UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: ENDLESS MOUNTAINS AIR, INC.

FAA Order No. 2017-1

FDMS No. FAA-2013-0848[1]

Served: March 3, 2017

DECISION AND ORDER

Complainant Federal Aviation Administration ("Complainant" or "FAA") and Respondent Endless Mountains Air, Inc. ("Respondent" or "EMA") have filed cross-appeals from the Initial Decision of Administrative Law Judge J.E. Sullivan ("ALJ").[2] EMA had admitted that its pilot, who had not completed recurrent knowledge and flight check testing, operated six flights in violation of 14 C.F.R. Part 135.[3] The ALJ determined that the FAA Inspector's alleged failure to answer the pilot's questions about the deadlines for obtaining recurrent testing constituted a mitigating factor, and, consequently, the ALJ imposed a civil penalty that was lower than that proposed by Complainant.[4] On cross-appeal, Complainant argues that the civil penalty should be increased from $16,200, the amount the ALJ assessed, to $46,200, the amount Complainant originally sought. For its part, EMA argues on cross-appeal that the $16,200 civil penalty should be further reduced due to its inability to pay.[5] For the reasons discussed below, I grant Complainant's cross-appeal in part, deny EMA's cross-appeal, and assess EMA a civil penalty of $ 26,400.

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[1] Generally, materials filed with the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at *http://www.regulations.gov*. 14 C.F.R. § 13.210(e)(1).

[2] The ALJ's Initial Decision is attached.

[3] 14 C.F.R. Part 135 regulations involve oversight of on-demand and air taxi operators. Tr. 29.

[4] Initial Decision at 8-9.

[5] Respondent's Appeal Brief at 1. *See also Rushmore Helicopters*, FAA Order No. 2012-8 at 14 (Oct. 11, 2012), citing *Folsom's Air Service*, FAA Order No. 2008-11 at 11 (Nov. 6, 2008) (the Administrator will consider a respondent's ability to pay in establishing a penalty).

I. Burden of Proof and Standard of Review

It is Complainant's burden to prove that the sanction is appropriate. *See, e.g.*, *National Power Corp.*, FAA Order No. 2016-3 at 2 (Sept. 30, 2016); *Schuman Aviation Company, Ltd.*, FAA Order No. 2016-2 at 2 (Aug. 24, 2016); *Seven's Paint & Wallpaper*, FAA Order No. 2001-6 at 4-5 (May 16, 2001). However, the respondent bears the burden to prove any affirmative defenses such as an inability to pay. *Id. See* p. 9 *infra*.

On appeal, the FAA decisionmaker considers whether: (1) each finding of fact is supported by a preponderance of the evidence, which must be reliable, probative, and substantial; (2) each conclusion of law is in accordance with applicable precedent and public policy; and (3) the ALJ committed any prejudicial errors.[6]

II. Factual Background

EMA is a charter air carrier[7] and operates under 14 C.F.R. Part 135.[8] The company employs one pilot, Mr. Randy Palmer, and owns one aircraft, a single-engine Cirrus SR20 with registration number N624CP.[9] The president and owner is Mr. William J. Dobitsch, Jr.[10]

Mr. Palmer, at the time of this case, had been a certificated pilot for 19 years.[11] He alleged that he was uncertain about the deadlines for completing his next required knowledge test and flight

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[6] 14 C.F.R. § 13.233(b).

[7] Tr. 72, 90, and 173.

[8] Tr. 29, 42, and 60.

[9] Tr. 33-35.

[10] Tr. 2, 7; 3/18/2014 Telecon. at 3; 10/27/2014 Telecon. at 5.

[11] Tr. 99.

check.[12] The knowledge test is a written or oral test required by 14 C.F.R. § 135.293(a). The check is a flight check required by 14 C.F.R. § 135.299(a). Mr. Palmer affirmatively sought confirmation of the applicable deadlines by calling EMA's former Principal Operations Inspector ("POI"), Inspector Robert Ference, on August 29, 2011.[13] Mr. Palmer stated that he did not call EMA's then current POI, Inspector Harry Soudas, because Inspector Soudas had given Mr. Palmer failing grades on three previous flight checks.[14]

Inspector Ference testified that he responded to Mr. Palmer by asking him to submit copies of his records (FAA Forms 8410-3) to compare with the files at the FAA Flight Standards District Office.[15] Inspector Ference further testified that he wanted to see Mr. Palmer's records because he did not want to give Mr. Palmer any misinformation, which he said could occur if he failed to review the records, or failed to discuss them with EMA's then current POI, Inspector Soudas.[16] In conflicting testimony, Mr. Palmer stated that Inspector Ference did not ask him to produce his records.[17] Instead, Mr. Palmer asserted that Inspector Ference merely told him to review his paperwork to determine the date by which he needed to complete recurrent testing to remain certificated under 14 C.F.R. Part 135.[18] The ALJ did not make a credibility determination on the conflicting testimony.

