UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: AIRO INDUSTRIES COMPANY

FAA Order No. 2018-2

FDMS No. FAA-2017-0083

Served: December 14, 2018

DECISION AND ORDER

Complainant, the Federal Aviation Administration ("FAA" or "Agency"), has appealed the Initial Decision of Administrative Law Judge ("ALJ") Douglas M. Rawald. The ALJ found that Respondent Airo Industries Company ("Airo"), an aviation repair station, failed to conduct random drug and alcohol tests of its safety-sensitive employees in 2015, thereby violating 14 C.F.R. §§ 120.35(a),[1] 120.109(b)(6),[2] and 120.217(c)(6).[3] Complainant had sought a civil penalty of $9,075, but the ALJ assessed a $2,100 civil penalty against Airo.[4] For the reasons stated, the appeal is granted in part and denied in part, and a $3,850 civil penalty is assessed.

---

[1] 14 C.F.R. § 120.35 is entitled "*Testing for prohibited drugs.*" 14 C.F.R. § 120.35(a) provides: "(a) Each certificate holder … shall test each of its employees who perform a function listed in subpart E of this part in accordance with that subpart."

[2] 14 C.F.R. § 120.109(b)(6) provides: "(b) *Random drug testing.* … (6) As an employer, you must select and test a percentage of employees at least equal to the minimum annual percentage rate each year."

[3] 14 C.F.R. § 120.217(c)(6) provides: "(c) *Random alcohol testing.* … (6) As an employer, you must select and test a percentage of employees at least equal to the minimum annual percentage rate each year."

[4] Initial Decision at 11-13.

I. Standard of Proof and Burden of Proof

A. Standard of Proof

The Rules of Practice provide, regarding the standard of proof, as follows:

> The [ALJ] shall issue an initial decision or shall 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. In order to prevail, the party with the burden of proof shall prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence.

14 C.F.R. § 13.223.

B. Burden of Proof

The Rules of Practice provide that the burden of proof generally is on the Complainant. 14 C.F.R. § 13.224(a) & (c). For example, the complainant has the burden to prove the appropriateness of a civil penalty. *Schuman Aviation Company*, FAA Order No. 2016-2 at 2 (Aug. 24, 2016). The respondent, however, must prove any affirmative defenses, such as the taking of corrective action. *Seven's Paint and Wallpaper*, FAA Order No. 2001-6 at 4-5 (May 16, 2001).

The Rules of Practice further provide that:

> In any appeal from an ALJ's decision, the FAA decisionmaker considers only the following issues:
>
> 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 ALJ committed any prejudicial errors that support the appeal.

14 C.F.R. § 13.233(b).

II. Facts and Conclusions of the ALJ

Airo is a repair station that refurbishes aircraft interiors for commercial operators. Complaint II.1; Answer II.1; Tr. 75; Ex. C-1. Its operations specifications provide that Airo elected to implement the Anti-Drug and Alcohol Misuse Prevention Program in accordance with the FAA and DOT drug and alcohol testing regulations. Tr. 45; Ex. C-1. Under the requirements for random drug and alcohol testing, Airo is required to select and test a percentage of its employees performing safety-sensitive functions[5] at least equal to the established minimum annual percentage rate each year. 14 C.F.R. §§ 120.109(b) and 120.217(c).

Airo hired Norton Medical Industries ("Norton") to serve as its third-party administrator or service agent,[6] to assist it with its drug and alcohol testing program. Ex. R-1; Tr. 16. To comply with the regulations regarding random drug and alcohol testing, a third-party administrator may select employees randomly from either: (1) a pool consisting of the employer's own safety-sensitive employees, *i.e.*, a stand-alone pool; or (2) a pool of safety-sensitive employees from multiple employers, *i.e.*, a consortium pool. 14 C.F.R. §§ 120.109(b)(6)(ii) and 120.217(c)(6)(ii). Norton originally placed Airo's employees in a consortium pool for random testing but in 2005, switched Airo's employees to a stand-alone pool. At that time, Norton put all of its clients with four or more employees in a stand-alone pool and all clients with three or fewer employees in a consortium pool. Tr. 20, 34-36, Ex. C-2, Ex. C-3 at 1, Ex. R-1. Airo's witnesses testified that Airo was not notified that it had been switched to a stand-alone pool and it was unaware in 2015 that its employees were not in a consortium pool. Tr. 27, 53, 77, 86-87, 94, 109-111; *see* Tr. 36.

[5] 14 C.F.R. §§ 120.105 and 120.215.

[6] A third-party administrator is a "service agent that provides or coordinates the provision of a variety of drug and alcohol services to employers." 49 C.F.R. § 40.3.

It was Norton's practice to mail Airo a notice each time Norton selected one of Airo's safety-sensitive employees for random drug or alcohol testing. Tr. 81-83, 99-100. When Airo received a notice, it would send the selected employee(s) for testing. Tr. 76-77.

Airo's CEO testified at the hearing that Airo did not receive any written selection notices from Norton by mail in 2015. Tr. 77, 81-83. He explained that Airo assumed, when it did not receive any selection notices, that no one had been selected for random testing. Tr. 83. As a result, Airo did not send any employees for testing. Ex. C-3. Notwithstanding Airo's assumption, Norton had randomly selected Airo employees for drug testing on four dates in 2015 and for alcohol testing on two dates in 2015. In total, Norton selected six Airo employees for random testing. Ex. C-3; Initial Decision at 4, n. 21.

On August 22, 2016, FAA Inspector Kristin Miller inspected Airo's drug and alcohol testing program. Tr. 43, 44, 46. She examined records that Airo provided to her, and then she accessed additional records related to Airo that were available on Norton's website. Tr. 46-47, 103-105. The Inspector concluded based upon her investigation that Airo had not performed random drug or alcohol testing in 2015. Tr. 23, 49, 53; Ex. C-2, Ex. C-6.

Norton's clients could log on to their on-line accounts and review their individual dashboards, which included lists of employees selected for random testing, test results, and a report card showing the customer if it was meeting the requirements of its drug and alcohol testing program. Tr. 17-18, 22-23, 47. Airo's CEO and quality assurance manager testified that before the Inspector's visit in 2016, they did not know about the dashboard or that they could use the dashboard to find out whether any of Airo's employees had been selected for random testing. Tr. 84-85, 103-104. After the inspection, Airo asked Norton to notify Airo by e-mail each time Norton selected a safety-sensitive employee for random drug or alcohol testing to prevent future lapses. Tr. 102, 109.

