

**UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC**

**In the Matter of: SCHUMAN AVIATION COMPANY, LTD.**

FAA Order No. 2016-2

FDMS No. FAA-2013-1080<sup>1</sup>

Served: August 24, 2016

**DECISION AND ORDER**<sup>2</sup>

Complainant Federal Aviation Administration (“Complainant” or “FAA”) has appealed the civil penalty assessed in the written initial decision (“Initial Decision”) of Administrative Law Judge (“ALJ”) Richard C. Goodwin.<sup>3</sup> The Initial Decision found, based on the undisputed record, that Respondent Schuman Aviation Company, Ltd. (“Schuman”) violated 14 C.F.R. § 119.5(g)<sup>4</sup> by operating 24 round-trip scheduled operations under 14 C.F.R. Part 135 to Kailua-Kona International Airport, Kona, Hawaii (“KOA”). At the time, Respondent’s operations specifications did not permit it to operate to KOA. In addition, the ALJ concluded, also based on

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<sup>1</sup> Generally, materials filed in 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).

<sup>2</sup> The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: [www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/AGC400/Civil\\_Penalty/](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/). See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. The decisions also are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database).

<sup>3</sup> The ALJ’s Initial Decision is attached.

<sup>4</sup> “No person may operate as a direct air carrier or ... commercial operator without, or in violation of ... appropriate operations specifications.”

the undisputed record, that Schuman violated 14 C.F.R. § 135.73<sup>5</sup> by initially refusing to permit two FAA Aviation Safety Inspectors to inspect Schuman's records concerning the above operations.<sup>6</sup> The ALJ, however, rejected Complainant's proposed civil penalty of \$28,000 and instead assessed civil penalties of \$5,000 each for the violation of the two regulations, *i.e.*, a total civil penalty of \$10,000. For the reasons discussed herein, I reverse the Initial Decision in part and assess a civil penalty of \$27,800.<sup>7</sup>

### **I. Burden of Proof and Standard of Review**

Complainant has the burden to prove the appropriateness of a civil penalty. *Wallaesa*, FAA Order No. 2013-2 at n.30 (May 14, 2013); *Seven's Paint & Wallpaper*, FAA Order No. 2001-6 at 4-5 (May 16, 2001). Complainant may meet this burden by, among other things, introducing the Agency's Sanction Guidance<sup>8</sup> and the testimony of an FAA Inspector. *Northwest Airlines*, FAA Order No. 1990-37 at 6-9 (November 7, 1990). A respondent must prove any affirmative defenses relating to the sanction, such as financial hardship or corrective action. *Seven's Paint & Wallpaper*, *supra*; *Atlas Frontiers, LLC*, FAA Order No. 2010-10 at 11 (June 16, 2010).

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<sup>5</sup> "Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests ... to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications."

<sup>6</sup> Tr. 15.

<sup>7</sup> Remanding this case to the ALJ is unnecessary. *See Esau*, FAA Order No. 1991-38 at 7 n.7 (September 4, 1991) (case would not be remanded to determine civil penalty because it was more efficient for the Administrator to make the determination).

<sup>8</sup> FAA Order No. 2150.3B, entitled "FAA Enforcement and Compliance Program" (October 1, 2007), contains the Agency's Sanction Guidance. *Id.* at 2-4. The particular portions of the order that FAA personnel use to determine an appropriate sanction are Chapter 7 ("Sanction Guidance Policies"); Appendix B ("Table of Sanctions for All Enforcement Programs, Except Hazardous Materials"); and Appendix C ("Sanction Guidance—Hazardous Materials Enforcement").

In an appeal of an initial decision, the FAA decisionmaker considers whether: (1) each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) the administrative law judge committed any prejudicial errors.<sup>9</sup>

## **II. Discussion**

### **A. Unauthorized Scheduled Operations**

Schuman holds a certificate authorizing it to conduct scheduled air carrier service under 14 C.F.R. Part 135.<sup>10</sup> Schuman's Operations Specification C070, entitled "Airports Authorized for Scheduled Operations," stated that Schuman was authorized to conduct scheduled passenger and cargo operations only at the airports listed.<sup>11</sup> At all relevant times, Schuman's Operations Specification C070-2 did not authorize it to conduct scheduled operations at KOA.<sup>12</sup> Nevertheless, between September 8, 2012, and September 13, 2012, Schuman operated 24 round-trip scheduled commuter operations<sup>13</sup> to KOA for Mokulele Airlines,<sup>14</sup> using Cessna

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<sup>9</sup> 14 C.F.R. § 13.233(b). Schuman argues that these considerations are rendered moot by the Pilot's Bill of Rights, Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012). In this regard, Schuman cites to a decision of the National Transportation Safety Board ("NTSB") in *Administrator v. Jones*, NTSB Order No. EA-5647, 2013 WL 316199 at \*4 (January 16, 2013). The Pilot's Bill of Rights, however, applies to NTSB certificate cases, rather than to FAA civil penalty cases, such as the instant case. Schuman cites no authority indicating that the Pilot's Bill of Rights applies in FAA civil penalty cases. Schuman also states that when it made an offer to settle this case, Complainant's attorney did not respond. The Administrator does not, in an appeal, review an agency attorney's discretionary decision to settle or not settle a matter. See *Offshore Air*, FAA Order No. 2001-4 at 10 (May 16, 2001).

