UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	)	
	)	
Premraj Shiwram	)	FAA Order No. 2022-05
	)	Served: November 1, 2022
Dkt. No. D13-21-01	)	

Appearances:
FOR THE RESPONDENT: Elisabeth A. Vasseur-Browne, Esq.
Cooling & Herbers, P.C.

FOR THE AGENCY: Christopher R. Stevenson, Esq.

DECISION AND ORDER

Premraj Shiwram appeals from Administrative Judge ("AJ") Marie Collins's Summary Decision concluding that 14 C.F.R. § 120.111(e)(1) (2022) permanently disqualifies him from performing safety-sensitive flight crewmember duties because he failed[1] two employer-sponsored drug tests.[2] Shiwram argues that the regulation applies to "employees," so failing a "pre-employment" screening test should not count as one of the disqualifying tests. The regulation's text, structure, history, and purpose do not support Shiwram's interpretation, and I affirm the decision below.

I. Background

The underlying facts of this matter are not in dispute. The parties agree that Shiwram failed a pre-employment screening in 2016 when he applied to an airline for a first officer position.[3] His medical certificates were revoked after the failed

[1] For readability, this Decision and Order uses the words "fail," "failed," "failing," and "failure" in lieu of variations on the longer phrase, "verified positive drug test result," found in 14 C.F.R. § 120.111(e)(1) (2022).

[2] The Hearing Officer Summary Decision ("Summary Decision"), served on July 21, 2022, is contained in attachment A to this Order and Decision. The Summary Decision relied in part on an earlier Order on Motion to Dismiss, served on December 13, 2021. The Order on Motion to Dismiss, is contained in attachment B to this Decision and Order. Service certificates are omitted from both attachments.

[3] Respondent's Appeal Brief to the Administrator from the Hearing Officer Summary Decision ("Shiwram's Appeal Brief") at 1; FAA Reply Brief at 2. *See also* Summary Decision at 3-4.

test, and he did not appeal. Following a residential treatment program, he received a new first-class medical certificate under an authorization for a special issuance.[4]

The parties also agree that Shiwram, while employed as a flight crewmember in 2020, failed his employer's random drug test. After failing this second test, he received an emergency order revoking his pilot and medical certificates. Once again, he did not appeal.[5]

On September 2, 2021, the Federal Aviation Administration ("FAA") Enforcement Division ("Complainant") issued a Notice of Proposed Permanent Disqualification that recited both failed test results and relied upon 14 C.F.R. § 120.111(e)(1).[6] It proposed "permanently disqualifying [Shiwram] from performing safety-sensitive flight crewmember duties, as those terms are used in 14 C.F.R. part 120."[7] Shiwram requested a hearing under 14 C.F.R. Part 13, subpart D, and filed a Motion to Dismiss. After denying the Motion to Dismiss, AJ Collins allowed a reasonable discovery period and partially granted Respondent's Motion to Compel discovery.[8]

Following discovery, AJ Collins considered cross-motions for summary decision and found that "the facts and the regulation support the proposed disqualification."[9] The disqualifying regulation at issue, § 120.111, states:

> **§ 120.111 Administrative and other matters.**
>
> ...
>
> (e) Permanent disqualification from service.
>
> (1) An *employee* who has verified positive drug test results on two drug tests required by this subpart of this chapter, and conducted after September 19, 1994, is permanently precluded from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test.[10]

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[4] Summary Decision at 3, n.19 (citing Respondent's Motion for Summary Judgment, Ex. A (Shiwram Decl. at 2, ¶ 11)).

[5] Notice of Proposed Permanent Disqualification at 1, ¶ 3; Answer to Notice of Proposed Permanent Disqualification at 1, ¶ 3.

[6] The regulation has not changed since 2020.

[7] Notice of Proposed Permanent Disqualification at 2.

[8] Order on Motion to Compel, *passim*.

[9] Summary Decision at 1.

[10] 14 C.F.R. § 120.111(e)(1) (2022) (emphasis added).

Citing this regulation, the AJ wrote, "Respondent met both elements for permanent suspension: (1) he was an employee of an air carrier subject to drug testing under part 120; and (2) he had two verified positive drug tests conducted pursuant to the requirements of part 120, subpart E." The AJ also rejected Shiwram's constitutional argument that the regulation was unduly vague and granted summary judgment in favor of the complainant.

Shiwram filed this administrative appeal.

II. Standard of Review

In any appeal from an initial decision, the FAA decisionmaker considers only whether: (1) each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) the hearing officer committed any prejudicial errors."[11]

III. Discussion

Shiwram argues that the AJ committed two errors. First, he argues that the AJ incorrectly interpreted § 120.111(e)(1). Second, he argues that the same regulation is unconstitutionally vague. Neither argument has merit.