It is undisputed, however, that Mr. Palmer never produced the documentation in question to Inspector Ference.[19] Rather, according to Mr. Palmer, he reviewed the regulations and

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[12] Tr. 122.

[13] Tr. 121.

[14] Tr. 112, 117-118.

[15] Tr. 86, 89.

[16] Tr. 87-88.

[17] Tr. 104.

[18] *Id.*

[19] *Id.*

paperwork with Mr. Dobitsch, and together they concluded, erroneously, that Mr. Palmer would remain current on testing for 3 more months.[20] After meeting with the FAA Inspector, Mr. Dobitsch admitted that he and Mr. Palmer did, in fact, "make a mistake."[21] Mr. Palmer called Inspector Ference for guidance on August 29, 2011.[22] By then there were only 2 days remaining for Mr. Palmer to complete the recurrent testing by the August 31, 2011 deadline. 14 C.F.R. §§ 135.293(a) and 135.299(a).[23] FAA Inspector Soudas testified that based on his review of Forms 8410-3 dated July 7, 2010 and July 22, 2010, he determined that Mr. Palmer's knowledge test under 14 C.F.R. § 135.293(a) and flight check under 14 C.F.R. § 135.299(a) were due in July, 2011.[24] Under 14 C.F.R. § 135.301, there is a 1-month grace period. The grace period allowed Mr. Palmer until the last day of August, 2011 to complete his recurrent testing. 14 C.F.R. §§ 135.293(a) and 135.299(a).[25]

Mr. Palmer continued to operate flights for EMA past the August 31, 2011 expiration date. EMA admitted that from September 23, 2011 through October 9, 2011, Mr. Palmer operated six Part 135 flights despite Mr. Palmer not completing the required recurrent testing.[26] Accordingly, EMA violated two regulations: (1) EMA used Mr. Palmer as a pilot when he had not completed the 14 C.F.R. § 135.293(a) knowledge test; and (2) EMA used Mr. Palmer as a pilot when he had

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[20] Tr. 107, 121-122, and 124. Mr. Palmer and Mr. Dobitsch believed that the instrument proficiency test could substitute for the testing required under 14 C.F.R. §§ 135.293 and 135.299 (Tr. 107-108, 118, and 121), and therefore, that Mr. Palmer did not have to repeat those tests until the end of November, 2011. They based their belief on a misreading of 14 C.F.R. § 135.293(c), which provides that "[t]he instrument proficiency check required by Section 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check." However, 14 C.F.R. § 135.293(c) does not permit the instrument proficiency check to substitute for the 14 C.F.R. § 135.293(a) knowledge test or the 14 C.F.R. § 135.299(a) line flight check. Tr. 29-31; *see also* Tr. 185-186.

[21] Tr. 131.

[22] Tr. 121.

[23] Tr. 45.

[24] Tr. 42-45; Exhs. C-2 and C-3.

[25] Tr. 37-38, 45.

[26] Complaint II.2-4; Tr. 17, 35, and 62.

not completed the 14 C.F.R. § 135.299(a) flight check.[27]

III. Complainant's Cross-Appeal

Air carriers, including their pilots, have a duty to perform their services with the highest degree of safety in the public interest. 49 U.S.C. §§ 44701(d) and 44702(b). Air carriers must only use as pilots in command those who have passed and continue to pass, in a timely manner, the necessary checks and tests in accordance with the regulations. 14 C.F.R. §§ 135.293(a) and 135.299(a). FAA Order 2150.3B, Compliance and Enforcement Program, contains the FAA's Sanction Guidance Policies[28] and a Table of Sanctions setting forth a range of penalties that may be imposed for violations of these duties and regulations.[29]

FAA Order 2150.3B's Table of Sanctions (see below) indicates that the civil penalty for use of an unqualified crewmember should be the Maximum range.[30]

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[27] *Id.* The two regulations violated are:

(1) 14 C.F.R. § 135.293(a), which provides: "No certificate holder may use a pilot … unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge …;" and

(2) 14 C.F.R. § 135.299(a), which provides: "No certificate holder may use a pilot … as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly."

Complainant explains that if it has been more than 12 months since a pilot has passed a knowledge test under 14 C.F.R. § 135.293(a), then the pilot must take and pass one before operating a Part 135 flight. Appeal Brief at 8. Similarly, Complainant explains, if it has been more than 12 months since a pilot has passed a flight check under 14 C.F.R. § 135.299(a), the pilot must take and pass one before operating a Part 135 flight. In addition, as stated above, there is a 1-month grace period under 14 C.F.R. § 135.301. *Id.*

[28] Chapter 7.