Inspector Miller testified at the hearing that the minimum random drug and alcohol testing percentage rates for 2015, as published in the *Federal Register*, were 25 percent of the pool for drug testing, and 10 percent for alcohol testing. Tr. 52, Ex. C-5, 79 Fed. Reg. 70267-

02 (Nov. 25, 2014). As a result, the regulations required Airo, which had an average of 8 safety-sensitive employees in 2015, to conduct at least two random drug tests and one random alcohol test in 2015. Complaint II.7-8; Answer II.7-8.

The ALJ concluded that Airo's witnesses were generally credible, and that the Norton employee who testified was not credible. Initial Decision at 4-6. The ALJ found that "[i]f the Respondent's employees had been in a consortium pool, it is conceivable that even if none of the Respondent's safety-sensitive employees were tested for drugs or alcohol in 2015, the group as a whole could have met the minimum annual test rates." Initial Decision at 7. The ALJ concluded that as a result of its mistaken belief that it was in a consortium pool, Airo was "understandably not concerned" when it did not receive any random test selection notices in 2015. Initial Decision at 12.

The Agency attorney explained in closing argument that Complainant sought a civil penalty of $9,075, based upon sanction guidance pertaining to violations involving a failure to conduct random drug and/or alcohol testing. (Tr. 124-128.) The ALJ, however, assessed a $2,100 sanction, writing: "The sanction guidance tables in Appendix B of FAA Order No. 2150.3B recommend a civil penalty in the minimum to moderate range where, as in the case at hand, a party fails to 'meet the minimum annual percentage rate for random drug and/or alcohol testing.'" Initial Decision at 11. The ALJ decided to impose a civil penalty at the lower end of the minimum sanction range because he determined, (1) Airo's violations were inadvertent and (2) Airo took swift and comprehensive corrective action by arranging with Norton to ensure it received all future notifications. Initial Decision at 12-13.

Complainant filed a Notice of Appeal and later perfected its Appeal by filing an Appeal Brief. Airo did not file a Reply Brief.

III. Issue on Appeal and Discussion

On appeal, Complainant raises several grounds in support of its argument that the ALJ's assessment of a $2,100 civil penalty is contrary to agency sanction guidance and precedent. Complainant's Appeal Brief at 6. Complainant argues that it met its burden of showing the appropriateness of the proposed $9,075 civil penalty. *Id.* at 7.

The Agency's sanction guidance applicable to this case is contained in FAA Order No. 2150.3B, entitled "FAA Enforcement and Compliance Program" (Oct. 1, 2007). The ALJs who preside over FAA civil penalty cases are not expressly required by the provisions of the Order to follow that guidance. However, when the Administrator reviews a sanction determination by an ALJ on appeal, the Administrator may reverse the ALJ's decision if it does not comply with Agency sanction policy as set forth in the Order. *Schuman Aviation Co.*, FAA Order No. 2016-2 at 9 (Aug. 24, 2016) (quoting *Northwest Airlines, Inc.*, FAA Order No. 90-37 at 8-10 (Nov. 7, 1990). Indeed, if an ALJ assesses a civil penalty that is not consistent with the sanction guidance, the Administrator has "both the authority and duty to impose the agency's policy on appeal." *Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 at 20 (Feb. 2, 2000).

The Sanction Guidance Table included in the Order reflects the FAA's assessment of the nature, circumstances, extent and gravity of each general type of violation as well as an entities' prior violation history. *Schultz*, FAA Order 89-5 at 12 (Nov. 13, 1989). The Complainant may meet its burden of proof by among other things introducing the Sanction Guidance Table and the testimony of an FAA inspector. *Schuman Aviation Co.*, FAA Order No. 2016-2 at 2. In this case, Complainant introduced the relevant portion of the Sanction Guidance Table and the testimony of Inspector Miller who explained that random testing deters the use or abuse of drugs or alcohol in the workplace. Tr. 61. Without that deterrent, she stated, employees could use or abuse drugs or alcohol without detection, threatening aviation safety. *Id.*

The Sanction Guidance provides sanction ranges for different types of violations. The Maximum, Moderate, and Minimum civil penalty ranges, for small businesses, such as Airo, under that Order are as follows:

Maximum	$7,150-$11,000
Moderate	$3,850-$7,149
Minimum	$935-$3,849

Ex. C-8 at 23 (FAA Order No. 2150.3B, Appx. B, B-5).

The Sanction Guidance Table provides that a penalty in the Minimum to Moderate range [$935 - $7,149] should be imposed when there has been a "failure to meet the minimum annual percentage rate for random drug and/or alcohol testing." Ex. C-8 at 24 (FAA Order No. 2150.3B, Appx. B, Fig. B-5-d.(2)). The Table also provides, however, that a Maximum range civil penalty [$7,150-$11,000] should be imposed when there has been a "failure to conduct random drug and/or alcohol testing." Ex. C-8 at 24 (FAA Order No. 2150.3B, Appx. B; Fig. B-5.d.(1).[7]

[7] Complainant argues that the maximum sanction range applies when the employer has not conducted any random testing. Brief at 9. The factual record does not support the Complainant's argument given that Airo sent employees for drug and alcohol testing for many years. Tr. 16, 76, 41-42, 92-94. Additionally, the applicable sanction guidance table in FAA Order No. 2150.3B, Appx. B, Fig. B-5-d(1) differentiates between complete failure to conduct random testing versus failing to meet an annual requirement:

Fig. B-5-d. Random drug and alcohol testing	**Civil Penalty**
(1) Failure to conduct random drug and/or alcohol testing	Maximum
(2) Failure to meet the minimum annual percentage rate for random drug and/or alcohol testing	Minimum to Moderate

Nothing in the first description includes a time parameter such as "annual" or "yearly," as the Complainant implicitly argues. Indeed, only the Order's latest revision—inapplicable to the present appeal--includes the phrase "during the calendar year." FAA Order No. 2150.3C, at 9-31, Fig. 9-9-1. A penalty within the Minimum to Moderate ranges, therefore, is appropriate under the Order in effect in 2015.

The regulations that Airo violated require that an employer select and test a percentage of employees at least equal to the minimum annual percentage rate each year. 14 C.F.R. §§ 120.109(b)(6) and 120.217(c)(6). It is undisputed that none of Airo's employees underwent random drug or alcohol testing in 2015, even though, to meet the published minimum percentage rate, at least two of its employees should have undergone random drug testing and at least one should have undergone random alcohol testing. The ALJ's reliance upon the guidance calling for a minimum to moderate range civil penalty when Airo failed to meet the minimum annual percentage rate for random drug and/or alcohol testing was reasonable, is supported by the preponderance of the evidence, and is consistent with the applicable guidance. A remaining issue, however, concerns the ALJ's rationale for imposing a penalty lower in the minimum range.