A. The AJ correctly interpreted § 120.111(e)(1).

Section 120.111(e)(1), quoted above, applies to an "employee." Shiwram argues that when he failed the first test, he was a "covered employee," not an "employee." The definitions have similarities and differences:

> (f) *Covered employee* means an individual who performs, either directly or by contract, a safety-sensitive function listed in §§ 120.105 and 120.215 for an employer (as defined in paragraph (i) of this section). For purposes of pre-employment testing only, the term "covered employee" includes an individual applying to perform a safety-sensitive function.
>
> ...
>
> (h) *Employee* is an individual who is hired, either directly or by contract, to perform a safety-sensitive function for an employer, as defined in paragraph (i) of this section. An employee is also an individual who transfers into a position to perform a safety-sensitive function for an employer.[12]

[11] 14 C.F.R. § 13.65(d) (2022).

[12] 14 C.F.R. § 120.7(f), (h) (2022).

These terms are similar in that they refer to individuals who perform safety-sensitive functions. But Shiwram focuses on the difference that a "covered employee" includes an individual *applying* to perform safety-sensitive functions. He argues that because § 120.111(e)(1) used the term "employee," his failed pre-employment screening test does not count toward disqualification.[13]

Regulatory interpretation uses "traditional tools" that consider "the text, structure, history, and purpose of a regulation."[14] Analysis using these traditional tools shows that Shiwram's argument does not withstand scrutiny.

1. The text and structure support the AJ's interpretation.

The essence of Shiwram's argument is that the noun "employee" functions as an adjective to restrict the tests that could result in disqualification under § 120.111(e)(1), i.e., the tests must be of an "employee." This approach is not a grammatically correct interpretation of the several adjectival clauses in the regulation.

Adjectival clauses modify a preceding noun, not vice-versa.[15] The text of § 120.111(e)(1) uses three adjectival clauses that combine to form a larger clause that ultimately modifies the noun "employee." Breaking down the regulatory text into its constituent parts helps in understanding the sentence:

Text segments of § 120.111(e)(1)	Grammatical Comments
(1) An employee ...	The noun "employee" is the subject of the sentence.
... who has verified positive drug tests ...	This is an adjectival clause that modifies the preceding noun "employee."
... required by this subpart of this chapter, ...	This is another adjectival clause. It modifies the preceding noun "tests."
.. and conducted after September 19, 1994, ...	The coordinating conjunction "and" signals that this third adjectival clause also modifies the noun "tests."
... is permanently precluded from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test."	The verb "is" (third person, singular, present tense of "to be"), followed by a description of the subject, i.e., the "employee."

[13] Shiwram's Appeal Brief at 2-3.

[14] *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019).

[15] C. Edward Good, *Mightier than the Sword: Powerful Writing in the Legal Profession* 93, Word Store (1989) (an "adjective clause" describes a particular noun in the sentence and always follows the word it modifies). *See also* William Strunk, Jr. and E.B. White, *The Elements of Style* 89, 4th ed., Pearson Education, Inc. (2000) (defining an "adjectival modifier" as "a word, phrase, or clause that acts as an adjective in qualifying the meaning of a noun or pronoun"). Notably, both authorities give examples—like §120.111(e)(1)—of adjectival modifiers that begin with "who."

The analysis shows that the second and third adjectival clauses narrow the relevant tests to those conducted under subpart E after 1994. With the relevant tests identified, the first adjectival clause specifies the subset of employees subject to the disqualification, i.e., those employees who have failed the tests required under subpart E since 1994.

Unfortunately for Shiwram, subpart E requires pre-employment drug tests without needing to reference "covered employees." It states:

> **§ 120.109 Types of drug testing required.**
> Each employer shall conduct the types of testing described in this section in accordance with the procedures set forth in this subpart and the DOT "Procedures for Transportation Workplace Drug Testing Programs" (49 CFR part 40).
>
> (a) Pre-employment drug testing.
>
> (1) No employer may hire *any individual* for a safety-sensitive function listed in § 120.105 unless the employer first conducts a pre-employment test and receives a verified negative drug test result for *that individual.*[16]

A verified positive result under this test after September 19, 1994, is a failure of a test required by subpart E, and it counts toward disqualification under § 120.111(e)(1). There is no other valid, grammatically correct interpretation.

2. The AJ's analysis of the text is equally correct.

AJ Collins observed that the definition of "employee" uses the present tense when it states that the individual "is hired," or "is" a transferee into a position.[17] Regardless that subpart A has a definition for a "covered employee," to "be" an "employee," an individual must undergo pre-employment testing conducted under subpart E.[18] Thus, Shiwram's argument that pre-screening tests made him a "covered employee" under the definition in subpart A is irrelevant; subpart E also requires an "employee" to take a pre-screening drug test.