<sup>10</sup> Initial Decision at 3.

<sup>11</sup> *Id.*

<sup>12</sup> Complaint II.3; Answer 2.

<sup>13</sup> Tr. 24, 27-28, 143-46.

<sup>14</sup> Tr. 24, 26; Complainant's Exhibit A-5.

Caravan 208B aircraft.<sup>15</sup>

The FAA Sanctions Guidance provides a range of penalties for operations that are contrary to a company's operations specifications. The sanction guidance indicates a minimum-range civil penalty for those unauthorized operations that involve *technical noncompliance*.<sup>16</sup> Schuman is a Group III Operator<sup>17</sup> and Small Business Concern.<sup>18</sup> To determine the appropriate civil penalty, one begins with the middle of the range. If there are aggravating factors, one increases that amount, and if there are mitigating factors, one decreases that amount. FAA Order No. 2150.3B at 7-9. Complainant followed this approach, decreasing from the midpoints due to mitigating factors. For a Group III operator, the minimum range civil penalty is \$825 to \$3,299,<sup>19</sup> and the midpoint is \$2,062.

The record shows that two weeks after the flights, Complainant amended Schuman's operations specifications to include KOA as an authorized airport, showing that Schuman's operations into the airport likely did not affect safety. Due to this mitigating factor, Complainant selected the bottom of the prescribed minimum civil penalty range – \$825. Imposing an \$825 civil penalty for each of the 24 unauthorized flights amounted to a sanction of \$19,800.<sup>20</sup>

#### **B. The Refusal to Permit Records Inspection**

On or about September 17, 2012, two FAA Inspectors from the Honolulu Flight

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<sup>15</sup> Complainant's Exhibit A-3; Tr. 62.

<sup>16</sup> FAA Order No. 2150.3B at B-12.

<sup>17</sup> Schuman operates seven aircraft. Complainant's Exhibit A-1. The sanction guidance indicates that an operator with seven aircraft is a Group III Operator. FAA Order No. 21050.3B at B-3.

<sup>18</sup> It is not disputed that Schuman is a small business and was treated as such by Complainant.

<sup>19</sup> *Id.* at B-4, B-12.

<sup>20</sup> Complainant's Closing Argument at 10.

Standards District Office (FSDO) visited the Schuman offices and asked Mr. Schuman, the President and owner of Schuman,<sup>21</sup> to inspect the company's daily flight logs and maintenance logs.<sup>22</sup> Complainant was not required to provide Schuman with prior notice of a records request.<sup>23</sup> Mr. Schuman refused to provide the records and the FAA Inspectors left.<sup>24</sup> About 2 hours later, however, after consulting with his attorney, Mr. Schuman notified the FAA Inspectors that he would comply with the request.<sup>25</sup> Subsequently, Schuman delivered the records to the Inspectors at the Honolulu FSDO.<sup>26</sup>

The Sanction Guidance prescribes a maximum civil penalty for several types of failure to permit FAA inspection. The maximum civil penalty range for a Group III operator such as Schuman is \$7,150 to \$11,000,<sup>27</sup> and the midpoint is \$9,075. Due to the presence of a mitigating factor, i.e., about 2 hours after the records request, Schuman agreed to the inspection of its records, Complainant selected a civil penalty of \$8,000, which is near the bottom of the prescribed range.<sup>28</sup>

### C. The ALJ's Sanction Analysis

In imposing a lower civil penalty than had been proposed by Complainant, the ALJ

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<sup>21</sup> Tr. 84.

<sup>22</sup> Tr. 15-16, 48.

<sup>23</sup> Tr. 49; Footnote 5, *supra*.

<sup>24</sup> Tr. 15, 69, 102-04.

<sup>25</sup> Tr. 17, 52, 54, 70.

<sup>26</sup> Tr. 16-17.

<sup>27</sup> FAA Order No. 2150.3B at B-4.