The ALJ mitigated the sanction because Airo had intended to comply with the FAA's testing program and because Airo's violations were inadvertent. Based upon these factors, the ALJ determined that a minimum range civil penalty would be appropriate. Initial Decision at 11-12. The ALJ found that the violations resulted from Airo's "inadvertent mistake," stemming from its incorrect belief that it was still in consortium pool for random drug and alcohol testing.[8] The ALJ found that due to this mistaken belief, it was understandable that Airo did not suspect that anything was amiss when it did not receive any random selection notifications from Norton in 2015. Initial Decision at 11-12.

Notwithstanding the ALJ's conclusions, the issue of intent to comply already is taken into account in the sanction guidance table. The sanction guidance "generally reflects a presumption that the alleged violator wants to comply with the law." Ex. C-8 at 14 (FAA Order No. 2150.3B at 7-9, ¶ 7-5b.(1)). Likewise, the recommended sanction ranges for various types of violations assume that violations are inadvertent. *Id. Liberty Foundation,*

---

[8] According to the ALJ, this mistaken belief was entirely reasonable because Norton failed to inform Airo that it had been switched from the consortium pool. Initial Decision at 3. The record showed, however that Airo had been removed from the consortium pool some 10 years earlier, in 2005. Ex. C-2.

Inc., FAA Order No. 2017-4 at 20 (Dec. 26, 2017.) Thus, inadvertence does not justify the ALJ's selection of a civil penalty at the bottom of the minimum range. The Regulations squarely place on an employer the responsibility for the actions of its service agents. See 14 C.F.R. § 120.103(c) (providing that employers are responsible for the actions of their service agents, and §§ 120.109(b)(6)(ii) and 120.217(c)(6)(ii) (providing that an employer must ensure that its service agent is conducting random testing with at least the appropriate percentage of employees.)

The ALJ also found that Airo took corrective action that warranted a lower civil penalty within the minimum range. Corrective action is an affirmative defense, which the respondent bears the burden of proving. *Seven's Paint and Wallpaper*, FAA Order No. 2001-6 at 4-5 (May 16, 2001). The Administrator has held that "swift, comprehensive, and positive corrective action may warrant a reduction in an otherwise reasonable civil penalty." *Mole-Master Services Corp.*, FAA Order No. 2010-11 (June 16, 2010), citing *Whitley*, FAA Order No. 2009-4 at 10 (Jan. 14, 2009). The ALJ stated that Airo took swift and comprehensive corrective action by arranging with Norton to ensure it received future test selection notices by e-mail. However, merely arranging to receive notices by e-mail, rather than by regular mail or on-line, does not constitute comprehensive corrective action and thus does not warrant a reduction in an otherwise appropriate civil penalty. *Pinnacle Airlines, Inc.*, FAA Order No. 2012-2 at 15 (May 22, 2012). Rather, in the unique circumstances of this case, the assessment of a $3,850 civil penalty, i.e., at the bottom of the Moderate sanction range is appropriate.[9]

[9] The FAA is correct that previous cases have held that I need not remand this case to the ALJ to redetermine the sanction amount. FAA Appeal Brief at 15; *Warbelow's Air Ventures*, FAA Order No. 2000-3 at 20 (Feb. 2, 2000); *Esau*, FAA Order No. 1991-28 at 7 n.7 (Sept. 4, 1991). I have the authority to impose the agency's sanction on appeal and it is more efficient to do so. *Id.*

IV. Conclusion

Based on the foregoing, Complainant's appeal is granted in part and denied in part. The ALJ's civil penalty of $2,100 is reversed, and Airo is assessed a civil penalty of $3,850.[10]

DANIEL K. ELWELL
ACTING ADMINISTRATOR
Federal Aviation Administration

[10] 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 (2018). *See* 71 Fed. Reg. 70460 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in FAA civil penalty cases).

SERVED: June 14, 2018

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

In The Matter Of:	)	
	)	Docket No. FAA-2017-0083
Airo Industries Company	)	
	)	Case No. 2016WP910232
Respondent	)	

INITIAL DECISION

1. Pertinent Procedural History

On November 18, 2016, the Complainant served the Respondent a Notice of Proposed Civil Penalty in the amount of $9,075. On February 2, 2017, the Complainant served the Respondent a Final Notice of Proposed Civil Penalty for the same amount.

On February 10, 2017, the *pro se* Respondent filed a Request for Hearing, which the Complainant received on February 21, 2017. On February 24, 2017, the Complainant timely filed its complaint.

After the *pro se* Respondent failed to file a timely answer, the undersigned judge issued an Order to Show Cause and Provide Answer ("Show Cause Order") on April 10, 2017. The *pro se* Respondent submitted its response to the Show Cause Order, accompanied by its "Answer to Complaint," on April 18, 2017.

On June 14, 2017, the Complainant filed a Motion to Motion to Deem Allegations Admitted and Motion for Decision,[1] to which the *pro se* Respondent responded on July 11, 2017. The undersigned judge denied the motion on July 17, 2017.

On February 5, 2018, the undersigned judge provided notice that a hearing would be held in Los Angeles, California, beginning on May 15, 2018.

On February 13, 2018, the Complainant filed a Motion for Decision in which it argued that there were no genuine issues of material fact in dispute and that the case should be decided in its favor. The *pro se* Respondent filed its opposition on February 19, 2018. The undersigned judge denied this motion on April 13, 2018.

---

[1] The service date of "June 14, 20176," appears to be a typographical error. *See* Mot. Decision at 12.

The undersigned judge conducted a hearing on May 15, 2018, in Los Angeles, California. Allison Baxter appeared on behalf of the Complainant; the Respondent appeared without legal representation.

Based upon the evidence presented at the hearing and the applicable law, the undersigned judge has come to the following decision.