3. The history and purpose of Part 120 support the AJ's interpretation.

AJ Collins correctly stated that "no language in Part 120 ... shows regulatory intent to treat covered employees any differently than other employees with respect

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[16] 14 C.F.R. § 120.109(a)(1) (2022). Transferred employees must take a similar test. *Id.* at (a)(2).

[17] Order on Motion to Dismiss at 3. *See also* Summary Decision at 4.

[18] 14 C.F.R. § 120.109(a)(1) (2022).

to drug testing under subpart E."[19] Indeed, before publishing Part 120 in 2009, the FAA's regulations concerning drugs and alcohol were scattered in various sections of Parts 61, 63, 65, 91, 121, and 135. The FAA published Part 120 to simplify locating the multiple requirements. It summarized the consolidated rule: "This action amends the FAA's drug and alcohol regulations to place them in a new part. The FAA is not making any substantive changes to the drug and alcohol regulations in this rulemaking."[20]

The regulatory history reveals that the definitions of "employee" and "covered employee" derive from separate regulatory schemes that merged into Part 120.[21] As a result of the merger:

- The Drug Testing Program requirements in former appendix I of Part 121, which used and defined the term "employee," became the current Part 120, subpart E; and

- The Alcohol Testing Program requirements in former appendix J of Part 121, which used and defined the term "covered employee," became the modern Part 120, subpart F.[22]

As the regulatory history explains, the definitions used in these two programs were separated from their appendices and migrated into modern subpart A of Part 120:

> Appendices I and J themselves set forth the requirements for drug and alcohol testing programs. Some provisions in the current regulations in appendices I and J are duplicative. For example, the definitions in the appendices are mostly verbatim duplications. In addition, some of the terms defined in the appendices I and J are used in parts 121 and 135. Because the drug and alcohol testing provisions of 121 and 135 are being moved to new part 120, it makes sense to move those definitions up to subpart A of new part 120. We are therefore including all the definitions in section 120.7 of subpart A.[23]

Thus, the evolution of Part 120 produced a set of definitions—including those at issue—consolidated into subpart A. They were retained to avoid disturbing the existing regulatory requirements.

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[19] Order on Motion to Dismiss at 3.

[20] *Drug and Alcohol Testing Program*, 74 Fed. Reg. 22649, 22649 (May 14, 2009).

[21] *Id.* at 22650.

[22] *Id.*

[23] *Id.*

The applicable drug testing requirements migrated into Part 120, essentially intact. The disqualification rule in the current § 120.111(e)(1) migrated nearly word-for-word from former appendix I,[24] which required:

> E. *Permanent Disqualification From Service.* An employee who has verified positive drug test results on two drug tests required by appendix I to part 121 of this chapter and conducted after September 19, 1994 is permanently precluded from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test.[25]

The only difference is the underlined text stating an internal cross-reference, which is now replaced by an internal cross-reference to subpart E.[26] Similarly, the pre-employment testing requirements of modern subpart E, at § 120.109(a)(1), migrated word-for-word from former appendix I.[27]

The word-for-word migration of the drug testing program into the modern subpart E demonstrates the intent *not* to change the disqualification standards. Moreover, consolidating all definitions into subpart A does not show an intention to narrow the drug disqualification rule based on the alcohol program's definition of "covered employee." Indeed, narrowing the drug disqualification rule would have been inconsistent with the stated purpose of Part 120, i.e., to consolidate disparate regulatory sections into one part without making substantive changes.

Finally, no underlying policy statement supports omitting pre-employment drug test failures from the tests justifying a permanent disqualification. A finding of repeated drug use by an employee, even if based on one test that preceded hiring, is still a finding of repeated drug use. Public safety is not enhanced by excluding pre-employment drug test results from the disqualification analysis.

B. Nothing about the regulation is vague.

Several pages of Shiwram's brief argue that the regulation is so vague that it violates constitutional standards of due process. As demonstrated above, nothing in the regulation's text, structure, history, and purpose suggests that it is vague. Shiwram's argument is without merit.

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[24] *Compare* 14 C.F.R. § 120.111(e)(1) *with* 14 C.F.R. Part 121, app. I, VI.E (2008).

[25] 14 C.F.R. Part 121, app. I, VI.E (2008) (underlining added).

[26] *Compare* 14 C.F.R. § 120.111(e)(1) (2022) (stating "this subpart of this chapter") *with* 14 C.F.R. Part 121, app. I, VI.E (2008) (stating "appendix I to part 121 of this chapter").

[27] *Compare* 14 C.F.R. § 120.109(a)(1) (2022) *with* 14 C.F.R. Part 121, app. I, V.A.1 (2008).

