UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: VENTURA AIR SERVICES, INC.
FAA Order No. 2012-12

Docket No. CP08EA0008
FDMS No. FAA-2008-0505[1]

Served: November 1, 2012

DECISION AND ORDER[2]

Administrative Law Judge ("ALJ") Isaac D. Benkin issued a written initial decision finding that Ventura Air Services ("Ventura") violated 14 C.F.R. §§ 135.293(a)(1) and (4)-(8),[3] by using a pilot on three revenue flights when the pilot had not taken a written or oral test in the subjects specified in those provisions in a timely fashion. The ALJ assessed a nominal $1.00 civil penalty.[4]

The FAA and Ventura filed cross-appeals. On appeal, Ventura argued that (1) the ALJ's findings of fact were not supported by a preponderance of the evidence and each conclusion of law was not made in accordance with applicable law, precedent and policy, (2) Section 135.293(a) is void for vagueness, and (c) the ALJ erred in admitting the FAA's rebuttal witness's expert testimony. The FAA, on appeal, argued that the ALJ should have found that Ventura also

[1] 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).

[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/*. *See* 14 C.F.R. § 13.210(e)(2). 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] See Appendix I for the full text of Sections 135.293(a)(1) and (4)-(8).

[4] A two-day hearing was held on April 7-8, 2009.

violated Section 91.13, and that a $15,000 civil penalty is consistent with agency policy as applied to the facts of this case.

As explained in this decision, Ventura's appeal is denied. This decision holds that the preponderance of the evidence supports the ALJ's decision that Ventura used a pilot who was not current on his Sections 135.293(a)(1) and (4)-(8) testing. Further, Ventura's arguments regarding the admission of the expert testimony of FAA Inspector Roy Michael Sees and that Section 135.293 should be found void for vagueness are rejected. The FAA's cross-appeal is granted. A $15,000 civil penalty is assessed.

I. Background

Pilots who serve as required crewmembers in Part 135 operations are required under 14 C.F.R. §§ 135.293(a)(1)-(8)[5] to pass initial and recurrent oral or written tests in eight specified areas. Sections 135.293(a)(1) and (4)-(8) require oral or written testing of a pilot's *non-aircraft-specific* knowledge, including pertinent regulations, provisions of the carrier's operations specifications and manual, navigation, air traffic control procedures, and meteorology. Sections 135.293(a)(2)-(3) require written or oral testing of a pilot's *knowledge about the particular type of aircraft* that the pilot will operate for the air carrier. In addition, under Section 135.293(b), pilots are required to take competency tests, commonly referred to as "flight checks" in the aircraft or class or type of aircraft that they will fly for the operator.[6]

Regarding the timing of these oral or written tests and flight checks, Section 135.293 provides that "[n]o certificate holder may use a pilot, nor may any person serve as a pilot, unless since the beginning of the 12th calendar month before that service, that pilot has passed" a written

[5] See Appendix I for the full text of Section 135.293(a).

[6] See Appendix II for the full text of Section 135.293(b).

or oral test and a flight check. This requirement must be read in conjunction with Section 135.301(a), which provides as follows:

> If a crewmember who is required to take a test or a flight check under this part, completes the test or flight check in the calendar month before or after the calendar month in which it is required, that crewmember is considered to have completed the test or check in the calendar month in which it is required.

14 C.F.R. § 135.301(a).

For example, under Sections 135.293(a) and 135.301(a), if a pilot passed a written or oral test on all the areas covered by Section 135.293(a) in February of Year 1, the pilot could satisfy Section 135.293(a)'s recurrent oral or written test requirement by completing a knowledge test no later than the end of the "grace month," March of Year 2. (*See* Tr. 39, 42.) In this example, February would be the "base month" and, under Section 135.301, if the pilot completed the recurrent testing during the following January, February, or March of Year 2, the testing would be considered as accomplished in February of Year 2. (Tr. 42.) This 3-month period, comprised of the base month, the month before and the month after the base month of Year 2, is referred to as the "eligibility period." (*See* Respondent's Exhibit 1 at 1 (FAA Order No. 8400.10, ¶ 603); Letter by FAA Assistant Chief Counsel Rebecca MacPherson to Gregory Winton, Esq., dated September 6, 2006, Respondent's Exhibit 7 at 2.)

FAA Inspector Mark Rogers testified at the hearing that it is common for Part 135 operators to establish separate base months for the Sections 135.293(a)(1) and (4)-(8) (non-aircraft specific) portions of the oral or written test, the Sections 135.293(a)(2) and (3) (aircraft-specific) portions of the oral or written test, and the Section 135.293(b) flight check. (Tr. 118-119.)

In 2004, Ventura, the holder of an air carrier certificate, hired Nicholas Tarascio to serve as second in command of a Lear 25 and Lear 55. (Tr. 176-177.) Before that, Tarascio worked

for Air East Management, another company operating under Part 135, as second in command flying the same aircraft.

Complainant's Exhibit 1, Tarascio's airman competency check records, FAA Form 8410-3, showed that after Tarascio was hired by Ventura, he took oral or written tests and flight checks under Section 135.293 as summarized in the following chart:

DATE	**SUBJECT- § 135.293**	**AIRCRAFT**	**INSPECTOR/ CHECK AIRMAN**
12/08/2004	(a)(1) & (4)-(8)	Not Applicable	Inspector Mauro
02/03/2005	(a) & (b)	Lear 25D	Inspector Fraher
03/15/2005	(a)(2)-(3) & (b)	Lear 35A	Check Airman Boyd at SIMCOM
03/16/2005		Lear 25 differences[7]	(illegible signature) at SIMCOM
04/18/2005		Lear 55 differences	Check Airman Santiago at SIMCOM
05/08/2006	(a)(1) & (4)-(8)	Not Applicable	Inspector Rogers

According to Ventura's flight logs, Tarascio served as second in command on revenue flights under Part 135 on April 1 and 2, 2006 in a Lear 25 and on April 13, 2006, in a Lear 55. (Complainant's Exhibits 5 and 6; Tr. 88-90.) The next month, in May 2006, Ventura sent Tarascio to Inspector Rogers, who was Ventura's principal operations inspector (POI) at the time, for the oral or written test required under Sections 135.293(a)(1) and (4)-(8).[8] (Tr. 29-30.)