2. Summary of Complainant's Allegations

The Complainant alleges the Respondent, a certificated repair station, failed to conduct the required minimum number of drug or alcohol tests of its safety-sensitive employees during calendar year 2015, thereby violating 14 C.F.R. §§ 120.35(a), 120.109(b)(6), and 120.217(c)(6).[2]

For these alleged violations, the Complainant seeks a civil penalty of $9,075.[3]

3. Standard of Proof

The pertinent regulations at 14 C.F.R. § 13.224(a) and (c) place the burden of proof on the agency, except in the case of an affirmative defense, at which time the burden shifts to the party asserting the affirmative defense. In accordance with 14 C.F.R. § 13.223, the burden of proof in a civil penalty action is a "preponderance of reliable, probative, and substantial evidence." Because circumstantial evidence can be reliable, probative, and substantial,[4] a party may use circumstantial evidence to sustain its burden of proof.[5]

4. Factual Findings

After considering all the testimony and evidence submitted by the parties, the undersigned judge has come to the following factual findings. The Respondent, the holder of repair station certificate No. QIRR250L, performs safety-sensitive functions for Part 121 and Part 135 certificate holders and for Part 91 operators conducting operations under section 91.147.[6] During the relevant time period, the Respondent held appropriate operations specifications

---

[2] *See* Complaint at 1-3.
[3] *See id* at 3.
[4] *See In re America West Airlines*, FAA Order No. 96-3 at 31 (Decision and Order, Feb. 13, 1996) (referring to certain circumstantial evidence as "strong").
[5] *See In re Continental Airlines, Inc.*, FAA Order No. 90-12 at 20 (Decision and Order, Apr. 25, 1990). *See also In re Florida Propeller & Accessories, Inc.*, FAA Order No. 97-32 at 7 (Decision and Order, Oct. 8, 1997) (noting that the use of circumstantial evidence in cases involving allegations of improper repair is not unusual, given the time it takes to discover such violations.).
[6] *See* Answer at 1 and Answer to Requests for Admission to Interrogatories at 4.

certifying that it would comply with the requirements of 14 C.F.R. Part 120 and 49 C.F.R. Part 40 by conducting drug and alcohol testing.[7]

Since the 1990s, the Respondent has employed the services of Norton Medical Industries ("Norton") as a third-party administrator for the Respondent's drug and alcohol testing.[8] Norton initially placed the Respondent's safety-sensitive employees in a consortium pool, where the random testing pool included safety-sensitive employees from multiple companies.[9] In 2005, Norton switched the Respondent's employees to a stand-alone pool, where the random testing pool included only employees of the Respondent.[10] Norton never notified the Respondent of this change.[11]

From the date they were first retained through 2014, Norton mailed the Respondent a notice each time Norton selected one of the Respondent's safety-sensitive employees for random drug or alcohol testing.[12] Upon receiving this notification, the Respondent sent the selected safety-sensitive employee for the appropriate testing.[13] During those years, the Respondent never failed to send a selected employee for drug or alcohol testing.[14]

In 2015, however, the Respondent received no letters by mail from Norton indicating that any of its safety-sensitive employees were selected for random drug or alcohol testing.[15] The Respondent had an average of eight safety-sensitive employees during 2015.[16] Having received no notices of selection, the Respondent did not send any of its safety-sensitive employees for random drug or alcohol testing in 2015.[17] The Respondent sent two new employees for pre-employment drug testing, however, in 2015.[18]

---

[7] *See* Ex. C-1, Answer at 2, and Answer to Requests for Admission to Interrogatories at 1.
[8] *See* Ex. R-1, Answer at 2, and Answer to Requests for Admission to Interrogatories at 1.
[9] *See* Exs. C-2, C-3 at 1, and R-1 and Transcript at 34 and 85.
[10] *See* Ex. C-2.
[11] *See* Transcript at 77, 87-88, 94-95, and 109-111. *See also* Transcript at 36 (when asked if he notified Norton's customers of the policy change that switched them from a consortium pool to a stand-alone pool, Dr. Zablen replied: "I may not have.").
[12] *See* Transcript at 76, 81-82, 93, and 99-100.
[13] *See* Transcript at 76 and 92-93.
[14] *See* Transcript at 16, 41-42, and 94.
[15] *See* Transcript at 77 and 82. *See also* Transcript at 24-26 (where Dr. Zablen admitted that the notification letters contained in Ex. C-3 at 3-26 were not actual copies of the letters supposedly mailed to the Respondent, but instead were printed off from the Respondent's account dashboard on May 1, 2018.). *See also* Transcript at 67 (when the undersigned judge asked Inspector Miller if she asked the Respondent if it received notification letters from Norton in calendar year 2015, Inspector Miller replied that the Respondent had "no pieces of paper [from Norton] to show me.").
[16] *See* Answer at 3 and Answer to Requests for Admission and Interrogatories at 2 and 6.
[17] *See* Exs. C-2, C-3 at 2, C-6, and C-7 and Transcript at 23-26, 48-49, 57-58, 67, 77, 82, and 92-93.
[18] *See* Exs. C-3 at 28 and C-6 and Transcript at 90-92.

On August 22, 2016, FAA Inspector Kristin Miller visited the Respondent's office to inspect their drug and alcohol testing program records.[19] During the inspection, Inspector Miller and her assistant helped Sam Camarillo, the Respondent's employee responsible for the drug and alcohol testing program, access Norton's web-based platform.[20] Upon accessing the site, the Respondent became aware for the first time that, according to the database, Norton had selected six[21] of the Respondent's employees for random testing in 2015.[22] Realizing there was a breakdown in communication with Norton, the Respondent developed a plan with Norton wherein Norton would notify the Respondent via email each time a safety-sensitive employee was selected for random drug or alcohol testing.[23] Following this corrective action, the Respondent has ensured each employee selected by Norton reports for the appropriate testing.[24]

5. Significant Credibility Determinations

In finding the above facts, the undersigned judge made the following significant credibility determinations.

a. *Doctor Marshall Zablen's testimony was generally not credible.*

As background, Dr. Zablen testified that he has been employed by Norton for about 20 years, serving as its medical review officer, medical director, and custodian of records.[25] In addition to reviewing test results, Dr. Zablen is responsible for ensuring "everything is done properly" for its clients.[26] He is also the spouse of Norton's owner.[27] Despite his years of employment at Norton, Dr. Zablen's answers often lacked specificity,[28] and at one point he sought help answering a question from a spectator seated in the gallery of the hearing room.[29] At other times, Dr. Zablen

---

[19] *See* Transcript at 44 and 103.
[20] *See* Transcript at 46-48, 84-85, and 103-106.
[21] The records show that on nine separate occasions in 2015, Norton selected one of the Respondent's safety-sensitive employees for random drug or alcohol testing. However, some of the Respondent's employees were selected on more than one occasion, thus six different employees were selected for random testing in 2015. *See* Ex. C-3 at 2, 3, 4, 15, 21-22, and 25-26.
[22] *See* Transcript at 84-85 and 94-95.
[23] *See* Transcript at 102 and 109.
[24] *See* Transcript at 41-42 and 94.
[25] *See* Transcript at 15-16.
[26] *See* Transcript at 16.
[27] *See* Transcript at 39.
[28] *See* Transcript at 20-21 (when the undersigned judge asked Dr. Zablen if it has always been Norton's policy to place customers with four or more employees in a consortium pool, Dr. Zablen replied: "It's -- yeah. I think -- yeah."). *See also* Transcript at 36 (while discussing the implementation of a policy change at Norton, Dr. Zablen stated: "I think this change happened in 2007.").
[29] *See* Transcript at 36 (while discussing the timeframe when Norton implemented a policy change, Dr. Zablen stated his answer and then shouted towards the back of the hearing room, "Am I correct, Paula?").

