UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: FELTS FIELD AVIATION

FAA Order No. 2020-6

FDMS No. FAA-2015-3307

Served: October 28, 2020

DECISION AND ORDER

Respondent, Felts Field Aviation ("Felts Field"), filed an appeal from the Initial Decision issued by Administrative Law Judge ("ALJ") J.E. Sullivan.[1] The ALJ's decision assessed $6,000 as a civil penalty for failing to include a pilot in Felts Field's drug and alcohol testing pool. On appeal, Felts raises three arguments relating to jurisdiction and the ALJ's authority to assess a civil penalty. I deny the appeal.

I. Standard of Review

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

---

[1] The Initial Decision, served on November 26, 2018, is attached. The Federal Aviation Administration (FAA) also filed a Notice of Appeal but did not timely perfect its appeal. On September 15, 2020, the FAA's appeal was dismissed, and that dismissal is incorporated into this final order.

[2] 14 C.F.R. § 13.233(b) (2020).

II. Significant Factual and Procedural Background

The pleadings in this matter reveal that the parties agree on many of the underlying facts and related legal obligations. At all relevant times, Felts Field was authorized to conduct 14 C.F.R. Part 135 operations and employed Mr. Richard Webber as a pilot,[3] which is a safety-sensitive function.[4] As a Part 135 operator, Felts Field was required to comply with the drug and alcohol testing requirements found in 14 C.F.R. Part 120 and 49 C.F.R. Part 40.[5]

Other facts were not reasonably in dispute and formed the basis of a partial summary decision against Felts Field. Relying on Felts Field's admissions, which were attached to an FAA motion for summary decision, the ALJ found that Mr. Webber was not in seven random drug and alcohol testing pools that ran between July 2013 and April 2015.[6] Based on these admissions and the acknowledgement that Mr. Webber was a pilot employed by Felts Field, the ALJ correctly concluded that Felts Field had violated 14 C.F.R. § 120.105 (drug testing) and 14 C.F.R. § 120.215(a) (alcohol testing).[7] The ALJ, however, did not summarily grant the $11,000 civil penalty that the FAA sought in the Complaint. She found instead that the FAA had failed to offer its sanction guidance into the record and had not demonstrated through testimony or other evidence how the proposed sanction was calculated.[8] Further, she found that no evidence had been submitted as to the totality of the circumstances regarding the violation, which she needed to assess a

---

[3] Complaint at 1-2, ¶¶ II.1 and 3; Answer at 1, ¶¶ 1 and 3.

[4] Complaint at 2, ¶ 6; Answer at 1,¶ 6.

[5] Complaint at 2, ¶ 2; Answer at 1, ¶ 2.

[6] Order Granting in Part and Denying in Part the FAA's Motion for Summary Judgement (hereinafter "Partial Summary Decision") (citing FAA Motion for Decision, ex. C-2 at pp. 1-2, ¶¶ 2-8).

[7] Partial Summary Decision at 14-15, 21.

[8] *Id.* at 16.

civil penalty.[9] Most notably, this included the question of whether Mr. Webber actually operated an aircraft for Felts Field during this time period.[10] Without this evidence, she concluded that the record was insufficient to grant the proposed civil penalty.

On June 20, 2017, the ALJ convened a hearing to receive evidence relevant to the amount of the civil penalty. The ALJ accepted into evidence FAA exhibit C-1, which contained excerpts of FAA Order 2150.3B, and later she concluded that the text was in effect during the period of the violations.[11] The FAA also presented the lead FAA inspector involved in the matter. The inspector testified that she believed that the duration of Mr. Webber's absence from the testing pool was an aggravating factor,[12] but she also admitted on cross-examination that she could not tell from the documentary evidence whether Mr. Webber had flown any flights for Felts Field as opposed to his other employers.[13] The FAA did not produce any witness who testified as to the civil penalty calculation. It relied instead on closing arguments to summarize the evidence and compare that evidence to the allegedly relevant aggravating factors described in FAA Order 2150.3B and the sanction tables it contains.[14]

On May 14, 2020, nearly three years after the hearing, ALJ Sullivan issued her Initial Decision. Certain aspects of the Initial Decision are especially important for the present appeal. First, she rejected the FAA's position that closing arguments, rather than testimonial and documentary evidence, are sufficient for explaining the

---

[9] *Id.* at 17.

[10] *Id.* at 17-19.

[11] Initial Decision at 7-8.

[12] Hearing Transcript ("Tr.") 41:12-19.

[13] Tr. 59:14-60:19.

[14] *See* Tr. 171-190.

proposed sanction.[15] As a result, she concluded that there was no evidence in the record showing "that any FAA employee (or group of employees) had 'considered several factors, such as the nature of the violation, degree of hazard, violation history, circumstances surrounding the case, Respondent's size as a company, and the consistency of the sanction' to arrive at the proposed $11,000 civil penalty."[16] Second, and somewhat related, she denied Felts Field's motion to dismiss the FAA's Complaint. Felts Field argued that the matter should be dismissed because the FAA had not submitted evidence regarding the appropriate sanction amount and fifteen factors contained in FAA Order 2150.3B. The ALJ rejected the argument because the factors listed in the order are not intended to be exhaustive, and additional factors not listed could be equally relevant.[17] Finally, she assessed a civil penalty totaling $6,000—based on $3,000 for each of the two regulatory violations—after analyzing the sanction guidance in FAA Order 2150.3B and the evidence relating to aggravating or mitigating circumstances.

III. Issues on Appeal and Discussion

Felts Field raises three issues that question the ALJ's jurisdiction and authority to assess a civil penalty.

A. The ALJ did not lose jurisdiction by not issuing a decision within 30 days.

By regulation, an ALJ may issue a written initial decision within 30 days from the close of the record.[18] The hearing in this matter ended on June 20, 2017, but the written Initial Decision was not served until May 14, 2020, i.e., a period of two

[15] Initial Decision at 15-16.

[16] *Id.* at 16.

[17] *Id.* at 14.

[18] 14 C.F.R. § 13.232(c) (2020).

years, ten months, and 24 days. Felts Field asserts that this was "prejudicial error."[19]

Felts does not explain how it was prejudiced by the delay. An error is prejudicial when it creates "substantial doubt" that the forum below would have reached the same result but for the error.[20] Nothing in this record—or in Felts Field's brief—creates doubt in the Initial Decision based on its delayed issuance.

Regardless of whether prejudice can be shown, neither regulations, statutes, nor precedent require this matter to be dismissed for want of jurisdiction. To the contrary, the Administrator has refused such a remedy on several occasions.[21] While the parties have an interest in a speedy resolution of a matter, the overarching public interest in aviation safety would be compromised if delays in the administrative process yielded dismissal of civil penalty complaints.

B. The ALJ's assessment of a civil penalty is not limited to simple adjustments to the FAA's proposed civil penalty.

Without solid footing in the regulatory text, Felts Field argues that "the ALJ did not adjust or modify the FAA's proposed civil penalty; rather, the ALJ threw out the FAA's proposed civil penalty, part and parcel, and assessed a civil penalty of the ALJ's own design."[22] By itself, this is not a reason to sustain the appeal.

A faulty premise underpins Felts Field's argument:

---

[19] Respondent's Appeal Brief at 4.

[20] *Consol. Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 606 F.2d 323, 329 (DC Cir. 1979).

[21] *Kuhling*, FAA Order 2003-3 (May 6, 2003); *Horner*, FAA Order No. 2000-19 (August 11, 2000); *Sanford*, FAA Order No. 1997-31 (October 8, 1997).

[22] Respondent's Appeal brief at 5-6.

> *[P]ursuant to 13.232(a) the ALJ has authority or jurisdiction to adjust or modify a propose penalty that the ALJ has found partially appropriate based on the reliable, probative, and substantial evidence*; the ALJ does not have authority or jurisdiction to create a penalty after finding that the Complainant has failed to present required evidence, let alone a preponderance of the evidence.[23]

The italicized portion of the argument suggests that § 13.232(a) contains restrictive language that binds the ALJ merely to adjusting or modifying the civil penalty that the FAA has proposed. But this restriction is not found in the regulation.[24] Instead, the penalty is simply the amount "found appropriate by the administrative law judge."[25] Paragraph (d) reiterates the same language.[26] Lacking a basis in the text or other authority, Felts Field's argument has no merit.

C. The ALJ is not stripped of authority to assess a civil penalty when the record does not address all considerations described in FAA Order 2150.3B.

Lastly, Felts Field renews the argument from its motion to dismiss, charging that the FAA presented no evidence on numerous factors found in FAA Order

---

[23] *Id.* at 6.

[24] The cited regulation states:

> (a) ***Contents.*** The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge shall include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, *the amount of any civil penalty found appropriate by the administrative law judge*, and a discussion of the basis for any order issued in the proceedings. The administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge shall make copies of that initial decision available to all parties and the FAA decisionmaker.

14 C.F.R. § 13.232(a) (2020) (emphasis added).

[25] *Id.*

[26] *Id.* at § 13.232(d).

