UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: M & R HELICOPTERS, LLC

FAA Order No. 2013-4

FAA Docket No. CP10SO0011
FDMS No. FAA- 2010-1211[1]

Served: September 5, 2013

DECISION AND ORDER[2]

I. Introduction

Respondent M & R Helicopters (Respondent) has appealed the decision of Administrative Law Judge (ALJ) Richard C. Goodwin.[3] The ALJ found that Respondent used an aircraft mechanic to perform a safety-sensitive function – maintenance and preventive maintenance on Respondent's helicopter – in 2008 without testing him for drugs and alcohol, in violation of 14 C.F.R. §§ 135.251(a)[4] and 135.255(b)[5] (2008). The ALJ assessed a $4,400 civil

[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases or materials under seal) are also available for viewing at the following Internet address: www.regulations.gov.

[2] 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. In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

[3] A copy of the ALJ's decision is attached.

[4] Section 135.251(a) (2008) provided as follows:

§ 135.251 Testing for prohibited drugs.

(a) Each certificate holder or operator shall test each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that

penalty against Respondent for these violations.

On appeal, Respondent argued that it should not have been found liable for violations of the drug testing rules because the mechanic who performed the work for Respondent on a contract basis in 2008 had been included in the drug testing program of his full-time employer, Air Methods, and his part-time employer, the National Guard. Prior to 2004, FAA regulations permitted an employer to use a person for a safety-sensitive function without including the person in the employer's drug testing program *if* the person was included in another employer's drug testing program. However, by the time the alleged violations in this case occurred, the FAA had amended the regulations to provide that an employer could only use a person for a safety-sensitive function who was not included under the employer's drug testing program *if* the person was included under another employer's drug testing program *and* was performing a safety-sensitive function on that other employer's behalf (*i.e.*, within the scope of employment for the other employer). The FAA stated when it adopted this change that "employers will only be permitted to rely on companies with whom they have contractual relationships to cover testing of their employees." *Final Rule, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities*, 69 Fed. Reg. 1840, 1843 (January 12, 2004). Neither Air Methods nor the National Guard were involved with the mechanic's work for

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appendix.

[5] Section 135.255(b) (2008) provided as follows:

§ 135.255 Testing for alcohol.

…

(b) … [N]o certificate holder or operator may use any person who meets the definition of "covered employee" in appendix J to part 121 of this chapter to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

….

Respondent. Therefore, as the ALJ held, Respondent's use of the mechanic was contrary to the regulations.

Respondent advanced other arguments on appeal, including the following:

- It was unaware of the amendment to the drug testing regulations, and the FAA should have informed it about these changes.
- The drug and alcohol testing regulations were unclear.
- Nothing more than a warning or a letter of correction was justified because this case did not involve serious safety issues or an unwillingness to comply with the regulations.
- The mechanic who performed safety-sensitive work for Respondent was not Respondent's employee because he only worked for Respondent 1 day every 2 years.
- Respondent could not have violated the regulations because it was not operating at the time.
- Respondent is financially unable to pay the $4,400 civil penalty assessed by the ALJ.

As will be explained in this decision, all of these arguments are rejected. This decision affirms the ALJ's decision both as to the finding of violations and the $4,400 civil penalty.

II. Background

A. Governmental Regulation

The FAA required drug or alcohol testing of individuals performing safety-sensitive functions in commercial aviation in the 1980's. *Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities; Final Rule*, 69 Fed. Reg. 1840, 1840 (January 12, 2004). Citing "the broad use of [illegal] drugs in American society," the FAA adopted regulations requiring the testing of persons performing safety-sensitive functions

in commercial aviation for certain illegal drugs.[6] *Id. Antidrug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 14, 1988).

In 1991, Congress enacted the Omnibus Transportation Employee Testing Act of 1991 ("the Transportation Testing Act" or "the Act"), Pub. L. 102-143, 105 Stat. 953, 49 U.S.C. §§ 45101 - 45107. Congress found that "the greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft …." Pub. L. 102-143 § 2(3). Congress also found that "the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing." Pub. L. 102-143 § 2(5). The Transportation Testing Act required the FAA Administrator to prescribe regulations, in the interest of aviation safety, to test safety-sensitive employees not just for controlled substances, but for alcohol as well.

Regarding controlled substances, the Transportation Testing Act directed the FAA Administrator to require air carriers to conduct the following types of testing: pre-employment, reasonable suspicion, random, and post-accident testing. 49 U.S.C. § 45102(a)(1) (2008). Regarding alcohol, the Act directed the Administrator to require the same types of testing as for controlled substances, except the Act did not require pre-employment testing for alcohol. 49 U.S.C. § 45102(a)(2). The Act directed that the regulations permit, but not require, air carriers to conduct pre-employment testing for alcohol. (*Id.*)

The FAA implemented the Transportation Testing Act, as required. In 1994, the FAA published a final rule entitled *Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities*. 59 Fed. Reg. 7380 (February 15, 1994). Also in 1994, the FAA published a final rule entitled, *Antidrug Program for Personnel Engaged in Specified Aviation*

[6] In the final rule, the FAA stated that it "expressly excluded the issue of alcohol testing from this rulemaking …." 53 Fed. Reg. 47024, 47048 (November 21, 1988).

Activities. 59 Fed. Reg. 42911 (August 19, 1994).

Under the drug testing rules prior to 2004, when an employee was included in an employer's (Employer A's) drug testing program, then another employer (Employer B) could use the employee for safety-sensitive functions even if the employee was not included in that employer's (Employer B's) testing program. *Final Rule, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities*, 69 Fed. Reg. 1840, 1843 (January 12, 2004). This was called the "moonlighting loophole." *Id*.

Unfortunately, problems arose as a consequence of the "moonlighting loophole."

> In many cases, … Employer A was unaware of its employee's activities for Employer B. One problem arising from this was that if Employer A terminated the employee, Employer B might not know that the employee was no longer covered by Employer A's drug testing program.
>
> Another problem was that, in the event of an accident while an employee was working for Employer B, Employer B could not have post-accident tested the employee because the employee was not included in Employer B's drug testing program. Employer A might not have been aware of the need to test the employee, or it might not have agreed to test the employee if the employee had not been performing a safety-sensitive function within the scope of employment with Employer A. In adopting the original rule, it was not the FAA's intent to create a situation where a person performing a safety-sensitive function could avoid being tested.

Id.

The FAA eliminated the "moonlighting loophole" in 2004 by adding the following language to the regulation defining the term "employer":

> An employer may use a contract employee who is not included under that employer's FAA-mandated antidrug program to perform a safety-sensitive function only if that contract employee is included under the contractor's FAA-mandated antidrug program and is performing a safety-sensitive function on behalf of that contractor (*i.e.*, within the scope of employment with the contractor).