could not provide answers to specific questions related to Norton's practices.[30] On at least one occasion, Dr. Zablen's testimony was directly contradicted by the record.[31] Given Dr. Zablen's inability to provide independent, specific, and consistent testimony, the undersigned judge finds his testimony to be generally not credible.

b. *Bahram Salem's testimony was generally credible.*

Mr. Salem, Respondent's CEO, founded the company 25 years ago.[32] As the CEO, Mr. Salem oversees all of the Respondent's activities, and ran the company's drug and alcohol testing program until 2012.[33] While Mr. Salem understandably has an interest in the outcome of this proceeding, the undersigned judge found his testimony generally credible. Mr. Salem did not contradict himself during the hearing, and his testimony was consistent with the information provided in the Respondent's Answer, as well as its Answer to Requests for Admission to Interrogatories. Further, Mr. Salem's testimony was consistent with the records submitted in this case, as well as the testimony of Mr. Sam Camarillo, and was corroborated at times by the Complainant's witnesses. The Complainant offered no persuasive reason to question Mr. Salem's credibility and did not recall any of its witnesses to rebut any of Mr. Salem's testimony. Lastly, the undersigned judge recognizes that Mr. Salem did not contest the Complainant's assertion that the Respondent failed to randomly test any of its safety-sensitive employees for drugs or alcohol in 2015. This admission furthers supports the credibility of Mr. Salem's testimony.

c. *Sam Camarillo's testimony was generally credible.*

Mr. Camarillo has been employed by the Respondent since 1997, serving initially as a technician and then becoming the Quality Assurance Manager in 2012.[34] After assuming these duties, Mr. Camarillo became responsible for overseeing the Respondent's drug and alcohol

---

[30] *See* Transcript at 23-24 (while discussing the Respondent's report card, which is created by Norton and can be found on page two of Ex. C-3, Dr. Zablen could not answer the undersigned judge's question of what would be in the grey space next to the word "No" following the words "Alco Sel" and "Drug Sel."). *See also* Transcript at 36 (when asked, Dr. Zablen could not state with certainty whether Norton advised the Respondent that it had been switched to a stand-alone pool, responding: "I may not have.").

[31] *Compare* Transcript at 36 *with* Ex. C-2 (while Dr. Zablen testified that he thought Norton switched all of its customers with four or more safety-sensitive employees to stand-alone pools in 2007, an email from Julian P at Norton stated that the Respondent was "switched from a consortium to a stand alone pool in 2005.").

[32] *See* Transcript at 74-75.

[33] *See* Transcript at 95-96 and 99.

[34] *See* Transcript at 97-98.

testing program, a task previously handled by Mr. Salem.[35] Similar to Mr. Salem, Mr. Camarillo did not contradict himself during the hearing, and his testimony was consistent with the information provided in the Respondent's Answer, as well as its Answer to Requests for Admission to Interrogatories. Further, Mr. Camarillo's testimony was consistent with the records submitted in this case, as well as the testimony of Mr. Salem, and the Complainant offered no persuasive reason to question Mr. Camarillo's credibility and did not recall any of its witnesses to rebut any of Mr. Camarillo's testimony. Lastly, the undersigned judge recognizes that Mr. Camarillo admitted that the Respondent failed to randomly test any of its safety-sensitive employees for drugs or alcohol in 2015. This admission furthers supports the credibility of Mr. Camarillo's testimony.

6. Discussion of Alleged Violations

a. *In 2015, the Respondent failed to randomly test at least 25-percent of its safety-sensitive employees for drugs or 10-percent of its safety-sensitive employees for alcohol.*

Pursuant to 14 C.F.R. § 120.109(b)(6), which covers random drug testing, employers "must select and test a percentage of employees at least equal to the minimum annual percentage rate each year." Similarly, 14 C.F.R. § 120.217(c)(6), dealing with random alcohol testing, states that employers "must select and test a percentage of employees at least equal to the minimum annual percentage rate each year." The Respondent specifically certified that it would "comply with the requirements of 14 CFR Part 120 … for its Antidrug and Alcohol Misuse Prevention Program."[36] In 2015, the minimum annual testing rate for drugs and alcohol were 25-percent and 10-percent, respectively.[37] Because the Respondent had an average of eight safety-sensitive employees and was in a stand-alone pool in 2015, the Respondent was required to conduct two random drug tests[38] and one random alcohol test[39] among its safety-sensitive employees.

The regulations expressly allow the Respondent to use a service agent like Norton to conduct random drug and alcohol testing of its safety-sensitive employees.[40] The employer, however, is

[35] *See* Transcript 98-99.
[36] Ex. C-1 at 1.
[37] *See* 79 Fed. Reg. 70267 (stating that the "minimum random drug and alcohol testing percentage rates for the period January 1, 2015, through December 31, 2015, [would] remain at 25 percent of safety-sensitive employees for random drug testing and 10 percent of safety-sensitive employees for random alcohol testing.").
[38] Twenty-five percent of eight is two.
[39] Ten percent of eight is 0.8; rounding up, the minimum would be one employee.
[40] *See* 14 C.F.R. §§ 120.109(b)(6)(ii) and 120.217(c)(6)(ii) (stating that an employer "may use a service agent to perform random selections for" it.).

responsible for ensuring that any service agent used, such as Norton, "is testing at the appropriate percentage established for [their] industry"[41] and "must ensure that testing is conducted at least at the minimum annual percentage rate … ."[42] The regulations also permit the service agent to use either a stand-alone pool, where the random testing pool consists of participants from only one company, or a consortium pool, where the random testing pool consists of participants from more than one company.[43] Use of a service agent does not absolve an employer of responsibility for ensuring "compliance with all applicable requirements" of the Department of Transportation's drug and alcohol testing regulations.[44] Accordingly, despite its use of Norton as a third-party administrator, the Respondent was required to ensure it conducted the required minimum number of drug and alcohol tests of its safety-sensitive employees in 2015.

