (Tr. 55). His duties involved the certification of various types of aircraft. This was accomplished by working directly with the aircraft companies in reviewing reports, test plans and test results. Aerospace Engineers also witness or perform tests of aircraft, some of which are performed while the aircraft is in flight (Tr. 16-18). Aerospace Engineers receive a 25 percent pay differential for any 8 hour work period in which they witness or perform in-flight testing regardless of the duration of the test (Tr. 18, 19).

Odle's Disqualification from Flight Status

In July of 2004³ Odle, on behalf of the Union, filed an unfair labor practice charge against the Respondent which was designated as SF-CA-04-0543 (Tr. 20, 21; GC Ex. 2).⁴ In the charge the Union alleged that the Respondent had violated the Statute by unilaterally establishing a requirement for "certain FG-861 engineers" to obtain third class medical certificates. There is no direct evidence that Aerospace Engineers such as Odle are included in that group, but the Respondent has not challenged that proposition. Odle testified that the charge was resolved when he received a telephone call from an investigator from the Authority who informed him that the Respondent was "on record" that there was no requirement for engineers to have a third class medical certificate, but that a supervisor could request that the employee submit a "doctor's note" (Tr. 22, 23). Neither the General Counsel nor the Union introduced any written evidence that the charge had been settled or withdrawn, nor is there any written or oral evidence that the terms of the settlement were promulgated to the supervisors to whom the affected engineers reported.

Some time in the fall of 2004 Power, who became Odle's supervisor in July or August of that year, told him that he did not need to have a third class medical certificate, but that, in lieu of the certificate, he was required to provide a doctor's note indicating his fitness to perform his duties while in flight. Odle obtained the doctor's note and presented it to Power in or around October (Tr. 23, 24, 63; Resp. Ex. 5). The note is handwritten on a prescription pad and states that, "Patient in satisfactory condition for flight long distance." Power then cleared Odle to participate in in-flight testing.

Odle's Message to Union Representatives and Its Aftermath

Odle was assigned to perform in-flight testing in October on a project that involved a flight to Brazil. While in Brazil on October 24 Odle sent an e-mail message (GC Ex. 3) to other Union representatives (Tr. 25, 26) stating:

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All subsequently cited dates are in 2004 unless otherwise indicated.

4

This exhibit is the amended charge; the date of filing of the original charge was not specified.

The agency has recently told me AND the FLRA that there is currently no longer ANY requirement for a [n] engineer, including those in flight test, to maintain a 3rd Class medical certificate in order to perform flight test related duties.

However, the supervisor of the Flight Test Branch in La told those of us without a 3rd class medical it is his responsibility to ensure that when he assign[s] a project that those he assigns it to are physically capable of performing the job.⁵ As such, we were told that he either requires us to show him that we posses[s] a 3rd Class medical certificate or provide him a doctor[']s note saying I and [sic] physically able to fly (those were his exact words).

As such, I provided him a doctor[']s note that said precisely that "Patient is OK able to fly". I submitted this and made sure they knew that the doctor performed absolutely no extra tests or anything prior to giving me the note. I guess this was satisfactory since just prior to leaving for Brazil he asked about flying down here and I told him I would [be] flying with Embraer since I had given him the doctor's note just as he had asked.

Please let everyone know that the agency is now claiming that there is no requirement for an engineer to have a 3rd class medical and that if there [sic] supervisor assigns them work, they should assume the supervisor has satisfactorily carried out his responsibility of ensuring that the person is physically capable of [sic] do the job.

If any person is told otherwise, i.e., they are told FAA policy or orders require them to hold one, please let me know immediately as this would demonstrate that what they are telling the FLRA is untrue.

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There is no evidence that Power had such a conversation with any employee other than Odle. Power testified without challenge that all other Aerospace Engineers on flight status held third class medical certificates (Tr. 55).