[7] Differences training is defined as "the training required for crewmembers who have qualified and served on a particular type aircraft, when the Administrator finds differences training is necessary before a crewmember serves in the same capacity on a particular variation of that aircraft." 14 C.F.R. § 135.321(a)(4). Tarascio testified that Ventura was going to operate a Lear 25, not a Lear 35, aircraft. (Tr. 190.) Hence, after his Lear 35 simulator recurrent training and testing, he took differences training in the Lear 25 and later the Lear 55.

[8] Because Rogers was not rated in the Lear, he could not give the Sections 135.293(a)(2) and (3) portions of the oral or written test. (Tr. 31-32, 37-38.)

Rogers testified that before administering the test, he reviewed Tarascio's training records and did not notice anything "abnormal."[9] (Tr. 38.) However, he noticed "an area of discontinuity" in the test records because he could find no records to show that Tarascio had completed an oral or written test under Sections 135.293(a)(1) and (4)-(8) since he was tested by Inspector Susan Fraher in February 2005, approximately 15 months earlier. (Tr. 29, 38-39.) Rogers testified that he asked Ventura's director of operations, Gould Ryder, whether there were any records to show that Tarascio had completed the non-aircraft specific knowledge test by the end of March 2006, but Ryder never provided him with any additional documentation on this issue. (Tr. 44.) After giving the test to Tarascio on May 8, 2006, Rogers wrote in the "Remarks" section of the FAA Form 8400-3, that a "new base month [is] established for 135.293(a)(1), (4-8) only." (Complainant's Exhibit 1 page 6; Tr. 64.)

The FAA argued that Tarascio was overdue for the non-aircraft specific portions of the oral or written test required under Sections 135.293(a)(1) and (4)-(8) when he flew as second in command on April 1, 2, and 13, 2006. Rogers testified at the hearing that because Tarascio completed the non-aircraft specific test with Inspector Fraher on February 3, 2005, he was required to complete those portions of the test again no later than the last day of March 2006 under Sections 135.293(a)(1) and (4)-(8) and 135.301. (Tr. 39, 43.) However, Rogers testified, he found no evidence in the official test records that Tarascio had completed a recurrent test as required by Sections 135.293(a)(1) and (4)–(8) prior to the three flights in April 2006. (Tr. 39, 44, 47, 75, 113.)

[9] Rogers testified, based upon his review of the records, that Tarascio completed his *initial* training and Section 135.293(a)(1)-(8) test in February 2005, and took *recurrent* training and a Sections 135.293(a)(2)-(3) test pertaining to the Lear in the simulator at SIMCOM in March 2005. (Tr. 154-155.)

Ventura argued that Tarascio was current on his Sections 135.293(a)(1) and (4)-(8) testing when he served on the revenue flights in April 2006 because, in Ventura's view, Tarascio's testing date should have been deemed to be in March, not February. Ventura's argument was based on its interpretation of guidance in FAA Order No. 8400.10. A review of training programs implemented by Part 135 carriers generally and Ventura's training program[10] in particular is necessary to understand Ventura's arguments.

Crewmember training requirements are set forth in 14 C.F.R. §§ 135.321-135.353. Section 135.343 provides that:

> No certificate holder may use a person, nor may any person serve, as a crewmember in operations under this part unless that crewmember has completed the appropriate initial or recurrent training phase of the training program appropriate to the type of operation in which the crewmember is to serve since the beginning of the 12th calendar month before that service.

Section 135.323(b) provides a "grace month" for training, similar to Section 135.301's provision regarding oral or written tests and flight checks. 14 C.F.R § 135.323(b).

The FAA's rebuttal witness, Inspector Roy Sees,[11] whom the ALJ found qualified as an expert in pilot training[12] and testing, (Tr. 398-399), testified about training programs. He testified that a carrier's pilot training program[13] is divided into six categories, including initial new hire and recurrent training. Each category is divided into curriculums for each required

[10] A certificate holder must obtain initial and final FAA approval of a training program before implementing it. 14 C.F.R. §§ 135.323(a)(1) and 135.325. FAA Inspector Sees testified that operators' training curriculums must be approved by the FAA. (Tr. 448-449.)

[11] Sees is as an instructor at the FAA Academy at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma. (Tr. 388.) Prior to his assignment at the FAA Academy, he served as the supervisor of the Scottsdale, Arizona Flight Standards District Office (FSDO). He testified that he has taught all of the FAA Academy courses, but primarily those related to air carrier training programs, pilot testing, proving flights and air carrier certification. (Tr. 388-391.)

[13] See Appendix III for definitions of the following terms as set forth in FAA Order 8400.10: training program, modular training, categories of training, curriculum, curriculum segment, training module, element, element, and checking and qualification module.

crewmember for a particular type aircraft operated by that operator.[14] Curriculums are divided into segments, including basic indoctrination, aircraft ground, aircraft flight, and qualification segments. (Tr. 404.) The qualification segment is the final segment of any curriculum. (Tr. 431.) Curriculum segments are divided into modules,[15] which are composed of elements and events.[16]

Section 8 of Ventura's training manual describes the Qualification Segment for Ventura pilots. (Respondent's Exhibit 9.) Completion "of all the curriculum segments as listed for the initial new hire curriculum" is a prerequisite for enrolling in the qualification segment. (Respondent's Exhibit 9 at 1.) The first module in Ventura's Qualification Segment is entitled "CM-1 Competency Check 135.293," (Respondent's Exhibit 9 at 2), which includes the testing elements and checking events of Sections 135.293(a) and (b) respectively. (Respondent's Exhibit 9 at 2–4.)