2150.3B. Felts Field seizes on the ALJ's criticism of the FAA's use of the closing argument to present its proposed penalty,[27] and it argues that the FAA must produce evidence explaining its proposed penalty that addresses a litany of factors—i.e., the nature of the violation, degree of hazard, violation history, circumstances surrounding the case, Respondent's size as a company, and the consistency of the sanction—to arrive at the proposed civil penalty.[28] It concludes that, without this factor-by-factor evidence, an ALJ may not fashion a civil penalty.

Felts Field does not—and cannot—point to a specific statute, regulation, or policy that supports its argument. The statutory provisions underlying the administrative civil penalty program do not impose a litany of mandatory factors that must be considered for this kind of case.[29] Further, as discussed in the previous section, the applicable regulations state that the assessment is simply the amount "found appropriate by the administrative law judge."[30] Indeed, the regulation places the burden of proof on the respondent for some factors that form affirmative defenses, like corrective action and the ability to absorb the sanction.[31] Even the specific FAA policy that Felts Field cites, FAA Order 2150.3B, does not impose a duty on the FAA to present evidence on each factor or element described in the Order. Instead, it describes a flexible approach that considers only the elements that actually apply.[32]

---

[27] The issue of whether this criticism was appropriate is not raised in this appeal. Nothing in this decision should be construed as accepting the ALJ's analysis on this point.

[28] Respondent's Appeal Brief at 6-7.

[29] *See* 49 U.S.C. § 46301; *Northwest Airlines, Inc.*, FAA Order 90-37 (Nov. 7, 1990).

[30] *See supra* Part III.B (citing 14 C.F.R. 13.232(a) and (d)).

[31] 14 C.F.R. § 13.224(a) (2020).

[32] As contained in hearing exhibit C-1, the policy states:

> 4. **Mitigating or Aggravating Factors and Elements.** The factors in chapter 7, subparagraphs 4.a. through m. have been developed over years of policy making and case adjudication. They have proven useful and appropriate for determining the seriousness of a violation and for selecting an

Caselaw also does not aid Felts Field. To the contrary, its argument was rejected three decades ago in the civil penalty appeal of *Northwest Airlines, Inc.*[33] In that appeal, the Administrator noted that some explicit considerations are found in the former codification of the civil penalty program, but that statutory language pertained only to hazardous materials cases.[34] Even so, the decision cautioned that it "should not be read as requiring the prosecutor at a hazardous material case hearing to offer evidence on each of the specific considerations."[35] Thus, the FAA is not obligated to present evidence on every irrelevant consideration described in the governing authorities. Further, the ALJ is not stripped of authority to render a civil penalty assessment for not considering the same irrelevant factors.

IV. The Sanction

As previously stated, ALJ Sullivan assessed a total penalty of $6,000 for violating the two regulations. In reaching this figure, she determined that no mitigating or aggravating factors were present.[36] She reached this conclusion "based on the evidence adduced in the record" and using FAA Order 2150.3B as guidance.[37] While the ALJ erred in selecting the appropriate mid-point provided in

---

> appropriate sanction. Elements for evaluating and weighing each factor are also described. These factors and elements provide a framework for determining sanctions for violations specifically listed in the table as well as those not specifically listed. *All the factors and elements, however, may not apply to each violation. Only those factors and elements that are relevant to a violation are considered in determining a sanction for the violation.* This list of factors and elements is not intended to be exhaustive; other factors may be relevant as well.

Ex. C-1 at "5 of 17" (excerpts of FAA Order 2150.3B) (emphasis added).

[33] *Northwest Airlines, Inc.*, FAA Order 90-37 (Nov. 7, 1990).

[34] *Id.* at 11-12 (citing former 49 U.S.C. App. 1471(a)(1)).

[35] *Id.* at 12, n.9.

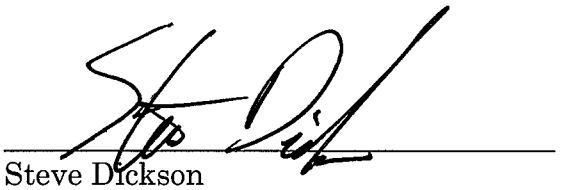
[36] Initial Decision at 26.

[37] *Id.*

the sanction guidance,[38] I do not find this error to be prejudicial to Felts Field. To the contrary, the sanction would be $11,000 based on the sanction guidance, as constrained by the amount sought in the Complaint. Nevertheless, the FAA did not perfect an appeal on this point, and assessing a higher amount would penalize Felts Field for filing an administrative appeal. I therefore will not make an adjustment to the ALJ's penalty assessment.

V. Conclusion

Felts Field's appeal is denied in its entirety. I assess a total civil penalty in the amount of $6,000.*



Steve Dickson
ADMINISTRATOR
Federal Aviation Administration

*This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with 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. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2020). *See* 71 Fed. Reg. 70460 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in FAA civil penalty cases.)

[38] FAA Order 2150.3B recommends starting at the midpoint of the applicable penalty range when determining the final assessment. *See* Ex. C-1, at 10 of 17 (FAA Order 2150.3B, page 7-9, ¶ 5.b.3.). Binding precedent establishes that when the recommended penalty spans ranges (e.g., "moderate to maximum"), the midpoint is determined by the low end of the lower range, and the high end of the higher range. *Riter Aviation*, FAA Order 2019-1 at 9. Here, the midpoint for a Group IV operator, with a sanction range from "moderate to maximum," would be $6,600. This midpoint derives from the low end of the lower range ($2,200) and the high end of the higher range ($11,000).

SERVED: May 14, 2020

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

In the Matter of:	)	
	)	Docket No. FAA-2015-3307
FELTS FIELD AVIATION	)	
	)	Case No. 2015WP910090
Respondent	)	

INITIAL DECISION

OF U.S. ADMINISTRATIVE LAW JUDGE

Held by May 4, 2017 Summary Judgment Order:

On May 4, 2017, an Order issued that granted the FAA summary judgment relief on Violation No. 1(a) ((14 C.F.R. § 120.105) and Violation No. 1(b) (14 C.F.R. § 120.215(a)), but denied summary judgment relief on the FAA's proposed civil penalty of $11,000.

Held After Evidentiary Hearing:

The Respondent, Felts Field Aviation ("Felts Field"), is assessed a total civil penalty of $6,000 for Violation No. 1(a) ((14 C.F.R. § 120.105) and Violation No. 1(b) (14 C.F.R. § 120.215(a)).

I. INTRODUCTION

To assist the reader, this Introduction provides a brief overview of the pleadings and relevant motions and Orders in the case record.

A. September 22, 2015 Complaint and Proposed Civil Penalty

On September 22, 2015, the Federal Aviation Administration ("FAA") served Felts Field with a Complaint, alleging that Felts Field, a certificate holder authorized to conduct Part 135 operations, had failed to ensure that one of the pilots it employed was subject to drug and alcohol testing under a testing program implemented in accordance with 14 C.F.R. Part 120. The FAA

alleged that this pilot, Mr. Richard Webber, had performed safety-sensitive functions for Felts Field, "specifically to act as a pilot," between the dates of July 2013 and April 5, 2015 without drug and alcohol testing (Compl. 2, § II ¶¶ 3-6). As a result, the FAA charged the Respondent with Violation No. 1(a) (14 C.F.R. § 120.105, which requires drug testing) (Compl. 3, § III ¶ 1(a)), and Violation No. 1(b) (14 C.F.R. § 120.215(a), which requires alcohol testing) (*id.* ¶ 1(b)). The FAA asserted that each of these two violations had a maximum penalty of $11,000. (*Id.* ¶ 2.) It proposed a total penalty of $11,000 for these two violations. (*Id.* at 4, § III ¶ 3.)

B. October 8, 2015 Answer

On October 8, 2015, Felts Field served the FAA with its Answer and Affirmative Defenses ("Answer").[1] In this October 8, 2015 Answer, Felts Field admitted holding FAA Certificate No. GFV A247E and employing Mr. Webber as a pilot between the relevant dates of July 2013 and April 6, 2015. (Ans. 1, ¶¶ 1, 3.) Felts Field also admitted that Mr. Webber performed safety sensitive piloting duties for Felts Field prior to April 6, 2015. (*Id.* ¶ 6.) Felts Field denied, however, that it had failed to add Mr. Webber to Felts Field's random drug and alcohol testing pool prior to April 6, 2015 (*id.* ¶ 4) or that it had failed to include Mr. Webber in its random selection pool during selections prior to April 6, 2015 (*id.* ¶ 5). Felts Field also raised an affirmative defense of reasonable reliance on an FAA-approved provider who had the duty to monitor and advise Felts Field of its obligations under 14 C.F.R. Part 120 and 49 C.F.R. Part 40.