<sup>28</sup> Complainant's Closing Argument at 10; Rebuttal to Respondent's Closing Argument at 3.

inaccurately stated that Complainant had failed to show how it used the sanction guidance to arrive at a figure of \$28,000 for the civil penalty.<sup>29</sup> In fact, Complainant explained in its post-hearing briefs<sup>30</sup> how it used the Agency Sanction Guidance in FAA Order No. 2150.3B<sup>31</sup> to address the violations. Regarding the violation of its operations specifications (14 C.F.R. § 119.5(g), Complainant's sanction analysis noted that: the proposed civil penalty of \$19,800 for the violations of 14 C.F.R. § 119.5(g), and \$8,000 for the violation of 14 C.F.R. §135.7, equals \$27,800.<sup>32</sup>

The ALJ, however, refused to impose the penalty requested for unauthorized operations, stating that Complainant had failed to prove how it arrived at \$11,000 for each violation.<sup>33</sup> The ALJ's conclusion, however, is based on a false premise. Complainant had not argued for imposing an \$11,000 civil penalty for each violation. Rather, Complainant correctly stated in the Complaint that *under 49 U.S.C. § 46301*, Schuman was subject to a civil penalty *not to exceed* \$11,000 for each of the violations.<sup>34</sup> And, as noted above, Complainant imposed the bottom of the minimum civil penalty amount for each unauthorized flight.

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<sup>29</sup> The ALJ acknowledged that the parties filed post-hearing briefs (Initial Decision at 3), but he apparently was unaware of Complainant's explanations in them regarding the sanction.

<sup>30</sup> Complainant's Closing Argument at 9-10; Complainant's Rebuttal to Respondent's Closing Argument at 3.

<sup>31</sup> The ALJ took judicial notice of FAA Order No. 2150.3B, which is Complainant's Exhibit 7. Tr. 3, 30-31. The ALJ said he had checked to ensure that this version of the order was correct. *Id.*

<sup>32</sup> Rounded up, it totals \$28,000, which is what Complainant sought. On appeal, however, Complainant does not round up and instead seeks \$27,800.

<sup>33</sup> Initial Decision at 13. The ALJ wrote, "The FAA failed to prove by testimony and/or evidence of how it arrived at the figure of \$11,000 for each violation. We are left to speculate how the figures of \$11,000 and \$28,000 were determined." *Id.*

<sup>34</sup> Complaint IV.1.

The ALJ also incorrectly found that Complainant did not show that it considered the nature, circumstances, extent, and gravity of the violations. These factors, however, are taken into account in the Sanction Guidance itself, which Complainant appropriately used in arriving at its sanction recommendation: “[w]hen the FAA formulated [the] sanction ranges for different types of violations, the agency considered the nature, extent and gravity of each general type of violation ....” *Ventura Air Services*, FAA Order No. 2012-12 at 27 (November 1, 2012), citing *Folsom’s Air Service, Inc.*, FAA Order No. 2008-11 at 12 (November 6, 2008) and *Schultz*, FAA Order No. 1989-5 at 12 (November 13, 1989). Moreover, Schuman has not disputed that Complainant used the Sanctions Guidance to arrive at the proposed civil penalty. Thus, by appropriately applying the Sanctions Guidance, Complainant necessarily took into account the nature, circumstances, extent, and gravity of the violations.

The ALJ also incorrectly held that Complainant had failed to show how it used aggravating or mitigating factors to adjust the sanction. In its post-hearing briefs, however, Complainant explained that it took into account two mitigating factors in determining the proposed civil penalty. First, Complainant ultimately approved Schuman’s operations to KOA, indicating that the operations were not unsafe. Due to this mitigating factor, the Complainant sought a minimum civil penalty, i.e., \$825, rather than a midpoint penalty. Second, Schuman agreed after about 2 hours to produce the records. In light of that fact, the Complainant sought a sanction of \$8000 rather than a midpoint sanction of \$9,075. Thus, Complainant appropriately considered mitigating factors by selecting a civil penalty near the bottom of the prescribed range.

The ALJ further found that Complainant had failed to show whether its sanction analysis took into account Schuman’s ability to pay. It is not, however, Complainant’s burden to prove Respondent’s inability to pay. “Financial hardship and inability to pay are affirmative defenses

that the respondent has the burden of proving ....” *Atlas Frontiers*, FAA Order No. 2010-10 at 11 (June 16, 2010), citing *Giuffrida*, FAA Order No. 1992-72 at 2 (December 21, 1992). A respondent bears the burden of proof because its financial records are within its control. *Atlas Frontiers*, FAA Order No. 2010-10 at 11-12, citing *Seven’s Paint & Wallpaper*, FAA Order No. 2001-6 at 5 (May 16, 2001). To prove inability to pay, a respondent must introduce supporting financial documentation, such as tax records, which Schuman failed to provide. *Atlas Frontiers*, *supra* at 12; *Giuffrida*, *supra* at 5. Self-serving testimony of a company’s owner is insufficient.<sup>35</sup> Thus, Shuman, not Complainant, failed to appropriately pursue the “inability to pay” component of determining the proper civil penalty amount.