Id. at 1856 (codified at 14 C.F.R. Part 121, Appendix I, § II (definition of "Employer."). In the final rule, the FAA explained that if the employee was performing a safety-sensitive function on

behalf of a contractor:

> then the contractor is fully knowledgeable of what work the individual is doing, and the contractor can … remove from service any individual who tests positive while working for a client. This way, the regulation permits the employer to use an individual without directly covering him or her, but also ensures that the contractor will be in a position to know who is working where, so that safety and individual privacy are correctly balanced should a positive test result be received.

Id. at 1843.

In 2008, when the alleged violations in the instant case occurred, the drug and alcohol testing regulations applicable to this case were set forth in 14 C.F.R. Part 135, as well as in 14 C.F.R. Part 121, Appendix I (entitled "Drug Testing Program") and Appendix J (entitled "Alcohol Misuse Prevention Program") (2008).

B. Facts

M & R Helicopters (later renamed DR Helicopters), is located in Bethlehem, Pennsylvania. (PHC Tr. 47, Tr. 349.)[7] At all relevant times, Respondent held a 14 C.F.R. Part 119 certificate (for air carriers and commercial operators) and held operations specifications authorizing it to operate under 14 C.F.R. Part 135 (operating requirements for commuter and on demand operations). Respondent certified in its operations specifications that it would comply with the requirements of Appendices I and J of 14 C.F.R. Part 121 for its Antidrug and Alcohol Misuse Prevention Program. (Exhibit A-2).[8]

On June 19, 2007, Dr. Michael Selig, Respondent's owner and president, failed his airman competency check. (Exhibit R-6 at 1.) The FAA informed Dr. Selig that he must not act as a pilot during 14 C.F.R. Part 135 operations until he satisfactorily completed the check. (*Id.*)

[7] Citations to the Pre-Hearing Conference are as follows: "PHC Tr. [page number(s)]." Citations to the Hearing Transcript are as follows: "Tr. [page number(s)]."

[8] The exhibits from the hearing are labeled as follows. The agency's exhibits – *i.e.*, Complainant's exhibits – are labeled "Exhibit A-[number]." M & R Helicopter's exhibits – *i.e.*, Respondent's exhibits – are labeled "Exhibit R-[number]."

The helicopter flight log showed that Respondent conducted Part 135 flights with this helicopter until June 2007. (Tr. 91-92.)

On July 21 and 23, 2009, inspectors from the FAA's Drug Abatement Division conducted a routine inspection of Respondent's operation. (Tr. 77, 85; Exhibit A-7.)[9] The inspectors discovered that on July 24, 2008, Edward Baker III, an A&P mechanic, had performed safety-sensitive duties (maintenance and preventive maintenance)[10] on Respondent's helicopter, even though Mr. Baker was not part of Respondent's drug and alcohol testing programs and did not have his own drug and alcohol testing programs. (Tr. 109, 228-229.) In particular, Mr. Baker had checked the helicopter's main rotor track and balance in accordance with checklist #4300 and the Bell 206 maintenance manual. (Tr. 88; Exhibit A-4.) At the hearing, Mr. Baker described this work as a "vibration balance check." (Tr. 227.) Mr. Baker wrote in the maintenance log, "All measurements found to be within limits, no adjustments required." (Exhibit A-4.)

Virginia Lozada, the FAA's Eastern Region Drug and Alcohol Compliance and Enforcement Manager, testified that Mr. Baker was an employee of Respondent under the drug and alcohol testing regulations because he was hired to perform safety-sensitive functions. (Tr. 109.) When Mr. Baker was on the stand and was asked whether he performed the work in

[9] Respondent has alleged that the behavior of one of the FAA inspectors on July 23, 2009, was offensive and unprofessional, stating that her inspection that day lasted more than 3 hours and that she insisted that Respondent write her a spur-of-the-moment letter addressing several matters. (Appeal Brief at 3.) The ALJ did not mention this contention specifically in his initial decision, although he did write that any other arguments made by Respondent had been carefully considered, were rejected, and did not merit discussion. (Initial Decision at 6 n.5.) Respondent's description of the inspector's behavior does not necessarily indicate any impropriety. There is no time limit on inspections and the inspector was within her rights to request that Respondent write the letter documenting several matters.

[10] The regulations defined the following duties as safety-sensitive: flight crewmember, flight attendant, flight instruction, aircraft dispatcher, aircraft maintenance or preventive maintenance, ground security coordinator, aviation screening, and air traffic control. Part 121, Appendix I, § III (drug testing program) and Appendix J, § II (alcohol testing program); see also Tr. 108-09.

his capacity as an independent contractor, he responded, "I guess you could say that." (Tr. 228.) Dr. Selig paid Mr. Baker $200 for the main rotor track and balance check. (Tr. 104-105; Complainant's Exhibit 10.)

At the time of his work on Respondent's helicopter in 2008, Mr. Baker was employed full time by a company called Air Methods and part time by the National Guard. (Tr. 101-102; Exhibit A-9.) Although both Air Methods and the National Guard tested Mr. Baker for drugs and alcohol, they were not involved in any way with the work Mr. Baker performed for Respondent. (Tr. 221, 228.)[11] In other words, neither Air Methods nor the National Guard was a contractor to Respondent.

In the complaint issued on November 17, 2010, Complainant alleged that on July 24, 2008, Respondent used one of its employees (specifically, an airframe and powerplant mechanic, or "A&P" mechanic) to perform safety-sensitive duties (maintenance, preventive maintenance) on Respondent's helicopter, even though the employee was not part of Respondent's drug and alcohol testing programs, and did not have his own drug and alcohol testing programs. Complainant alleged that Respondent violated 14 C.F.R. § 135.251(a), which required each certificate holder or operator to test its safety-sensitive employees for drugs in accordance with Appendix I to 14 C.F.R. Part 121.[12] Complainant also alleged that Respondent violated 14 C.F.R. § 135.255(b), which required each certificate holder or operator to test its safety-sensitive employees for alcohol in accordance with Appendix J to 14 C.F.R. Part 121.[13]

[11] On September 9, 2008, 47 days after Mr. Baker performed the check on Respondent's helicopter, Dr. Selig changed his company's name from M & R Helicopters, LLC, to DR Helicopters, LLC. (Exhibit R-7 at 1.)

[12] Appendix I "contain[ed] the standards and components that must be included in an anti-drug program required by this chapter." (First sentence of Appendix I.)