C. July 14, 2016 Order Directing Production of Discovery

On July 14, 2016, an Order Extending Certain Litigation Deadlines was filed. Among other things, this July 14, 2016 Order denied Felts Field's July 12, 2016 oral motion to bar Mr. Eric Wells from testifying as the FAA expert witness; and directed the FAA to serve Felts Field, on or before July 22, 2016, with either a modified, redacted copy of Exhibit C-1, or a privilege log justifying the redactions to the current Exhibit C-1. (July 14, 2016 Order 3, ¶¶ 3-4.) This Order also extended the deadline for completing general discovery from August 30, 2016, to September 16, 2016. (*Id.* ¶ 6.)

[1] Felts Field's Answer was not filed with the Office of Hearings ("OH"). On November 25, 2017, an OH staff member obtained a copy from regulations.com.

D. January 26, 2017 Order Compelling Certain Discovery

On September 16, 2016, Felts Field filed the Respondent's Motion to Compel ("Motion to Compel"), asserting, among other things, that the FAA had failed to comply with the July 14, 2016 Order directing production of discovery. Both Felts Field and the FAA filed additional materials, which are fully codified and discussed in the January 26, 2017 Order, and will not be repeated here. (Jan. 26, 2017 Order.)

On December 15, 2016, the parties presented oral argument on Felt's Field's Motion to Compel. The primary underlying discovery dispute between the parties involved discovery of what facts the FAA had considered in calculating the proposed $11,000 civil penalty plead in its Complaint. Felts Field requested the factual data the FAA had considered in determining the proposed $11,000 amount for the two (2) alleged violations.

After hearing oral argument on December 15, 2016, the Court denied in part Felts Field's Motion to Compel, when it denied Felts Field's request for disclosure of the redacted portions[2] of the FAA's EIR (Jan. 26, 2017 Order 14, ¶ 2). The Court found that the EIR itself was a compilation of preliminary investigative work that was protected by work product privilege. (Dec. 15, 2016 Tr. 67:4-68:3). However, the Court granted the Motion to Compel in part, when it ordered the FAA to disclose, on or before January 17, 2017,[3] how each of the "Factors Affecting Sanction" headlined in the EIR, as well as any other data it considered pursuant to FAA Order 2150.3B, had been considered by the FAA in the FAA's final determination of the proposed $11,000 civil penalty (Dec. 15, 2016 Tr. 64:11-66:4; Jan. 26, 2017 Order 14, ¶ 1). The Court's oral rulings were subsequently codified in the January 26, 2017 Order Granting In Part and Denying In Part the Respondent's Motion to Compel.

---

[2] These were contained in Section B of the FAA's Enforcement Investigative Report ("EIR"), which was a total of six (6) pages, but contained multiple redactions on pages 2 through 6. (Mot. Ex. A.)

[3] The January 17, 2017 deadline was provided to the FAA during the December 16, 2016 Motion Conference, after requesting input from the FAA about its holiday schedule, and when it believed it could reasonably produce the evidence.

E. February 6, 2017 Order

On January 17, 2017, Felts Field filed the Respondent's Motion to Dismiss ("Motion to Dismiss"), asserting that the FAA had failed to produce discovery on or before January 17, 2017, as ordered by the Court. Seven days later, on January 24, 2017, the FAA filed the Complainant's Opposition to Respondent's Motion to Dismiss, and then two (2) days later, on January 26, 2017, the FAA filed the Complainant's Calculation of the Proposed Civil Penalty. On January 31, 2017, Felts Field filed a Supplemental Brief, in which it amended its previously filed January 17, 2017 Motion to Dismiss by adding an alternate request for relief; specifically, to preclude the admission of certain FAA evidence ("Motion to Preclude"), pursuant to 14 C.F.R. § 13.220(n)(3). On February 3, 2017, the parties appeared by telephone and discussed multiple issues. On February 6, 2017, an Order Denying the Respondent's Motion to Dismiss and Reserving the Respondent's Alternate Motion for Preclusion of Evidence was filed. As part of this February 6, 2017 Order, the FAA was provided an opportunity to file a written response on Felts Field's preclusion request. (Feb. 6, 2017 Order 4, ¶ 3.)

F. February 23, 2017 Order Precluding Certain Evidence

On February 10, 2017, the FAA filed the Complainant's Opposition to Respondent's Motion for Preclusion of Evidence. Five (5) days later, on February 15, 2017, the parties appeared by telephone and presented oral argument on Felts Field's Motion to Preclude. On February 23, 2017, an Order Granting In Part and Denying In Part the Respondent's Motion for Preclusion of Certain Evidence ("Feb. 23, 2017 Order") was filed. In summary, the Court found that the FAA had failed to fully comply with the Court's December 15, 2016 oral rulings (codified in the January 17, 2017 Order). The Court found it "clear that the FAA omitted from its Calculation multiple factors that the Court specifically ordered the FAA to address. Thus, the FAA's narrative Calculation fell noticeably short of complying with the Court's December 15, 2016 ruling." (Feb. 23, 2017 Order 9.) As a result, the FAA could introduce certain fact evidence it had disclosed regarding its calculation of the proposed $11,000 civil penalty, but was precluded from introducing at the Hearing the evidence that the FAA had failed to disclose after Court order. (Feb. 23, 2017 Order 10-12.)

G. May 4, 2017 Order Partially Granting Summary Judgment

On May 4, 2017, an Order Granting In Part and Denying In Part the FAA's Motion for Summary Judgment was filed. This May 4, 2017 Order granted summary judgment to the FAA on Violation No. 1(a) and Violation No. 1(b), but denied summary judgment on the FAA's proposed civil penalty of $11,000.

1. Undisputed Facts Found by Grant of Partial Summary Judgment

In the May 4, 2017 Order, the Court found that it was undisputed that Felts Field was, at all times mentioned in the Complaint (i.e., July 2013 through April 6, 2015), the holder of FAA-issued Certificate No. GFVA247E, authorizing it to conduct operations under Part 135 of the Federal Aviation Regulations. (Compl. 1, § II ¶ 1; Ans. 1, ¶ 1.) Felts Field was required to comply with the requirements of 14 C.F.R. 120 and 49 C.F.R. Part 40 for its drug and alcohol testing program. (Compl. 2, § II ¶ 2; Ans. 2, ¶ 2.)

At all times relevant (i.e., July 2013 through April 6, 2015), it was undisputed that Felts Field employed Mr. Richard Webber (Compl. 2, § II ¶ 3; Ans. 1, ¶ 3) to perform a safety sensitive function, specifically to act as a pilot (*id.*). Prior to April 6, 2015, Mr. Webber had performed piloting duties, a safety-sensitive function, for Felts Field. (Compl. 2, § II ¶ 6; Ans. 1, ¶ 6); May 4, 2017 Order 7, § IV.) Felts Field added Mr. Webber to its drug and alcohol testing pool on April 6, 2015. Prior to April 6, 2015, Mr. Webber had not been included by Felts Field in seven (7) selections from its drug and alcohol testing pool. (*Id.* at 3, § I(B).) Those seven (7) random drug and alcohol selections occurred over a twenty (20) month period; specifically, in July 2013, October 2013, January 2014, April 2014, July 2014, October 2014, and January 2015. (*Id.* § IV(A).)

2. Additional Facts Found by Grant of Partial Summary Judgment

Felts Field's admissions and the FAA's flight log evidence (Mot. Ex. C-5) also established the following facts were not genuinely disputed: a) Felts Field met the definition of "Employer" under 14 C.F.R. § 120.7; b) Mr. Webber was a Felts Field's employee pilot, who was ready and available to perform safety-sensitive piloting duties for the Respondent "in an aircraft during flight time," as required by the definition of "Flightcrew member" in 14 C.F.R. §

1.1; and c) between July 2013 and April 5, 2015, Mr. Webber had not been subject to the relevant random drug and alcohol testing program implemented by Felts Field.

3. Issue Remaining for Hearing

In the May 4, 2017 Order, the Court found there were genuine disputes of material fact regarding the FAA's proposed civil penalty of $11,000 for Violation No. 1(a) (14 C.F.R. § 120.105) and Violation No. 1(b), (14 C.F.R. § 120.215(a)). The Hearing date was re-confirmed, so that the parties could present evidence on the disputed issues regarding the proposed $11,000 civil penalty dispute. (May 4, 2017 Order 21-22, ¶¶ 2-5.)

H. June 1, 2017 Order

On June 1, 2017, an Order Granting and Reserving Motions was filed. Among other things, this Order granted Felts Field's unopposed Motion in Limine, and reserved other requested relief.

I. June 12, 2017 Order

On June 12, 2017, an Order Granting and Denying Motions was filed. In this Order, the Court granted Felts Field's May 22, 2017 Motion to preclude testimony of an FAA untimely disclosed witness (June 12, 2017 Order 18, ¶ 1), but denied the FAA's inferred motion to compel supplemental discovery and granted Felts Field's Motion for Protective Order (*id.* ¶¶ 2-3). The Court also granted the FAA's Request for a Subpoena of Mr. Webber, with the limitation that the FAA could compel the attendance of Mr. Webber at the Hearing only to provide impeachment testimony.[4] (*Id.* at 19, ¶ 4).