The ALJ stated that he considered the following “corrective actions” justifying mitigation in setting a \$10,000 civil penalty: (1) Schuman immediately stopped operating when it was notified that it was violating its operations specifications; and (2) Schuman permitted Complainant to inspect its records 2 hours after it refused permission.<sup>36</sup>

However, the Sanction Guidance, which could not be clearer, states:

The FAA considers corrective action a mitigating factor in determining sanction *provided the corrective action exceeds the minimum regulatory or statutory requirements*. ... Corrective action ... *that simply brings that person into compliance with the statutory or regulatory requirements is not considered* in mitigation of sanction. To mitigate a sanction based on such corrective action would put at an economic disadvantage competitors who have expended the resources necessary to maintain compliance.<sup>37</sup>

Thus, as set forth above, the two actions cited by the ALJ are not “corrective actions”

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<sup>35</sup> *Id.* Complainant points out that although it did not have the burden of proving Schuman’s ability to pay, it necessarily considered this by using the Sanction Guidance. Using FAA Order No. 2150.3B, Appendix B, Complainant classified Schuman as a Group III Operator and Small Business Concern.

<sup>36</sup> Initial Decision at 13.

<sup>37</sup> FAA Order No. 2150.3B, chapt. 7, ¶ 4(m) at 7-8 and 7-9 (emphasis added).



justifying mitigation because they simply brought Schuman into compliance. Schuman's actions here were not comprehensive; nor was stopping its unauthorized operations a "positive" action warranting a reduction in the civil penalty. *Pinnacle Airlines*, FAA Order No. 2012-2 at 15 (May 22, 2012); *Mole-Master*, FAA Order No. 2010-11 at 11 (June 16, 2010). As discussed above, Complainant appropriately considered Schuman's action to be a mitigating factor and lowered the proposed civil penalty accordingly to at or near the bottom of the minimum sanctions amount.<sup>38</sup>

In addition to the above-stated deficiencies, the ALJ's assessment does not comport with the Sanction Guidance, the Administrative Procedure Act ("APA"),<sup>39</sup> and the FAA's Rules of Practice.<sup>40</sup> It is well established that: "On matters of law and policy ... ALJ's are entirely subject to the agency." *Northwest Airlines*, FAA Order No. 1990-37 at 8 (November 7, 1990), citing *D'Amico v. Schweiker*, 698 F.2d 903, 907 (7<sup>th</sup> Cir. 1983); see Scalia, *The ALJ – a Reprise*, 47 *U. Chi. L. Rev.* 57, 62 (1980). Moreover, "[i]f the ALJ does not follow agency policy, the agency may impose that policy by reversing the ALJ's decision on appeal." *Id.*; *Northwest Airlines*, *supra*; *Warbelow's Air Ventures*, FAA Order No. 2000-3 at 9 (February 3, 2000). Thus, the ALJ failed to follow the applicable law and policy on such matter.

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<sup>38</sup> Complainant's Closing Argument at 9-10; Complainant's Rebuttal to Respondent's Closing Argument at 3.

<sup>39</sup> The APA required the ALJ to include in his decision "a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented ...." 5 U.S.C. § 557(c)(3)(A).

<sup>40</sup> The FAA's Rules of Practice required the ALJ, in each decision, to "include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the ALJ's discretion, [and] the amount of any civil penalty found appropriate by the ALJ ...." 14 C.F.R. § 13.232.

### III. Conclusion

The ALJ's reduction of the requested civil penalty was not supported by a preponderance of reliable, probative, and substantial evidence; was not in accordance with applicable law, precedent, and public policy; and was prejudicial. I therefore reverse the ALJ's sanction determination in part and assess a civil penalty of \$27,800.<sup>41</sup>



MICHAEL P. HUERTA  
ADMINISTRATOR  
Federal Aviation Administration

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<sup>41</sup> 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 (2009). See 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

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HEARING DOCKET

SERVED: August 31, 2015

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

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IN THE MATTER OF

SCHUMAN AVIATION COMPANY, LTD.

FAA DOCKET NO. [TO BE ASSIGNED]  
(Civil Penalty Action)

FDMS NO. FAA 2013 - 1080

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INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE

1. Glossary

ASI	Aviation Safety Inspector
C.F.R.	Code of Federal Regulations
FAA	Federal Aviation Administration
FAA#	FAA Exhibit
FAR	Federal Aviation Regulation
FSDO	Flight Standards District Office
Grace	Darryl Grace, Director of Operations for Mokulele Airlines
HNL	Honolulu, HI
KOA	Kailua-Kana International Airport, Kona, HI
Monfort	Joseph Monfort
NPCP	Notice of Proposed Civil Penalty
OGG	Kahului, Maui
OpSpecs	Operations Specifications

S# Schuman Exhibit  
U.S.C. United States Code

## II. Introductory Comment

Between September 8, 2012, and September 13, 2008, Schuman Aviation Company, Ltd. (hereinafter "Schuman") operated out of Kailua-Kana International Airport, Kona, Hawaii (hereinafter "KOA"), an airport it was not authorized for scheduled operations by Schuman's OpSpecs C070-2.

On or about September 17, 2012, the FAA requested to inspect Schuman's records regarding the above flights. Schuman initially refused to make any records available, but informed the FAA approximately two (2) hours later that Schuman would comply with the request.