[29] Appendix B – non-hazardous materials cases.

[30] Exh. C-7 at 6; Fig. B-1-n(3); Tr. 61-62.

Fig. B-1-n. Provisions specific to flight deck crew	Civil Penalty
(1) Use of crewmember with expired medical certificate	Minimum to moderate
(2) Failure to make flight deck seat available to authorized en route inspector	Maximum
(3) Use of unqualified crewmember	**Maximum**
(4) Flight and duty time violation	Moderate

The FAA sanction guidance provided by FAA Order 2150.3B contains civil penalty ranges that depend on a carrier's or operator's size.[31] The guidance establishes four groups. The largest entities are in Group I and the smallest entities are in Group IV.[32]

EMA is categorized as a Group IV air carrier[33] because it operates under 14 C.F.R. Part 135[34] with only one pilot and one aircraft.[35] EMA did not contest that, under 49 U.S.C. § 46301(a)(5), EMA was subject to a Maximum civil penalty of $11,000 for each violation, as described in the Complaint.[36] The Table of Sanctions indicates that for Group IV air carriers like EMA, where the violations are covered by 49 U.S.C. § 46301(a)(5)(A) and occurred after June 15, 2006, the appropriate sanction ranges are:

Maximum	$ 4,400 - $ 11,000
Moderate	$ 2,200 - $ 4,399
Minimum	$ 550 - $ 2,199[37]

According to Complainant, there were no aggravating or mitigating circumstances, and,

[31] *Air Charter*, FAA Order No. 2013-1 at 5 (May 14, 2013), citing FAA Order 2150.3B, Appx. B, B-3 -- B-5.

[32] *Id.*

[33] FAA Order 2150.3B, Appx. B, B-4; Exh. C-7 at 1; *see also* Tr. 60-61.

[34] Tr. 33.

[35] Tr. 61.

[36] Complaint IV.1 at 3; *see also* Answer at 1-4.

[37] FAA Order 2150.3B, Appx. B, B-6; Exh. C-7 at 3; *see also* Tr. 63.

therefore, under the Table of Sanctions, a civil penalty in the middle of the Maximum range was appropriate.[38] The middle of the Maximum range – $4,400 plus $11,000 divided by 2 – is $7,700 per flight. Multiplying that number by six flights results in a total civil penalty of $46,200, i.e., the amount Complainant originally sought. Complainant notes that it could have proposed a total civil penalty of double that amount, $92,400, by multiplying $7,700 x 6 violations of 14 C.F.R. §135.293(a), plus $7,700 x 6 violations of 14 C.F.R. § 135.299(c), but Complainant decided that "compounding the sanction in this way would be disproportionately harsh."[39]

The ALJ, however, found a mitigating factor, i.e., that the FAA Inspector did not answer EMA's question concerning the deadlines for Mr. Palmer's recurrent testing. According to the ALJ, the FAA's Maximum penalty range did not reflect the "unique circumstances" of this case.[40] The ALJ stated that the FAA should have answered EMA's (Mr. Palmer's) question, but, instead, it "erected roadblocks" and "then waited to see what would happen."[41] The ALJ found that the Moderate range, which is between $2,200 and $4,399, was "more fitting."[42] Indeed, the ALJ further ruled that the *lower* end of the Moderate civil penalty range should be used.[43] The ALJ then selected a civil penalty of $2,700 per flight multiplied by six flights, totaling $16,200, i.e., the amount assessed in the Initial Decision.

The ALJ's analysis, however, is not supported by the record. It is undisputed that the Inspector did not ignore Mr. Palmer's question. Rather, based on conflicting testimony, the Inspector

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[38] "When determining a specific sanction amount within a range, FAA enforcement personnel begin with an amount in the middle of the range and increase that amount toward the higher end of the range for aggravating circumstances or decrease that amount toward the lower end of the range for mitigating factors." FAA Order 2150.3B at 7-9.

[39] Complainant's Appeal Brief at 12 n.3.

[40] Initial Decision at 8.