[13] Appendix J "contain[ed] the standards and components that must be included in an alcohol

Complainant's complaint sought a civil penalty of $5,400 for violations of 14 C.F.R. §§ 135.251(a) and 135.255(b). Complainant later amended the complaint to remove certain allegations, to reduce the proposed civil penalty from $5,400 to $4,400, and to correct typographical errors.

Respondent filed a document captioned "Preliminary Objections," apparently instead of an answer, in which Respondent admitted that: (1) Mr. Baker performed safety-sensitive functions for Respondent on July 24, 2008; and (2) Respondent was at all relevant times the holder of an air carrier certificate issued under 14 C.F.R. Part 119, and had operations specifications authorizing it to conduct operations under 14 C.F.R. Part 135. Respondent denied the remainder of the complaint. In its defense, Respondent stated that it had not been able to conduct Part 135 operations for about a year before the work performed by Mr. Baker on July 24, 2008.

Complainant filed a motion to compel discovery, after Respondent failed to respond fully to discovery requests. The ALJ issued Respondent an order to show cause. The ALJ determined that Respondent's response to the order to show cause was inadequate. As a consequence, the ALJ ruled that Respondent could not rely on any evidence that it should have disclosed in response to Complainant's discovery request. Respondent asked the ALJ to reconsider, but the ALJ declined to do so.

Both parties filed motions for decision, both of which the ALJ denied. After a 2-day hearing, the ALJ issued his written decision finding that Respondent violated the regulations as alleged and assessing a $4,400 civil penalty.

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misuse prevention program required by this chapter." (First sentence of Appendix J.)

III. The ALJ's Written Decision

In his written decision, the ALJ found that Complainant proved each element of its case alleging that Respondent had violated 14 C.F.R. §§ 135.251(a) and 135.255(b). He held that the agency proved that: (1) Respondent was an entity required to follow the drug and alcohol testing regulations; (2) Respondent was an employer who had hired an employee to perform a safety-sensitive task; and (3) the employee was not included in Respondent's random pool for drug and alcohol testing and he did not have his own random pool.

Respondent argued that it did not violate the regulations because it could not operate at the time given that Respondent's pilot lacked the credentials to fly the helicopter. Respondent asserted that if there were no operations, there could be no violations. But the ALJ held that it was irrelevant whether the aircraft was flown afterward. It was merely fortuitous that the aircraft was not flown, he wrote. Respondent also pointed out that its name had changed, but the ALJ stated that the name change had no effect on Respondent's certificate number[14] and that Respondent's air carrier certificate remained valid. (Initial Decision at 5.)

Respondent argued that it should not be held responsible because it had no knowledge of the rule change. Respondent argued that the FAA did not notify Respondent of the rule change and did not post the change on the FAA's Web site. But the ALJ held that it is the certificate holder's duty to maintain knowledge of all applicable requirements, and ignorance of the law is no excuse. The ALJ noted that the FAA publication of all phases of the rulemaking in the Federal Register constituted legally sufficient notice.

As for the sanction, Complainant sought $4,400, based on its sanction guidelines in FAA

[14] DR Helicopters, LLC's Part 119 certificate number is MR3A020K, as was M & R Helicopter, LLC's.

Order No. 2150.3B.[15] As a Part 135 air carrier with no more than five pilots and five aircraft, Respondent was considered a "Group IV" entity under the guidelines. [16] The guidelines call for a civil penalty in the maximum range for an entity that failed to include a safety-sensitive employee in a drug and alcohol testing program.

The ALJ wrote that under the FAA sanction guidelines, Complainant's proposed civil penalty of $4,400 was the minimum amount for a small-business entity, like Respondent, for these violations. The ALJ noted that Respondent had alleged inability to pay the proposed civil penalty. The ALJ wrote that inability to pay was an affirmative defense that Respondent must prove, and Respondent had offered no evidence of inability to pay. The ALJ concluded that a civil penalty of $4,400 was appropriate because: (1) it reflected the risk resulting from permitting maintenance without drug and alcohol controls; and (2) it provided a proper deterrent effect. He assessed Respondent a civil penalty of $4,400.

Respondent filed a timely notice of appeal from the ALJ's decision.

IV. Respondent's Appeal

A. Employee Status

On appeal, Respondent sidesteps the issue of whether Mr. Baker was its employee for the purpose of the drug and alcohol testing regulations, asserting that he worked for only 1 day every 2 years and that he was "always and continuously on a [testing] program by his primary full-time employer Air Methods Corporation and [his part-time employer] the National Guard." (Respondent's Brief at 2.) Thus, Respondent argues that "Mr. Baker was continuously and

[15] The FAA's sanction guidelines take many factors into account, including the size of an air carrier and the nature of the violations.

[16] The sanction guidelines divide air carriers into four "groups" – Groups I – IV – with Group IV including the smallest carriers. The minimum sanction for Group IV carriers is lower than that for Group I – III carriers.

without interruption on multiple drug programs and [Respondent] always had its own drug program for those not on a drug program." (*Id.* at 13.) Even if Respondent's factual assertions are correct, its legal conclusion is in error.

The overarching requirement of the regulations and the implementing provisions of Appendix I and Appendix J is that any person performing safety-sensitive work for a Part 135 certificate holder must be included either in the certificate holder's testing program or, if the work is done by contract, in the contractor's testing program, regardless of whether the contractor is an individual or a company. Any doubt regarding this intent was removed in the revised provisions of Appendix I concerning the definition of "employer":

> An employer may use a contract employee who is not included under that employer's FAA-mandated antidrug program to perform a safety-sensitive function only if that contract employee is included under the contractor's FAA-mandated antidrug program and is performing a safety-sensitive function on behalf of that contractor (*i.e.*, within the scope of employment with the contractor).

Further, in the preamble to the final rule, the FAA explained that "including an employee in a drug and alcohol testing program depends on his or her duties, not employment status (full time, part time, temporary, or intermittent)." *Final Rule, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities*, 69 Fed. Reg. 1840, 1852 (January 12, 2004); *see* 14 C.F.R. Part 121, Appendix I, § III and Appendix J, § II.A ("full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision" must be included in drug and alcohol testing programs).

Here, the work for Respondent was performed "by contract" with Mr. Baker – not by contract with either Air Methods or with the National Guard – and Mr. Baker had no individual FAA testing program applicable to him. The definitions of "employee" in Appendix I[17] and

[17] 14 C.F.R. Part 121, Appendix I, § II.