On or about November 1, which was Odle's first day back at his office after the trip to Brazil, he opened an e-mail message from Power dated October 29 (GC Ex. 4) which stated:

After further review, I do not consider the doctor's note you submitted regarding your fitness "for light long distance" to be adequate. The medical determination needs to specifically attest to your fitness for flying as a crewmember. Since your personal physician cannot make such a determination, a qualified flight surgeon must conduct the examination. As I explained previously, you also have the option of obtaining a Class 3 Medical Certificate.

On the same day Odle received by facsimile from Matthew Lystra, a Union representative in Seattle, a copy of an e-mail message dated October 28 from Power to a number of the Respondent's supervisors (GC Ex. 5). The message stated:

Due to the sensitive nature of this topic could you please comment on the following bold text I plan to send to Scott Odle. I included in italics Scott's email for reference. (My use of the word "developments" is meant to indicate Scott's inappropriate, and partially inaccurate email which he only addressed to union personnel). FYI Adam 500 FAA flight testing is continuing next week and Scott will now not be participating until this is resolved.⁶

After further developments and scrutiny by, additional FAA personnel involved, the doctor note you submitted stating your fitness "to fly on long flights" has been determined not to meet the proper intent. The medical fitness determination needs to specifically attest to your fitness for flying as a crewmember. If your personal physician does not understand, or is unable to make such a determination a qualified flight surgeon should conduct the examination. As I explained previously, you also have the option of obtaining a Class 3 Medical Certificate.

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Adam 500 FAA flight testing refers to the testing of a new aircraft in which Odle had been scheduled to participate. Odle testified without challenge that he did not participate in this project and that, if he had done so, he would have earned between \$1,000 and \$1,500 of hazardous duty pay (Tr. 32, 33).

Regards,

Pat

Power's e-mail message ends with a copy of the text of Odle's message of October 24 to Union representatives. There is no evidence as to how the Respondent obtained Odle's message or how the Union obtained Power's message.

Odle testified that he was in Power's office later that day discussing other matters when Power asked him if he had received his e-mail message of October 29 and whether he had any questions or concerns. According to Odle, Power explained that the doctor's note was no longer acceptable as proof of his medical fitness. Odle then suggested that the Union had copies of e-mails indicating otherwise; at that point Power "changed his story" and told Odle that he had been grounded because his e-mail had "pissed off" a number of other managers. Odle further testified that Power told him that he would have continued to accept the doctor's note if Odle had not sent the e-mail message to the other Union representatives (Tr. 30, 31).

Power testified that Odle had previously held a third class medical certificate because it was a requirement for him to perform his in-flight duties. He acknowledged that he had told Odle that a doctor's note was sufficient, but indicated that "in hindsight" it was a mistake. Power stated that he rescinded his acceptance of the doctor's note after he learned that the note was "less than what [he] had taken it for" (Tr. 53, 54). Power denied that he grounded Odle because of his status in the Union or his activities on behalf of the Union. He further stated that, although he did not deny having had a conversation with Odle, he had no specific recollection of the conversation and did not remember saying that Odle had made people mad or words to that effect (Tr. 56).

The Respondent's Medical Standards

Although the parties have tacitly agreed that, at all times pertinent to this case, engineers such as Odle were subject to medical examinations to determine whether they were physically qualified to perform in-flight testing, they differ over the necessary form of medical certification. Dr. Nestor Kowalsky, the Respondent's Regional Flight Surgeon for Great Lakes (which does not include California), testified that he reviews third class medical certificates for the Respondent's employees, but played no part in establishing the requirements for such certificates. Dr. Kowalsky had no part in the decision to ground Odle and

did not communicate an opinion on whether Odle should have been grounded (Tr. 45-47). He did indicate that an examination for a third class medical certificate may only be conducted by a physician who has been designated by the Respondent as an Aviation Medical Examiner. He also testified that the failure to conduct such an examination properly could have an impact on flight safety (Tr. 45).