[41] *Id.*

[42] *Id.*

[43] *Id.*

either responded to Mr. Palmer's question by asking him to submit copies of his check records, or advised Mr. Palmer to review his paperwork.[44] Regardless of whether one accepts the Inspector's or Mr. Palmer's version, it is established that Mr. Palmer did not submit documentation to the Inspector, and failed to discern that his records indicated the expiration date for the knowledge test and the flight check.[45]

In addition, EMA[46] and Mr. Palmer[47] were not novices. The ALJ found that they were "seasoned" and "experienced."[48] They had been subject to the regulations at issue for years, and never found to be in violation of these or any other Federal Aviation Regulations.[49] Mr. Palmer deliberately sought help from an inspector who was not his current POI, rather than seeking out his POI, the person who was in the best position to advise him.[50] Thereafter, instead of following up with either inspector, Mr. Palmer chose to rely on his own incorrect determination of his status, notwithstanding that his paperwork expressly stated the pertinent expiration date.[51] Given all the circumstances, the ALJ was not justified in reducing the proposed civil penalty to a level below the range specified in the Table of Sanctions.[52]

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[44] Tr. 86, 89, and 104.

[45] Tr. 104, Exhs. C-2 and C-3.

[46] EMA had been an air carrier since 2003. Tr. 58.

[47] Mr. Palmer had flown since 1996, for about 19 years, as of the date of the hearing. Tr. 99. He had been flying as a charter pilot for 14 years. Tr. 100. He had flown more than 15,000 hours. *Id.*

[48] Initial Decision at 5.

[49] Tr. 137.

[50] Tr. 112-113, and 116.

[51] Tr. 80; 202.

[52] The sanction guidance provides that it may be appropriate to select a civil penalty below the ranges, but only if the degree of culpability is minimal, the degree of potential hazard is extremely low, and there are no aggravating circumstances. FAA Order 2150.3B at 7-13.

Nonetheless, under the unique circumstances of this case, including that EMA and Mr. Palmer had not ignored the recurrent testing requirements, but rather sought and received guidance; and mistakenly miscalculated the applicable due date, a lower penalty within the Maximum range will be assessed. As discussed above, the lowest applicable amount within the Maximum range for each violation is $4,400. Based on the entire record, I impose a civil penalty of $26,400 ($4,400 x 6 violations).

IV. EMA's Cross-Appeal

On cross-appeal, EMA argues that it is unable to pay the $16,200 sanction assessed by the ALJ. In determining an appropriate civil penalty, the respondent's ability to pay can be considered. *Rushmore Helicopters*, FAA Order No. 2012-8 at 14 (Oct. 11, 2012), citing *Folsom's Air Service*, FAA Order No. 2008-11 at 11 (Nov. 6, 2008). Inability to pay is an affirmative defense. *Frostad Atelier*, FAA Order No. 2013-5 at 15 (Sept. 5, 2013); *Rushmore Helicopters*, FAA Order No. 2012-8 at 14, citing *Atlas Frontiers*, FAA Order No. 2010-10 (June 16, 2010). However, the burden of proving an affirmative defense such as inability to pay is on the respondent. *National Power Corp.*, FAA Order No. 2016-3 at 2 (Sept. 30, 2016); *Schuman Aviation Company, Ltd.*, FAA Order No. 2016-2 at 2 (Aug. 24, 2016); *Frostad Atelier*, FAA Order No. 2013-5 at 15 (Sept. 5, 2013); *Seven's Paint & Wallpaper*, FAA Order No. 2001-6 at 5 (May 16, 2001).

The respondent must prove this affirmative defense, by a preponderance of the evidence in the record, which must be reliable, probative, and substantial, because the respondent has control over its financial information. *Frostad Atelier*, FAA Order No. 2013-5 at 15 (Sept. 5, 2013); *Rushmore Helicopters*, FAA Order No. 2012-8 at 14, citing *Atlas Frontiers*, FAA Order No. 2010-10 at 11-12 (June 16, 2010). As Complainant has pointed out,[53] the Administrator stated in a previous case: "A respondent attempting to prove inability to pay must substantiate his or her claims at the hearing with the types of records that a reasonable person would accept as reliable

[53] Complainant's Reply Brief at 2.

and probative on the issues of incomes and expenses." *Villamor Tabula,* FAA Order No. 2010-6 at 13 (June 15, 2010).

EMA failed to introduce sufficient proof of inability to pay before the ALJ. EMA states that it did not submit its tax returns at the hearing because it had a large overdue balance that it was unable to satisfy prior to the hearing.[54] EMA further states that it strongly believes that if the Administrator reviews its Federal tax returns when completed, he will find that EMA is unable to pay a $16,200 civil penalty.[55] EMA, however, was not required to introduce the tax returns if they were not yet prepared. Instead, as Complainant points out, EMA could have introduced the financial records on which the tax returns were based. EMA only introduced three W-2 forms (Wage and Tax Statements), indicating the wages that EMA paid Mr. Dobitsch as its President in 2012, 2013, and 2014. This information was inadequate to demonstrate the financial condition of EMA as a whole.