According to Ventura's training manual, Ventura may use a "reduced initial new hire training curriculum" to train flight deck crewmembers who have "properly documented Part 135 employment experience and who are current and qualified on the same equipment and duty position." (Respondent's Exhibit 2 at 1). The reduced initial new hire curriculum for a pilot serving as second in command, according to the manual excerpt introduced at the hearing, requires the completion of the following curriculum segments: Basic Indoctrination; General Emergency; Aircraft Ground; Aircraft Flight; and Qualification. (Respondent's Exhibit 2 at 2.)

[14] "Each certificate holder must prepare and keep current a written training program curriculum for each type of aircraft for each crewmember required for that type aircraft." 14 C.F.R. § 135.327(a). Each curriculum must include ground and flight training.

[15] For example, Sees testified, an operator's ground training curriculum segment may include training modules regarding aircraft electrical and fuel systems. (Tr. 404.)

[16] Respondent's Exhibit 7 at 1.

Ventura's training manual also stated that for the reduced initial new hire training curriculum, "Ground and Flight Training shall consist of the Operator Specific modules (BIO-1 through BIO-3) of the Basic Indoctrination Curriculum and the *Recurrent* Training Modules of other curriculums as appropriate." (Respondent's Exhibit 2 at 1, emphasis added.)

Ventura's witnesses, Tarascio and Richard Peck, whom the ALJ found qualified as an expert in air carrier operations,[17] testified that Ventura hired Tarascio with credit for his past training and experience at Air East Management, and used the reduced initial new hire curriculum to train him. (Tr. 180-181, 288-291.)

Peck testified that operators usually provide the following *in-house* training: Section 135.293(a)(1) and (4)-(8) training, including weight and balance, logging duty times, filing flight plans, and first aid. He explained that operators usually send their pilots to a Part 142 training center classroom for aircraft-specific Sections 135.293(a)(2) and (3) training. He testified that the Part 142 training center classroom has "all kinds of training aids[18] and they teach the pilot how the hydraulics work, the electrical systems, the air conditioning, and so on." (Tr. 275.) He testified that operators also provide flight training at the Part 142 training center, some of which is taught in a classroom and some of which is taught in a simulator.[19] (Tr. 275- 276.)

[17] Richard Peck, the safety officer and compliance specialist for Universal Jet Aviation and the assistant manager for the Fort Lauderdale International Airport, testified for Ventura as an expert in air carrier operations. (Respondent's Exhibit 8; Tr. 252, 254-255.) Since 2005, Peck has been a consultant for the law firm representing Ventura in this litigation. In 2005, Peck retired from the FAA, after 33 years of employment, including serving as the FAA aircraft program manager for Continental Express from 1998-2005, FAA POI for Champlain Enterprises from 1994-1998, and FAA Operations Unit supervisor for the Albany, New York FSDO from 1989-1994. (Respondent's Exhibit 8; Tr. 249-250.) Peck's resume indicated that since 2005, he was also the assistant director of operations for Ventura but no mention of this position was made in his testimony at the hearing. He did not claim to testify based upon personal knowledge of the events.

[18] See 14 C.F.R. § 61.1(b)(7) for the definition of "flight training device."

[19] See 14 C.F.R. § 61.1(b)(5) for the definition of "flight simulator."

Under its operations specifications dated March 3, 2005, Ventura was authorized to send its pilots to SIMCOM, a Part 142 training facility located in Orlando, Florida, for certain training and checking in the LR-35 (Lear 35) series approved simulator, as well as for differences training for the LR-25 and LR-55 (Lear 25 and 55).[20] (Complainant's Exhibit 4, Tr. 56, 80-83.) In a letter dated April 13, 2005, to Ryder, Inspector Mauro, Ventura's POI at the time, wrote that Ventura was authorized to use SIMCOM to conduct all training and checking in LR-35 series approved simulator with differences training for the LR-25 and LR-55, except for Sections 135.293(a)(1) and (4)-(8) testing. (Complainant's Exhibit 4 at 1.)

Ventura introduced a portion of the Air Carrier Operations Inspector's Handbook, FAA Order 8400.10, in effect at the time. Paragraph 603 of this order, provided:[21]

> *A. Training/Checking Month.* The training/checking month is that calendar month during which a flight crewmember is due to receive recurrent training. …
>
> *(1) Designating the Training/Checking Month.* When a crewmember completes an initial, transition, upgrade, or requalification training program within a 3-calendar month period, the month in which the qualification curriculum segment is completed is then considered to be that crewmember's training/checking month. If the training has been completed within the 3-month period, the operator may make a single record of the entire curriculum without noting when individual events occurred. Subsequent scheduling of recurrent training may then be based on the training/checking month. ….

(Respondent's Exhibit 1.)

Based on this guidance, Peck testified that if a pilot completed the Sections 135.293(a)(1) and (4)-(8) test on January 20, the Sections 135.293(a)(2) and (3) test on January 25, and the

[20] Ventura's operations specifications (A031), dated March 3, 2005, provided that SIMCOM was an approved training provider for pilot initial, recurrent, transition, upgrade, requalification and differences training courses in the LR-25 and LR-55. (Complainant's Exhibit 4 at 6.) Ventura had not operated a Lear 25 previously, and therefore, it is likely that it had not had authority to use SIMCOM for Lear 25 training prior to the approval of these operations specifications.

[21] Peck testified that he compared the pertinent language in the current order, FAA Order No. 8900.1 with the now superceded FAA Order No. 8400.10, and found that the pertinent language is practically identical in the two orders. (Tr. 261.)

Section 135.293(b) flight test on February 4, the pilot's base month for recurrent testing for the entire Section 135.293 test/check would be February because the pilot completed the checking module in February within a 3-month period. (Tr. 263; see Tr. 277.)

Tarascio testified that he took the oral test and check ride with Inspector Fraher on February 3, 2005, after he completed the company-specific basic indoctrination training. (Tr. 181-182.) At that point, he testified, he had not completed his reduced initial new hire training program because he needed to take simulator training and checking at SIMCOM. (Tr. 188-189.)