II. HEARING WITNESSES AND EXHIBITS

On June 20, 2017, the parties convened in Spokane, Washington for the Hearing. As noted *supra*, the material facts supporting Violation No. 1(a) (14 C.F.R. § 120.105) and Violation No. 1(b) (14 C.F.R. § 120.215(a)) had been conclusively established by summary

[4] The FAA did not serve the subpoena on Mr. Webber, and Mr. Webber did not appear at the Hearing. (June 20, 2017 Tr. 11:4-13.)

judgment order. The Court had found in its May 4, 2017 Order that Felts Field had committed both Violation No. 1(a) and Violation No. 1(b) by failing to ensure that its employee, Mr. Webber, who performed safety sensitive functions, had been subject to drug and alcohol testing under a testing program implemented under 14 C.F.R. part 120. (May 4, 2017 Order 21.)

The Court had not, however, granted full summary judgment relief. In its pleading, the FAA had proposed a total civil penalty of $11,000 as "appropriate" for the two (2) alleged violations. This allegation, and any facts (not yet found) in support of it, remained in dispute. Thus, the parties convened for the Hearing to present evidence and arguments regarding what civil penalty was "appropriate" for the two proven violations, in light of the unique facts and circumstances of the case.

A. The FAA's Witnesses and Exhibits

In support of its case-in-chief, the FAA presented one (1) fact witness: FAA Drug and Alcohol Compliance Enforcement Investigator Ms. Simone Clinton. The FAA had not identified Inspector Clinton as an expert witness prior to the Hearing, and acknowledged at the Hearing that Inspector Clinton was not offered as, or testifying as, an expert witness. (June 20, 2017 Tr. 22:5-11.)

The FAA also moved to admit five (5) exhibits, marked as Exhibits C-1 through C-5, into the record for the Court's consideration. Exhibit C-1 is discussed below. Exhibits C-2 and C-3 were printouts of Westlaw text of 14 C.F.R. §§ 120.105 and 120.215, respectively. (June 20, 2017 Tr. 18:14-22.) They are deemed admissible as copies of public laws. The Court admitted Exhibit C-4 without objection (June 20, 2017 Tr. 27:15-28:1). Exhibit C-5 was admitted over Felts Field's relevancy objection (*Id.* at 33:22-35:5).

Exhibit C-1 consisted of portions of the FAA's Sanction Guidance, specifically: part of Chapter 7 and part of Appendix B. (FAA Order No. 2150.3B, effective October 1, 2007). The Court first denied the FAA's request for judicial notice of those excerpts, based on Felts Field's objection that nothing on the face of Exhibit C-1 showed that it was in effect on the date of the violations (June 20, 2017 Tr. 16:5-17:2, 17:19-21, 18:9-14.) On the FAA's motion for reconsideration (*id.* at 79:7-13) the Court reconsidered its ruling and found that it would "take judicial notice [] that the FAA has a published guidance policy identified as FAA Order

2150.3[B] regarding its policies, procedures, and guidelines for calculating the proposed civil penalty in its enforcement program" (*id.* at 80:2-8). The Court, however, could not take judicial notice that Exhibit C-1 was "an accurate reflection and representation of the most current version of FAA [O]rder 2150.3[B] . . . because the court d[id]n't have the entire order with all the revisions in it." (*Id.* at 80:9-14.) However, the Court did deem Exhibit C-1 "admissible as illustrative of FAA Order 2150.3[B]." (*Id.* at 80:15-22.)

B. Felts Field's Witnesses and Exhibits

As part of Felts Field's cross-examination of Inspector Clinton, Felts Field moved for admission of two (2) exhibits into evidence, marked as Exhibits R-1 and R-2. (*Id.* at 43:12-19.) The Court admitted Exhibit R-1 without objection (*id.* at 45:6-10) and admitted Exhibit R-2 over the FAA's foundation and relevancy objections (*id.* at 45:11-14, 44:1-4). After the FAA rested its *prima facie* case, Felts Field did not offer any witnesses.

C. Post-Hearing Rulings on Exhibits

After the conclusion of the Hearing, this Court compared Exhibit C-1 to the published Sanction Guidance. Exhibit C-1 is an accurate copy of Chapter 7, pages 7-1 through 7-12, and a portion of Appendix B of the FAA's Compliance and Enforcement Program, FAA Order No. 2150.3B, which was in effect at the time of the violations: July 2013 – April 6, 2015. Therefore, the Court modifies its prior admissibility ruling, and takes judicial notice that Exhibit C-1 is an accurate copy of part of the Sanction Guidance.

However, at the time of the proven violations, FAA Order No. 2150.3B also contained "Change 3" at page 7-14, paragraph 8, "Guidance for Determining Sanctions in Cases Involving Drug and Alcohol Testing Violations," which on its face appears to be applicable to this case. Therefore, the Court will also take judicial notice of Change 3 to FAA Order No. 2150.3B, applicable to drug and alcohol testing violations. *See* 5 U.S.C. § 556(e); *U.S. Lines v. Fed. Maritime Comm'n*, 584 F.2d 519, 534-35 (D.D.C. 1978) (agency decisionmaker may rely on

publicly available information, but must "specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review."[5])

D. Citations to Sanction Guidance Materials

Citations in this Initial Decision to the FAA Sanction Guidance contained in FAA Order 2150.3B, pages 7-1 through 7-12 are to Exhibit C-1. Citations to the Sanction Guidance for determining sanctions in cases involving drug and alcohol testing are to Order No. 2150.3B itself.

E. June 20, 2017 Hearing Transcript Corrections

The following errors in the June 20, 2017 Hearing Transcript are hereby corrected:

Page 28:16	"Mr. Wyborney"	corrected as:	Ms. Clinton
Page 29:16	"witness option"	corrected as:	witness opinion
Page 32:8	"payment"	corrected as:	any
Page 82:7-8	"any in propia"	corrected as:	an appropriate

III. CIVIL PENALTY DISCUSSION

As noted *supra*, in its September 22, 2015 Complaint, the FAA proposed a total civil penalty of $11,000 for the two alleged violations: Violation No. 1(a) and Violation 1(b). (Compl. 4, § III ¶ 3.) This section summarizes the FAA's evidentiary burden of proof, the legal standard in assessing the evidence, and what civil penalty is appropriate in this case, given the evidence in the record.

A. Legal Standards

1. The FAA's Evidentiary Burden of Proof

As the movant seeking assessment of a proposed civil penalty, the FAA has the burden of proof. 14 C.F.R. § 13.224. The FAA must proffer specific evidence demonstrating the appropriateness of a civil penalty. *Seven's Paint & Wallpaper,* FAA Order No. 2001-6, at 4-5

[5] FAA Order 2150.3B, Change 3 is publicly available at https://www.faa.gov/documentLibrary/media/Order/2150.3%20B%20with%20Chg%203%20Included.pdf (last visited May 1, 2020).

(May 16, 2001). The FAA must proffer admissible evidence into the record that is "reliable, probative, and substantial evidence" in support of its proposed civil penalty. 14 C.F.R. § 13.223. The FAA may meet its evidentiary burden by, among other things, introducing the sanction guidance found in FAA Order No. 2150.3B, as well as the testimony of an FAA inspector. *Schuman Aviation Co. LTD.*, FAA Order No. 2016-2, at 2 (Aug. 25, 2016). The FAA may also proffer other documentary, testimonial, or reliable fact evidence into the evidentiary record to meet its burden of proof regarding the proposed civil penalty.

2. The FAA's Published Sanction Guidance

It is well-established that a civil penalty assessment should not be based on a "mathematical, formulaic approach." *Midtown Neon Sign Corp.*, FAA Order No. 96-26 (Aug. 13, 1996); *Warbelow's*, FAA Order No. 2000-3 at 9 (Feb. 3, 2000)(The FAA's published Sanction Guidance specifically provides that a civil penalty computation "should not be done simply by multiplying the sanction for a single violation by the number of flights", citing FAA Order No. 2150.3A, at 1), petition for reconsideration denied, FAA Order No. 2000-14 (June 8, 2000), petition for reconsideration denied, FAA Order No. 2000-16 (Aug. 8, 2000), petition for review denied, *Warbelow's Air Ventures v. FAA*, 19 F. Appx. 606 (9th Cir. Sept. 20, 2001).

The FAA's Sanction Guidance explains that "sanction determinations result from a judgment of where a case lies along a spectrum of gravity . . . [and] the circumstances of each case are evaluated in terms of the needs of safety and the public interest." FAA Order No. 2150.3B, at 7-9. *Ventura Air Services, Inc.*, FAA Order No. 2012-12, at 26 (Nov. 1, 2012). ("An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations."). This is a subjective determination, utilizing a wide variety of facts, because civil penalty determinations are unique to each case. The FAA's Sanction Guidance emphasizes that its list of factors is not exhaustive because "other factors may be relevant as well." (Ex. C-1 at 7-4, ¶ 4.) The Sanction Guidance also emphasizes that "Sanction determinations result from a judgment of where a case lies along a spectrum of gravity . . . [and] the circumstances of each case are evaluated in terms of the needs of safety and the public interest." (Ex. C-1 at 7-9, ¶ 5(a).)