If the Respondent's employees had been in a consortium pool, it is conceivable that even if none of the Respondent's safety-sensitive employees were tested for drugs or alcohol in 2015, the group as a whole could have met the minimum annual test rates. That is not the case here because the Respondent's employees were in a stand-alone pool. As the employer, the Respondent was responsible for ensuring at least two of its safety-sensitive employees were randomly tested for drugs and one of its safety-sensitive employees was randomly tested for alcohol in 2015. In failing to subject any of its safety-sensitive employees to any random testing in 2015, the Respondent failed to satisfy its regulatory duty to ensure testing was conducted at the minimum annual test rates for drugs and alcohol in 2015.

b. *The Administrator has previously found that an inadvertent mistake does not absolve a Respondent of liability for regulatory violations.*

It is clear from the facts that the Respondent's failure to randomly test its safety-sensitive employees was due to an inadvertent mistake resulting from a breakdown in communication with Norton, the Respondent's third-party service agent. The Administrator, however, has consistently upheld findings of regulatory violations even when a Respondent raised the defense

---

[41] 14 C.F.R. §§ 120.109(b)(6)(ii) and 120.217(c)(6)(ii).
[42] 14 C.F.R. §§ 120.109(b)(6)(ii)(A) and (B) and 120.217(c)(6)(ii)(A) and (B).
[43] *See id.* (permitting an employer's safety-sensitive employees to "be part of a larger random testing pool of safety-sensitive employees.").
[44] *See* 40 C.F.R. § 40.15(c) (stating that "good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which [an employer's] alleged noncompliance with this part of a DOT agency drug and alcohol regulation may have resulted from the service agent's conduct."). *See also* 14 C.F.R. §§ 120.103(c) and 120.203(c) (stating that as an employer, the Respondent is "responsible for all actions of [its] officials, representatives, and service agents in carrying out" the Department of Transportations' drug and alcohol testing requirements.).

of inadvertent mistake.[45] The undersigned judge is mindful of the fact that the Field Administrator for the Federal Motor Carrier Safety Administration (FMCSA) has strictly enforced the regulatory requirement imposed upon employers to comply with all applicable Department of Transportation controlled substances and alcohol testing requirements, even when a service agent is used.[46] While FMCSA decisions are not binding upon the Administrator, there are strong policy reasons to follow this precedent and prohibit a regulated party from absolving itself of liability for failing to comply with the Department of Transportation's drug and alcohol testing regulations where the violation stemmed from a service agent's mistake. The Administrator has no statutory authority over such third-parties, so to allow such shifting of responsibility would resultantly undermine the Administrator's ability to promote the goal of aviation safety and security.[47]

Accordingly, Norton's failure to notify the Respondent of the selection of safety-sensitive employees for testing did not absolve the Respondent, as the employer, of liability for ensuring compliance with the minimum drug and alcohol testing percentages.

c. *The Respondent's ignorance of the law does not absolve it of liability for regulatory violations.*

The Respondent's assertion that it should not be subject to a penalty because it did not know of the minimum annual percentage rates for random drug and alcohol testing in 2015 does not provide a valid defense.[48] Notably, "ignorance of the law is no excuse,"[49] and the Administrator has upheld the general rule that "publication in the Federal Register is legally sufficient notice to

---

[45] *See In re Pinnacle Airlines, Inc.*, FAA Order No. 2012-2 (Decision and Order, May 22, 2012) (affirming the finding of a regulatory violation where the Respondent's failure to place a safety-sensitive employee in a random drug testing pool was due to an "inadvertent computer error."). *See also In re Offshore Air*, FAA Order No. 2001-4 (Decision and Order, May 16, 2001) (upholding the finding that the Respondent's reliance upon outdated information provided by the FAA did not absolve it from liability for failing to randomly drug test the regulatory required percentage of its employees.).

[46] *See In re Reyes*, FMCSA-2012-0189 (Decision on Petition for Administrative Review of Failed Safety Audit, July 11, 2012) (finding the Respondent's defense that he was never notified by his third-party administrator of being selected for random testing unavailing, noting that if an "employer violates a DOT drug and alcohol testing regulation because a service agent has not provided services as the regulation requires it is responsible for such noncompliance.").

[47] *See In re Wendt*, FAA Order No. 92-40 at 7 (Decision and Order, June 15, 1992) ("The FAA has no more important goal than aviation safety.").

[48] In particular, the Respondent argued that it should not be subject to a penalty because "the new Rules and Regulations [the minimum annual test rates for drugs and alcohol in calendar year 2015]" were not "communicated" to it by either the Federal Aviation Administration or Norton. *See* Answer at 2, 3, and 5.

[49] *In re M&R Helicopters, LLC*, FAA Order No. 2013-4 at 14 (Decision and Order, Sept. 5, 2013) (*citing Salazar v. Ramah Navajo Chapter*, 132 U.S. 2181, 2194 (2012)).

all interested or affected parties regardless of actual knowledge or hardship resulting from ignorance."[50] Accordingly, notice of the random drug and alcohol testing percentage rates of covered aviation employees in the Federal Register provided constructive notice to the Respondent of this information as of its November 25, 2014 publication date.[51]

d. *The Respondent committed regulatory violations when it failed to randomly test at least 25-percent of its safety-sensitive employees for drugs or 10-percent of its safety-sensitive employees for alcohol.*

In light of the discussion above, the undersigned judge finds by a preponderance of the reliable, probative, and substantial evidence that, while in a stand-alone pool in calendar year 2015, the Respondent failed to randomly test the minimum required number of safety-sensitive employees for drugs or alcohol, in violation of 14 C.F.R. §§ 120.109(b)(6) and 120.217(c)(6).

Further, pursuant to 14 C.F.R. § 120.35(a), "[e]ach certificate holder … shall test each of its employees who perform a function listed in subpart E of this part in accordance with that subpart." Subpart E of 14 C.F.R. Part 120 covers drug testing program requirements, which encompasses the types of drug tests employers "shall conduct" in section 120.109. By proving that the Respondent violated 14 C.F.R. § 120.109(b)(6), the Complainant established that the Respondent committed a residual violation of 14 C.F.R. § 120.35(a). The Complainant's counsel acknowledged at the hearing that every violation of 14 C.F.R. § 120.109(b)(6) is a "de facto violation" of 14 C.F.R. § 120.35(a) that requires no additional facts.[52]

The National Transportation Safety Board (NTSB) has long held that a "residual violation has no effect on sanction."[53] While NTSB holdings are not binding upon the Administrator, the undersigned judge may decide to follow persuasive NTSB precedent.[54] In addition to citing this NTSB finding,[55] the Administrator has held that a separate sanction is not justified for a residual violation, where the "residual violation is not based on any independent event."[56] Accordingly, although the Complainant proved that the Respondent committed a residual violation of

---

[50] *M&R Helicopters,* FAA Order No. 2013-4 at 14 *(citing Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008)).
[51] *See* 79 Fed. Reg. 70267.
[52] *See* Transcript at 122.
[53] *In re Richard,* NTSB Order No. EA-4223 at 5, n. 17 (Opinion and Order, July 21, 1994).
[54] *In re Richardson & Shimp*, FAA Order No. 92-49 at 9, n. 13 (Decision and Order, July 22, 1992).
[55] *In re Rushmore Helicopters, Inc.*, FAA Order No. 2012-8 at 12 (Decision and Order, Oct. 11, 2012).
[56] *In re Gojet Airlines, LLC*, FAA Order No. 2012-5 at 16 (Decision and Order, May 22, 2012). *See also In re Pacific International Skydiving Center, Ltd.*, FAA Order No. 2017-3 at 10 (Decision and Order, Dec. 26, 2017) (finding that "residual violations do not increase the sanction.").