According to Peck, on February 3, 2005, Tarascio was only qualified to take the Sections 135.293(a)(1) and (4)-(8) portion of the oral or written test because he had not taken the training at SIMCOM. Thus, in Peck's view, Tarascio was not qualified to take the Sections 135.293(a)(2) and (3) oral or written test or the Section 135.293(b) flight check that Fraher administered to Tarascio on that date. (Tr. 282.)

According to a SIMCOM certificate introduced by the FAA, Tarascio completed a "Specialty Curriculum Part 135 Lear 35 Recurrent Training course with [Lear] 25 differences" at SIMCOM in March 2005. (Complainant's Exhibit 3, Tr. 80-84.) Ventura maintains that this *recurrent* training course that Tarascio took satisfied a requirement in Ventura's reduced *initial* new hire training program. (Tr. 226, 245-246.) Consequently, according to Ventura's witnesses, Tarascio *completed* the Section 135.293 checking module of his reduced initial new-hire training program in March 2005 – not in February 2005. (Tr. 225.) Therefore, Ventura maintains, March was Tarascio's base month.[22]

Tarascio testified that he "was under the impression it [the base month for recurring training and checking] was always March based on the training … in March." (Tr. 197.) He

[22] There was no evidence offered to explain whether the April 2005 Lear 55 differences testing that Tarascio took at SIMCOM was part of initial or recurrent training.

testified that he did not have different base months for Sections 135.293(a)(1) and (4)-(8) testing and Sections 135.293(a)(2) and (3) testing. (Tr. 197.)

Based upon his review of Tarascio's records, Peck testified that Tarascio completed the first phase of his in-house training and the first phase of the Section 135.293 checking module on February 3, 2005 (Tr. 279-280, 284), and completed the last phase of his training and the Section 135.293 checking module at SIMCOM with the flight check on March 16. (Tr. 279, 284.) Peck testified that because Tarascio completed the checking module on March 16, 2005, which was "within the three-month block," March was the base month for recurrent testing, not February [the month of the test and check with Fraher]. (Tr. 284.) "And he is good for the next twelve months which would be March of '06 plus a thirty-day grace period." (Tr. 284-285.) Consequently, according to Peck, Tarascio was eligible to fly until the end of April 2006, even though he had not completed the Sections 135.293(a)(1) and (4)-(8) test since February 2005. (Tr. 285.) Thus, in his opinion, Ventura did not violate Section 135.293(a) when it used Tarascio as second in command in April 2006. (Tr. 288.) He opined further that Ventura "operated the aircraft to the highest standards and at no time did they [Ventura] risk anybody's life or damage property." (Tr. 294-295.)

Peck testified that a check ride should not be given before a pilot has completed all of his training. (Tr. 281.) However, according to Peck and Tarascio, Tarascio took the check with Fraher in February 2005, although he had not completed his training, because he had to demonstrate to FAA inspectors that he could operate the Lear 25 prior to serving as second in command on "proving runs." (Tr. 198-199, 281-282.) Because Ventura had not operated this aircraft previously, it had to conduct 20 to 25 hours of flights – "proving runs"[23] - in that aircraft

[23] Section 119.33(c) provides in part that "[e]ach applicant for a certificate under this part and each applicant for operations specifications authorizing a new kind of operation that is subject to

with FAA inspectors on board to demonstrate that it could operate the Lear 25 safely. (Tr. 131.) Peck testified that the FAA would count the time spent on a check ride as part of the 25 hours of required proving runs. (Tr. 347.)

On rebuttal, Sees testified, based upon his review of the documentary evidence that had been introduced at the hearing and that was included in the enforcement package, that Tarascio served as a pilot on flights in April 2006 when he had not passed a Sections 135.293(a)(1) and (4)-(8) knowledge test during the previous 13 months [12 months plus the grace month]. He explained:

> Mr. Tarascio received a complete 135.293(a) and (b) check in February of 2005. He received a partial check in March of 2005. He did not receive the 293(a)(1) and (4)-(8) check at any time after February of 2005 until May of 2006.

(Tr. 402-403.)

Sees testified that the Tarascio's checking records showed that Tarascio completed the qualification segment in February 2005, when he successfully completed the Section 135.293(a) test and the Section 135.293(b) flight check. He testified that Fraher should have checked Tarascio's records and should not have given him the Section 135.293(a) test and Section 135.293(b) flight check unless Tarascio had completed all of his training. (Tr. 418, 475.) Consequently, he assumed that Tarascio had completed all of his prerequisite training before the check ride on February 3, 2005. (Tr. 443, 476-477.) He testified that "there is no mechanism for reaching back to training and testing that's already been completed and adding or cherry-picking portions of that into the next month's training that's being conducted." (Tr. 418.)

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§ 121.163 or § 135.145 of this chapter shall conduct proving tests as authorized by the Administrator during the application process for authority to conduct operations under part 121 or part 135 of this chapter. 14 C.F.R. § 119.33(c).

II. The Initial Decision

The ALJ's factual findings included the following:

1. Tarascio was hired by Ventura in 2004. (Initial Decision at 3.)

2. Tarascio had previous experience as a flight crewmember of a Lear 25. (Initial Decision at 3.)

3. Ventura used its "Reduced Initial New Hire Training Curriculum to train him. (Initial Decision at 3.)

4. Tarascio took a Section 135.293(a)(1) and (4)-(8) test with Mauro in December 2004. She did not test him on the aircraft-specific topics covered under Section 135.293(a)(2) and (3). (Initial Decision at 3.)

5. Fraher gave Tarascio a Section 135.293(a) test and Section 135.293(b) check ride in a Lear 25 on February 3, 2005. Fraher found that "Tarascio possessed the knowledge required to pass the test in all respects (at least as a second-in-command.)" (Initial Decision at 3.)