"covered employee" in Appendix J[18] expressly contemplate this scenario when they include a person who is hired or who performs a safety-sensitive function "by contract." Consequently, under the circumstances here, Respondent had no alternative other than to deem Mr. Baker its contract employee and to conduct the testing required under Appendix I and Appendix J.

B. Notice

On appeal, Respondent argues that the FAA and its inspectors failed to notify it of the 2004 change in the regulation regarding contractor employees.[19] Along the same lines, Respondent states that the FAA did not update Respondent's operations specifications or compliance statements to reflect the change in the regulations. Had it known of the change, it states, it would not have violated the regulations. (Appeal Brief at 4.)

In the instant case, it is undisputed that mechanic Baker performed safety-sensitive duties for Respondent, but was not included in Respondent's drug testing program. It is also undisputed that Mr. Baker's work for Respondent was *not* within the scope of his employment for the entities that did test him, Air Methods and the National Guard. Nevertheless, Respondent argues, Complainant's case against it must fail because the FAA failed to notify it of the above-

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[18] 14 C.F.R. Part 121, Appendix J, § I, D.

[19] In its appeal brief, Respondent asks that someone other than the ALJ review its appeal. (Appeal Brief at 1.) This request was unnecessary, as the Rules of Practice do not provide for an appeal to the ALJ. Instead, the Rules provide for an appeal from the ALJ's decision to the *FAA decisionmaker*. 14 C.F.R. § 13.233. The Rules of Practice define "FAA decisionmaker" as:

> the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil penalty action. As used in this subpart, the FAA decisionmaker is the official authorized to issue a final decision and order of the Administrator in a civil penalty action.

14 C.F.R. § 13.202. The ALJ has no authority over this appeal. The undersigned has decisionmaking authority over this appeal and has not delegated this authority to anyone else in this case.

described change in the regulations.

While the FAA apparently did not provide Respondent with *actual* notice of the change, it did provide Respondent and others with *constructive* notice of the change by publishing the proposed change in the Federal Register, providing the public with time to comment, and publishing the final rule in the Federal Register.[20] The general rule is that "publication in the Federal Register is legally sufficient notice to all interested or affected parties regardless of actual knowledge or hardship resulting from ignorance." *Williams v. Mukasey*, 531 F.3d 1040, 1042 (9th Cir. 2008) (quoting *Camp v. U.S. Bureau of Land Management*, 183 F.3d 1141, 1145 (9th Cir. 1999)). Further, the ALJ was correct that the maxim "ignorance of the law is no excuse" (*Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2194 (2012)) applies, and that as a 14 C.F.R. Part 119 air carrier certificate holder and Part 135 operator, Respondent had a duty to keep abreast of any changes in the regulations. (Tr. 144, 182, 276, 277.)[21]

C. Inclusion in Another Entity's Testing Program

Respondent argues that the FAA initiated this case based on the erroneous assumption that Mr. Baker was not included in *any* approved drug or alcohol testing program, but, Respondent points out, the evidence showed that he *was* indeed included in the testing programs of his other employers, Air Methods and the National Guard. (Appeal Brief at 2.)

[20] *Notice of Proposed Rulemaking, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities*, 67 Fed. Reg. 9366 (February 28, 2002); *Final Rule, Antidrug and Alcohol Misuse Prevention Programs for Personnel Engaged in Specified Aviation Activities*, 69 Fed. Reg. 1840 (January 12, 2004).

[21] Note too that the regulations put the onus on Respondent to update the operations specification relating to drug and alcohol testing, Operations Specification A449, entitled "Antidrug and Alcohol Misuse Prevention Operations Specification," when any changes to the information in the operations specification occurred. 69 Fed. Reg. at 1850. Appendix I to Part 121 – Drug Testing Program, § IX.D.4 ("You [Respondent] must update the Antidrug and Alcohol Misuse Prevention Program Operations Specification when any changes to the information contained in the Operation Specification occur"); Appendix J to Part 121 – Alcohol Misuse Prevention Program, § VII.D.4 (the same).

As discussed above, it was not enough under the regulations that Mr. Baker was included in someone else's testing program when he performed safety-sensitive work for Respondent, because Mr. Baker's work for Respondent was not within the scope of his employment for his other employers. FAA regulations changed in 2004 so that Respondent could only use a contract employee like Mr. Baker to perform a safety-sensitive function if he was included under a contractor's (Air Methods' or the National Guard's) FAA-mandated antidrug program and was performing a safety-sensitive function for Respondent on behalf of the contractor – *i.e.*, within the scope of his employment with the contractor. But Mr. Baker's safety-sensitive work for Respondent was not performed on behalf of either Air Methods or the National Guard. This work was simply not within the scope of his employment with Air Methods or the National Guard.

D. Clarity of the Regulations

Respondent argues that the drug and alcohol testing regulations, in particular Part 121, Appendix I and Appendix J, were so ill-defined that the FAA was forced to recodify them in 2009. The fact that the FAA recodified the drug and alcohol regulations, however, without more, does not mean that they were defective.

In 2009, the FAA did recodify the drug and alcohol testing regulations, moving the requirements for drug and alcohol testing into a single part, 14 C.F.R. Part 120, entitled "Drug and Alcohol Testing Program." 74 Fed. Reg. 22649 (May 14, 2009). The FAA made it clear in the final rule that the move did not involve any substantive changes. *Id.* at 22651.[22]

Although Respondent does not use the term "vague," its brief suggests that it is arguing that the drug and alcohol testing regulations were void for vagueness. The vagueness doctrine

[22] 14 C.F.R. §§ 135.251(a) and 135.255(b) are now codified at 14 C.F.R. §§ 120.35(a) and 120.39(b), respectively.

provides that "a law or regulation that does not fairly inform an ordinary person of what is commanded or prohibited or which encourages arbitrary and discriminatory enforcement is unconstitutional as violative of due process." *Trans States Airlines, Inc.*, FAA Order No. 2005-2 at 8-9 (March 9, 2005) (citing *American Airlines*, FAA Order No. 1991-1 at 8 (March 2, 1999)).

The courts require a *reasonable* degree of certainty in regulations, not perfect certainty, and the courts require less precision here than in a case where the regulations govern First Amendment activities. *Trans States Airlines*, FAA Order No. 2005-2 at 8-9 (citing *Throckmorton v. National Transportation Safety Board*, 963 F.2d 441, 445 (D.C. Cir. 1992)).

Respondent fails to explain exactly how the regulations at the time of the alleged violations were defective; it has failed to explain how the regulations lacked reasonable certainty. In fact, the regulations were reasonably clear.