IV. Conclusion

I affirm the decision below. The undisputed record shows that Respondent was an employee performing flight crewmember duties, and he failed two drug tests required by subpart E of Part 120. Respondent is permanently disqualified under 14 C.F.R. § 120.111(e)(1) (2022) from performing flight crewmember duties for an employer.*

Billy Nolen
ACTING ADMINISTRATOR
Federal Aviation Administration

*This is a final order of the Administrator. Respondent may file a petition for review within 60 days of service of this Decision and Order in the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. Court of Appeals for the circuit in which the respondent resides or has its principal place of business. 49 U.S.C. § 46110; 14 C.F.R. § 13.65(g) (2022).

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	)	
	)	
Premraj Shiwram	)	Served: July 21, 2022
	)	
Docket No. D13-21-01	)	

HEARING OFFICER SUMMARY DECISION

This decision concerns a Notice of Proposed Permanent Disqualification ("Notice") issued on September 2, 2021, by the Federal Aviation Administration ("FAA") Enforcement Division. In the Notice, the FAA proposed to permanently disqualify Respondent Premraj Shiwram ("Respondent") from performing safety-sensitive flight crewmember duties in the future because he failed two drug tests required under 14 C.F.R. part 120, subpart E. The FAA and Respondent filed cross-motions for summary decision pursuant to 14 C.F.R. § 13.49(c).

For the reasons discussed below, the undersigned Hearing Officer grants the FAA's motion for a summary decision and concludes that the facts and the regulation support the proposed permanent disqualification. The Respondent's motion for summary decision is denied.

I. Pertinent Procedural History

On November 17, 2021, by email, the Hearing Docket received the Respondent's timely request for an informal hearing with respect to the Notice pursuant to 14 C.F.R.§ 13.20.[1] Respondent also filed a motion to dismiss in lieu of an answer.[2] In the motion to dismiss, the Respondent asserted that the FAA's action against him was improper, as the Notice fails to set forth sufficient facts to support a violation of 14 C.F.R. § 120.111(e)(1).[3] That regulation states: "(1) An employee who has verified positive drug test results on two drug tests required by this subpart of this chapter and conducted after September 1994, is permanently precluded from performing for an employer the safety-sensitive duties the employee performed

[1] Appeal of Permanent Disqualification, Exhibit A ("Notice"). Respondent's request for an informal hearing under subpart D preserves his right to appeal the Notice to the Administrator. 14 C.F.R. § 13.20(c) and § 13.65.

[2] 14 C.F.R. § 13.49(a)(1).

[3] Motion to Dismiss at 1.

prior to the second drug test."[4] Respondent argued that the elements of the regulation were not satisfied because he was not an "employee" but rather a "covered employee" at the time of his first verified positive [pre-employment] drug test.[5]

Respondent's motion to dismiss was denied in a December 13, 2021 Order ("Order") that found both employees and covered employees are subject to drug tests required by subpart E of Part 120.[6] The Order concluded further that, regardless of the differences between an "employee" and a "covered employee," the regulation provides that an "employee" who has two verified positive drug test results conducted pursuant to subpart E is subject to permanent disqualification.[7] Notwithstanding this conclusion, Respondent maintains his arguments distinguishing a "covered employee" from an "employee" as affirmative defenses.[8] Respondent also raised two more affirmative defenses based on constitutional grounds.[9]

Discovery commenced on January 14, 2022. Disagreements arose between the parties regarding the relevance of certain discovery requests, and the Respondent filed a motion to compel.[10] The undersigned Hearing Officer granted Respondent's motion to compel in part with respect to discovery relevant to his constitutionally based defenses. She noted, however, that review of such issues in the context of agency administrative proceedings is merited only in rare circumstances, such as when an agency "has deliberately cast grave legal doubt" on the constitutionality of its own policy.[11]

On June 1, 2022, both the FAA and Respondent filed motions for summary decision ("Motions"), arguing there were no genuine issues of material fact.[12] Each side contended it was entitled to judgment as a matter of law.[13]

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[4] 14 C.F.R. § 120.111(e)(1).

[5] *Id.* at 2.

[6] Order at 3.

[7] Order at 4.

[8] Respondent's Answer, dated December 21, 2021.

[9] *Id.*

[10] Motion to Compel, dated April 13, 2022, at 3; Order on Motion to Compel, dated May 6, 2022.

[11] Order on Motion to Compel at 5, n. 24, citing *Meredith Corp. v. F.C.C.*, 809 F.2d 863 (D.C. Cir. 1987).

[12] FAA Motion at 1, 2 and 11; Respondent Motion at 1, 8 and 15.

[13] *Id.,* citing 14 CFR § 13.49(c).

Discovery ended on June 6, 2022. The parties filed responses to each other's Motions on June 13, 2022 ("Oppositions").[14] On June 14, 2022, the undersigned Hearing Officer suspended all further proceedings identified in the January 14, 2022 adjudication schedule, pending a decision on the parties' Motions.