## III. Procedural History

The Federal Aviation Administration (hereinafter "FAA") advised the Respondent, Schuman Aviation Company, Ltd. (hereinafter "Schuman") through a Notice of Proposed Civil Penalty and Final Notice of Proposed Civil Penalty that the FAA proposed to assess a civil penalty in the amount of \$28,000.00.

On February 5, 2014, Schuman submitted a written request for a hearing.

The FAA filed its Complaint on February 12, 2014.

Schuman answered the FAA's Complaint on February 26, 2014.

## IV. Hearing

A hearing was held on December 4, 2014, in Honolulu, HI.

The FAA was represented by Don Bobertz, Esq., FAA, Western-Pacific Region, Office of Regional Counsel, Los Angeles, CA.

Schuman was represented by Christopher D. Ferrara, Esq., Honolulu, HI.

Post hearing briefs were filed by both parties.

The matter is now ready for decision.

V. Jurisdiction

Schuman was at all times mentioned herein, the holder of Air Carrier Certificate No. MKHA108K, and authorized to conduct scheduled air carrier service under Part 135 of the Federal Aviation Regulations (hereinafter "FAR"s) and was subject to those regulations.

VI. Burden of Proof

The FAA was the petitioning party with the initial burden of proof (*14 C.F.R. § 13.224*).

VII. Allegations

A. FAA's recitation of facts

1. Schuman was the holder of Air Carrier Certificate No. MKHA108K, authorized to conduct scheduled air carrier service under part 135 of the FARs.
2. Schuman's Operations Specifications (hereinafter "OpSpecs") C070, "Airports Authorized for Scheduled Operations" stated that Schuman was "authorized to conduct scheduled passenger and cargo operations between the regular, refueling, and provisional airports" only at the airports listed on C070-2.
3. At all relevant times, Kailua-Kana International Airport, Kona, Hawaii (hereinafter "KOA"), was not an airport authorized for scheduled operations by Schuman's OpSpecs C070-2.
4. Between September 8, 2012, and September 13, 2008, Schuman operated civil aircrafts N687MA and N865MA, both Cessna 208B aircraft on approximately twenty-four (24) round trip flights to KOA.

5. On or about September 17, 2012, the FAA requested to inspect Schuman's records regarding the above flights.

6. Schuman initially refused to make any records available, but informed the FAA approximately two (2) hours later that Schuman would comply with the request.

7. On or about September 21, 2012, Schuman provided the requested records to the FAA.

The FAA alleged by reason of the foregoing facts and circumstances, Schuman violated the following Sections of the FARs (*Title 14, Code of Federal Regulations* (hereinafter "CFR")):

*14 C.F.R. 119.5(g)*, which states that "[n]o person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications."

*14 C.F.R. 135.73*, which states: "Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications."

The FAA alleged, pursuant to *Title 49 U.S.C. Section 46301*, Respondent was subject to a civil penalty not to exceed \$11,000.00 for each of the violations alleged.

The FAA alleged, under the facts and circumstances of this case, a civil penalty of \$28,000.00 was appropriate.

B. Schuman's recitation of facts

Schuman Answered:

FIRST DEFENSE

1. The Administrator's Complaint failed to state a cause of action upon which relief could be granted.

SECOND DEFENSE

2. Respondent admitted the allegations in paragraphs I; II, 1, 2, 3, 4 and 7 of the FAA's Complaint.

3. Respondent averred it was without knowledge of the actual date in the allegation contained in paragraph II, 5 of the FAA's Complaint, and therefore denied the same.
4. Respondent denied the allegation contained in paragraph II, 6 of the FAA's Complaint.
5. Respondent denied the applicability of paragraph III, a and b and paragraph IV, 1 and 2 of the FAA's Complaint.

#### THIRD DEFENSE

6. Schuman intended to rely on any and all Affirmative Defenses that were available, the applicability of which might be determined and/or disclosed by investigation and/or discovery.

#### VIII. Issues

Did Schuman violate *14 C.F.R. 119.5(g)*, and *14 C.F.R. 135.73* of the FARs.

If Schuman violated the above provisions of the C.F.Rs. was a fine of \$28,000.00 appropriate under the circumstances.

#### IX. Summary of Testimony and Evidence

All admitted testimonial and documentary evidence was reviewed and considered. Only brief highlights are summarized herein.

##### A. FAA's Case

##### **Joseph Monfort<sup>1</sup>**

Joseph Monfort (hereinafter "Monfort") was employed by the FAA at the Honolulu (hereinafter "HNL") Flight Standards District Office (hereinafter "FSDO") as an Aviation Safety Inspector (hereinafter "ASI") at the time of the alleged violations. He had been employed approximately five (5) years. He had primary oversight of general aviation in the islands.

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<sup>1</sup> Tr. p. 9, l. 11 to p. 32, l. 20

He was the principal operations inspector for Schuman and routinely conducted surveillance of all Part 135 operations.

