

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

LARRY'S FLYING SERVICE

FAA Order No. 95-17

Served: August 4, 1995

Docket Nos. CP93AL0267, CP93AL0268

DECISION AND ORDER

On May 17, 1994, John J. Mathias, Chief Administrative Law Judge, issued an oral initial decision¹ finding that Respondent Larry's Flying Service had committed numerous violations of 14 C.F.R. §§ 135.63(a)(4)(iv), 135.63(a)(4)(x), 135.293(a), 135.95(b), 135.267(b)(1), and 135.343.² With regard to sanction, the law judge stated that the \$30,000 and \$5000 civil penalties sought by Complainant in Docket No. CP93AL0267 and Docket No. CP93AL0268, respectively, were reasonable given the nature of the violations as well as Larry's Flying Service's violation history.³ However, due to Larry's Flying Service's financial difficulties, the law judge reduced the combined civil penalties to \$15,000 payable over a 15-month period beginning in August 1994. Complainant has appealed, arguing that the law

¹ The law judge issued the oral initial decision at the conclusion of a hearing that was held on May 16-17, 1994, in Fairbanks, Alaska. A copy of the transcript excerpt setting forth the law judge's initial decision is attached to this decision.

² The text of these regulations appears in the addendum to this decision.

³ Larry's Flying Service had been assessed civil penalties on two occasions prior to these civil penalty actions.

judge lacked the authority to decide that Larry's Flying Service may delay payment of the civil penalty. Complainant's appeal is denied.

Larry's Flying Service is a Part 135 operator, flying out of Fairbanks, Alaska. It is a Subchapter S corporation, with two shareholders: Lawrence Chenaille and his wife. Larry's Flying Service, which has been in operation since 1982, employs about 100 people in Alaska. Part of its business is hauling mail. (1 Tr. 151-152.)

Larry's Flying Service filed for bankruptcy under Chapter 11 in January 1987. (1 Tr. 118.) Mr. Chenaille testified at the hearing that Larry's Flying Service would make its last payment under the bankruptcy plan by the end of 1994. (1 Tr. 171.) Mr. Chenaille testified that while Larry's Flying Service had a loss in 1993, he was projecting a profit for 1994. (1 Tr. 167). He testified that he expected that Larry's Flying Service would be financially viable in 5 years. (1 Tr. 169.) However, he testified, Larry's could not afford to pay a large penalty, and a large penalty might force the company to stop doing business. (1 Tr. 168.) He noted that Larry's Flying Service's assets already were pledged as security or collateral on loans, and that there were no substantial assets that were not already pledged as collateral. (1 Tr. 234.)

Gary Hutchison, a certified public accountant with the firm of Core, Schmidt and Hutchison, testified that based upon the company's financial statements at the end of 1993, Larry's Flying Service's liabilities exceeded its assets. (1 Tr. 101, 107.) He testified that Larry's Flying Service had sustained losses in 1992 and 1993. (1 Tr. 105.) In Mr. Hutchison's opinion, Larry's Flying Service could not afford a large civil penalty, but could afford a \$2000 to \$3000 civil penalty. (1 Tr. 109.)

Lyle Bruce Fjermedal, an auditor with the Department of Transportation Office of the Inspector General, testified during Complainant's rebuttal case. Mr. Fjermedal testified that in his opinion, a \$35,000 civil penalty would not prevent the company from continuing as a going concern. (1 Tr. 197.) He testified that \$35,000 was a manageable amount to pay, although Larry's Flying Service did not at the time of the hearing have that much money in the bank. (1 Tr. 215-217.)

In his initial decision, the law judge found that the weight of the evidence supported a finding that Larry's Flying Service is in a recovering, but nonetheless precarious financial condition. He wrote "... although the financial situation of Respondent is not quite as bad as that argued by Respondent, it is not quite as good as that argued by Complainant." (2 Tr. 44.) The law judge stated, "In reviewing the financial records, I believe that Larry's can survive a sanction of a civil penalty in the amount of \$15,000, provided that it be made payable over a period of one year and beginning in August of 1994" (2 Tr. 45-46.) Upon request of Larry's Flying Service's attorney, the law judge modified his order to permit payment of the assessed penalty over a 15-month period, ending in October 1995. (2 Tr. 47-48.)⁴

On appeal, Complainant states that it does not disagree with the law judge's finding that a \$15,000 civil penalty was appropriate in light of Larry's Flying Service's numerous violations and financial condition. Complainant argues that the law judge lacked the authority under the Rules of Practice to decide that Larry's Flying Service may pay the civil penalty in installments. Also, Complainant argues, permitting the payment of the penalty over the course of 15 months dilutes the

⁴ According to Respondent's reply brief, Larry's Flying Service began making its monthly \$1000 payments of the civil penalty on August 8, 1994. (Reply Brief at 6.)

sanction's deterrent effect. Complainant argues that "the law judge has usurped the role of the Complainant or prosecutor in determining the proper disciplinary sanction." (Appeal Brief at 10.) Complainant argues that "[w]hile case law allows the law judge to reduce the amount of the sanction in light of a respondent's established financial hardship, the law judge is not empowered to fashion his own equitable remedies." (Appeal Brief at 10.) Finally, Complainant argues that if it is held that the law judge has the authority to order that the penalty be payable over a 15-month period, then the case should be remanded to the law judge to clarify the payment terms. In other words, the case should be remanded to the law judge to determine the frequency of the payments or whether he simply envisioned that the entire penalty would be paid at the end of the 15-month period. Complainant concludes by cautioning the Administrator against finding "too readily" that the law judge may order that civil penalties be paid in installments because, claims

Complainant:

It is not difficult to envision this power leading law judges to establish a multitude of collection schedules, at great expense to the agency to maintain. Clearly reduction of a civil penalty, when warranted, is a more practical means of responding to financial hardship.