6. The check ride with Fraher on February 3, 2005 was a "proving flight." (Initial Decision at 3.)

7. Tarascio completed a specialty curriculum Part 135 Lear 35 recurrent course and a Lear 25 differences course at SIMCOM in March 2005. While at SIMCOM, Tarascio successfully completed Section 135.293(a)(2) and (3) tests. (Initial Decision at 4.)

8. Tarscio's next Section 135.293(a) testing was in May 8, 2006, when he passed a Section 135.293(a)(1) and (4)-(8) test administered by Rogers. (Initial Decision at 4.)

9. Tarascio flew as first officer for Ventura on flights on April 1, 2, and 13, 2006. (Initial Decision at 4-5).

The ALJ rejected as "nonsensical" Ventura's argument that Tarascio's testing under Sections 135.293(a)(1) and (4)-(8) should be considered as having been accomplished in March 2005, rather than in February 2005, when Tarascio actually took that test. (Initial Decision at 12-13.) Regarding Ventura's theory of the case, the ALJ wrote, "The principal problem with the Respondent's theory is that it is not rooted in the language of the governing regulation." (Initial Decision at 9.) He wrote:

> Nothing in the text of § 135.293(a) supports the notion that a requirement for an annual test of a crewmember's knowledge really allows a crewmember to be tested once in a period of 15 months. Yet, that is the result we would reach if the Respondent's theory were adopted. If a crewmember were tested on the first day of the year and completed the testing program on March 31, for example, under the Respondent's version of the "modular" hypothesis and giving effect to the Respondent's thesis that only the last event in the three-month testing-and-training cycle counts in calculating when the next training-and-testing cycle must take place, the crewmember would not be due for re-testing until the end of March of the following year. Indeed, if we combine the Respondent's view of how the "modular" hypothesis is applied with the notion of a one-month "grace" period, the deadline would extend to the end of April of the following year. That means that almost 16 months will have elapsed since the crewmember was previously tested on the material set forth in § 135.293(a). Interpreting a requirement for "annual" tests to allow that result constitutes quite a stretch.

(Initial Decision at 9-10.)

The ALJ also found that Ventura's theory of the case was flawed because it had failed to define the term "module" satisfactorily. (Initial Decision at 10.) The ALJ wrote that Ventura could not rely upon any guidance in FAA Order No. 8400.10 or Ventura's training manual "to change the unambiguous meaning of a regulation." (Initial Decision at 11.) He held that the regulation requires that the pilot complete various recurrent training and checking events within 12 calendar months, not 15 calendar months plus a grace month. (Initial Decision at 11.)

The ALJ held that Tarascio was out of time when he made the three flights in April 2006, because "one-year-plus-a-grace-month hiatus for testing under § 135.293(a)(1) and (a)(4)-(8) had expired at the end of March 2006." (Initial Decision at 13.) Hence, he held, Ventura used an unqualified second-in-command pilot on three flights in April 2006. (Initial Decision at 13.)

Regarding sanction, the ALJ found that it was unfair to impose a heavy financial liability upon Ventura for several reasons, including that "Ventura made the wrong guess" when "faced with an ambiguous regulatory situation."[24] (Initial Decision at 14 and 15.) The violation, the

[24] He wrote in the Initial Decision at 14 as follows:

ALJ held, was "neither extraordinarily blameworthy, intentional nor deliberate." (Initial Decision at 15.) Consequently, the ALJ assessed a $1.00 civil penalty, rejecting the $15,000 civil penalty sought by Complainant.

III. Anaylsis

A. The ALJ's findings of fact were supported by a preponderance of the reliable, probative and substantial evidence, and his conclusions of law were made in accordance with the applicable law, precedent, and policy.

Although the issue in this case is relatively easy to describe, the necessary analysis is more difficult. Simply put, pursuant to 14 C.F.R. §§ 135.293(a) and (b), Tarascio was required to complete certain testing and checking every 12 months. The 12-month requirement of Section 135.293, however, is modified by Section 135.301, which allows a test taken either the month before or the month after (the "grace month") to be deemed as having been taken during the month it is due (the "base month"). Further, paragraph 603B of FAA Order No. 8400.10, the Order that implements the regulations, provided that even if the required recurrent test is not taken during the base month the following year, there is no violation for flight activities that occur within the grace month.

This system of testing is relatively straight forward in circumstances where the base month or the "checking month" for a particular pilot is already established because the

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> [T]he FAA had published "guidance" that was virtually at war with the text of its regulation. While § 135.293 told the aviation community that flight deck crewmembers must be trained and tested on an annual basis, another section of the FAR … went on to say that the annual test of flight check requirement can be fulfilled once every 13 months. Then, to add further ambiguity to the requirement for annual testing, the FAA published § 10 of Order No. 8400.10, which appears to say that the requirement for an annual test of piloting skills (meaning a test every 13 months) can be met in certain circumstances by "adopt[ing] a modular approach," performing the training, testing, or both, over a three-month period and then treating all of the testing as if it had been done on the last day of that three-month period. To add an additional enigma to the regulatory program, the agency's chief counsel then issued an interpretation which can be construed to extend the annual training-and-testing cycle to some 15 months!

determination of when testing "is due" is a simple matter. The difficulty in the instant case arises in connection with determining the checking month for a pilot, such as Tarascio, who is newly hired by the Part 135 certificate holder, here Ventura, and who does not have an established checking month. On their face, the regulations are not ambiguous with respect to the requirement to have accomplished the required testing every 12 months (with a grace period). The ambiguity arises from paragraph 603A(1) of FAA Order No. 8400.10, regarding the establishment of the "training/checking" month. Paragraph 603A(1) of that Order advised that "[w]hen a crewmember completes an initial … training program within a 3-calendar month period, the month in which the qualification curriculum segment is completed is then considered to be that crewmember's training/checking month and the operator may make a single record of the entire curriculum without noting when individual events occurred." If the training program, including the qualification segment, extends beyond three months, the Order advises, the certificate holder must "schedule the accomplishment of recurring events separately." The Order does not provide any express guidance regarding circumstances where the qualification segment is accomplished over more than the last month, which is what Ventura claims happened in this case. Nor does the Order make any express distinction between training and testing.