4. Evidentiary Factors

The evidentiary factors for the Court to consider, as part of its assessment of where the case lies along a spectrum of gravity and the totality of the individual case circumstances, may include, but are not limited to, those factors applicable to hazardous material violations,[6] *Luxemburg*, FAA Order No. 94-18, at 5–6 (June 22, 1994); *see Ventura Air Services, Inc.*, FAA Order No. 2012-12, at 26 n.33, those listed in the Sanction Guidance for safety violations (e.g., the nature of the violation, level of experience of the violator, attitude of the violator, degree of hazard, action by employer or other authority, use of certificate, decisional law, the ability to absorb the sanction, consistency of the sanction with other similar cases, and corrective actions (Ex. C-1 at 7-4, ¶ 4), as well as "other factors" that may be relevant and unique to the case (*id.*).

5. The Respondent's Optional Responsive Burden, and Affirmative Defenses

Assuming the FAA meets its *prima facie* evidentiary burden of proof on its recommended civil penalty, a respondent may then choose to present responsive evidence to the FAA's admitted evidence. In addition, the respondent may choose to raise affirmative defenses relating to the sanction, such as (among other things), financial hardship or corrective action. If the respondent raises affirmative defenses, the respondent has the initial burden of proof to make a *prima facie* case. 14 C.F.R. § 13.224(c); *Seven's Paint & Wallpaper,* FAA Order No. 2001-6*; Atlas Frontiers, LLC,* FAA Order No. 2010-10 at 11 (June 16, 2010).

6. Sanction Guidance Not Binding on the Court

In considering the parties' evidence on the proposed sanction, the Court must use discretion to determine a "civil penalty, in an amount found appropriate." 14 C.F.R. §§ 13.232(d), 13.16(d)(3). While the FAA's Sanction Guidance is not binding on the Court, it provides helpful guidance. *Folsom's Air Service, Inc.*, FAA Order No. 2008-11, at 14 (Nov. 6, 2008); *see also* [*Air Carrier*], FAA Order No. 96-19, at 7 (June 4, 1996); *Northwest Airlines,*

[6] "In determining the amount of a civil penalty under subsection [49 U.S.C. § 46301(a)(3)] related to transportation of hazardous material, the Secretary shall consider: (1) the nature, circumstances, extent, and gravity of the violation; (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue doing business; and (3) other matters that justice requires." 49 U.S.C. § 46301(e)

FAA Order No. 90-37, at 8 (Nov. 7, 1990); *Tice*, FAA-2013-0042, Initial Decision (June 19, 2015); *Liberty Foundation*, FAA-2012-0477, Initial Decision (Apr. 4, 2017). Pursuant to 14 C.F.R. § 13.223, the Court may rule in a party's favor "only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record."

B. Summary of the Parties' Hearing Evidence

1. The FAA's Prima Facie Evidence

In addition to the evidentiary facts established by the May 4, 2017 Order, and the FAA's admitted Hearing Exhibits, the FAA presented Inspector Clinton, who testified that she had been the "lead inspector" in this case.[7] (June 20, 2017 Tr. 24:3). Inspector Clinton had drafted the FAA's enforcement investigative report ("EIR"). (*Id.* at 24:3-4.) She opined that there was an "aggravating" factor to consider in this case, because Mr. Webber's lack of inclusion in Felts Field testing program had occurred over a span of 22 months. (*Id.* at 41:12-19.)

2. Felts Field's Opposition Evidence

During Felts Field's cross-examination, Inspector Clinton testified that Felts Field had employed two (2) pilots, but she did not know if they were employed full or part-time. (June 20, 2017 Tr. 52:7-12). She agreed that a pilot, such as Mr. Webber, could fly for more than one Part 135 operator in any given month. (*Id.* at 59:14-21.) She did not know whether the flights identified in Ex. C-5 were flown by Mr. Webber for Felts Field or for another operator. (*Id.* at 60:7-19). It was her belief that all the flights listed in Ex. C-5 had either been flown by Mr. Webber for Felts Field, or he had been available to fly such flights. (*Id.* at 63:3-12; 64:16-21; 66-:19-3.) Inspector Clinton had not spoken to Mr. Webber, and didn't know if anyone else from the FAA had spoken with him. (*Id.* at 72:18-73:4.) Inspector Clinton did not know of any history of violations by Felts Field prior to her April 7, 2015 inspection. (*Id.* at 75:11-19.)

[7] No evidence was proffered as to what Inspector Clinton's scope of function was as the "lead" investigator, or what the identity, number of, or function was of other inspectors involved.

C. Felts Field's Motion to Dismiss

At the close of the FAA's case-in-chief, Felts Field moved "for dismissal" of any consideration of a sanction (June 20, 2017 Tr. 82:7-8), "[i]n light of the FAA not making their case for an appropriate sanction" (*id.* at 82:3-4).

1. Felts Field's Argument

Felts Field argued that because FAA Order 2150.3B requires the FAA to consider fifteen (15) factors and the FAA could only prove that it had considered six (6) of those factors (roughly 40%), the FAA could not prove any appropriate civil penalty by a preponderance of the evidence. (*Id.* at 85:18-22.) Felts Field reasoned that, "Where the FAA cannot establish an appropriate sanction, none should be adjudicated against the Respondent." (*Id.* at 85:22-86:3.) Upon further inquiry by the Court (*id.* at 92:20-96:13), Felts Field agreed that when "the evidence is so slim that there is no way for the FAA to show an appropriate penalty," the judge "should probably choose an appropriate civil penalty" (*id.* at 96:14-18). Felts Field then posited that in this case the minimum civil penalty called for by FAA Order 2150.3B—$550—would be appropriate. (*Id.* at 97:10-13.)

2. The FAA's Response

In response to Felts Field's motion, the FAA argued that it had made a *prima facie* case that its $11,000 proposed civil penalty was appropriate. (*Id.* at 111:15-19.) Specifically, the FAA had presented evidence, either through Felts Field's admissions to the allegations in the Complaint or at the Hearing, of the following facts pertinent to the penalty: 1) Mr. Webber was not included in Felts Field's drug and alcohol testing pool for 22 months total, which resulted in exclusion from the random selection pool during seven (7) selections (*id.* at 111:20-113:20); and 2) Mr. Webber was available to perform or actually performed a safety-sensitive function on all the dates reflected in Exhibit C-5, Mr. Webber's flight and duty log (*id.* at 114:1-15, 135:4-14). These facts, argued the FAA, showed that Felts Field's violations were careless because,

> A reasonable and prudent certificate holder would have subjected Richard Webber to drug and alcohol testing, and they would have at least noticed if Richard Webber was missing from a few, you know, random selections. But in

this case, the Respondent failed to notice during 22 consecutive months, Your Honor. That, the Agency asserts, is careless conduct.

(*Id.* at 124:4-13.)

The FAA argued that these facts and the testimony of Inspector Clinton that Felts Field employed two (2) pilots (*id.* at 52:7-10) established that the proposed civil penalty was in accordance with the FAA sanction guidance in Exhibit C-1. (*Id.* at 125:13-135:22.) The FAA argued that in the Sanction Guidance, the moderate to maximum penalty range for the violations in this case, for an operator of Felts Field's size (i.e., a Group IV operator, less than five (5) pilots), was $2,200 – $11,000. (*Id.* at 126:22-128:1; Ex. C-1 at B-4.) The FAA suggested starting in the middle of the range, specifically, at $6,600. (*Id.* at 128:3-14.) But the FAA argued that the middle range should not be utilized, because it had proven that the penalty should be increased to $11,000 due to what it argued were multiple aggravating factors.[8]

3. The Court's Oral Ruling

After hearing argument from the parties, the Court denied Felts Field's Motion to Dismiss. (*Id.* at 149:20-21.) The Court found that because the FAA's Sanction Guidance in Exhibit C-1 "allows for all kinds of different factors to be utilized, it cannot be found that the factors presented by the FAA are on its face, insufficient for the proposal of a civil penalty." (*Id.* at 152:5-9.) Although the FAA only presented evidence and argument that it had considered six (6) of the civil penalty factors, "only those factors and elements that are relevant to a violation are considered in determining a sanction for the violation. This list of factors and elements is not intended to be exhaustive. Other factors may be relevant as well." (*Id.* at 150:11-16 (quoting Ex. C-1 at 7-4, ¶ 4); see Ex. R-2.) The Court concluded that the FAA had "presented prima facie evidence for the issuance of a civil penalty" based on the factors it had considered. (*Id.* at 152:11-13.)

However, based on the evidence presented by the FAA, Felts Field's argument on its motion to dismiss, and the FAA's response, the Court agreed with Felts Field "that there ha[d]

[8] Although Inspector Clinton testified that she believed, as the lead investigator, that there was only one aggravating factor (June 20, 2017 Tr. 41:12-19), the FAA argued that the Court should find there were four aggravating factors proven.

been insufficient evidence to support a finding of an $11,000 proposed civil penalty on the basis of aggravation." (*Id.* at 153:19-22.) Therefore, the Court would proceed to consider the parties' evidence and argument to determine an appropriate civil penalty. (*Id.* at 154:6-14.)