He was notified in September 2012 there were commuter operations conducted by Schuman at Kona airport. He reviewed the files for Schuman, verified that he did not have the operation specifications, "Charlie 070" (hereinafter "C070") to conduct commuter operations in to Kona, so he and Bartler<sup>2</sup> went over to Schuman's office to find out what was going on.

At the interview, when Monfort inquired about the operations, Schuman denied doing commuter operations. Schuman said he was doing "on-demand charter", and he could do as many as he wanted, as often as he wanted. Monfort reviewed C070, which was issued to Schuman as of the date of September 17, 2012 (FAA# 1). Monfort pointed out that under operation specification C070, page two, there was a list of airport cities where Schuman was authorized to conduct commuter operations and Kona was not listed on that page.

During the interview, when Monfort and Bartler mentioned that Schuman could not conduct commuter operations into Kona, Schuman disagreed, so Monfort and Bartler asked to see his maintenance logs, daily flight logs. At that point in time, Mr. Schuman said, no, I don't think so. Monfort testified he and Bartler said:

...are you sure that's what you want to do? He says: Yeah, I don't think so, and he backed away from his desk. At that point in time, we got up and we walked out of the office. It was a very short meeting...

Monfort testified Schuman was under the impression he could do on-demand operations or charter operations from Mokulele Airlines and he believed that he could do that as often as he liked.

Monfort testified, two hours later, Schuman called me, after contacting his lawyer, and he said the records would be made available to us. Schuman delivered the records to the FSDO

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<sup>2</sup> Kyle Bartler, see ID below.



sometime later.

Monfort reviewed FAA# 2 and 3. FAA# 2 was his statement, which was given limited weight because it was cumulative to the live testimony at the hearing.

FAA# 3 was the daily flight logs or run sheets for the Cessna Caravan. The document showed the actual commuter flights that were conducted for Mokulele by Schuman with this aircraft. There were two (2) flights that day on the page one of eight, and it had the time periods, the actual aircraft hours, when they took off, when they landed, how much time was accumulated between each flight. These notations recurred on multiple pages. On page three of eight, it showed Kahului, Maui (hereinafter "OGG"), KOA, KOA, OGG, OGG. The records indicated operations between Kona and Maui. There were two different aircraft used 687 Mike Alpha and 65 Mike Alpha.

Once the FAA identified that the actual flights to Kona were done from Mokulele, the FAA requested records from Mokulele Airlines,<sup>3</sup> to give the FAA their published schedule and which flights Schuman flew those published schedules for. The FAA received a document Darryl Grace<sup>4</sup> (hereinafter "Grace") showing the actual commuter scheduled airline operations. FAA# 5 showed the flights were scheduled operations, which was the basis for a commuter airline. In other words, a ticket was sold for a certain time, from a certain airport to a certain place, just like you would go to an airline. When this operation was conducted on these days, it was a scheduled commuter operation. The flights that went between Kona and OGG were pre-planned flights by Mokulele, which were conducted by Schuman Aviation. On page four of six, were the actual logs by the flight-locating system for Mokulele, and with the estimated time of departures and their estimated time of arrivals, and their actual times, inputted by an individual,

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<sup>3</sup> FAA# 4, Ltr. to Darryl Grace, Director of Operations for Mokulele

<sup>4</sup> FAA# 5.

when they landed and when they took off. The first two pages were the flights conducted by Schuman for Mokulele, and the pilot's name that conducted those flights from Schuman.

Cross<sup>5</sup>

Monfort had not been involved in management in prior employment. He was a line pilot.

Schuman told Monfort he had amended the OpSpecs about four months prior to the inspection allowing Schuman to operate into Lahaina and Lanai. Schuman told Monfort he had been in the commuter business for over a year, a year and a half at the time, and he had previously amended the OpSpecs. Schuman principally operated from Mokulele into Lanai and Lahaina. Kalaupapa was a very small airport that was difficult to fly in, but the same requirements for the commuter operation existed at Kona as they did at Kalaupapa. The weather at Lanai was pretty much island weather, the same as everywhere. Kona was a single, very long runway airport. Monfort testified Schuman ultimately applied for and received OpSpecs allowing him to operate out of Kona.

Schuman had asked to do on-demand operations for Mokulele in the past, and Monfort informed him that he had to have same operation specifications at Mokulele to support Mokulele commuter operations. Had Schuman asked me for the Kona route, Monfort would have gone through the categorical exclusion, requested an amendment to his operation specifications, and would have gone through the proper procedure to authorize him to conduct Kona operations, just like we did Lahaina and Lanai City. Had Monfort known that he was requesting to go to Kona, he would have started the process to issue him and go through the requirements to issue C070 into Kona.

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<sup>5</sup> Tr. p. 34, l. 5 to p. 60, l. 7.

On the date in question, when Monfort requested records, and he was denied access. Schuman immediately pulled the aircraft out of Kona and brought it back to Honolulu.