In the present case, there is no question that Tarascio took a Section 135.293(a) and (b) test with Inspector Fraher during February 2005.[25] By itself, that fact would compel the conclusion that Tarascio would be required to complete the same testing again by the end of March the following year. And, it would follow, that Ventura would be within regulatory

[25] Ventura's argument that Fraher administered an incomplete flight test because she did not have Tarascio perform a V-1 cut is frivolous because, as Inspector Sees explained, a V-1 cut is not required by the FAA or by Ventura's training program. See Respondent's Exhibit 9, at page 8-3, which indicates that a pilot must demonstrate a takeoff with a powerplant failure only in a multiengine aircraft but this "may be tested by alternative means if the performance characteristics of the aircraft make this event hazardous."

compliance for any flights Tarascio flew as second in command through the end of March of the following year, but would not be within the regulations for any flights, such as the ones in controversy here, in April of the following year. Ventura defends the April flights, arguing that, notwithstanding Tarascio's testing in February 2005, his initial training was not concluded until he underwent further training and testing at SIMCOM in March 2005. Ventura points to the language of the FAA's Order in asserting that because Tarascio's training and testing extended into March, it is March, not February, which should be considered the base or checking month. If that were the case, then Tarascio's flights in April were within the grace period.

It is not necessary to parse the potential conflict between the regulations and the FAA order in this case because Ventura did not demonstrate that Tarascio's training and testing in February and March were part of the same curriculum, and because even if they were part of the same curriculum, Ventura did not prove that the entire training program – start to finish - was accomplished within three months so that Ventura should be allowed to use March, rather than February, as his checking month for Sections 135.293(a)(1) and (4)-(8) testing. The preponderance of the evidence supports a determination that February was Tarascio's checking month for those sections, and consequently, that the flights he made in April 2006 were after the expiration of the eligibility period for Section 135.293 testing.

Ventura failed to offer sufficient proof that Tarascio's "training program" was limited to three months or that his initial training program was not completed until after he attended training at SIMCOM. Peck's testimony that everything was completed within 6 weeks referred only to the time between the tests with Fraher and at SIMCOM. Ventura never presented a comprehensive explanation of Tarascio's training or when such training began. Ventura's only fact witness was Tarascio, who testified that he took the test with Fraher on February 3, 2005,

after completing the basic indoctrination training. Tarascio, however, did not provide the date(s) of his basic indoctrination training or explain how long before the February 3, 2005, test his basic indoctrination training occurred. Peck had no personal knowledge of Tarascio's training. His testimony was based on training records. Ventura did not introduce any of Tarascio's training records. The training records might have shown the dates on which Tarascio started and completed the initial or reduced initial new hire training, depending upon how Ventura kept its records and how long it took Tarascio to complete that curriculum. If Ventura only recorded the date on which Tarascio completed the initial or reduced initial new hire curriculum because the training was completed in 3 months, then someone with personal knowledge regarding how the records were kept needed to testify to that "fact." Ventura needed a fact witness, such as the chief pilot or the chief operations officer, to testify about how the operator kept its training records generally and Tarascio's training records, in particular, and to explain what training, testing and checking Tarascio completed on what dates. However, no one from Ventura's management testified.

Although not dispositive of the issue of how long the training program lasted, the record reflects that Tarascio completed some testing under Sections 135.293(a)(1) and (4)-(8) on December 8, 2004. No reason for the December 8, 2004, test with Mauro was given. This testing constitutes at least circumstantial evidence of a "training program" longer than the three-month period described in FAA Order No. 8400.10.

Further, the preponderance of the evidence does not support Ventura's theory that Tarascio had not completed his training and testing under Sections 135.293(a) and (b) before he took the test and check with Inspector Fraher. Ventura contends that Inspector Fraher gave Tarascio the February check and test before he completed his Part 135 training because he

needed to participate in the proving runs. To prove this theory, Ventura needed to introduce the company's training records and the testimony of a management official to explain those records as well as the circumstances surrounding the proving runs. Tarascio did not keep his own training records and he did not have first-hand knowledge about the timing of the proving runs. Inspector Fraher should not have administered the complete test and flight check under Sections 135.293(a) and (b) respectively to Tarascio if he had not completed his required training. Also, proving flights are governed by 14 C.F.R. § 119.33(c),[26] (Tr. 411), and therefore, Tarascio should not have flown on any proving runs (and Ventura should not have used him) until he had completed his Part 135 training. Since the evidence, in particular, the FAA testing forms, supports a finding that Tarascio completed his training, testing and checking for the initial or reduced initial new-hire curriculum on February 3, 2005, then any training and Sections 135.293(a)(2) and (3) testing and Section 135.293(b) checking he took in March 2005 was part of another curriculum. Consequently, Tarascio's March 2005 testing and checking could not be combined with February testing and checking to determine when recurrent Sections 135.293(a)(1) and (4)-(8) testing was due in 2006.

Expert testimony is evaluated on the basis of its logic, depth and persuasiveness. *Griffin Avionics*, FAA Order No. 2007-9, at 10, n.16 (August 2, 2007); *Stambaugh's Air Service*, FAA Order No. 2001-7 (May 16, 2001); *Metcalf*, FAA Order No. 1993-17 at 6 (June 10, 1993). Peck's expert testimony that Tarascio's training and testing in February and March 2005 were part of the same curriculum was not persuasive. Despite his claims that he had thoroughly examined Tarascio's records, he was unable to testify about when Tarascio was hired by Ventura

[26] Section 119.33(c) provides in pertinent part that "[all proving tests must be conducted under the appropriate operating and maintenance requirements of part 121 or 135 of this chapter that would apply if the applicant were fully certificated." 14 C.F.R. § 119.33(c). See also 14 C.F.R. § 135.1(a)(7) which states that Part 135 governs "[e]ach person who is an applicant for an Air Carrier Certificate or an Operating Certificate under [Part] 119 of this chapter, when conducting proving tests."