D. Closing Arguments

After the evidentiary record was closed, both parties presented closing arguments. The FAA argued for an $11,000 civil penalty based on aggravating factors (June 20, 2017 Tr. 182:19-21), while Felts Field argued for a $550 civil penalty (*Id.* at 170:8-10).

1. Closing Arguments – No Evidentiary Value

It must be emphasized that a closing argument has no evidentiary value. A closing argument is not subject to admissibility standards or cross-examination, which are fundamental concepts of due process in any adversarial proceeding. An argument may not be substituted for evidence or testimony (fact and/or opinion) that offers proof of a party's allegations (or defenses). Thus, a closing argument is not, and may not be, considered as part of a party's *prima facie* or responsive evidence. *Federal Trial Handbook Civil* § 22:1 (4th ed.)(database updated Oct. 2019)("Importantly, arguments by counsel are not evidence.") Because it is not evidence, a closing argument cannot be given any evidentiary weight. *See, e.g.*, *Guilbeau v. W.W. Henry Co.*, 85 F.3d 1149, 1168 n.47 (5th Cir. 1996)(closing argument is not evidence).

Instead, a closing argument—if utilized well—serves as a vehicle for a litigant to succinctly and persuasively summarize and reference how the testimonial and documentary evidence introduced into the evidentiary record proves the litgant's allegations (or defenses). 88 C.J.S. *Trial* §§ 289 & 291 (databased updated March 2020) (counsel's closing arguments must be confined to, and grounded in, the evidence). Counsel may draw certain inferences during closing argument, but such inferences must be reasonably related to the adduced evidence. *Whittenburg v. Werner Enterprises Inc.*, 561 F.3d 1122, 1128–29 (10th Cir. 2009)(counsel must confine comments and inferences to evidence in the record). *See also*, 75A Am. Jur. 2d *Trial* § 503 (database updated Feb. 2020) ("During a closing argument, counsel may not 'travel outside the record' by arguing facts or matters not included in the evidence of record"); *Federal Trial Handbook Civil*, *supra*, at § 22:1 (the factual explanation in the closing argument should employ

the words used by the witnesses or be supported by the contents of admitted documents); 88 C.J.S. *Trial* at § 292 (permissible inferences may not include discussion of facts not in evidence). If the closing argument is supported by the referenced evidence, the court may find it helpful. But in itself, the closing argument has no evidentiary value or weight.

2. The FAA's Closing Argument Regarding Civil Penalty

During both the oral argument on Felts Field's Motion to Dismiss and in closing argument after the evidentiary record closed, the FAA argued that "[i]n accordance with the sanction guidance, the Agency considered several factors." (*Id.* at 172:18-19.)

While the FAA offered a part of its Sanction Guidance into the court record, it did not proffer any testimonial or documentary evidence to prove that any FAA employee utilized the sanction guidance in considering the factual evidence in this case, or how the proffered admissible evidence had been utilized in the penalty calculation, in order to support a finding, by a preponderance of the evidence, that the amount of $11,000 should be deemed an appropriate civil penalty to assess against Felts Field, given the facts and circumstances of this case.

Thus, despite the FAA's closing argument, it had not proffered any evidence that any FAA employee (or group of employees) had "considered several factors, such as the nature of the violation, degree of hazard, violation history, circumstances surrounding the case, Respondent's size as a company, and the consistency of the sanction" to arrive at the proposed $11,000 civil penalty. (*Id.* at 172:19-173:1.) No such evidence exists in the record. Rather, the record shows that the FAA chose not to present such evidence for cross-examination, objection, or opposing evidence. Instead, the FAA attempted to introduce, during closing argument, a subjective consideration of factors to support its proposed penalty.

Both the FAA's and Felts Field's closing arguments have been considered, but such closing arguments have no evidentiary weight.

E. Court's Evaluation of Evidence for Civil Penalty Assessment

As discussed in Section III(C)(3), *supra*, the Court finds that the FAA did not prove by a preponderance of the reliable, probative, and substantial evidence that its $11,000 proposed civil

penalty is appropriate. In the absence of such a showing, the Court must use its discretion to consider the reliable fact evidence and assess an appropriate civil penalty. All admitted evidence was considered, but only highlights are discussed below.

1. Number of Violations - Two

Prior to the Hearing, this Court found by summary judgment that between July 2013 and April 5, 2015, Mr. Webber was not subject to the relevant random drug and alcohol testing program implemented by Felts Field. (May 4, 2017 Summ. J. Order 14.) As a result, the Court found that Felts Field had committed Violation No. 1(a) and Violation No. 1(b). However, during the Hearing, the FAA raised a question regarding the number of violations plead in this case.

The Complaint alleges the following:

> By reason of the foregoing facts and circumstances, Felts Field violated the following sections of the Federal Aviation Regulations (14 C.F.R.):
>
> a. Section 120.105, in that Felts Field failed to ensure that each employee that performs a safety-sensitive function was subject to drug testing under a testing program implemented in accordance with 14 C.F.R. Part 120.
>
> b. Section 120.215(a), in that Felts Field failed to ensure that each employee that performs a safety-sensitive function was subject to alcohol testing under a testing program implement in accordance with 14 C.F.R. Part 120.

(Compl. 3-4, § III ¶ 1.)

The FAA does not state in its Complaint that there are any underlying counts (i.e., number of times) associated with each charged Violation. Nevertheless, at the Hearing the FAA argued that, based on the allegations in the Complaint,

> each time the Respondent made a selection from his random drug and alcohol testing pool, when Richard Webber was excluded, the Respondent violated one regulation for alcohol testing, and one regulation for drug testing. And each time the Respondent allowed Richard Webber to perform safety-sensitive functions, or Mr. Webber was available to perform safety-sensitive functions for the Responded while he was excluded, those are also violations.

(June 20, 2017 Tr. 116:12-21; *see also*, 182:14-19.)

The FAA then shifted its language and described the 22-month period of time in which Mr. Webber was excluded from the testing pool as an aggravating factor for the civil penalty. (*Id.* at 116:22-117:20, 119:4-16, 129:20-130:18, 134:7-135:14.) In contrast, Felts Field took the position that only two (2) violations were charged, found at summary judgment, and at issue for the civil penalty (*id.* at 139:9-18), and "[t]he duration doesn't have anything to do with the violation (*id.* at 139:19-20).

Upon inquiry by the Court, the FAA clarified its argument: "The Agency could have assessed a civil penalty for each violation that the Respondent conducted, but we determined that it was reasonable to assess $11,000 in this case." (*Id.* at 185:20-186:1.) The FAA then asserted that rather than proposing $6,600 (the FAA's argued calculated midpoint) for each violation of each regulation, an FAA employee had used the $6,600 midpoint and aggravated the penalty up to $11,000 to avoid "an extremely large penalty" by compounding the civil penalty for multiple violations. (*Id.* at 187:5-16.)

It should first be noted that in this and in every other civil penalty enforcement case, the FAA exercises its prosecutorial discretion in how many violations to charge. Furthermore, the FAA does not, as a matter of policy, seek a civil penalty for each violation when the result would be a "recommended sanction amount that is disproportionately harsh for the misconduct involved in an average [drug and alcohol testing] case if they were to simply add the appropriate amounts of penalty for each violation based on the guidance in Appendix B and chapter 7, paragraph 4." FAA Order No. 2150.3B at 7-14.[9]

Instead, the FAA policy is to 1) identify each separate violation discovered during the inspection "(For example, each employee for whom pre-employment drug test results were not received prior to hire; each employee who was not included in the random drug testing pool,

[9] Pursuant to statute, "A separate violation occurs under this subsection for each day the violation . . . continues . . . ." 49 U.S.C. § 46301(a)(2). Therefore, in the instant case the FAA could have charged Fields Field with one (1) violation of 14 C.F.R. § 120.105 for the first day that Felts Field employed Mr. Webber to perform a safety-sensitive function (sometime in July 2013), one (1) violation for the second day, and so on for each day in the 22-month period (July 2013 – April 6, 2015) that Mr. Webber was not subject to drug testing and proposed a civil penalty for each day. Likewise, the FAA could have charged Felts Field with one (1) violation of 14 C.F.R. § 120.215(a) for the first day that Felts Field employed Mr. Webber to perform a safety-sensitive function (sometime in July 2013), one (1) violation for the second day, and so on for each day in the 22-month period (July 2013 – April 6, 2015) that Mr. Webber was not subject to alcohol testing and proposed a civil penalty for each day. A rough calculation under this structure would result in a civil penalty in the neighborhood of $4.3 million.

each employee for whom a background check was not performed)," *id.* ¶ 8(a)(1); and then 2) "Consult the table in Appendix B and the general guidance in chapter 7, paragraph 4, on aggravating or mitigating factors to determine the amount of penalty for each separate violation," *id.* ¶ 8(a)(2). A failure to include a safety-sensitive employee in the random pool is one of four violation types, as discussed by the Sanction Guidance in addressing how to calculate the penalty for the violation type. *Id.* ¶ 8(a)(4). 3)(Add separately the amounts of penalty determined for each of the four types of violation, including "All failures to include safety-sensitive employees in the random pool"). Factors to consider for assessing a penalty for a violation type, or a grouping of types of violation, are both discussed in the Sanction Guidance. *Id.* ¶ 8(a)(5).