(Appeal Brief at 10-11.)

Essentially, Complainant presents the same arguments in this appeal as in its appeal in In the Matter of Mulhall, in which a law judge ordered that a respondent who had violated the Hazardous Materials Regulations could pay a \$750 civil penalty in 30 installments. In both cases, Complainant did not appeal from the law judge's reduction of the civil penalty based upon financial hardship but only whether the law judge has the authority to order installment payments. In resolving the latter issue, the Administrator held in In the Matter of Mulhall, FAA

Order No. 95-16 at 7-10 (August 4, 1995), that law judges may prescribe payment plans, but for policy reasons, the law judges should use this authority on only rare occasions, such as in cases in which the respondent has severely limited financial means.^{5 6}

The Administrator has held that financial hardship, when proven, may constitute grounds for a reduction of an otherwise appropriate civil penalty. In the Matter of Conquest Helicopters, FAA Order No. 94-20 (June 21, 1994); In the Matter of Costello, FAA Order No. 93-10 at 9 (March 25, 1993); In the Matter of Lewis, FAA Order No. 91-3 at 8-9 (February 4, 1991). In cases in which financial hardship has been proven, the total amount of civil penalty that the respondent can afford to pay may depend upon whether the penalty is payable in installments, and if so, in how many installments.⁷

In its appeal brief, Complainant requested that the case be remanded for clarification by the law judge if it is held that the law judge had the authority to order that the penalty be payable in installments. This request is denied. When the law judge concludes that a respondent has proven financial hardship and that

⁵ Indeed, in at least two cases, the Administrator has affirmed orders in which a law judge had permitted the payment of a civil penalty in monthly installments. See In the Matter of Giuffrida, FAA Order No. 92-72 (December 21, 1992)(\$500 civil penalty payable in 10 monthly installments of \$50), and In the Matter of Barnhill, FAA Order No. 92-32 (May 5, 1992)(\$550 civil penalty payable in 11 monthly installments of \$50.) In both cases, the law judges reduced the civil penalty proposed by Complainant and ordered that the respondents be permitted to pay the civil penalty in installments based upon the law judges' determination of the respondents' financial hardship.

⁶ That does not mean, however, that it would be inappropriate for the *agency attorney* in exercising his or her discretion, to offer to reduce a civil penalty and/or to make it payable in installments *as an incentive to a respondent to settle or compromise a case.*

⁷ In cases of demonstrated financial hardship, a civil penalty payable in small installments may also be more readily collectible.

installment payments would be appropriate, the law judge should specify the total amount to be paid, the amount of each installment and the intervals between payments. The law judge in this case ordered that a \$15,000 civil penalty be paid over a 15-month period. (See 2 Tr. 45, 48). It seems reasonable, and most likely, therefore, that he contemplated that Larry's Flying Service would make monthly \$1000 payments. A remand to clarify the law judge's order is unnecessary.

As explained in In the Matter of Mulhall at 10, the law judges should be sensitive to the difficulty that the agency may have in administering many different payment plans. Hence, when considering a civil penalty payable in installments, the law judges should consult the agency attorneys regarding whether each payment schedule would be unduly burdensome for the agency to administer. Reducing the civil penalty to an amount that the respondent can afford to pay in one lump sum is another option available to a law judge.

Based upon the foregoing, the law judge's oral initial decision, assessing a \$15,000 civil penalty payable in 15 [monthly] installments, as modified, is affirmed.⁸



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 4th day of August, 1995.

⁸ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. § § 13.16(b)(4) and 13.233(j)(2) (1994).

ADDENDUM

Sections 135.63(a)(4)(iv) and (x) of the Federal Aviation Regulations, 14 C.F.R. §§ 135.63(a)(4)(iv) and (x) (1990), provided as follows:

Recordkeeping requirements.

(a) Each certificate holder shall keep at its principal business office or at other places approved by the Administrator, and shall make available for inspection by the Administrator the following --

(4) An individual record of each pilot used in operations under this part, including the following information:

(iv) The pilot's current duties and the date of the pilot's assignment to those duties.

(x) The date of the completion of the initial phase and each recurrent phase of the training required by this part.

Section 135.95(b) of the Federal Aviation Regulations, 14 C.F.R. § 135.95(b) (1990), provided as follows:

Airmen: Limitations on use of services.

No certificate holder may use the services of any person as an airman unless the person performing those services --

(b) Is qualified, under this chapter, for the operation for which the person is to be used.

Section 135.267(b)(1) of the Federal Aviation Regulations, 14 C.F.R. § 135.267(b) (1990), provided as follows:

Flight time limitations and rest requirements: Unscheduled one- and two-pilot crews.

(b) Except as provided in paragraph (c) of this section, during any 24 consecutive hours the total flight time of the assigned flight when added to any other commercial flying by that flight crewmember may not exceed --

(1) 8 hours for a flight crew consisting of one pilot[.]

Section 135.293(a) of the Federal Aviation Regulations, 14 C.F.R. § 135.293(a) (1990), provided as follows:

Initial and recurrent pilot testing requirements.

(a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas --

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for --

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

Section 135.343 of the Federal Aviation Regulations, 14 C.F.R. § 135.343 (1990) provided as follows:

Crewmember initial and recurrent training requirements.

No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service. This section does not apply to a certificate holder that uses only one pilot in the certificate holder's operations.