Federal Aviation Administration

Memorandum

Date: November 12, 2021

To: Tonya Coultas, Deputy Associate Administrator for Security and Hazardous Materials Safety, ASH-002

From: LORELEI DINGES PETER Digitally signed by LORELEI DINGES PETER Date: 2021.11.12 09:13:54 -05'00' Lorelei D. Peter, Assistant Chief Counsel for Regulations, AGC-200

Subject: Public Aircraft Training Flights

You requested that the Office of the Chief Counsel reassess its opinion of the public aircraft statute with regard to conducting training flights, with an emphasis on when public aircraft status might be available for training flights.

Under 49 USC 40102(a)(41)(A), public aircraft authority is granted [i] to Federal Government entities:

> *(41)"public aircraft" means any of the following:*
> *(A) Except with respect to an aircraft described in subparagraph (E), an aircraft used only for the United States Government, except as provided in section 40125(b).*

Paragraph B of that section discusses public aircraft authority for training.

> *(B) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in section 40125(b).*

Sections of the statute that grant public aircraft authority to state and local entities are contained in paragraphs (C) and (D) of that section; paragraph (C) reads:

> *(C) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in section 40125(b).*

In applying standard statutory construction to the language of the statute, we first note that the only mention of training is in paragraph (B), which uses the term "Government" with a capital "G." That usage by Congress means the provision applies only to the Federal Government. Second, the placement directly following the authority for Federal Government entities also serves to limit the application of the provision to the entities described above it. The third consideration of statutory construction is that once a specific authority is given to particular entity in a statute, it cannot be applied to all others. Therefore, §40102(a)(41)(B) applies only to entities of the Federal Government, and not to state or tribal authorities covered under §40102 (a)(41)(C), (D) or (F).

This presents a significant limit on the ability of non-Federal entities to conduct training for PAO operations in their own aircraft without fully qualifying as a civil operation. Aircraft that qualify for public aircraft operation (PAO) are not required to comply with the civil airworthiness or crew requirements of 14 CFR. The text of §40102(a)(41)(B) can place non-Federal operators in a difficult position, in that it is possible to end up with an aircraft that is fully functional for public aircraft needs but does not comply with civil regulations and thus cannot not be operated as a civil aircraft. Because of the statutory restriction, a non-Federal entity cannot claim PAO status to train its crews in the very public aircraft operations for which it is intended.

We believe the root of this problem is that the definition portion of the statute focuses on aircraft, but the requirements of the statute in the more substantive provision, §40125, are stated in terms of conditions of operation. For that reason, AGC and AFS refer to "public aircraft operation" to cover all of the provisions required to qualify for operation.

The placement of the public aircraft statute in Chapter 401of the FAA's authority means that public aircraft and their operations are generally not subject to the FAA's authority to regulate under Chapter 447. The statute does not give the FAA any authority to waive any of its provisions. However, §40125(a)(2) does provide the means for the FAA to tailor what may be accomplished under the requirement that every flight have a "governmental function." Governmental function is defined as:

> *The term "governmental function" means an activity undertaken by a government, such as national defense, intelligence missions, firefighting, search and rescue, law enforcement (including transport of prisoners, detainees, and illegal aliens), aeronautical research, or biological or geological resource management.*

The use of the term "such as" means the list is not inclusive. The FAA has the sole authority to expand the list. Since it affects the statute itself, expansion of the list has been limited to determinations made through legal interpretation issued by the Office of the Chief Counsel as a means of keeping any expansion consistent and the documentation and reasoning centralized. We have specifically noted that the term "such as" cannot be

used by government entities to include any other function that an entity thinks appropriate.

We are of the opinion that it is reasonable to expand the use of public aircraft operation status to include training for PAO missions as a policy matter under limited circumstances. We are not expanding the list of governmental functions in §40125(a)(2) to include training; there is nothing to support an unspecified training function as a separate basis for operational authority. However, as a policy matter, we are of the opinion that all entities that qualify for PAO under the statute are able to conduct training flights designated as PAO when they are conducted for purposes of training their own crewmembers in the operation of the aircraft, the equipment on it, and the conditions expected for PAO operation. We have concluded that it was not the intent of Congress to unnecessarily restrict state and local entities from declaring PAO status when a crew is being trained to operate its own aircraft. Such restriction would not serve the interests of safety since it would force the expenditure of resources by government entities to make their aircraft and crews fully civilly compliant, and for the FAA to exercise oversight, simply to train their crews. It might alternatively force government entities to seek civil exemptions to operate their training missions, many of which could fail the tests of equivalent levels of safety or public interest. The result would be that government entities might have to conduct PAO missions without properly trained crews. However, we continue to read the training provision of §40102(a)(41)(B) as restricting the status of PAO to the federal government when training any person other than an entity's own crew for expected PAO operations.

Accordingly, we find it reasonable to include the limited training flights of an entity's own crew in an entity's own aircraft as qualifying for public aircraft operation when the training related to subsequent PAO operation. To say otherwise means a state entity could, for example, purchase a specially equipped helicopter for police or emergency rescue operations but be unable to accomplish training flights for its own crew in that aircraft since it is not fully civilly certificated based on specialized equipage, and its crew not civilly qualified as pilots under the terms of 14 CFR, which would not even apply to subsequent valid PAO flights.

While we are able to say that flights to train an entity's own qualified crewmembers in its own aircraft comprise a legitimate expansion of PAO status, there may need to be limits placed on the conduct of such operations. We expect that the Flight Standards Service (AFS) and the Unmanned Aircraft Systems Integration Office (AUS) will need to shape reasonable future operational policy. For example, mindful of the presence of §40102(a)(41)(B), no state or local entity could be in the business of training another entity's crew while asserting its own PAO authority to do so. Such operations would run afoul not only of the Federal training provision, but the prohibition on compensation or hire provision that dominates §40125. We are cognizant of the fact that other operational scenarios may need to be addressed, and that the limits will need to be described in revised guidance material issued by the program offices.

This interpretation was prepared by Karen Petronis, Senior Attorney for Regulations on my staff. Please feel free to contact my office if you have further questions about this interpretation.

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[i] All entities in the statute are restricted by the provisions of 49 USC 40125.