In the instant case, the FAA's wavering argument that each of the seven (7) selections made from the random pool, or each of the 60 flights listed in Exhibit C-5 were additional violations of the regulations is not in accord with the text of its own pleading, 14 C.F.R. §§ 120.105 and 120.215(a), the Sanction Guidance, caselaw, or the pre-hearing summary judgment relief requested and granted to the FAA in this case.

First, as noted above, the FAA's pleading (reiterated supra), does not allege multiple counts of each violation.

Second, 14 C.F.R. §§ 120.105 and 120.215(a) require that each employee "must be subject to" drug and alcohol testing, respectively. The act of failing to enroll Mr. Webber in its drug and alcohol testing program made Mr. Webber not subject to drug and alcohol testing. The fact that seven selections were made from the program did not make Mr. Webber not subject to testing under the program. Likewise, even assuming for the sake of argument that Exhibit C-4 proved that Mr. Webber piloted each of the 60 flights for Felts Field, his piloting did not make him not subject to testing.

Third, as discussed above, the Sanction Guidance bases the number of violations on "each employee who was not included in the random drug [or alcohol] testing pool." FAA Order 2150.3B at 7-14, ¶ 8(a)(a).

Fourth, the caselaw addressing drug and alcohol testing violations does not support considering each missed selection or operation performed while not subject to testing as a separate violation of the regulations. *See Stebbins Aviation, Inc.*, FAA Order No. 2006-3, at 12

(Feb. 7, 2006) ($9,200 civil penalty when respondent "failed to have any alcohol program at all for several years, it failed to maintain essential records concerning its drug program, and it failed to implement its drug program properly".); *Airo Indus. Co.*, FAA Order No. 2018-2, at 4 (Dec. 14, 2018) ($3,850 civil penalty when respondent failed to send employees for six selections over one year).

Fifth, the FAA did not move for summary judgment relief on more than two alleged violations. Thus, the summary judgment relief granted to the FAA by Court order was only on the two violations alleged and proven.

Based on the foregoing and in accordance with the May 4, 2017 Summary Judgment Order, Felts Field is subject to a civil penalty for one (1) violation of 14 C.F.R. § 120.105, and one (1) violation of 14 C.F.R. § 120.215(a), as plead in the FAA's Complaint, and proven by summary judgment motion.

2. Classification of Operator and Penalty Ranges

The penalty ranges for violations of FAA safety regulations committed by air carriers and commercial operators vary depending on the size of the operator. (Ex. C-1 at B-3.) Operators fall within one of four groups based solely on the number of aircraft or pilots for Groups III and IV, or a combination of operating revenue and number of aircraft or pilots for Groups I and II. (*Id.*)

Felts Field is classified as a Group IV operator because at the time of the violations, Felts Field held FAA issued Certificate No. GFV A247E, which authorized it to conduct Part 135 operations (Compl. 1, § II ¶ 1; Ans. 1, ¶ 1), and to employ two (2) pilots (June 20, 2017 Tr. 52:9-10.)[10]

The penalty ranges for violations of 14 C.F.R. §§ 120.105 and 120.215(a), which are covered under 49 U.S.C. § 46301(a)(5)(a), are as follows:

Maximum $4,400-$11,000
Moderate $2,200-$4,399

[10] While the evidence on this issue was scant, a Group IV operator is subject to the lowest penalty under the Sanction Guidance. Therefore, even if the Court found that Felts Field employed only Mr. Webber, who Felts Field admits it employed as a pilot (Compl. 2, § II ¶ 3; Ans. ¶ 3), it would not affect the classification or penalty range.

Minimum $550-$2,199

(Ex. C-1 at B-4.)

3. The Applicable Penalty Range for the Violations

The Sanction Guidance provides multiple penalty ranges for violations of 14 C.F.R. §§ 120.105 and 120.215(a)—moderate to maximum.[11] (Ex. C-1 at B-31, Fig. B-5-b(1).) Thus, "it is necessary to first determine, based on the facts and circumstances of the individual case, which of the three penalty ranges should apply, and then determine the appropriate civil penalty within that penalty range." *Worldwide Aircraft Servs, Inc.*, FAA-2013-0045, Initial Decision, at 13 (FAA May 28, 2015); *see also*, *Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 at 20-21 (the sanction is not a mathematical formula, it is a subjective assessment based on where a case lies along a spectrum).

In the instant case, Felts Field thought, albeit erroneously, that Mr. Webber was enrolled in a drug and alcohol testing program with Felt Field's service agent, First Advantage. (Ex. C-4, 1.) While this mistaken belief is not a defense to the violations or imposition of a civil penalty (June 20, 2017 Tr. 171:18-172:7), it does inform the Court of Felt Field's compliance disposition and the nature of the violations. Based on these facts and circumstances, the appropriate civil penalty range in this case is moderate. *See Star Helicopters, LLC*, FAA-2017-0091, Initial Decision, at 9 (FAA Dec. 7, 2018).

3. Midpoint and Midpoint Spread

Once a sanction range is identified, the FAA's Sanction Guidance recommends starting at the midpoint[12] of that applicable range. (Ex. C-1 at 7-9, ¶ 5(b)(3); June 20, 2017 Tr. 128:3-5.) Pursuant to the Sanction Guidance, the moderate penalty range for a Group IV operator is $2,200 – $4,399. (Ex. C-1 at B-4.) The mathematical midpoint of the moderate range is $3,299.50. The midpoint spread within the moderate range is between $2933 and $3666. For this discussion,

[11] The FAA argued that the starting point for any civil penalty is the midpoint of the entire civil penalty range—$2,200 to $11,000—and in the instant case, approximately $6,600. (June 20, 2017 Tr. 128:3-129:6.) This argument is contrary to the Sanction Guidance, which provides three (3) sanction ranges, and requires a serious and subjective consideration of all the ranges, based on the unique facts in each case.

[12] The midpoint is the mathematical point midway between two disparate numbers.

utilizing the Sanction Guidance as helpful guidance, the Court finds it appropriate to utilize the midpoint spread amount of $3000 as the start point in this case.

4. No Grounds for Aggravation

Once the amount in the midpoint of the applicable penalty range is identified, the Sanction Guidance suggests adjusting the amount, either increasing toward the higher end of the range for aggravating factors or decreasing toward the lower end of the range for mitigating factors listed in the Sanction Guidance. (Ex. C-1 at 7-9, ¶ 5(b)(3).) The FAA argued that the Court should find several aggravating factors in this case. Felts Field opposed this argument. Each of these factors are addressed below.

a. *Length of Time of Time and Number of Selections Mr. Webber was Excluded*

The FAA elicited testimony from Inspector Clinton that the length of time Mr. Webber was excluded from random drug and alcohol testing—22 months— is an aggravating factor. (June 20, 2017 Tr. 41:4-16.) Inspector Clinton did not explain why she considered the length of time an aggravating factor or where this factor fits into the Sanction Guidance. Inspector Clinton did not testify that she considered as an aggravating factor the seven random selections from which Mr. Webber was excluded. The FAA then argued, however, that the 22 months Mr. Webber was excluded (*id.* at 116:22-119:1, 129:20-130:5, 182:19-7), and the number of random selections from which Mr. Webber was excluded (*id.* at 119:4-8, 130:14-18) should be considered aggravating factors.

Neither of these factors are listed as aggravating factors in the FAA Sanction Guidance. However, the list of factors is not exhaustive and other factors may be relevant. (Ex. C-1 at 7-4, ¶ 4.) This Court could envision a scenario where evidence in the record showed that a respondent received some notice that a violation was ongoing or should have discovered a violation during some mandated activity and allowed the violation to continue that would call for aggravation. In this case there is no such evidence. Absent more, this Court declines to aggravate the civil penalty based solely on the amount of time the violation continued, or on a number of non-violation, albeit related, events (*i.e.*, random selections) that occurred while the violation was ongoing.

b. *No Evidence of Aggravated Degree of Hazard*

The FAA argued that the degree of hazard involved in this case is high.[13] The FAA argued,

> Failing to subject a safety-sensitive employee to random drug and alcohol testing for almost two years is a serious safety issue that could lead to the performance of safety-sensitive functions in an impaired state, and it also has the risk of placing the public as a whole in danger.

(June 20, 2017 Tr. 120:19-121:3.)