E. Justification for Legal Enforcement Action

Respondent points out that an FAA order states that, "[l]egal enforcement action includes circumstances where serious safety issues are involved or [there is] unwillingness to comply with regulatory requirements." *Drug and Alcohol Compliance and Enforcement Inspector Handbook*, FAA Order No. 9120.1A at 19 (May 23, 2008), http://www.faa.gov/documentLibrary/media/Order/FULL%209120.1A1.pdf. Respondent asserts that in the instant case, only a letter of correction or warning notice was appropriate – not legal enforcement action – because there were no serious safety issues and there was no unwillingness to comply on the part of Respondent. However, "the Administrator will not review an agency attorney's decision to initiate a civil penalty action rather taking administrative action." *Offshore Air*, FAA Order No. 2002-7 at 4 (April 16, 2002). As previously stated, "The agency attorney's decision to initiate a civil penalty action is an exercise of prosecutorial discretion and is immune from

review." (*Id*., citing *Wyatt*, FAA Order No. 1992-73 at 9 (December 21, 1992).

F. Operational Status

Respondent argues that it could not have violated the regulations because it was not operational when Mr. Baker conducted the check in 2008. First, Respondent states, it was unable to operate any Part 135 flights because its only pilot, Dr. Selig, had failed his competency examination. Second, Respondent states, it was unable to operate Part 135 flights because it had changed its name, and the local FAA Flight Standards District Office (FSDO) had advised Respondent not to operate until its operations specifications and compliance statements were revised to reflect the name change. Because Respondent was not operating during the relevant time period, Respondent contends, there could not have been any incidents or accidents and the public was not exposed to any danger.

Sections 135.251(a) and 135.255(b) both expressly applied to "certificate holders," not just to operators.[23] Thus, Respondent, as the certificate holder, was responsible for complying with these regulatory provisions, regardless of whether it was operating at any particular time.

Under Respondent's interpretation, an air carrier could use a mechanic to perform maintenance on a helicopter at a time when it was not conducting operations, and so avoid subjecting the mechanic to drug and alcohol testing. Later it could resume operations with an aircraft upon which maintenance had been performed while the mechanic was not subject to drug and alcohol testing. It is for this reason that the requirements to conduct drug and alcohol testing apply to certificate holders, regardless of whether they are conducting operations at the time or not.

Respondent relies on the *Everson* civil penalty case. In that case, the ALJ held that because Everson had not flown any Part 135 operations during the relevant period, the drug and

[23] *See supra* notes 4 and 5.

alcohol testing rules did not apply. *Everson, d/b/a North Valley Helicopters Inc*., 2000 WL 34229107 at *5 (DOT) (June 16, 2000). Agency counsel filed an appeal from the ALJ's decision to the FAA Administrator, but because agency counsel later withdrew its appeal while the case was pending, the Administrator did not have the opportunity to decide whether the ALJ had ruled properly that there could be no violation of the drug and alcohol testing rules if the certificate holder was not in operation. Under the Rules of Practice, the ALJ's findings and conclusions are not binding precedent unless affirmed by the Administrator on appeal. *See* 14 C.F.R. § 13.233(j)(3), providing that "[a]ny issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action."

Having prevailed before the ALJ, Everson applied under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, to recover attorney fees and expenses. The ALJ denied Everson's request for fees on the ground that the FAA's civil penalty case had been substantially justified, and the Administrator affirmed. The Administrator stated that it was reasonable for the FAA to argue that a certificate holder "must implement drug and alcohol programs, simply by virtue of holding the certificate, and regardless of the type of operations flown." *Everson*, FAA Order No. 2004-5 at 18 (September 22, 2004). The Administrator pointed out that certain regulations – (1) 14 C.F.R. § 135.251(a); (2) Appendix I to 14 C.F.R. Part 121; (3) 14 C.F.R. § 135.255(a); and (4) Appendix J to 14 C.F.R. Part 121 – referred to "each certificate holder," supporting the agency's position. (*Id.* at 19.) Also, the Administrator noted that the regulations required pre-employment testing, which for a new air carrier obviously must take place before operations begin; thus, the Administrator stated, the drafters could not have intended that the regulations require testing only during actual operations. (*Id.* at 20.) In the end, the Administrator stated

that there were reasonable arguments on both sides of the issue, and the Administrator did not decide the issue. The Administrator simply found that the FAA's position had been substantially justified, and, consequently, no award of fees was appropriate under EAJA.

Respondent points to language in 14 C.F.R. §§ 135.241 and 135.255(a) to support its argument that it did not violate Sections 135.251(a) and 135.255(b) because it was not conducting operations at the time of Mr. Baker's inspection. At the time, Sections 135.251(a) and 135.255(b) were found in Part 135's Subpart E, entitled "Flight Crewmember [24] Requirements." The applicability section for Subpart E was 14 C.F.R. § 135.241, which stated that "this subpart [Subpart E] prescribes the flight crewmember requirements for *operations* under this part." (Emphasis added.) Respondent also points out that Section 135.255(a) stated that "Each certificate holder *and* operator must establish an alcohol misuse prevention program …" Respondent asserts that by referring to the certificate holder *and* operator, Section 135.255(a) indicated that it only applied if a company is not just a certificate holder but also an operator.

Although Section 135.241 stated that Subpart E prescribed the flight crewmember requirements for Part 135 *operations*, there are other indications that a certificate holder must implement drug and alcohol programs, simply by virtue of holding the certificate, and regardless of the operations flown. The regulations in Part 135 that specifically relate to drug and alcohol testing, Sections 135.251 and 135.255, refer in various places to either the "certificate holder" alone, or to the "certificate holder *or* operator." While it is true that Section 135.255(a) refers to "each certificate holder *and* operator," most often the regulations involving drug and alcohol

[24] While Subpart E is entitled "Flight Crewmember," Mr. Baker, the mechanic who performed the check on Respondent's helicopter, does not fit into the definition of "flight crewmember" set forth in 14 C.F.R. § 1.1. It is clear that Mr. Baker is an employee under the drug testing regulations in Part 121, Appendix I and a covered employee under Appendix J. This is evidence that Section 135.241 was not intended to limit the scope of Sections 135.251(a) and 135.255(b).

testing refer to "each certificate holder" or "each certificate holder *or* operator." While Section 135.255(a) refers to certificate holders *and* operators, Complainant did not allege that Respondent violated Section 135.255(a). Rather, Complainant alleged that Respondent violated Section 135.255(b), which states that "No certificate holder *or* operator" may use any covered employee to perform any safety-sensitive function unless that person is subject to alcohol misuse testing.