II. Standard of Review

The standard of review for a motion for summary decision pursuant to 14 C.F.R. § 13.49(c) is guided by the Federal Rules of Civil Procedure Rule 56.[15] The Rule provides: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[16]

III. Undisputed Material Facts

In September 2016, Respondent took a pre-employment drug test required under part 120, subpart E.[17] The test was verified positive.[18] Respondent then participated in residential inpatient treatment for substance dependence.[19]

On February 5, 2018, the FAA Administrator issued an order revoking Respondent's airman medical certificates based on his verified positive pre-employment drug test in September 2016.[20] Respondent did not appeal that order.[21] Respondent, however, was allowed to reapply immediately for his certificates, and "[a]fter complying with everything the FAA and [Respondent's] doctors required, Respondent was issued a First-Class medical certificate with a special issuance."[22]

On March 2, 2020, Respondent performed flight crewmember duties with a prohibited drug in his system.[23] Respondent then submitted to a follow-up drug

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[14] 14 C.F.R. § 13.49(h).

[15] Fed. R. Civ. P. 56.

[16] Fed. R. Civ. P. 56(a).

[17] Notice ¶ 1.a, Respondent's Answer ¶ 1.

[18] Notice ¶ 1.b, Respondent's Answer ¶ 1; Respondent Motion, Exhibit A, Declaration of Respondent ¶¶ 5, 7.

[19] Respondent Motion, Exhibit A, Declaration of Respondent ¶ 11; Respondent Opposition at 3, ¶ 9.

[20] Notice ¶ 1.c, Answer ¶ 1.

[21] Respondent Motion at 4, ¶ 11. An order of certificate revocation can be challenged before the National Transportation Safety Board ("NTSB") under 14 C.F.R. § 13.19.

[22] Respondent Motion at 4, ¶¶ 11-12; Exhibit A, Declaration of Respondent, ¶14.

[23] Notice ¶ 3.a; Respondent's Answer ¶ 3.

test required under part 120, subpart E.[24] That follow-up drug test was verified as positive.[25]

On April 23, 2020, the FAA Administrator issued an emergency revocation order for Respondent's medical and airline transport pilot airman certificates.[26] Respondent did not appeal that emergency order of revocation to the NTSB.[27]

On September 2, 2021, the FAA Enforcement Division issued a Notice alleging that Respondent failed two drug tests required under 14 C.F.R. part 120, subpart E, and proposing that he be permanently disqualified from performing safety-sensitive flight crewmember duties in the future.[28] Respondent challenged the Notice under the procedures set forth in 14 C.F.R. part 13, subpart D.[29]

IV. Respondent's two verified positive drug tests subject him to permanent disqualification.

Respondent maintains that the FAA has failed to satisfy the elements of 14 C.F.R. § 120.111(e)(1), and thus Respondent is not subject to permanent disqualification under the regulation.[30] Respondent continues to argue that the first verified positive drug test resulted from a "pre-employment test," and Respondent was not an "employee" at the time of the first verified positive drug test.[31]

The December 13, 2021 Order already addressed these arguments. That Order found that 14 C.F.R. § 120.111(e)(1) contains no requirement for the individual to be an employee at the time of the first test under the regulation.[32] Indeed, Respondent met both elements for permanent disqualification: (1) he was an employee of an air carrier subject to drug testing under part 120; and (2) he had two verified positive

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[24] Notice ¶ 3.b; Respondent's Answer ¶ 3.

[25] Notice ¶ 3.c; Respondent's Answer ¶ 3.

[26] Notice ¶ 3.d; Respondent's Answer ¶ 3; Respondent Motion at 5, ¶ 16.

[27] Notice ¶ 4; Respondent Motion at 6, ¶ 16.

[28] Appeal of Permanent Disqualification, Exhibit A ("Notice").

[29] *Id.*

[30] Respondent Motion at 8-9.

[31] *Id.*

[32] Order on Motion to Dismiss, dated December 13, 2021, at 3-4.

drug tests conducted pursuant to the requirements of part 120, subpart E.[33] There is no basis in the record to reconsider this finding.

V. The record does not show circumstances that merit review of constitutional issues.

During these proceedings, Respondent was allowed to conduct discovery relative to his affirmative defenses three and four, namely that "the permanent disqualification in this case is excessive and not reasonable" and "the permanent disqualification sought in this case is unconstitutional and unlawful."[34] Respondent, however, has not shown that his third and fourth affirmative defenses merit legal review in the context of these administrative proceedings. There is no evidence that the FAA had any questions, much less "grave legal doubt," about the constitutionality of its own policies.[35]

Rather, the record shows that the FAA's implementation of 14 C.F.R. § 120.111(e)(1) gives direct effect to the specific intent of Congress.[36] By statute, Congress authorized the FAA to implement regulations preventing individuals who use controlled substances or have been found to have used controlled substances from serving in safety-sensitive functions. [37] Although Congress left it up to the FAA to decide what types of service would be considered safety-sensitive functions,[38] it clearly mandated consequences for specific prohibited actions.[39]

Respondent had fair notice of the FAA's regulation since at least May 2009, when it was published.[40] The prohibited actions are set forth plainly in the

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[33] Part 120, Drug and Alcohol Testing Program, is found in subchapter G, which governs "Air Carriers and Operators for Compensation or Hire: Certification and Operations."