and when he began serving as a pilot for Ventura. More importantly, as the ALJ found, Peck was unable to explain satisfactorily what a module is. The terms "modular training," "training module" and "checking and qualification module" are defined in the FAA Order No. 8900.1, and had the same definitions in its predecessor, FAA Order No. 8400.10[27] but Peck showed no familiarity with these definitions. In contrast, the description of a modular training program, including curriculums, segments, modules, elements and events, given by Inspector Sees was consistent with the definitions of these terms in the FAA Orders. (See Appendix III.) Further, Peck's testimony was unpersuasive in light of his incorrect testimony that proving flights are conducted under Part 91 and that Tarascio's flight test with Fraher was incomplete. [28]

In light of the above, it is held that Ventura failed to prove its affirmative defense that Tarascio had completed his reduced initial new-hire training and testing within a 3-month period, ending in March 2005, which allowed Ventura to use him in revenue service in April 2006 although he did not undergo recurrent Sections 135.293(a)(1) and (4)–(8) testing until May 2006.

B. The ALJ Did Not Err In Receiving Inspector Sees As An Expert Witness.

Ventura argued that the ALJ should not have accepted Sees as an expert witness in this case. According to Ventura, Sees's testimony did not meet the test for reliability set forth in *Kumho Tire Co. v. Carmichael*, 526 U.S. 135 (1999), and therefore, the ALJ should have excluded Sees's expert opinion testimony.

[27] See Appendix III.

[28] Peck opined that Tarascio's flight test in February 2005 was incomplete because Tarascio did not perform a V-1 cut, which "is where you lose an engine right after the speed of V-1" while "[y]ou are still on the runway." (Tr. 283-284). However, a V-1 cut is not required under Ventura's training manual, which provides that takeoff with powerplant failure in a multiengine aircraft "may be tested by alternative means if the performance characteristics of the aircraft make this event hazardous." (Respondent's Exhibit 9 at page 8-3.) See testimony of Inspector Sees at Tr. 444-447, and 449-500.

In *Kumho,* the Supreme Court held that trial judges were required under Fed.R.Evid. 702 to determine whether expert opinion testimony based upon *technical or other specialized* knowledge was sufficiently reliable to admit. Previously, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court had held that trial judges were required to perform such a "gatekeeping" function regarding *scientific* expert testimony. The Court in *Daubert* gave examples of factors for trial judges to consider including whether a theory or technique can be tested, has been subjected to peer review and publication, has a high known or potential error rate, and has been generally accepted with the relevant community of experts.

In *Kumho,* the Court considered whether the *Daubert* factors should be considered by trial judges regarding technical experts. The Court held that it could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* …" because "[t]oo much depends upon the particular circumstances of the particular case at issue." *Kumho,* 526 U.S. at 150. In the present case, the questions about testing, peer review, publication, and error rate, and acceptance by the relevant community of experts are inapplicable. [29]

Agency proceedings are governed by the Administrative Procedure Act (APA) and the agency's individual procedural rules. The APA provides that "[a]ny oral or documentary

[29] Moreover, while the Federal Rules of Evidence govern the admission of evidence in jury trials, ALJs in agency proceedings are not bound to follow those rules. *Bennett v. NTSB,* 66 F.3d 1130, 1137 (10th Cir. 1995). "Agencies relax the rules of evidence because they believe that they have the skill needed to handle evidence that might mislead a jury." *Peabody Coal Company v. McCandless*, 255 F.3d 465 (7th Cir. 2001) (referring to *Richardson v. Perales*, 402 U.S. 389 (1971). *Kumho* and *Daubert* are based upon Fed.R.Evid. 702. Hence, because ALJs in FAA civil penalty proceedings are not required to apply Fed.R.Evid. 702 when deciding whether to admit expert evidence, they are not required to follow the tests for exclusion of expert testimony set forth in *Kumho* or *Daubert* either. *See e.g., Bayliss v. Barnhart*, 427 F.3d 1211 (9th Cir. 2005) stating that the "Federal Rules of Evidence do not apply to the admission of evidence in Social Security administrative proceedings" and because *Daubert* and *Kumbo* rest upon an interpretation of Rule 702, neither decision governs the admissibility of evidence before an ALJ in administrative proceeding in a Social Security case); *Peabody v. McCandless*, 255 F.3d at 469 (*Daubert* does not apply directly in black lung cases, because it is based on Fed.R.Evid. 702, which agencies need not follow.)

evidence may be received but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence." 5 U.S.C. § 556(d). Section 13.222(b) of the FAA's Rules of Practice in Civil Penalty Proceedings, 14 C.F.R. § 13.222(b) similarly provides that an ALJ "shall admit any oral, documentary, or demonstrative evidence introduced by a party but shall exclude irrelevant, immaterial, or unduly repetitious evidence. Inspector Sees's testimony was not irrelevant, immaterial or unduly repetitious.[30]

C. Ventura's Argument that Section 135.293(a) is Void for Vagueness is Rejected.

Ventura argues on appeal that Section 135.293(a) is void for vagueness based upon the ALJ's finding that "Ventura, in deciding how to deal with Capt. Tarascio's qualifications, was faced with an ambiguous regulatory situation." Ventura argues that because, as the ALJ found, the "published guidance was virtually at war with the text of the regulation," it did not have fair warning of the rule's requirements. Hence, Ventura urges, the Administrator should reverse the ALJ's initial decision and dismiss this case. (Appeal Brief at 23, 25.)