Inasmuch as EMA failed to meet its burden to introduce sufficient documentation of inability to pay before the ALJ, any such evidence cannot be considered on appeal. It is well established that "it is too late to submit ... documents on appeal when their significance cannot be clarified through cross-examination." *Villamor Tabula*, FAA Order No. 2010-6 at 13 (June 15, 2010). In this case the ALJ correctly declined to find that EMA was unable to pay the civil penalty.

[54] Respondent's Appeal Brief at 1.

[55] *Id.*

V. Conclusion

Based on the foregoing, I grant Complainant's cross-appeal in part, deny EMA's cross-appeal, and impose a civil penalty of $26,400.[56]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

[56] 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 (2016). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

SERVED: May 20, 2016

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

In The Matter Of:	)	
	)	Docket No. FAA-2013-0848
ENDLESS MOUNTAINS	)	
AIR, INC.	)	
	)	Case No. 2012EA50008
Respondent	)	

INITIAL DECISION OF U.S. ADMINISTRATIVE LAW JUDGE

Pro Se Respondent's Admissions Regarding the Alleged Violations:

1. In the Respondent's April 3, 2014 Answer, it generally admitted to the violations alleged in the FAA's Complaint, specifically violations of 14 C.F.R. § 135.293(a) and 14 C.F.R. § 135.299(a).[1]

2. Approximately one (1) year later, at the beginning of the March 10, 2015 Hearing, the Respondent clarified that it was admitting to all twelve (12) violations alleged in the FAA's Complaint had occurred.

Undisputed based on Admission:

1. **Count No. 1:** The Respondent committed six (6) violations of 14 C.F.R. § 135.293(a) between September 23, 2011 and October 9, 2011, as identified in the FAA's Complaint; and

2. **Count No. 2:** The Respondent committed six (6) violations of 14 C.F.R. § 135.299(a) between September 23, 2011 and October 9, 2011, as identified in the FAA's Complaint.

[1] It should be noted, however, that during the May 28, 2014 Litigation Scheduling Conference, the Respondent orally admitted to the FAA's allegations in Paragraphs 1, 2, and 3 in Section II of the FAA's Complaint (re: 14 C.F.R. § 135.293(a)), but denied the allegation in Paragraph 4 in Section II of the FAA's Complaint (re: 14 C.F.R. § 135.299(a)). The parties discussed these oral admissions, and agreed to proceed with discovery on the disputed allegations.

Held after Full Evidentiary Hearing:

1. The Respondent did not meet its burden of proof to show that it was financially unable to pay a civil penalty.

2. **Total Civil Penalty Assessed - $16,200:** The Respondent is assessed a total civil penalty of $16,200 for the twelve(12) admitted violations that occurred during six (6) flights.

I. CASE BACKGROUND

On December 17, 2013,[2] the Federal Aviation Administration ("FAA") issued a Complaint charging the Respondent, Endless Mountains Air, Inc., ("Respondent") with an unspecified number of two different violations of Federal Aviation Regulations: 14 C.F.R. §§ 135.293(a) and 135.299(a). The Complaint asserted these violations occurred when the Respondent operated six (6) flights between September 23, 2011 and October 9, 2011, utilizing a Cirrus SR20 aircraft, identification number N624CP. Comp. 1-3, §§ II and III. The FAA proposed a total civil penalty of $46,200 for the violations. Comp. 1-3, § IV.

After the December 17, 2013 Complaint was served and filed, the parties participated in various discussions, motions, and discovery exchange. This is fully documented in the case record, and will not be repeated here.

It should be noted, however, that on March 18, 2014, the FAA orally clarified, during a Litigation Scheduling Conference, that in its Complaint it was charging the Respondent with two (2) different regulatory violations for each of the six (6) flights the Respondent had allegedly operated between September 23, 2011 and October 9, 2011, for a total of twelve (12) alleged violations. (3/18/14 Tr. 15.)

Pursuant to the FAA's Complaint, and its oral clarifications regarding the Complaint, the FAA was alleging that for each of the six (6) flights the Respondent had allegedly operated between the dates of September 23, 2011 and October 9, 2011, the Respondent's aircraft pilot,

[2] The FAA's Complaint was not dated. Based on the totality of the record, the Court made a pre-hearing finding that the Complaint was served on December 17, 2013. *See*, e.g., May 15, 2014 Order Denying the FAA's Motion for Decision. The parties did not dispute this finding. *See, e.g.*, 5/28/14 Tr. 12, lines 17-20.