Further, as the Administrator pointed out in the *Everson* EAJA decision, the drug testing regulatory scheme involves pre-employment testing. *Everson*, FAA Order No. 2004-5 at 20.[25] For a new air carrier, pre-employment testing must necessarily take place before operations begin. Thus, the drafters could not have intended that the regulations require testing only *during* operations.

Respondent also relies on the *Helicopter Flite* case, FAA Order No. 2011-6 (June 13, 2011), arguing that Part 135 contains an implicit requirement that operations are occurring. This argument is not persuasive because: (1) *Helicopter Flite* did not involve the drug and alcohol testing regulations, and (2) the Administrator later modified *Helicopter Flite* to hold that:

> [a] finding that a certificate holder is not in compliance with Section 135.25(b) does *not* require proof that the certificate holder operated any aircraft during the time period in which it lacked an exclusive use aircraft.

Helicopter Flite, FAA Order No. 2011-11 at 2 (November 22, 2011) (italics added).

[25] As explained above beginning at p. 2, the Transportation Testing Act *required* the air carriers to conduct pre-employment testing for drugs and *permitted* the air carriers to conduct pre-employment testing for alcohol.

G. Inability to Pay

Respondent states that is not reasonable to impose a civil penalty on it, given that it has generated only losses. According to Respondent, it is a Limited Liability Corporation and therefore has the liability protection of a corporation. Respondent argues that a principal – meaning Dr. Selig – cannot be held personally liable. Respondent further argues that it would be unreasonable to cause further harm to Dr. Selig's personal assets, which Respondent states have been under assault in a protracted divorce litigation.

Dr. Selig is not being held personally liable in the instant case. The instant case is against Respondent, not Dr. Selig.

The ALJ correctly stated that the plea of inability to pay all or part of a proposed civil penalty is an affirmative defense, and as such, it is Respondent's burden to plead and to prove it. *See, e.g.*, *American Air Network*, FAA Order No. 2006-5 at 9 n.19 (February 10, 2006). The ALJ said that Respondent offered no evidence of inability to pay.

Complainant requested Respondent's three most recent federal returns, including the attached schedules. (Tr. 216.) However, Respondent provided only incomplete federal and state tax returns. Because Respondent failed to provide the necessary evidence of financial hardship or inability to pay, the ALJ did not err in declining to reduce the otherwise appropriate civil penalty based upon Respondent's alleged inability to pay.

Conclusion

As discussed above, the arguments in Respondent's appeal brief are without merit.[26]

[26] Respondent's other arguments have been considered and found to be unworthy of discussion.

The civil penalty assessed by the ALJ of $4,400 is affirmed.[27]

[Original signed by Michael P. Huerta.]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

[27] 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 Respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2013). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

SERVED: JUNE 18, 2012

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

FEDERAL AVIATION ADMINISTRATION,	
Complainant,	FAA DOCKET No. CP10SO0011
v.	(Civil Penalty Action)
M & R HELICOPTERS, LLC	
Respondent.	FDMS No. FAA-2010-1211

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: 1) Respondent violated 14 CFR §§135.251(a) and 135.255(b) as charged; and
2) Respondent is hereby assessed a civil penalty of $4,400.

I. Background

The Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. §§45101-45107 ("the Act"), requires drug and alcohol testing of "safety-sensitive" transportation employees. Under the Act's authority, the Federal Aviation Administration issued detailed regulations mandating pre-employment, random, and post-accident drug and alcohol tests for employees in aviation.[1]

[1] While the agency set up separate testing programs for drugs and alcohol, alcohol in fact is a drug. *See* Fifth Special Report to the U.S. Congress on Alcohol and Health from the Secretary of Health and Human Services, xiii (1983) ("alcohol is undoubtedly the most widely used -- and abused -- drug in America"). On the other hand, in common parlance the term "drug" does not connote "alcohol," *McCluskey v. Board of Education of Rogers, Ark.*, 662 F.2d 1263, 1267 (8 Cir. 1981). The latter formulation undoubtedly is the context in which the programs and rules were devised.

The Federal Aviation Administration ("Complainant," "FAA," or "the agency") brought an action against M & R Helicopters, LLC ("Respondent" or "M & R"), charging certain infractions of those regulations. The agency's Complaint states that M & R was, during the period of the alleged violations, a certificated operator under Part 119 and authorized to conduct operations under Part 135 of the Federal Aviation Regulations ("FARs"). Part 119 carriers are obligated under the agency's regulations to use an antidrug and alcohol misuse prevention program for their employees who perform safety-sensitive work. (The term "employees" includes prospective and contract employees). The agency's Complaint, as amended, alleges that M & R, of Bethlehem, PA, violated certain program requirements and is liable for a civil penalty. It asks that M & R be found in violation and that the carrier be assessed a civil penalty in the amount of $4,400 (Tr. 32).

More specifically, the Complaint alleges that Mr. Edward Baker III, identified as an M & R employee, performed safety-sensitive tasks for M & R, an employer, on or about July 24, 2008. At that time, the drug and alcohol testing regulations applicable to Part 119 certificate holders were found in 14 C.F.R. Part 121 and in Part 121's Appendices I (drug testing program) and J (alcohol misuse prevention program).[2] The following duties had been defined as safety-sensitive: flight crewmember, flight attendant, flight instruction, aircraft dispatcher, aircraft maintenance or preventive maintenance, ground security coordinator, aviation screening, and air traffic control. Part 121, Appendix I, §III (drug testing program) and Appendix J, §II (alcohol misuse prevention program); *see also* Tr. 108-09.

Mr. Baker had not been included in an antidrug program or alcohol misuse prevention program at the time he assertedly performed these functions, the Complaint continues (*see* Tr. 29, 31). He had neither been included in Respondent's random pool for required drug and alcohol testing nor had he set up his own drug and alcohol testing program. As such, the Complaint concludes, M & R violated FARs 14 C.F.R. §§135.251(a) and 135.255(b). Section 135.251(a) (now codified at 14 C.F.R. §120.35(a)) mandated drug testing in accordance with the provisions of then-applicable Part 121, Appendix I for each employee who performed safety-sensitive functions. Part 121, Appendix I, §V.B required each safety-sensitive employee to be subject to random drug testing. Section 135.255(b) (now codified at 14 C.F.R. §120.39(a)) required alcohol testing in accordance with Part 121, Appendix J for each employee who performed safety-sensitive functions. Part 121, Appendix J, §III.C compelled each safety-sensitive employee to be subject to random alcohol misuse testing.

Respondent, which appeared through its president and owner, Michael Selig ("Dr. Selig"), denied the charges and asked that the Complaint be dismissed.