[34] Order on Motion to Compel, dated May 6, 2022 at 4-5.

[35] *See Meredith, supra*.

[36] 49 U.S.C. § 45103 (a)-(c); *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

[37] *Id.*

[38] The statute repeatedly states that the term "safety-sensitive functions" is "(as decided by the Administrator of the Federal Aviation Administration), or employee of the Administration with responsibility for safety-sensitive functions)." 49 U.S.C. § 45103 (a)-(c).

[39] Under the statute, the FAA must prohibit an individual from carrying out certain safety-sensitive air transport-related duties if, for example, the FAA finds the individual used controlled substances while on duty, or used controlled substances after participating in an FAA-sanctioned rehabilitation program. 49 U.S.C. § 45103 (b),(c).

[40] Drug and Alcohol Testing Program, 74 Fed. Reg. 22,649 – 22,668 (May 14, 2009) (reorganizing the requirements for drug and alcohol testing into a single part). *See also Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *City of Chicago v. Morales*, 527; U.S. 41, 56-57 (1999) (No evidence that people of ordinary intelligence would not understand the consequences the regulation prescribes for

regulation, i.e., being an employee with two verified positive drug tests results on two drug tests" required by part 120, subpart E.[41] The consequence for the prohibited actions is spelled out in the regulation as permanent disqualification "from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test."[42] The regulation provides no exceptions, nor does it allow for any opportunity for an FAA decision maker to exercise discretion in its enforcement. As the FAA argues: "Section 120.11 provides a binary choice," depending on whether the individual is covered by the regulation.[43] If the individual is covered by the regulation and the elements are met, the consequence is permanent disqualification.

Respondent's Motion also alleges facts that suggest an FAA attorney who handled Respondent's April 2020 emergency order of revocation provided verbal assurances to Respondent that he would not be charged with the second violation.[44] The record on this point shows a genuine issue of material fact. However, even if Respondent's allegations are true, erroneous advice provided by an FAA attorney handling a separate legal matter does not constitute substantial evidence of unconstitutional vague, and arbitrary enforcement of the regulation.[45] Moreover, Respondent's reliance on that information was not prejudicial since he had already violated the regulation by his actions.[46]

Respondent further argues the permanent disqualification is unreasonable in breadth given that he is relatively young and his employment options as a pilot will be severely limited.[47] The express language in the Notice, however, belies his contention that the scope of disqualification is overbroad.[48] The Notice proposes permanently disqualifying Respondent "from performing safety-sensitive flight crew

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the prohibited actions and it does not authorize or enable arbitrary and discriminatory enforcement).

[41] 14 C.F.R. § 120.111(e)(1).

[42] *Id.*

[43] FAA Motion at 10.

[44] Respondent Motion at 13; Respondent Opposition at 5, ¶¶ 17, 18. The April 2020 emergency order of revocation was a legal enforcement action taken against Respondent under 14 C.F.R. part 13, subpart C, § 13.19, "*Certificate actions appealable to the National Transportation Safety Board.*" The reference to the second violation concerned whether the FAA would pursue the current legal enforcement action against Respondent under 14 C.F.R. part 13, subpart C, § 13.20, "*Orders of compliance, cease and desist orders, orders of denial, and other orders.*"

[45] 14 C.F.R. § 13.65(d)(1).

[46] *See, for example, Hill v. Lockhart* , 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[47] Respondent Opposition at 13.

[48] Appeal of Permanent Disqualification, Exhibit A.

member duties, as those terms are used in 14 C.F.R. part 120."[49] The Notice expressly identifies those banned duties as "safety-sensitive *flight crewmember duties*" that he performed prior to the second drug test.[50] (Emphasis added). In Title 14, Chapter I, subchapter A, the general definitions define "flightcrew member" as "a pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time."[51] The FAA's Notice does not reference other duties defined as "safety-sensitive functions" in subpart E, part 120.[52] Respondent, therefore, is not precluded from pursuing his aviation career in another capacity.

The undersigned Hearing Officer has no reason to doubt the facts set forth in Respondent's declaration and is only too well aware of the heart-breaking consequences and costs that can result from the use of controlled substances, whether intentional or not. Such considerations, however, cannot be properly applied under 14 C.F.R. § 120.111(e)(1).