Mr. Randy Palmer, had operated the aircraft without having passed his annual (i.e., 12th calendar month) test pursuant to 14 C.F.R. § 135.293(a). Mr. Palmer had also not passed his annual (i.e., 12th calendar month) flight check in a Cirrus SR-20 aircraft, pursuant to 14 C.F.R. § 135.299(a).

On March 10, 2015, the parties convened in Allentown, Pennsylvania for Hearing. The FAA orally moved to amend the Complaint by deleting the period and adding to the end of Section II, paragraph 4 the following: ", as required by Section 135.299(a) of the FARs." (3/10/15 Tr. 14:18 – 15:18). The Respondent did not object to the amendment, the motion was granted, and the Respondent admitted to the allegations contained in the amended Complaint. (Id. at 15:21 – 16:4, 16:14 – 17:1.)

With all factual allegations and violations admitted by the Respondent, the Hearing proceeded on the issue of the proposed civil penalty. The FAA presented two (2) witnesses: FAA Inspector Harry Soudas and FAA Inspector Robert Ference. During the Hearing, the FAA moved to admit seven (7) exhibits into evidence (i.e., Exs. C-2 through C-5, and C-7 through C-9). The motion was granted and all seven (7) exhibits were admitted. After the FAA rested its case-in-chief, the Respondent presented two (2) witnesses: Pilot Randy Palmer and the Respondent's owner William J. Dobitsch, Jr. During the Hearing, the Respondent moved to admit five (5) exhibits into evidence (i.e., Exs. B, D, E, F, and G). The motion was granted and all five (5) exhibits were admitted.

II. CIVIL PENALTY EVIDENCE DISCUSSION

All admitted testimony and exhibits were considered. The discussion herein provides only a brief summary and analysis of the evidence as needed.

A. Brief Summary of Parties' Evidence

In its Complaint, the FAA alleged that pursuant to 49 U.S.C. §46301(a)(5), the Respondent was subject to a maximum $11,000 civil penalty for each violation. (Comp. 3, § IV. 1). The Respondent did not disagree with this allegation or the legal support cited. The Respondent did, however, disagree with the FAA's proposed $46,200 civil penalty.

Utilizing the FAA's sanction guidelines in FAA Order 2150.3B, Appendix B, Inspector Soudas testified that the Respondent was in Group IV (3/10/15 Tr. 60:11 – 61:4; Ex. C-7, 1).

Both of the Respondent's violations fell under Fig. B-1-n (3) (use of unqualified crewmember), for which the FAA guidelines recommended utilizing the maximum penalty range (3/10/15 Tr. 61:14 – 62:7; Ex. C-7, 6). The violations had occurred after June 15, 2006, so the maximum range was between $4400 and $11,000 (3/10/15 Tr. 63:1 – 8; Ex. C-7, 3). Instead of charging fines for each violation, the FAA asserted that it was charging a penalty for each flight where the two violations had occurred.[3] It then took the mid-range of the maximum penalty by adding $4,400 and $11,000, which equaled $15,400. The FAA then divided $15,400 in half to reach the median amount of $7,700 (i.e., $15,400/2 = $7700). Since there were 6 flights, there were 6 violations. As a result, $7,700 x 6 = $46,400. (3/10/15 Tr. 64:4 – 19.)

As part of its case-in-chief, the FAA asserted that its calculations were accurate and appropriate, and that there were no mitigating circumstances to support reducing the proposed $46,400 fine. During testimony, FAA Inspector Harry Soudas stated that the Respondent should have had a clear understanding of the FARs and how to apply them to its operation, particularly since it had been a certificated operator since 2003. Inspector Soudas opined that neither the Respondent's confusion regarding the recertification time requirements, nor any other circumstance, should be considered as a mitigating factor in calculating the civil penalty. (3/10/15 Tr. 79:4-80:16).

In closing argument, the FAA also asserted that the Respondent should not have had to rely upon the FAA to give it guidance regarding FAA regulations. (3/10/15 Tr. 186:16-18.) No matter what the circumstances, the Respondent was "ultimately responsible" to know the FAA regulations, and to be safety compliant. (3/10/15 Tr. 188:1-2.) Thus, calculating a civil penalty based on the "mid point" of the maximum range was appropriate. (3/10/15 Tr. 189:17-21.)