Although Dr. Kowalsky had never before seen Odle's FAA medical record (Resp. Ex. 1) he was able to authenticate it by testifying that it was in a typical format for such a record (Tr. 48, 49).⁷ The top page of the record indicates that Odle applied for a third class medical certificate on August 28, 2000, and that Aviation Medical Examiner Francis C. Hertzog, Jr., M.D. reviewed the medical record and issued the certificate on the same date. The medical record is on a two-page (or front and back) printed form indicating the results of a comprehensive physical examination. The record also contains an identical form showing the issuance of a third class medical certificate on April 9, 1996.

Over the objection of the Union the Respondent was allowed to introduce an e-mail message to Respondent's counsel from Kay Hatcher of the Respondent's FOIA (presumably Freedom of Information Act) Desk. Hatcher indicated that Odle had held third class medical certificates since April 19, 1990. His most recent certificate had been issued on August 28, 2000, and had expired on August 31, 2003.⁸

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The General Counsel maintained that Dr. Kowalsky could not offer relevant testimony because of his lack of familiarity with the events of 2004 that are at issue in this case. However, Odle's medical record is further authenticated by the attached Certificate of True Copy signed by Jerry K. Bowen, Supervisor, Medical Records Section, Aerospace Medical Certification Division, on May 16, 2006. Bowen's status as legal custodian of Odle's medical record was certified by Stephen L. Carpenter, M.D., Acting Manager, Aerospace Medical Certification Division.

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The Union did not contest the dates indicated on the message, but objected to the fact that Hatcher was not present at the hearing and could not be cross-examined (Tr. 52, 53). Power testified that he was familiar with the effective period of Odle's most recent medical certificate (Tr. 53). Neither the General Counsel nor the Union attempted to challenge or rebut the evidence of Odle's medical history.

The Respondent did not, and apparently could not, produce any regulation or statement of policy showing that Aerospace Engineers were required to have third class medical certificates at the time of Odle's disqualification from flight status. During Power's cross-examination the General Counsel introduced FAA Order 8110.41 which was dated November 3, 1993, and was entitled "FLIGHT TEST PILOT TRAINING, RESPONSIBILITIES, AND PROCEDURES" (GC Ex. 6). Power identified the Order as stating the policy of the Respondent with regard to medical certifications. Power acknowledged that the Order "probably" did not mention medical certification (Tr. 67-69). My examination of this document confirms that there is no mention of medical certification. There is no evidence that the Respondent had a formal policy regarding medical qualifications for employees other than pilots at the time of Odle's disqualification.⁹

Power testified without challenge that, as of the time of the hearing, all of the Respondent's 25 or 26 Aerospace Engineers had third class medical certificates, other than one or two who had elected not to fly (Tr. 55). Power stated that he had also disqualified Frank Hoerman, another Aerospace Engineer who reported to him, because his medical certificate had expired; the date of Hoerman's disqualification was not specified. Hoerman subsequently renewed his certificate and was returned to flight status (Tr. 66, 67).

Although there is no direct evidence as to when the Aerospace Engineers other than Odle first acquired their third class medical certificates, the evidence in the record strongly suggests that, on and before the date of Odle's disqualification, the engineers were at least required to undergo extensive medical testing to maintain their eligibility to conduct and observe in-flight testing. It strains credibility to assume that, prior to his disqualification, Odle would have undergone extensive examinations by an FAA certified physician as part of his application for his now expired medical certificates if such examinations were not a requirement for maintaining his flight status. Accordingly, Odle knew or should have known that Power had acted improperly in accepting a perfunctory note from his personal physician, especially if, as claimed

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Section 3c(10), page 5, of Order 8110.41 required physiological training for all FAA personnel participating in flight tests above 10,000 feet. Power acknowledged that Odle was not scheduled to engage in such testing at the time of his disqualification (Tr. 69, 70).

by Odle, Power was aware that the physician had not performed any of the required tests. The issue of the requirement of a third class medical certificate is immaterial since Power did not require that Odle obtain a certificate, but only that he be examined by an Aviation Medical Examiner and certified as being eligible to serve as part of an aircrew. The alleged settlement of the Union's prior unfair labor practice charge (GC Ex. 2)¹⁰, assuming that it actually occurred, is consistent with this conclusion since the charge only complains of the requirement for a third class medical certificate rather than the need for an acceptable medical examination.

