

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: OFFSHORE AIR

FAA Order No. 2002-7

Docket No. CP98NM0025

Served: April 16, 2002

PETITION FOR RECONSIDERATION DISMISSED¹

The Administrator served FAA Order No. 2001-4, assessing a \$7,500 civil penalty against Respondent Offshore Air on May 16, 2001.² Offshore has petitioned the

¹ The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in Civil Penalty Actions, and other information, are available on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callahan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS, and Westlaw. Additional information is available on the website.

² In FAA Order No. 2001-4, the Administrator held that Offshore was required to receive a verified negative drug test result prior to allowing Francis Cantwell to perform any safety-sensitive duties whether he was an employee or a contractor. Cantwell, however, served as a pilot on numerous flights for Offshore before he underwent any drug testing. The Administrator affirmed the ALJ's finding that Offshore violated 14 C.F.R. § 135.251(a) and Part 121, Appendix I, § V, paragraph A.3 (1996) due to its failure to subject Cantwell to pre-employment drug testing. FAA Order No. 2001-4 at 14.

The Administrator granted Offshore's appeal regarding the ALJ's finding that Offshore had violated Section 135.251(a) and Part 121, Appendix I, § V, paragraph A.3 (1996) by failing to subject Robin G. Watson to pre-employment drug testing before he performed mechanic duties for Offshore. The Administrator held that Watson performed safety-sensitive duties as a contractor for Offshore during the 60-day period following the implementation of its anti-drug program. The Administrator noted that Offshore was not required to implement that program for its contractor employees during that initial 60-day period under 14 C.F.R. Part 121, Appendix I, § IX, paragraph A.2(a)(1996). As a result, the Administrator held, Offshore did not violate the regulatory provisions, as alleged, and reduced the civil penalty from \$10,000 to \$7,500. FAA Order No. 2001-4 at 11-13.

The Administrator also held that Offshore violated 14 C.F.R. § 135.251(a) and Part 121, Appendix I, § V, paragraph C.6 (1996) by not conducting random drug testing of 25% of its employees performing safety-sensitive functions during calendar year 1996. FAA Order No. 2001-4 at 14-18.

Administrator to reconsider her decision.³ Complainant filed a motion to strike Offshore's petition for reconsideration under 14 C.F.R. § 13.218,⁴ arguing that the petition was late-filed. In the same document, Complainant argued in the alternative that Offshore's petition for reconsideration should be denied because it is repetitious⁵ and neither raises any new matters warranting reconsideration nor presents any new evidence.

Under Section 13.234(a),⁶ a party may file a petition for reconsideration not later than 30 days after the Administrator served the final decision and order. In this case, the Administrator served the final decision and order on May 16, 2001, by United States certified mail, return receipt requested, thus entitling Offshore to an additional 5 days in which to file its petition for reconsideration under 14 C.F.R. § 13.211(e).⁷ Offshore's

Offshore did not appeal from the ALJ's finding that it had violated 14 C.F.R. § 135.255(a) and Part 121, Appendix J, § III, paragraph C (1996) by failing to conduct random alcohol testing of its covered employees during calendar year 1996.

³ Offshore filed a document entitled "Petition for Review." Because Offshore requests that the Administrator reconsider FAA Order No. 2001-4, the Administrator regards this document as a petition for reconsideration under 14 C.F.R. § 13.234(a), rather than as a petition for Federal court review of the Administrator's order under 49 U.S.C. § 46110 and 14 C.F.R. § 13.235.

⁴ In its motion, Complainant argued that the petition for reconsideration should be struck from the record. The Rules of Practice do not contain any specific provision authorizing the Administrator to strike any filed document from the administrative record. Offshore's petition for reconsideration shall remain a part of the record of this case.

⁵ The Administrator may dismiss repetitious petitions for reconsideration under 14 C.F.R. § 13.234(d).

⁶ Section 13.234(a) provides in pertinent part:

(a) *General.* Any party may petition the FAA decisionmaker to reconsider or modify a final decision and order issued by the FAA decisionmaker on appeal from an initial decision. A party shall file a petition to reconsider or modify with the FAA decisionmaker not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal and shall serve a copy of the petition on each party.

14 C.F.R. § 13.234(a).

⁷ Section 13.211(e) provides:

petition for reconsideration, therefore, was due to be filed no later than 35 days after the Administrator served FAA Order No. 2001-4 or by June 20, 2001. Offshore's petition, however, was dated July 4, 2001. Offshore has not demonstrated good cause for filing the petition for reconsideration in an untimely fashion.⁸ Hence, Offshore's petition is subject to dismissal. In the Matter of Pacific Aviation International, Inc., FAA Order No. 97-14 (May 2, 1997).

Moreover, even assuming that the petition for reconsideration was not subject to dismissal for untimeliness, it could be denied because Offshore has presented no arguments warranting modification or reversal of FAA Order No. 2001-4. Offshore repeated its argument that it relied to its detriment upon an outdated brochure about the agency's drug-testing program given to its owner by the FAA inspector. As a result, Offshore argues again, the Administrator should not have found that it violated Section 135.251 by failing to conduct random drug testing and to subject Cantwell to pre-employment drug testing. This argument was rejected in FAA Order No. 2001-4, which held that such reliance warranted mitigation of an otherwise appropriate sanction but not exoneration. FAA Order No. 2001-4 at 17-18. Offshore has presented no compelling reason to reverse that part of the earlier decision.

Offshore also argues in its petition for reconsideration that the FAA discriminated against it by initiating a civil penalty action rather than providing counseling. In support

(e) *Additional time after service by mail.* Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

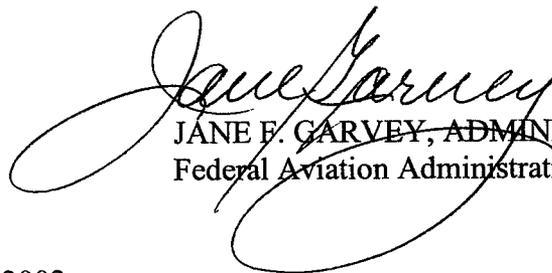
14 C.F.R. § 13.211(e).

⁸ Offshore did not file a reply to Complainant's motion.

of this argument, Offshore points to an unprofessional remark made by the agency attorney at the hearing. While the agency attorney's remark was inappropriate, it does not prove that the choice of sanction was discriminatory. In addition, when reviewing an ALJ's initial decision, the Administrator will not review the prosecutor's decision to initiate a civil penalty action rather than taking administrative action. The agency attorney's decision to commence a civil penalty action against a respondent is an exercise of prosecutorial discretion and is immune from review on appeal. In the Matter of Wyatt, FAA Order No. 92-73 (December 21, 1992).

Finally, Offshore argues in its petition for reconsideration that the FAA has hounded it out of existence. Offshore asserts that it voluntarily surrendered its operating certificate because the civil penalty action discouraged pilots from working for Offshore. This unsubstantiated argument does not justify modification of FAA Order No. 2001-4. The need for a civil penalty with its punitive and deterrent effect is not obviated by the operator's voluntary surrender of its certificate. In the Matter of Lifeflite Medical Air Transport, FAA Order No. 2000-28 at 3 (December 21, 2000); In the Matter of California Helitech, FAA Order No. 2000-18 at 11-12 (August 11, 2000).

In light of the foregoing discussion, Offshore's petition for reconsideration is dismissed.


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of April, 2002.