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[2] Effective July 13, 2009, the drug and alcohol testing regulations for Part 119 carriers were recodified. No substantive changes were made. The regulations simply were consolidated in a new 14 C.F.R. Part 120, subparts E and F. *See* Final Rule, 74 Fed.Reg. 22563 (May 14, 2009). This Initial Decision ("I.D.") will refer to the provisions current at the time of the alleged infractions unless otherwise stated.

A hearing was held on January 26 and 27, 2012, in Easton, PA. I determined that a written decision was reasonable and appropriate under the circumstances (Tr. 351-52). The parties have filed briefs and the matter now is ready for decision.

I hold that the facts and circumstances of this case justify findings of violations of each count and warrant an assessment against Respondent of the full amount requested in the agency's Complaint, $4,400.

II. The Proceeding

A. The Evidence and Findings

Complainant showed that Respondent was a Part 119 certificate holder authorized by its operations specifications ("op specs") to conduct Part 135 operations (Tr. 78; Exh. A-1). The op specs specifically authorized M & R to conduct operations using a Bell-206B helicopter, Registration No. N98CM (Exh. A-3; Tr. 83-84).

Such authorizations carry concomitant responsibilities. A comparison with the responsibilities of motorists is apt. Motor vehicle license holders are required by virtue of their licenses to obey the rules of the road; these licensees also impliedly, and necessarily, consent to the governing authority's system of punishment for violating those rules. Just the same, every air carrier in obtaining certification becomes duty-bound to respect the agency's rules and consents to appropriate penalties if it does not.

Op specs explicitly restate -- and underscore -- these obligations. M & R's op specs spelled out the carrier's obligation to conduct operations in accordance with all requirements. The op specs also specifically bound M & R to comply with the agency's drug and alcohol testing requirements. Op spec A449, paragraph a., states that "[t]he certificate holder who operates under [14 CFR Part 135] certifies that it will comply with the requirements of 14 CFR Part 121 Appendices I and J and 49 CFR Part 40 for its Antidrug and Alcohol Misuse Prevention Program." (Exhs. A-1 and A-2; Tr. 81, 315-16, 328-29). Indeed, Part 119 certificate holders such as M & R must comply with their op specs even if they are not actually conducting Part 135 operations (Tr. 329).

During a routine inspection conducted on July 21 and 23, 2009, FAA inspectors discovered that an airframe and powerplant ("A & P") mechanic, Edward Baker III, had on July 24, 2008, performed safety-sensitive duties – maintenance and preventive maintenance -- on Respondent's aforementioned Bell 206B helicopter.[3] M & R, as a Part 119 certificate holder authorized to perform Part 135 operations,

[3] Tr. 228-29. Mr. Baker, who also is a pilot, testified that he had performed a vibration balance check, ensuring that the aircraft "was within normal safe operating limits for vibration analysis." Tr. 227; *see also* Tr. 220-21.

met the regulations' definition of employer (Tr. 190). Mr. Baker was deemed an employee because he had performed safety-sensitive tasks under M & R's Part 135 certificate (Tr. 191-92). M & R, moreover, had hired him. Baker had been paid directly by Respondent's owner, Dr. Selig (Exh. A-10; Tr. 104-05).

Mr. Baker was neither a part of Respondent's drug and alcohol testing program nor did he have his own testing program (Tr. 204). He had belonged neither to M & R's random pool nor had he formed a random pool of his own (Exhs. A-4 and A-6; Tr. 86, 89, 95-96, 109-110).

Mr. Baker at this time had been employed by Air Methods, Inc. ("Air Methods"). He belonged to Air Methods' drug and alcohol testing program. But Air Methods had forbade him from performing any outside maintenance (Exh. A-9; Tr. 102-03). Baker was a "moonlighter;" that is, in performing tasks for M & R, he had operated on his own and outside the scope of his employment with Air Methods. This conduct, absent membership either in the employee's own drug and alcohol testing program or a program of the entity for which Baker moonlighted – Respondent -- was prohibited by the drug and alcohol testing regulations (Tr. 106-07, 110, 162-63, 310).

It became a point of controversy that, at one time, Baker's actions in performing safety-sensitive work for M & R would have been permissible under the FARs. Prior to February 11, 2004, employers such as M & R had only to ensure that employees performing safety-sensitive tasks were part of some entity's drug and alcohol testing program. Mr. Baker's work for M & R would have been permissible since he had belonged to Air Methods' program. (Mr. Baker testified that he also was a member of a drug abatement program under the auspices of the National Guard). However, a regulation which became effective on February 11, 2004 changed the definition of "employer" to require an individual performing a safety-sensitive function for an employer to be covered either by the employer's screening program or the program of the contractor (in this case, Air Methods) when the individual is performing work for the employer *within the scope of his employment for the contractor* (Exh. A-11; 69 Fed.Reg. 1840, 1843 (January 12, 2004); Tr. 139, 197, 220-21, 317-18). Since Mr. Baker was not authorized under his employment with Air Methods to perform outside maintenance, he had been working outside the scope of his employment. As such, his work for M & R had not been covered by an authorized drug or alcohol testing program.

B. Conclusion

I find and conclude that Respondent violated FARs 14 C.F.R. §§135.251(a) and 135.255(b) as charged.

Complainant proved each element of its case. The agency showed that, as an aviation entity holding a Part 119 certificate and authorized to conduct operations under Part 135, M & R was required to adhere to the drug and alcohol testing

regulations then effective. The agency further showed that Respondent was an employer who had hired an employee to perform a safety-sensitive task. That employee, Mr. Baker, was not part of a random pool for drug or alcohol screening either of his own creation or sponsored by Respondent. Proof of these elements demonstrated that Respondent violated 14 C.F.R. §§135.251(a) and 135.255(b) as charged.

Respondent raises several objections to a finding of violation. *See generally* "Respondent's Post-Trial Brief to Dismiss Complaint," pps. 2-3, 6-13. They are each rejected.

M & R states that it was unable to mount operations at the time of the asserted infraction. Its pilot did not have the credentials required to operate the helicopter; as such, the carrier had been effectively shut down (*see* Exh. R-6). A non-operable entity cannot be held in violation, Respondent contends.

The ability or inability to operate is not germane to the violations. What is relevant is the status of M & R's flight certificate; that certificate was valid and active. The status of the carrier's pilot had no effect on the certificate's validity (Tr. 167-68). The evidence showed that M & R's certificate had been validated as recently as June 10, 2011 (Exh. A-15; Tr. 331). Respondent's op specs were current (Tr. 157, 164, 167-68, 314). As a carrier with a valid certificate, M & R was required to abide by the regulatory requirements of the drug and alcohol programs (Tr. 164).