VI. Conclusion

The undisputed material facts show that the FAA has satisfied the elements for the permanent disqualification set forth in its Notice. There is no basis in the record to justify an administrative review of whether the Respondent's permanent disqualification violates his constitutional rights. The FAA's Motion for Summary Decision is granted, and the Respondent's Motion for Summary Judgment is denied. Pursuant to 14 CFR § 13.65, this decision shall be considered final unless either party files a notice of appeal to the FAA Administrator within 20 days after the date it is issued.

MARIE A COLLINS

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Date: 2022.07.21 13:41:58 -04'00'

MARIE A. COLLINS
Hearing Officer and Administrative Judge
July 21, 2022

[49] *Id.*

[50] Additionally, an "information sheet" attached to the Notice states: "The Notice also states the specific scope of the permanent disqualification." *Id.*

[51] 14 C.F.R. § 1.1.

[52] 14 C.F.R. § 120.7(p) and § 120.105.

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	)	
	)	
Premraj Shiwram	)	Served: December 13, 2021
	)	
Docket No. D13-21-01	)	

ORDER ON MOTION TO DISMISS

On September 2, 2021, the Federal Aviation Administration ("FAA") Enforcement Division ("Complainant") issued a Notice of Proposed Permanent Disqualification ("Notice"). The Complainant alleged in the Notice that Respondent Premraj Shiwram failed two drug tests. The Complainant proposed in the Notice to permanently disqualify Mr. Shiwram from performing safety-sensitive flight crewmember duties in the future.

On November 17, 2021, by email, the Hearing Docket received Respondent's request for a hearing with respect to the Notice. Respondent also filed a motion to dismiss ("Motion") in lieu of an answer in accordance with 14 C.F.R. §13.49(a)(1). The Motion asserts that the certificate action against the Respondent is improper, as the Notice fails to set forth sufficient facts to support a violation of 14 C.F.R. §120.111(e)(1).[1] On November 24, 2021, Complainant filed a response opposing the Motion ("Response").[2]

For the reasons discussed below, I find Respondent's Motion is not supported by the plain language and the overall intent of the regulation. The Motion is denied.

I. Standard of Review

The standard of review for a motion to dismiss is set forth in the Federal Rules of Civil Procedure Rule 12(b)(6).[3] The standard applies equally to a motion to dismiss for insufficiency under 14 C.F.R. Part 13.[4] In accordance with that rule, the factual allegations in the Notice are viewed in a light most favorable to

[1] Motion at 1.

[2] Response at 1.

[3] Fed. R. Civ. P. 12(b)(6).

[4] *In the Matter of Joseph Maridon, Sr.* FAA-2014-0116, 2020 WL 6927292, n.2 (D.O.T).

Complainant's position, i.e., presumed to be true. The Respondent has the burden of proof to show that those facts, even if true, do not support the proposed violation.[5]

II. Factual Allegations in Support of Permanent Disqualification

The Complainant alleges that on February 5, 2018 the FAA Administrator revoked Respondent's airman medical certificates based on a verified positive pre-employment drug test that he took on September 28, 2016. [6] The Complainant also alleges that on April 23, 2020, the FAA Administrator revoked Respondent's pilot and medical certificates after finding Respondent had performed flight crewmember duties with a prohibited drug in his system, and follow-up drug testing on April 13, 2020 showed verified positive results.[7]

III. Discussion

The Complainant alleges that the two verified positive drug tests, one performed before and the other after Respondent was hired to perform safety-sensitive duties, results in a violation of 14 C.F.R. §120.111(e)(1).[8] The Respondent disagrees, arguing that the elements of 14 C.F.R §120.111(e)(1) were not satisfied because at the time of the first verified positive drug test, Respondent was not an "employee" as defined in the regulation.[9] Instead, Respondent contends he was a "covered employee."[10] Respondent argues that since only one of the verified positive drug test results occurred while he was an employee, he did not violate the regulation.[11]

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[5] *Id.*

[6] Notice at ¶ 1. The Respondent allegedly did not appeal the revocation of his airman medical certificates. *Id.* at ¶ 2.

[7] Notice at ¶ 3. The Respondent also allegedly did not appeal the revocation of his pilot and medical certificates. ¶ 4.

[8] The regulation for permanent disqualification from service provides: "(1) An employee who has verified positive drug test results on two drug tests required by this subpart of this chapter and conducted after September 1994, is permanently precluded from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test." 14 C.F.R. §120.111(e)(1) (2021).

[9] Motion at 2, citing 14 C.F.R §120.7(h). That definition states "[an] *Employee* is an individual who is hired, either directly or by contract, to perform a safety-sensitive function for an employer …." (Emphasis in original).

[10] *Id.* Subpart A of Part 120 defines a "covered employee" as "an individual who performs, either directly or by contract, a safety-sensitive function" and "for purposes of pre-employment testing only" includes an individual who applies to perform a safety-sensitive function. 14 C.F.R §120.7(f) (2021).