There was no requirement for the FAA to notify the operator prior to an inspection. The FAA normally employed two inspectors when it conducted an investigation. In accordance with the 135 rules and regulations, an inspector can inspect at any time and any place, and all the records that are available should be made available to us.

Monfort did not know Schuman was conducting Kona operations. Early in the morning of the 17th, Monfort was told there was a possibility that Schuman was conducting commuter operations out of Kona. Monfort talked to his front-line manager, and then he and Bartler proceeded over to Schuman's office. Schuman kept a copy of logs file in his maintenance records downstairs in his office. Plus he had an All Pro System that identified where the aircraft go and come from.

When Mr. Schuman called Monfort two, two and a half hours later, there was no question that he was going to deliver the records. After his initial denial, he said he wanted to talk to his lawyer before he gave us the records. Had he told us the records were not there, this would be a non-issue. It's the initial -- that he denied it, that we were shocked.

Redirect<sup>6</sup>

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<sup>6</sup> Tr. p. 60, l. 10 to p. 61, l. 7.

To get an amendment to OpSpecs, an operator normally provided the FAA a letter saying where he wanted to go - start from and go to - and provided a list of altitudes that he'd be at where the single engine aircraft could make easy glide, or in the event of engine failure, could land on land. It was a seven page, eight page document. That document was signed by the operator and then finalized and issued by the FAA.

Recross<sup>7</sup>

Because Schuman did not have facilities to operate, or handle passengers out of Kona, except for the ones that Mokulele would provide, Monfort just needed to see the agreement. Eight (8) days later it was issued to him through the proper requests.

**Kyle Bartler<sup>8</sup>**

Kyle Bartler (hereinafter "Bartler") corroborated the testimony of Monfort.

#### Evidence

The following FAA exhibits were admitted : FAA# 1, FAA# 2, FAA# 3, FAA# 4, FAA# 5, FAA# 6, FAA# 8, FAA# 9

We took judicial notice of FAA# 7, FAA Order 2150.3B, consistent with past practices of this court.

#### B. Schuman's Case

**Gustav R. Schuman<sup>9</sup>**

Schuman testified he owned Schuman. In the summer of 2012 Mokulele contacted Schuman about supporting Mokulele to with their commuter scheduled operations from Oahu to Molokai, Molokai to Maui that may include Lanai and Kapalua. Schuman believed at that time,

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<sup>7</sup> Tr. p. 61, l. 13 to p. 65, l. 22.

<sup>8</sup> Tr. p. 65, l. 11 to p. 74, l. 1.

<sup>9</sup> Tr. p. 83, l. 9 to p. 132, l. 6.

that he could comply with Mr. Grace's requests because they were an authorized Part 135 on-demand carrier. Schuman attempted to contact the FAA but was unsuccessful. Schuman believed the flights were legal.

When the FAA informed Schuman he was not authorized to perform the missions, they immediately ceased the operations.

Schuman admitted denying the FAA access to his records. Schuman admitted that two hours later he called the FAA and offered to produce the records.

C. Credibility determinations

All witnesses were found to be credible.

X. Analysis of Evidence and Testimony

FAA's case

A. *14 C.F.R. 119.5(g)* provides:

No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

B. *14 C.F.R. 135.73* provides:

Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

XI. Law

A. The FAA has the burden of proof, except for affirmative defenses *14 C.F.R.*

§§ 13.224(a) and (c). The standard is a preponderance of reliable, probative, and substantial evidence *14 C.F.R. § 13.223*.

- B. 49 U.S.C. §§ 46301(a) and (d) (Transportation) provides for the imposition of civil penalties in FAA cases.

A person is liable to the United States Government for a civil penalty of not more than \$25,000 for violating... (B) a regulation prescribed or order issued under any provision to which clause (A) of this paragraph applies." The authority for issuing Parts 119 and 121 of 14 C.F.R. includes 49 U.S.C. Chapters 401, 441, and 447 — all of which are covered by clause (A). 49 U.S.C. § 46301(a)(1)(A), 14 C.F.R. Parts 119 and 121 (Preamble).

- C. 14 C.F.R. 119.5(g) provides:

No person may operate as a direct air carrier or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

- D. 14 C.F.R. 135.73 provides:

Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

## XII. Findings of Fact

We find that the evidentiary facts, by a preponderance of the evidence standard, do support a findings that the following violations occurred:

- A. 14 C.F.R. 119.5(g) provides:

No person may operate as a direct air carrier<sup>161</sup> or as a commercial operator without, or in violation of, an appropriate certificate and appropriate operations specifications. No person may operate as a direct air carrier or as a commercial operator in violation of any deviation or exemption authority, if issued to that person or that person's representative.

- B. 14 C.F.R. 135.73 provides:

Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

### XIII. Conclusions

We find that the evidentiary facts, by a preponderance of the evidence standard, support a finding that Schuman violated 14 C.F.R. 119.5(g) in that Schuman operated as a direct air carrier or as a commercial operator in violation of a deviation or exemption authority.

