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PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

1150 17th Street, NW, Suite 702, Washington, D.C. 20036
Telephone: (202) 293-PASS Fax: (202) 293-7727

## Memorandum

To: PASS Executive Board

From: Dennie Rose
Assistant Counsel DR

Date: September 28, 2005

RE: National Grievance – Federal Workplace Flexibility Act of 2004

As many of you may be aware, on January 31, 2005, we filed a national grievance on behalf of all our bargaining units against the agency for their failure to implement the Federal Workforce Flexibility Act of 2004.[1] Specifically Section 203 of the Act amended Subchapter V of Chapter 55 of Title 5 of the United States Code by adding a section 5550b to establish a new form of compensation for time spent by employees in a travel status away from their official duty stations if the travel time is not otherwise compensable.[2] As expected, the agency denied our grievance, arguing that since personnel reform exempted it from most parts of Title 5, this new law did not apply to the FAA. This case was scheduled to be arbitrated on September 27, 2005.

Through a settlement agreement, PASS has accomplished our main goal of guaranteeing that all of our bargaining unit employees will receive compensatory time when traveling outside of their duty hours away from their normal duty stations and when the travel time is not otherwise compensable.[3] This mirrors Section 203 of the Federal Workplace Flexibility Act of 2004. Effective October 16, 2005, our bargaining unit employees will be covered by an agency policy governing compensatory time for travel. Before agreeing to this, we insisted on a number of changes to the policy. For instance, in the agency's original policy proposed to the Union, compensatory time for travel was solely at management's discretion with no guarantees and the policy set up a two-part process where an employee would be forced to request approval for both the travel and the compensatory time in advance of any travel. Under this structure, it would be possible for the agency to authorize travel but deny the compensatory time. These were deal breakers for us; by working with the agency's policy division, we were able to change these sections.

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[1] In accordance with their collective bargaining agreement, AVN officially filed a national grievance on February 16, 2005.

[2] See 5 USC 5550b, 5 CFR 550, Sections 1401-1409.

[3] Our settlement agreement resolves all current pending grievances related to the agency's denial of compensatory time for travel.

While we had confidence in our national grievance, it is always possible that an arbitrator could have ruled against us. We developed two main arguments in support of our claim in which the agency had arguable counter-points. Our first argument that we planned to submit to the arbitrator was that all PASS bargaining unit employees in the FS, MIDO, AFS-700, and AVN[4] bargaining units should have been automatically covered by Section 203 of the Act based on the application of FAA PRIB #1, which provides as follows: "All Current Systems and Procedures Remain in Effect Until Superceded by a PRIB." This was issued by the agency following personnel reform in 1996 and has been interpreted by arbitrators and the FLRA in the past to represent the agency's adoption of the government-wide pay and compensation system until the agency devised and negotiated another system. The FAA's position was that since the Federal Workforce Flexibility Act was a new law that was not even envisioned in 1996 during personnel reform, the agency did not commit to following this particular law through the operation of PRIB #1. The FAA also planned to point out that all of our previous successful PRIB #1 cases dealt with laws that were in existence prior to the 1996 personnel reform.

Our second argument was that, although not expressly stated, Congress intended for all FAA employees to fall within the Act's coverage. Specifically, the Act applied to "an employee as defined in 5 USC Section 5541(2)." Our position was that Section 5541(2) defines the term "employee" as, among other things, "an employee in or under an Executive agency." All FAA employees meet this definition, including those in our AF bargaining unit who, unlike our other bargaining units, are covered by a negotiated pay and compensation system as a part of their current collective bargaining agreement. The FAA's counter to this was that since the FAA is exempt from Title 5 and not covered by 5 USC Section 5541(2), it is not legally possible for this definition of employee to apply to FAA employees.

Arguably, the Union's positions presented questions that had not been directly answered in the past. As such, we entered the arbitration process with the chance of losing this benefit for some, if not all, of our bargaining units. The agency made it perfectly clear that without this settlement (and if we were unsuccessful in our arbitration case), we would not receive this benefit without negotiating for it in each of our collective bargaining agreements. As you know, it could have been years before all of our bargaining units received this benefit. Equally clear was that the agency intended to grant this benefit to all other FAA employees who were not in a bargaining unit and not represented by a union. In view of these facts, settling was the best option. This settlement agreement provides us with definitive guarantees that we may not have received through the unpredictable arbitration process and allows all of our bargaining unit employees to receive this benefit effective October 16. Further, our success with this case will likely assist our fellow unions in obtaining this same benefit in the near future. Worth noting, this settlement does not provide for retroactive application or backpay. Copies of the settlement agreement and policy statement are enclosed and will be available on PASS's website.

[4] This argument would not include the AF bargaining unit because it is covered by a negotiated pay system.