[11] Motion at 1, citing 14 C.F.R. §120.111(e)(1) (2021). Respondent also relies on a legal interpretation that concludes that a refusal to submit to a drug test after a prior positive drug test result would not subject the employee to permanent disqualification from service under this regulation. *Legal Interpretation to Craig L. Fabian, from Rebecca MacPherson, Assistant Chief Counsel for*

Whether Respondent is subject to disqualification under 14 C.F.R. §121.111(e)(1) based on the facts alleged in the Notice is an issue of regulatory interpretation. Proper interpretation of this regulation must be based on a thoughtful examination of the plain and ordinary meaning of its language and structure of the regulation itself.[12]

14 C.F.R §120.111(e)(1) clearly sets forth the circumstances under which an individual is permanently disqualified from performing safety-sensitive duties. In this context, 14 C.F.R §120.111(e)(1) describes the individual's status simply as an "employee" at the time he or she has two verified positive results pursuant to drug testing required under subpart E.[13]

Respondent's distinction between "covered employee" and "employee" necessarily infers that the reference to "employee" in 14 C.F.R §120.111(e)(1) means an individual who *was* hired *before* the drug testing that produced two verified positive results. The pertinent language defining an "employee," however, does not state *was* hired but rather "*is hired*."[14] The definition's use of the present tense "is hired" per the regulation includes a "covered employee" who is drug tested while in the process of being hired.[15] Respondent's distinction therefore is not supported by the plain language of the definition.

Respondent points to no language in Part 120 that shows regulatory intent to treat covered employees any differently than other employees with respect to drug testing under subpart E. [16] Employees and covered employees both are subject to "drug tests required by this subpart." These specifically include pre-employment

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Regulations (September 19, 1994). This legal interpretation is readily distinguishable from the case at hand which involves allegations of two verified positive drug tests; not one positive drug test followed by a refusal to test.

[12] *In the Matter of: Presidential Aviation, Inc.*, FAA Order No. 2021-1, FDMS No. FAA-2013-0716, served July 15, 2021 *n.13,* citing *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407, 131 S. Ct. 1885 (2011).

[13] 14 C.F.R §111(e)(1) (2021).

[14] 14 C.F.R §120.7(h) (2021) (emphasis added).

[15] 14 C.F.R §120.7(f) (2021).

[16] In contrast to 14 C.F.R §120.111(e)(1), language in FAA alcohol testing regulations expressly preclude a positive pre-employment test result from being considered in a determination to permanently disqualify a person based on alcohol testing. Response at 2, citing to 14 C.F.R §120.221(b)(2). Where particular language exists in one section of a regulation but is omitted from another, it generally is presumed that the omission was intentional and purposeful. *In the Matter of: Presidential Aviation, Inc.*, FAA Order No. 2021-1, FDMS No. FAA-2013-0716, served July 15, 2021, n.14, *citing Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983). The absence of such language in 14 C.F.R §120.111(e)(1) indicates the FAA's intent to treat the use of illegal drugs differently than alcohol use. Response at 2.

drug testing and drug testing based on reasonable cause.[17] Thus, under the plain language of the regulation, an employee with two verified positive results from any of these types of drug tests would be subject to disqualification.

Finally, in addition to the reasons discussed above, Respondent's Motion lacks merit because it frustrates the overall purpose of subpart E.[18] That purpose is to promote aviation safety by preventing individuals who use illegal drugs from performing safety sensitive functions.[19]

IV. Conclusion

In view of the foregoing, Respondent's Motion to Dismiss is DENIED. As provided in 14 C.F.R. §13.49(a), Respondent shall serve an answer to the Complaint with ten days of the date of service of this order. [20]

MARIE A COLLINS

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Date: 2021.12.13 11:24:11 -05'00'

MARIE A. COLLINS
Hearing Officer and Administrative Judge

December 13, 2021

[17] 14 C.F.R §120.109(a)-(f) (2021); 14 C.F.R §120.111(e)(1) (2021).

[18] "Statutory construction… is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme … because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United States Saving Association v. Timbers of Inwood Forest Associates, LTD*, 484 U.S. 365, 371 (1988). *See also Weinberger v. Hynson, Westcott & Dunning Inc.*, 412 U.S. 609, 632 (1973).

[19] Subpart E requires employers to conduct pre-employment drug testing and random drug testing of employees and prohibits them from hiring "any individual for a safety-sensitive function … unless the employer first conducts a pre-employment test and receives a verified negative drug test result for that individual." 14 C.F.R §109(a) (2021).

[20] Denial of a pre-answer challenge does not prevent the Respondent from requesting dismissal on other grounds in the future. *In the Matter of Joseph Maridon, Sr.* FAA-2014-0116, 2020 WL 6927292, n.2 (D.O.T).