We find that the evidentiary facts, by a preponderance of the evidence standard, support a finding that Schuman violated 14 C.F.R. 135.73 in that Schuman denied the Administrator to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

### XIV. Penalty and Mitigation Considerations

Schuman subsequently allowed the FAA to inspect its records.

Schuman immediately ceased operations when informed it was in violation of the FARs.

We found the violations alleged.

Schuman was not initially cooperative and responsive to FAA concerns.

Once notified of the discrepancies/violations, Schuman took swift, comprehensive corrective action.

Schuman presented testimony that the penalty requested would severe impact its operations.

The FAA failed to prove by testimony and/or evidence of how it arrived at the figure of \$11,000 for each violation. We are left to speculate how the figures of \$11,000 and \$28,000 were determined.

While a penalty calculated in accordance with the FAA's policy guidance should stand, absent a showing of the Schuman's inability to pay, the evidence and testimony did not support

the penalty requested. While the FAA was entitled to substantial deference in establishing an appropriate civil penalty, we cannot ignore our role to evaluate the testimony and evidence.

A. Sanctions guidance

FAA Order 2150.3B Appendix C sets forth the penalty policy of the FAA.<sup>10</sup> As a general matter, a sanction should be imposed that is a sufficient deterrent but not excessive, in order to comply with the underlying purposes of the Federal hazardous material transportation law and HMR. The FAA considers a variety of factors when determining an appropriate civil penalty, including: (1) the nature and circumstances of the violation; (2) the extent and gravity of the violation; (3) the person's degree of culpability; (4) the person's history of prior violations, if any; (5) the person's ability to pay the civil penalty; (6) the effect on the person's ability to stay in business; and (7) other matters as justice may require.<sup>11</sup>

Any determination of penalty should weigh whether the violation was inadvertent or deliberate, the private or public character of the violation, and the attitude of the violator. The agency should also consider the respondent's size, particularly in determining the offender's ability to absorb the sanction. An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations. *Eastern Air Center, Inc.*, FAA Order No. 2008-3 (January 28, 2008). Finally, the civil penalty should provide sufficient incentive to deter the respondent and similarly-situated entities from future violations. *Folsom's Air Service, Inc.*, Id., p. 20.

The FAA has the burden of justifying the amount of civil penalty sought.<sup>12</sup> The FAA's

<sup>10</sup> *Folsom's Air Service, Inc.*, FAA Order No. 2008-11, 2008 WL 4948488 (November 6, 2008).

<sup>11</sup> Id. See also *Eastern Air Center, Inc.*, FAA Order No. 2008-3, 2008 WL 345386 (2008).

<sup>12</sup> *In The Matter of: Phyllis Jones Luxemburg*, 1994 WL 899676 (1994), citing *In the Matter of Northwest Airlines*, FAA Order No. 90-37 at 7 (November 7, 1990).



proposed sanction is no more than a proposal or a recommendation to the ALJ.<sup>13</sup> The FAA must prove to the ALJ how it used the sanction guidance to arrive at its proposal.<sup>14</sup> The FAA must also prove the existence of aggravating factors and must show how it used aggravating or mitigating factors to adjust the suggested sanction. Evidence of swift comprehensive corrective action must be considered as a mitigating factor. Significant weight has been given to respondent's efforts to ensure that a violation will not reoccur.<sup>15</sup>

#### B. Analysis

Schuman violated two (2) provisions of the FARs as set forth above.

The FAA presented no evidence that it considered the nature and circumstances of the violations, the extent in gravity related to the violations, any mitigating or aggravating circumstances, or whether Regent's ability to pay was taken into account.

The FAA failed to prove to the ALJ how it used the sanction guidance to arrive at its proposal.

The FAA failed to prove the existence of aggravating factors and failed to show how it used aggravating or mitigating factors to adjust the suggested sanction.

Taking the totality of the facts and circumstances into account, we conclude a fine of \$5,000 for each of the two (2) violations is appropriate, for a total fine of \$10,000.

WHEREFORE, evidence and testimony having been heard and considered it be and is hereby ORDERED as follows:

- a. We find the FAA proved Schuman violated *14 C.F.R. 119.5(g)* and *14 C.F.R. 135.73*; and

<sup>13</sup> *In the Matter of Eastern Air Center, Inc.*, FAA Order No. 2008-3, 2008 WL 345386 (2008).

<sup>14</sup> *In the Matter of Warbelow's Air Ventures, Inc.*, FAA Order 2000-3, 2000 WL 298578 (2000).

<sup>15</sup> *In the Matter of American Air Network, Inc.*, FAA Order No. 2006-5, 2006 WL 465369 (2006). See also *In the Matter of Airtran Airways, Inc.*, Docket No. FAA - 2010-0193, Initial Decision (June 23, 2010).

- b. Schuman be and is hereby assessed fines of \$5,000 for each of the two (2) violations for a total fine of \$10,000.



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Richard C. Goodwin  
U.S. Administrative Law Judge  
Attachment – Service List