M & R also asserts that it had undergone a name change. But any name change had no effect on its certificate number, which did not change. Respondent's requirement to abide by the regulations flows from the validity of its certificate (Tr. 174, 331).

M & R stresses that it did not fly the Bell helicopter after the inspection which triggered this action. If there are no operations, there can be no violations, Respondent asserts. But the scenario Respondent posits, assuming its truth for the sake of argument, is not relevant. It does not matter whether the aircraft was flown afterward or not. That the aircraft was not operated is a fortuitous circumstance. It has no bearing on the violation. It is the risk to aviation safety triggered by the conduct of Respondent's employee that constitutes the prohibited behavior (Tr. 207-08; *see* Exh. A-13).

Respondent also protests that it had no knowledge of the amendment to the rule under scrutiny which, after February 10, 2004, changed the requirements regarding drug and alcohol testing programs for certain employees and, most importantly, allowed the instant charges to be brought. The agency made no effort to notify Dr. Selig or M & R of the rule change. Nor did the FAA post the change on a web site or a similarly accessible platform. Respondent may not be charged with a violation of a rule of which it had no notice, it contends. Allegation by surprise, the argument continues, is unfair and illegal and may not stand.

This argument also is rejected. It is the operator's duty to acquire and maintain knowledge of all applicable requirements (Tr. 144, 182). Certificate holders are responsible for keeping up to date on all matters affecting their certificate (Tr. 276, 281). Lack of knowledge of the law simply does not excuse illegal conduct. *U.S. v. Cheesemen,* 600 F.3d 270 (3 Cir. 2010). These expressions of an operator's responsibilities, it should be recognized, are but a corollary of the old – and quite valid – axiom that ignorance of the law is no excuse.[4]

Moreover, the regulation complained of was duly promulgated under notice-and-comment rulemaking procedures. All phases of the rulemaking were published in the Federal Register. That process provides notice sufficient under the Constitution to all interested parties. It affords all affected parties due process under the law: "Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Jones v. United States,* 121 F.3d 1327, 1330 (9 Cir. 1997), *cert. den.* 523 U.S. 1121 (1998).

In view of the foregoing, Respondents' arguments are rejected.[5]

III. Penalty

I will assess a civil penalty of $4,400.

Complainant urges a civil penalty of $4,400. Its recommendation is based on guidelines the agency has published for its employees to follow when suggesting an appropriate civil penalty. They are designed to assure greater national consistency in enforcing the FARs. The guidelines are contained in FAA Order 2150.3B.

The guidelines assess all relevant statutory criteria, including mitigating and aggravating circumstances. They aid Complainant's penalty recommendation through a sanction guidance matrix. The sanction guidance matrix is intended to indicate the Administrator's general views about the civil penalty ranges appropriate for different types of violations. The matrix sets out specific penalty ranges for each input, cross-referencing such factors as the nature and size of the respondent and the nature and extent of the harm produced by the offending conduct.

The guidelines are not binding on the agency. Each situation, being dependent on so many variables, is unique. "An appropriate civil penalty," the FAA

[4] "[T]he maxim 'ignorantia legis neminem excusat,' applies. Every one is presumed to know the law, and is estopped from alleging ignorance of it." *Little v. Hasey,* 12 Mass. 319 (1815). If ignorance were a legitimate excuse, "law would be of no effect, but might always be eluded with impunity." *The Cotton Planter,* 1 Paine 23, 6 F.Cas. 620 (Cir.Ct.N.Y. 1810), *quoting Blackstone's Commentaries on the Laws of England* (1753), vol. 1, sec. II, 46.

[5] All other arguments Respondent has made have been carefully considered and are rejected without further comment. They do not merit discussion.

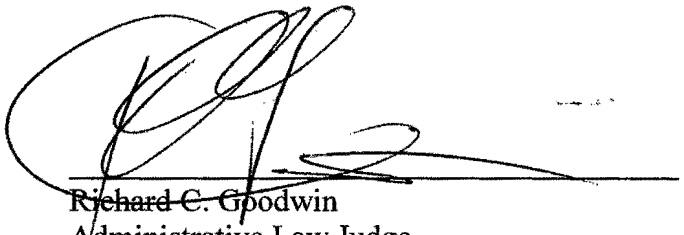
has emphasized, "must reflect the totality of the facts and circumstances surrounding the violations."[6]

M & R, as an operator under Part 135 with no more than five pilots and five aircraft, is considered a "Group IV" entity under the guidelines (Order 2150.3B, p. B-3; Tr. 212). The guidelines also call for a civil penalty in the maximum range for an entity which failed to include a safety-sensitive employee in a drug and alcohol testing program (Order 2150.3B, p. B-31, Fig. B-5-b; Tr. 213). Complainant additionally determined that Mr. Baker's performance on Respondent's helicopter constituted an aggravating factor (Tr. 215). Complainant's suggested civil penalty of $4,400 is the minimum amount suggested for a "Group IV" small-business entity whose violations are felt to belong in the maximum range (Tr. 215-16; *see* Order 2150.3B, p. B-4).

The plea of inability to pay all or part of a proposed civil penalty is an affirmative defense. That is, it is Respondent's burden to plead and to prove it. *See, e.g., American Air Network,* FAA Order No. 2006-5 (February 10, 2006), p. 9 n. 19. Respondent offered no evidence of this nature.

I find and conclude that a civil penalty of $4,400 is just and appropriate. It fairly reflects the nature of the violations and the risk of harm introduced into the air transportation system. The assessment also provides a proper deterrent effect. Allowing maintenance performance without proper drug and alcohol controls was a serious safety issue. It could have had disastrous consequences for the aircraft, the crew, and the flying public (Tr. 107, 157).

M & R Helicopters, LLC, is hereby assessed a civil penalty of $4,400 for violations of FAR 14 C.F.R. §§135.251(a) and 135.255(b) as described in this Initial Decision.[7]



Richard C. Goodwin
Administrative Law Judge

Attachment – Service List

[6] *Folsom's Air Service,* FAA Order No. 2008-11 (November 6, 2008), p. 11. I did not admit Order 2150.3B, which had been proffered as Exhibit A-14, but instead took judicial notice of it. Tr. 213-14. The guidelines may be found at the FAA's web site, www.faa.gov, or, more specifically, at www.faa.gov/documentLibrary/media/Order/ND/2150.3B.pdf.

[7] Any appeal from the Initial Decision to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus an additional 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to the Appellate Docket Clerk, Room 924-A, Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591, and to agency counsel. Service upon the presiding judge is optional.

FAA Docket No. CP10SO0011
(Civil Penalty Action)

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