In its defensive case, the Respondent asserted 1) an inability to pay the $46,200 proposed civil penalty; and, 2) the proposed penalty was not appropriate or fair, given all the

[3] This evidence differed from the FAA's March 18, 2014 oral explanation of the civil penalty calculation during a pre-hearing Conference. While the FAA's Conference explanation was not presented as evidence, nor is it considered by this Court in any way as evidence, it was the information provided to the Respondent and the Court prior to the March 10, 2015 Hearing. Thus, during this Conference, the FAA explained that it had calculated the proposed amount of the $46,200 by assigning a fine of $3,850 for each of the 2 regulatory violations, which then totaled $7,700 for each flight (e.g., $3,850 x 2 = $7,700). Six (6) flights x $7,700 = $46,200.

circumstances involved. Both Mr. William J. Dobitsch, Jr. and Mr. Randy Palmer testified about how the violations had occurred, after they had attempted to obtain assistance from the FAA Field Office regarding what regulatory time period was applicable. Among other things, the Respondent asserted that the violations were inadvertent, particularly given the advice received from FAA Inspector Ference. The Respondent was dedicated to flight safety, had a history of safety compliance, and had never intentionally acted to compromise flight safety.

B. Affirmative Defense of Inability to Pay – Not Proven

At the beginning of the March 10, 2015 Hearing, the Respondent was re-advised that if it made any argument regarding financial inability to pay the proposed civil penalty, such argument had to be supported by financial documentation. If no financial documentation or insufficient documentation was introduced into evidence, such an affirmative defense would fail. (3/10/15 Tr. 11:22 – 12:8.)

Mr. Dobitsch testified that the Respondent was unable to pay the proposed $46,200 penalty. (3/10/15 Tr. 134 – 140.) However, as supporting documentation of the company finances and inability to pay, the Respondent introduced only three (3) W-2 forms showing what Mr. Dobitsch, as the owner of the company, had paid himself as an employee. (Exs. E, F, G.)

At the conclusion of the Hearing, the Court made an oral ruling that the Respondent had failed to meet its burden of proof on the affirmative defense of inability to pay the proposed penalty. (3/10/15 Tr. 205:20 – 206:9.) This oral ruling is codified in this Decision.

C. Discussion of Other Evidence

It was undisputed that Mr. Palmer was a seasoned and experienced pilot. He had flown various aircraft since 1996 (i.e., for approximately 19 years as of the date of the Hearing). He had flown over 15,000 hours. Historically, he had never had problems obtaining re-certification. He did, however, have problems obtaining recertification when Inspector Soudas was assigned to replace Inspector Ference as the Respondent's principal operations inspector ("POI").

It was undisputed that as of July 22, 2010, Mr. Palmer was "current" on all his certification tests. According to Inspector Soudas, this meant that Mr. Palmer's one (1) year recertification under both 14 C.F.R. § 135.293(a) (i.e., pilot test – oral or written) and 14 C.F.R.

§ 135.299(a) (i.e., pilot flight check) were due in July 2011. (3/10/15 Tr. 45:3 -6.) However, because of a one (1) month "grace period," Mr. Palmer's certification remained current until the last day of August 2011. (*Id.* at 45:7 – 18.) In contrast, Mr. Palmer's six (6) month recertification under 14 C.F.R. §§ 135.297 would have been due in approximately October 2011. (*Id.* at 49:9-20.)

On August 29, 2011 (i.e., two (2) days prior to the last day of the month on August 31, 2011), both Mr. Dobitsch and Mr. Palmer contacted the FAA Field Office by telephone to get clarification about the time obligations for obtaining Mr. Palmer's annual pilot certifications. It was undisputed that they asked for FAA Inspector Ference, who had previously been the Respondent's POI, and that Inspector Ference took the call.

Both the Respondent and the FAA agreed that Inspector Ference did not specifically answer Mr. Dobitsch's and Mr. Palmer's questions about the pilot certification time issue. They disagreed, however, about the substance of the telephone call. Both Mr. Dobitsch and Mr. Palmer testified that FAA Inspector Ference told them to simply check their paperwork for the answer. In contrast, Inspector Ference recalled telling Mr. Dobitsch and Mr. Palmer that they needed to "present" their paperwork to him so that it could be checked. (3/10/15 Tr. 89:12 – 22.)

During cross-examination, Inspector Ferance testified that he could not give Mr. Dobitsch and Mr. Palmer guidance about Mr. Palmer's recertification time without seeing the Respondent's documents or discussing it with the Respondent's current POI, Inspector Soudas. Inspector Ference agreed that the FAA Field Office had accessible copies of all the Respondent's records, but he chose not to look at them. He explained he did not look at the FAA's copies, because he didn't know if they would match the Respondent's records. Thus, he asked Mr. Dobitsch and Mr. Palmer to physically come to the Field Office and "present" him with their records. (*Id.*) Inspector Ference did not, however, provide any reason(s) why he thought the records would not be exactly the same.