14 C.F.R. § 120.35(a), this additional violation will not increase the assessed civil penalty.

7. Civil Penalty Amount

Because the undersigned judge has determined that the Respondent violated 14 C.F.R. §§ 120.35(a), 120.109(b)(6), and 120.217(c)(6), the remaining issue is determining the appropriate civil penalty to be assessed against the Respondent for these violations, if any.

The Complainant sought a total civil penalty of $9,075 for the alleged violations.[57] The burden of justifying the proposed civil penalty falls upon the Complainant.[58] In attempting to meet this burden, however, the Complainant provided minimal testimonial evidence about how the proposed civil penalty amount was assessed.[59] Additionally, the Complainant submitted into evidence excerpts of FAA Order No. 2150.3B, including Paragraph 4 of Chapter 7, which provides mitigating and aggravating factors to consider when assessing a civil penalty.[60]

An appropriate civil penalty must reflect the totality of the circumstances surrounding the violation,[61] while providing enough "bite" to serve as a deterrent to both the current violator and the industry as a whole in order to promote the goal of safety.[62] Paragraph 4 of Chapter 7 of FAA Order No. 2150.3B provides a non-exhaustive list of mitigating or aggravating factors and elements that may be considered:

> a. nature of the violation; b. whether the violation was inadvertent or not deliberate; c. certificate holder's level of experience; d. attitude of the violator; e. degree of hazard; f. action taken by employer or other authority; g. use of a certificate; h. violation history; i. decisional law; j. ability to absorb sanction; k. consistency of sanction; l. whether the violation was reported voluntarily; and m. corrective action.[63]

---

[57] *See* Complaint at 3.

[58] *See In re Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 7 (Decision and Order, Nov. 7, 1990) (finding the FAA bore the burden of justifying the amount of the civil penalty it sought.).

[59] Inspector Miller testified that the FAA adopted its drug and alcohol testing program to "enhance aviation safety," explaining that random testing serves as a deterrent to keep individuals from "abusing drugs or alcohol in the workplace." *See* Transcript at 60-61. While acknowledging that the inadvertent nature of a violation can constitute a mitigating factor, Inspector Miller stated that she found no mitigation in this case. *See id.* at 64. During closing arguments, the Complainant's counsel argued that the Respondent's failure to conduct random tests "increases the likelihood that there will be safety-sensitive work performed by employees who are using or misusing illegal drugs and alcohol." *See id.* at 126. The Complainant's counsel did not argue the existence of any aggravating factors, and explained the Complainant's view that the Respondent's compliance following Ms. Miller's inspection did not go "above and beyond" the regulatory requirements, to support mitigation. *See id.* at 128-131. Notably, the Complainant's counsel's closing argument does not constitute evidence.

[60] Ex. C-8.

[61] *See In re Ventura Air Services, Inc.*, FAA Order No. 2012-12 at 26 (Decision and Order, Nov. 1, 2012); *In re Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (Decision and Order, Nov. 6, 2008).

[62] *In re Toyota Motor Sales, USA, Inc.*, FAA Order No. 1994-28 at 11 (Order and Decision, Sept. 30, 1994); *In re Charter Airlines, Inc.*, FAA Order No. 1995-8 at 28 (Decision and Order, May 9, 1995).

[63] *See* Ex. C-8 at 9-14.

While the undersigned judge is not expressly required to follow the provisions of FAA Order No. 2150.3B,[64] it does provide guidance.[65] Further, the Administrator has stated that "similar criteria should be considered in assessing civil penalties in non-hazardous materials types of cases"[66] to the following statutorily required factors in considering a civil penalty involving hazardous materials violations:

> (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 to do business; and (3) other matters as justice may require.[67]

The undersigned judge considered all the pertinent factors to assess a civil penalty that will deter future violations by the Respondent and the industry as a whole. In considering the relevant factors, it is important to note that the Respondent did not provide evidence of financial hardship regarding its ability to absorb a sanction.

As previously explained, in calendar year 2015, the Respondent failed to randomly test the minimum required number of its safety-sensitive employees for drugs or alcohol, resulting in violations of 14 C.F.R. §§ 120.109(b)(6) and 120.217(c)(6), and a residual violation of 14 C.F.R. § 120.35(a). The sanction guidance tables in Appendix B of FAA Order No. 2150.3B recommend a civil penalty in the minimum to moderate range where, as in the case at hand, a party fails to "meet the minimum annual percentage rate for random drug and/or alcohol testing."[68]

Contrary to the Complainant's contention, there is mitigation to consider in this case. In 2015, the Respondent believed it was still in a consortium pool for its drug and alcohol testing program.[69] As noted earlier, if the Respondent was in a consortium pool, consisting of several

---

[64] *See Folsom's Air Service, Inc.*, FAA Order No. 2008-11 at 14 (finding that because administrative law judges are not agency personnel, they are not expressly required to follow the guidance provided in FAA Order No. 2150.3A.).
[65] *In re Air Carrier*, FAA Order No. 1996-19 at 7 (Decision and Order, June 4, 1996) (*citing Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 8).
[66] *In re Luxemburg*, FAA Order No. 1994-18 at 6 (Order and Decision, June 22, 1994) (*citing Northwest Airlines, Inc.*, FAA Order No. 1990-37 at 12 n. 9).
[67] 49 U.S.C. § 46301(e). *See also* 14 C.F.R. § 13.16(c).
[68] *See* Ex. C-8 at 24 (Fig. B-5-d(2)).
[69] The record indicated that the Respondent was initially enrolled in a consortium pool with Norton for its drug and alcohol testing program. *See* Exs. C-2, C-3 at 1, and R-1 and Transcript at 35. While the record shows that the Respondent was switched to a stand-alone pool in 2005, the Respondent was never notified of this change. *See* Transcript at 36, 77, 87-88, 94-95, and 109-111. Further, there was nothing on the testing selection letters Norton sent its customers that would have notified the Respondent that it was in a stand-alone pool. *See* Transcript at 26-27 (while discussing the notification letters printed from the dashboard for Respondent's online account (Ex. C-3 at 3-26), Mr. Zablen explained that the letters "FAA" located next to the block stating "Type" indicated "the [Respondent] was in a standalone pool at the time these selections were made." The undersigned judge finds no basis in the record for a customer to know the letters "FAA" documented enrollment in a stand-alone pool.).

companies, it is conceivable that even if none of the Respondent's safety-sensitive employees were randomly tested for drugs or alcohol in calendar year 2015, the group as a whole could have met the minimum test rates. Based upon this mistaken belief, the Respondent was understandably not concerned when it failed to receive any test selection notices from Norton in 2015.