In summary, the credible evidence shows that Power's disqualification of Odle was neither discipline nor other adverse action, but the correction of an obvious error which amounted to an improper exemption of Odle from medical standards which had been uniformly applied to all other Aerospace Engineers. Odle, as a Union representative and an Aerospace Engineer of long experience, knew or should have known that he had received special treatment which was contrary to standard practice by the Respondent. The circumstances of Odle's disqualification indicate that neither he nor any other member of the bargaining unit had a reasonable basis for feeling coerced or intimidated on account of protected activity.

Discussion and Analysis

The Legal Framework

Each of the parties recognize that the standard for determining the existence of unlawful discrimination is set forth in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). Under *Letterkenny*, in order to prove discrimination under §7116(a) (1) and (2) of the Statute, the General Counsel must show that the discriminatory action was motivated, wholly or in part, by the protected activity of the employee against whom the action was taken. Once the General Counsel has presented a *prima facie* case of discrimination, the agency may rebut the General Counsel's case by showing that its

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Odle's testimony as to the resolution of the prior charge is questionable to say the least. If the charge had been settled or withdrawn, the Union would have received a settlement agreement and/or a notice of withdrawal from the Regional Director in accordance with §§2423.1 or 2423.12 of the Rules and Regulations of the Authority. Even if the Union had not received or retained such documentation, it certainly could have been obtained by the General Counsel.

action was justified and that it would have taken the action even in the absence of the protected activity. In determining whether the General Counsel has presented a *prima facie* case, it is appropriate to examine the record as a whole, *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

With regard to the allegations of interference, restraint or coercion under §7116(a)(1) of the Statute, the Authority has adopted an objective standard in determining the effect of the statement made on behalf of the agency. The test is whether, under the circumstances, the employee concerned could reasonably have drawn a coercive inference from the statement. Neither the agency's motive nor the employee's actual perception is controlling, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994) (*Frenchburg*).

Odle's Disqualification

As shown above, I have found as a fact that all of the Respondent's Aerospace Engineers were required either to undergo an examination by a FAA certified Aviation Medical Examiner or to obtain a third class medical certificate (presumably also after an examination by an Aviation Medical Examiner) in order to maintain their flight status. After having mistakenly accepted the doctor's note from Odle, Power corrected the mistake by insisting that he either undergo the necessary examination or obtain a third class medical certificate. In so doing, Power was only subjecting Odle to the same standards that applied to all other Aerospace Engineers. Power's action was not discriminatory and, consequently, the General Counsel has not presented a *prima facie* case of discrimination.¹¹ In accordance with the analysis in *Letterkenny*, there need be no further inquiry.¹²

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According to *305th Air Mobility Wing, McGuire Air Force Base, New Jersey*, 54 FLRA 1243, 1245 n.2 (1998), proof of disparate treatment of similarly situated employees is not a necessary element of a *prima facie* case of discrimination under §7116(a)(2). However, the Authority has not held that a finding of discrimination may be made in the absence of any supporting evidence.

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The Respondent does not dispute the proposition that Odle's e-mail message to the other Union representatives was protected activity under §7102 of the Statute.

Power's Statement to Odle

Even if, as claimed by Odle, Power stated that he would have accepted the doctor's note were it not for the e-mail message to other Union representatives, the General Counsel has not established a necessary element of a *prima facie* case of discrimination under §7116(a)(1) of the Statute. Odle knew or should have known that Power's statement of disqualification was no more than the application of the same medical criteria that had been applied to all other Aerospace Engineers. Therefore, the statement could not reasonably have been construed as being coercive or threatening as is required by the Authority in *Frenchburg*. The most that Odle could have inferred from Power's statement was that he should not have told anyone about his preferred treatment.

For the foregoing reasons, I have concluded that the Respondent did not commit unfair labor practices by disqualifying Odle from flight status or by informing him of its intent to do so. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, August 11, 2006.

Paul B. Lang
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-05-0095 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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Dated: August 11, 2006
Washington, DC