Upon inquiry from the Court, Inspector Ference admitted that he had not offered the Respondent an opportunity to e-mail or fax the documents to him so that he could review and compare them. (3/10/15 Tr. 94:12 – 18.) Inspector Ference agreed he had not made any notes of the phone call or about the conversation. (3/10/15 Tr. 96:1-2.) He also testified could not recall

whether or not he had "mention[ed]" the Respondent's call and questions to Inspector Soudas (the Respondent's POI). (3/10/15 Tr. 93:20 -94:1.)

The Respondent presented additional testimony. After speaking with Inspector Ference, Mr. Dobitsch and Mr. Palmer testified that they looked at their paperwork and the regulations, as Inspector Ference had instructed them to do. They interpreted the material together, and, [in retrospect] came up with the wrong answer regarding when Mr. Palmer was due for recertification, in part because Mr. Palmer's certification under 14 C.F.R. § 135.297 was not yet due. Mr. Palmer then flew six (6) different flights, between September 23, 2011 and October 9, 2011, before getting recertified as required by 14 C.F.R. §§ 135.293(a) and 135.299(a).

D. Assessment of Civil Penalty – Total $16,200

One of the underlying problems in this case is that Mr. Palmer had developed a negative perception of Inspector Soudas, in part because Inspector Soudas had earlier rated him as "failing" pilot tests. Mr. Palmer testified about his years as a pilot, and how he had never had an FAA Inspector rate him as a failure before. He also testified that he had been given these failed ratings without any specific explanation of what he had done wrong.

It is clear that on August 29, 2011 there was an attempt by Mr. Dobitsch and Mr. Palmer to avoid talking to Inspector Soudas. However, it is also clear that Inspector Ferance wanted to support his colleague, Inspector Soudas, in his role as the assigned POI for Respondent. So when Mr. Dobitsch and Mr. Palmer called Inspector Ferance instead of Inspector Soudas on August 29, 2011, Inspector Ferance was not helpful.

Inspector Soudas testified that he thought Inspector Ference had referred Mr. Dobitsch's and Mr. Palmer's phone call and inquiry to him. Assuming this did occur, then it is also clear that Inspector Soudas did not return the Respondent's call or provide any information about the recertification time requirement. Instead, Inspector Soudas waited for the Respondent to call or email him directly ("myself being the principal") or alternatively, to contact management at the FAA Field Office. (3/10/15 Tr. 80:6-12). Thus, Inspector Soudas chose not to respond or offer immediate help.

Given all the evidence in this case, it is obvious the Respondent feared that time was running out, when it called two days before Mr. Palmer's grace period expired. While this Court agrees with Inspector Soudas that the Respondent could have called earlier than August 29, 2011, or, after having spoken to an unhelpful Inspector Ference on August 29, 2011, tried to call and speak with either Inspector Soudas or someone else in the Field Office (3/10/15 Tr. 80:6-12), that did not happen. Nevertheless, the Respondent did contact the FAA during Mr. Palmer's grace period and ask for advice. The FAA knew the Respondent was in danger of safety noncompliance, and chose not to help.

The FAA's argument that "no mitigating circumstances" exist in this case is not persuasive. When the Respondent called the FAA on August 29, 2011, the FAA should have been responsive and answered the question. The FAA's primary concern on August 29, 2011 should have been to help ensure that the Respondent remained safety compliant. Instead, the FAA erected roadblocks for the Respondent to overcome, and then the FAA waited to see what would happen. Thus, whether or not the FAA thinks that Respondent should have known about the certification time requirements doesn't eliminate its responsibility to have answered the Respondent's safety compliance question fully, fairly, and promptly when it was asked. Had the FAA done so, the Respondent would likely have complied (given its history of compliance) and therefore not committed the violations.

Given the evidence in this case, the FAA's recommended maximum penalty range (Ex. C-7, 6) fails to reflect the unique circumstances of this case. Therefore, the maximum penalty range will not be utilized. Instead, the moderate range of the penalty guidance is more fitting to the facts. The moderate range for any violations occurring after June 15, 2006 is between $2,200 and $4,399 (Ex. C-7, 3). This Court agrees with the FAA that a penalty should be charged for each flight where the two violations occurred. In addition, given all the evidence, the lower end of the moderate penalty range should be utilized. Thus, the amount of $2,700 is appropriate as the penalty charged per flight in this case. Since there were six (6) flights, there are six (6) charged penalty amounts.

Based on the foregoing the Respondent is assessed a total civil penalty of $16,200 (i.e., $2,700 x 6 = $16,200) for the six flights and twelve admitted violations. This $16,200 civil penalty has sufficient "bite" to promote compliance, and deter future violations by the

Respondent and others. It also reflects the goals of the sanction guidance and the totality of the circumstances.

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