The sanction ranges contained in the FAA Sanction Guidance "reflect the degree of danger normally inherent in an average violation of a regulation, without aggravating circumstances." (Ex. C-1 at 7-6, ¶ 4(e).) This Court finds that based on the evidence in the record, the sanction range for violations of 14 C.F.R. §§ 120.105 and 120.215(a) (Ex. C-1 at B-31, Fig. B-5-b(1)), adequately reflects the degree of hazard and no aggravation is warranted.

c. *Nature of the Violations*

The FAA argued that the nature of the violations is an aggravating factor. (June 20, 2017 Tr. 120:12-14.) The FAA focuses its argument on the nature of the violations, the amount of time the violations continued, the number of selections from which Mr. Webber was excluded, and the number of flights performed for Felts Field by Mr. Webber. (*Id.* at 120:14-18.) The FAA asserted that Felts Field's conduct was careless based on the amount of time the violations continued. (*Id.* at 123:10-18.)

Pursuant to the Sanction Guidance, "[t]hree elements define the nature of a violation: first, whether violation was operational or non-operational; second, whether the violation involved careless or reckless conduct; and third, whether the violation involved any special aggravating or mitigating factors." (Ex. C-1 at 7-4, ¶ 4(a).

As this Court found at summary judgment and as Felts Field correctly argued at the Hearing, the flight log contained in Exhibit C-5 did not prove that Mr. Webber actually piloted

[13] The FAA began to elicit testimony from Inspector Clinton regarding why the degree of hazard was high in this case, but upon objection the FAA withdrew the question. (June 20, 2017 Tr. 42:1-43:3.)

any of the 60 flights for Felts Field. (May 4, 2017 Summ. J. Order 18-19; June 20, 2017 Tr. 96:18-22, 146:9-17.) The FAA did not offer any persuasive evidence at the Hearing to prove that Mr. Webber actually piloted any of the flights, only that the flight logs were consistent with Felts Field's admission that Mr. Webber was employed as a pilot and, therefore, available to perform safety sensitive functions. The Court agrees with Felts Field that without proof that Mr. Webber piloted any flights, the violations cannot be considered operational, which would aggravate the nature of the violations.

As to the issue of carelessness, the Sanction Guidance explains,

> Violations that involve careless or reckless conduct in violation of 14 C.F.R. § 91.13 may warrant more severe sanctions. . . . When a person operates an aircraft in violation of a specific regulation other than 14 C.F.R. § 91.13, however, that violation constitutes a careless or reckless operation in and of itself. In these cases, the misconduct may also result in a violation of 14 C.F.R. § 91.13 if it actually or potentially endangers the lives or property of others. When calculating the amount of sanction based on this factor, a distinction generally is drawn between instances where 14 C.F.R. § 91.13 is an independent violation and those where it is residual to another violation. When a 14 C.F.R. § 91.13 violation is residual only, a higher sanction generally is not warranted unless the conduct is also reckless.

(Ex. C-1 at 7-4, ¶ 4(a)(3).)

Even assuming that this guidance is applicable to non-operational violations, this Court finds that evidence in the record proves that Felts Field's violations were inadvertent, rather than careless. A violation "is inadvertent when it is the result of both inattention and lack of purposeful choice." (*Id.* ¶ 4(b)(2).) The only evidence in the record addressing why Mr. Webber was not in Felts Field random drug and alcohol testing pool supports a finding that Mr. Webber was enrolled with First Advantage upon his employment in 2008, but was somehow removed from the testing pool. (Ex. C-4.) Felts Field certainly was inattentive in not ensuring that Mr. Webber was subject to random testing. It is this inattention that gave rise to the violations. However, Felts Field did not make a purposeful choice to exclude Mr. Webber from the drug and alcohol testing pool.

Based on the inadvertent rather than careless nature of the violations, this Court finds that no aggravation or mitigation is appropriate based on this factor. *See Airo Indus. Co.*, FAA Order

No. 2018-2, at 8 ("[T]he recommended sanction ranges for various types of violations assume that violations are inadvertent."); Ex. C-1 at 7-9, ¶ 5(b)(1).

5. No Corrective Action as a Mitigating Factor

Felts Field argued that the statement of David Klaue on behalf of Felts Field (Ex. C-4) in response to the Letter of Investigation proved that Felts Field took corrective action to prevent future violations. (June 20, 2017 Tr. 163:3-10; Ex. C-4.) Mr. Klaue stated:

> [W]e are currently modifying our program by adding CoDesignated Employer Representatives to insure that this problem does not reoccur. The two employee[s] sharing this responsibility will be located at the airport facility and be responsible for compliance with 14 CFR Part 120 and 49 CFR Part 40.
>
> Both the Designated Employer Representatives have a long successful career in performing aviation administrative duties. They are presently preparing to assume these responsibilities in the near future.

(Ex. C-4.)

The FAA Administrator "has held that 'swift, comprehensive, and positive corrective action may warrant a reduction in an otherwise reasonable civil penalty.'" *Pinnacle Airlines, Inc.*, FAA Order No. 2012-2, at 15 (May 22, 2012) (quoting *Mole-Master Services Corp.*, FAA Order No. 2010-11, at 11 (Nov. 22, 2011), petition for review voluntarily dismissed, *Pinnacle Airlines, Inc. v. FAA*, Docket No. 12-3876 (6th Cir. Mar. 1, 2013); Ex. C-1 at 7-8 to 7-9, ¶ 8(m). "Corrective action is an affirmative defense, which the respondent bears the burden of proving." *Airo Indus. Co.*, FAA Order No. 2018-2, at 9 (citing *Seven's Paint and Wallpaper*, FAA Order No. 2001-6, at 4-5.

In this case, the statement of Mr. Klaue is insufficient to prove by a preponderance of the evidence that Felts Field performed corrective action warranting a mitigating reduction in the civil penalty.[14] Mr. Klaue's statement describes activity that Felts Field was either in the process of doing or preparing to do at the time of the statement. (Ex. C-4 ("we are currently modifying our program"; the two new employees "will be located at the airport facility"; the employees

[14] The opinion testimony of Inspector Clinton regarding the insufficiency of Felts Field's corrective action was stricken. (June 20, 2017 Tr. 28:7-32:15.) The Court did not consider Inspector Clinton's testimony in reaching its conclusion.

"are presently preparing to assume these responsibilities in the near future.").) Felts Field offered no evidence that these actions were ever completed.

6. The Total Amount of Penalty for Each Type of Violation is the Appropriate Penalty

Having determined that the record does not support any aggravating or mitigating factors, and that the midrange amount of penalty for each violation is $3,000, the Sanction Guidance calls for "[a]dding separately the amounts of penalty determined for each of the four types of violation," including "All failures to include safety-sensitive employees in the random pool," FAA Order 2150.3B, at 7-15 ¶ 8(a)(4). In this case there are two (2) violations, each with a midrange penalty of $3,000, falling in this type of violation. Adding the $3,000 penalty for each violation results in a civil penalty of $6,000 for the type of violation.

F. Assessment of Civil Penalty – $6,000

Based on the foregoing, this Court assesses a total civil penalty of $6,000. This total civil penalty has been reached based on the evidence adduced in the record, and after utilizing the FAA Sanction Guidance as helpful guidance in examining where a case lies along a spectrum of gravity and the unique facts and circumstances in this case. Based on the totality of the circumstances, a total penalty of $6,000 for the two proven violations is appropriate.

IV. CONCLUSION

Pursuant to 14 C.F.R. § 13.232(d), this Initial Decision shall be considered a final order assessing civil penalty unless either party files a notice of appeal within 10 days of service of this Initial Decision pursuant to 14 C.F.R. § 13.233.

Judge J.E. Sullivan
U.S. Administrative Law Judge

Attachment: Service List

ATTACHMENT

FAA OFFICE OF ADJUDICATION
Service List -- FAA Order No. 2020-6
In the Matter of Felts Field Aviation
FAA-2015-3307

HAND DELIVERY

Chris Stevenson, Esq. Federal Aviation Administration Office of the Chief Counsel Enforcement Division 800 Independence Ave., SW, Rm 913D Washington, DC 20591 Tel: (202) 267-5106	Complainant's Counsel	1 copy
Mark J. Conlin, Esq. Ben Wyborney, Esq. Conlin, Maloney & Miller 421 W. Riverside Ave., Ste 911 Spokane, WA 99201 Tel: (509) 624-3020	Respondent's Counsel	1 copy

Inter-Office Mail and via Email

Office of Hearings, M-20 Department of Transportation	8 copies

Hand-Carry—Internal AGC-70

- Case File — Original

FDMS – Enter in MTIS and send to FDMS through MTIS email

Others—Internal FAA Mail

Office of the Administrator, AOA-1 Attn: Sharon Harrison	1 copy

Others- DOT

Send pdf copy to Joe.Solomey@dot.gov via email.

Maisha will Send or Notify via e-mail to:

- E-mail PDF to Enforcement – Cynthia Dominik, Sharon Long, and Agnes Rodriguez
- E-mail PDF to publishers
    1. Deboarah.Patterson@thomsonreuters.com
    2. Sherry.Robinson@lexisnexis.com
- Email pdf to Kathy Yodice (Kathy.Yodice@aopa.org).
- Send paper copy directly to assigned ALJ *if case is remanded*.