Further, the Respondent's actions show their intent to adhere to the FAA's drug and alcohol testing program, thereby supporting this finding of inadvertence. There is no dispute that the Respondent was compliant prior to 2015, and has remained compliant since 2015. Additionally, although the Respondent failed to satisfy the regulatory minimum percentages for random drug and alcohol testing in 2015, it paid for the services of Norton as a third-party agent and in fact used those services to perform the regulatorily required pre-employment testing for new employees.[70] Given the Respondent's inadvertent mistake,[71] the undersigned judge finds a civil penalty in the minimum range appropriate.[72]

Additionally, when notified of the problem, the Respondent took swift and comprehensive corrective action to resolve the cause of the concern.[73] Once the Respondent learned of the problem from Inspector Miller, the Respondent worked with Norton to ensure it received all future notification letters regarding selection for random testing by email. Following these actions, the Respondent has remained compliant with the FAA's drug and alcohol testing program.

Accordingly, in light of all the circumstances, a civil penalty in the amount of $2,100 is

---

[70] *See* Exs. C-3 at 28-28 and C-6.

[71] *See in re Flight Unlimited, Inc.*, FAA Order No. 92-10 at 6-7 (Decision and Order, Feb. 6, 1992) (upholding the administrative law judge's determination that the inadvertent nature of the Respondent's violation constituted a mitigating factor.). *See also Offshore Air*, FAA Order No. 2001-4 (affirming a holding that while the Respondent's reliance upon outdated information provided by the FAA did not absolve it from liability for failing to randomly drug test the regulatory required percentage of its employees, it did constitute a "mitigating factor in determining the appropriate penalty.").

[72] The civil penalty ranges contained in Appendix B of FAA Order No. 2150.3B contain three different proposed ranges for minimum, moderate or maximum violations. The sanction range dealing with small business concerns, such as the Respondent, for violations covered under 49 U.S.C. § 46301(a)(5)(A) suggests a civil penalty range of $935-$3,849 for minimum violations. *See* Ex. C-8 at 23.

[73] *See in re Delta Air Lines, Inc.*, FAA Order No. 92-5 at 6 (Decision and Order, Jan. 15, 1992) (finding that the "[r]eduction of an otherwise reasonable civil penalty is appropriate when there is sufficient specific evidence of swift or comprehensive action."). *See also In re Detroit Metropolitan-Wayne County Airport*, FAA Order No. 97-23 at 5 (Decision and Order, June 5, 1997) (holding that, to justify reducing a civil penalty, corrective action must be not only be swift or comprehensive, but must also be "positive in nature, such as sending employees to special training, or instituting programs to ensure compliance with the safety regulations.") (*citing In re Toyota Motor Sales, USA, Inc.*, FAA Order No. 94-28 (Decision and Order, Sept. 30, 1994).

appropriate for the Respondent's violations of the FAA's regulations.

Therefore, pursuant to 14 C.F.R. § 13.205(a)(9), **IT IS HEREBY FOUND**:[74]

1. The Respondent failed to conduct the required minimum number of drug and alcohol tests of its safety-sensitive employees during calendar year 2015.
2. This failure constitutes a violation of 14 C.F.R. §§ 120.109(b)(6) and 120.217(c)(6), and a residual violation of 14 C.F.R. § 120.35(a).

AND ORDERED:

The Respondent shall pay a civil penalty in the amount of $2,100.[75]

DOUGLAS M. RAWALD
Administrative Law Judge

Attachments:

1. Service List
2. Appendix A: Complainant's Exhibits
3. Appendix B: Respondent's Exhibit

[74] Pursuant to 14 C.F.R. § 13.233(a), "A party may appeal the initial decision, and any decision not previously appealed pursuant to §13.219, by filing a notice of appeal with the FAA decisionmaker. A party must file the notice of appeal in the FAA Hearing Docket using the appropriate address listed in §13.210(a). A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party."

[75] 14.C.F.R. § 13.232(d), governing an order assessing a civil penalty states: "Unless appealed pursuant to §13.233 of this subpart, the initial decision issued by the administrative law judge shall be considered an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted."

Docket No. FAA-2017-0083
(Civil Penalty Action)

SERVICE LIST - BY U.S. MAIL

ORIGINAL & ONE COPY

Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591
Attention: Hearing Docket Clerk, AGC-430
Wilbur Wright Building—Suite 2W1000[76]

ONE COPY

Bahram Salem
Airo Industries Company, *Respondent*
429 Jessie Street
San Fernando, CA 91340
TEL: 818-838-1008
FAX: 818-838-1048
Email: airo@airoindustries.com

Allison Baxter, *Complainant's Counsel*
Enforcement Division, Western Team
Federal Aviation Administration
15000 Aviation Boulevard
Lawndale, CA 90261
TEL: 310-725-7111
FAX: 310-725-6816
Email: Allison.Baxter@faa.gov

The Honorable Douglas M. Rawald, *Administrative Law Judge*
Office of Hearings, M-20
U.S. Department of Transportation
1200 New Jersey Avenue, S.E. (E11-310)
Washington, DC 20590
TEL: 202-366-5121 Staff Assistant
FAX: 202-366-7536

[76] Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430.

Appendix A: Complainant's Exhibits

C-1 Operations Specifications

C-2 Email from Julian Petrov to Kristin Miller, dated August 26, 2016

C-3 Certified business records from Norton Medical Industries

C-4 [*Withdrawn*]

C-5 Notice of the Federal Aviation Administration's Notice of Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period of January 1, 2015, Through December 31, 2015 (79 Fed. Reg. 70267-68, Nov. 25, 2014).

C-6 Excerpt from the Respondent's U.S. Department of Transportation Drug and Alcohol Testing MIS Data Collection Form for calendar year 2015

C-7 Letter from Bahram Salem to Kristin Miller, dated September 13, 2016

C-8 Excerpts from FAA Order 2150.3B

C-9 [*Withdrawn*]

C-10 [*Withdrawn*]

C-11 [*Withdrawn*]

Appendix B: Respondent's Exhibit

R-1 Respondent's FAA Alcohol Misuse Prevention Program Certification Statement