Under the void for vagueness doctrine, a law or regulation that does not fairly inform a person of what is commanded or prohibited or that encourages arbitrary and discriminatory enforcement is unconstitutional because it violates due process. *Trans States Airlines, Inc.*, FAA Order No. 2005-2 at 9-10 (March 9, 2005). When evaluating a void for vagueness argument, a court will require only a reasonable degree of certainty, and will require less precision for a regulation that does not govern First Amendment activities. *Id., citing Throckmorton v. National Transportation Safety Board*, 963 F.2d 441, 445 (D.C. Cir. 1992). The Administrator has

[30] Finally, Ventura argued that "the circumstances of his [Sees's] late involvement in this case casts a large dark shadow over the logic and depth of his testimony," and, therefore, "his testimony should be disregarded." (Appeal Brief at 31.) Such hyperbole is unpersuasive and unwarranted. While the FAA did not inform Ventura that it planned to call Sees as an expert witness until shortly before the scheduled hearing date, the ALJ postponed the hearing, and Ventura was able to depose him prior to the hearing in April. (See Tr. 479.)

declined to consider certain constitutional challenges, such as a challenge to the rules of practice as a whole, because a Federal Court of Appeals is the appropriate forum for such appeals.[31] *Continental Airlines*, FAA Order No. 1990-12 at 6 (April 25, 1998). The Administrator has considered certain claims of vagueness to ensure that a regulation allegedly violated is defined with a sufficient degree of specificity so as to support the imposition of a punitive sanction. *American Airlines*, FAA Order No. 1999-1 at 7-8 (March 2, 1999).

The regulations are reasonably clear. As Sees testified:

> The regulations stipulate and they are very plain and straightforward that no operator may use a pilot nor may a pilot serve as a pilot for an operator if they have not, within the past twelve calendar months, received a 135.293(a) and (b) test and 135.301 specifies that there is a grace month period that if they took that test in the eleventh or thirteenth month, it would be considered to have been taken in the twelfth month. That did not happen in this case.

(Tr. 403.)

D. The ALJ Should Have Found That Ventura Violated Section 91.13.

The ALJ made no specific finding regarding whether Ventura violated Section 91.13 but he did find that Tarascio had the knowledge necessary to pass the Section 135.293(a) tests and that public safety was not at risk in April 2006 when Tarascio flew as second in command. The FAA argues on appeal that "[b]eing that Mr. Tarascio's qualifications were untested and unknown during those April 2006 flights, it was error for the ALJ to conclude that the public safety was never at risk … on the three flights." (Complainant's Appeal Brief at 18.)

Section 91.13(a) prohibits any person from operating an aircraft "in a careless or reckless manner so as to endanger the life or property of another." 14 C.F.R. § 91.13(a). Absent extraordinary circumstances, a residual or derivative violation of Section 91.13(a) is established once certain operational violations are proven. *E.g.*, *Ace Pilot Training*, FAA Order No. 2005-12

[31] "Challenges to the constitutionality of an agency regulation … lie outside the cognizance of that agency." *Howard v. FAA*, 17 F.3d 1213, 1218 (9th Cir. 1994).

(August 17, 2005) (operation of an aircraft that is not in compliance with airworthiness directives constitutes a violation of 14 C.F.R. § 39.3, and a residual violation of Section 91.13(a)); *USAIR, Inc.*, FAA Order No. 1992-70 (December 21, 1992) (operation of an unairworthy aircraft constitutes a violation of 14 C.F.R. §§ 121.153(a)(2) and a residual violation of Section 91.13); *Administrator v. Seyb*, NTSB Order EA-5024 (February 27, 2003) (deviation from an air traffic control instruction is a violation of 14 C.F.R. § 91.123 and a residual violation of Section 91.13); *Administrator v. Rogers*, NTSB Order EA-4428 (February 20, 1996) (operating an aircraft with an inaccurate load manifest constituted a violation of Section 135.63 and a residual violation of Section 91.13(a)). Proof of actual danger is not necessary to establish a violation of Section 91.13(a) because that regulation prohibits any careless or reckless practice which is inherently dangerous and has the potential to jeopardize safety of persons and property. *Terry*, FAA Order No. 1991-12 at 10 (April 12, 1991) (*citing Haines v. Dep't of Transp.,* 449 F.2d 1073, 1076 (D.C. Cir. 1971)), *aff'd sub nom, Terry v. Busey*, 972 F.2d 1445 (D.C. Cir. 1992).

In this case, the conclusion that Ventura violated Section 91.13(a) by acting in a careless manner so as to endanger the lives and property of others arises from the finding that Ventura violated Section 135.293(a)(1) and (4)-(8), and no specific evidence of carelessness or actual or potential danger was required. Permitting a pilot who has not demonstrated in a timely fashion that he has the knowledge required under the regulations to serve as a crewmember on flights for compensation or hire constitutes a careless endangerment of the safety of passengers and other crewmembers, as well as of property. The fact that Tarascio passed the test on May 6, 2006, with Inspector Rogers does not prove that Tarascio had the requisite knowledge one month earlier. However, the finding of a residual violation of Section 91.13 does not warrant an increase in the civil penalty. *Go Jet*, FAA Order No. 2012-5 at 15-16 (May 22, 2012).

E. The $1.00 Assessed By The ALJ Is Not Consistent With Applicable Law, Precedent, and Public Policy.

1. The ALJ's Failure To Consider FAA Sanction Guidance Was Arbitrary And An Abuse Of Discretion.

Rogers testified that he had relied upon paragraph O of the Sanction Guidance Table in FAA Order No. 2150.3A, Appendix 4, part 1. (Tr. 110-111.) The FAA sought to introduce a copy of an excerpt from FAA Order No. 2150.3B, which was in effect on the date of the hearing, rather than an excerpt from FAA No. Order 2150.3A, which was in effect at the time of the flights in this case. The ALJ noted at the hearing that he could have taken judicial notice of the pertinent portion of FAA Order No. 2150.3A. Instead, the ALJ gave the FAA leave to submit the pertinent portion from FAA Order No. 2150.3A as a late-filed exhibit (Tr. 503), but did not specify a date certain for that submission. Also, the ALJ directed both parties to file post-hearing initial briefs and post-hearing reply briefs simultaneously. (Tr. 501.) Instead of filing the excerpt from FAA Order No. 2150.3A separately, the FAA attached the excerpt to its initial post-hearing brief. The ALJ ruled in his decision that the FAA's submission was too late because "it deprived the Respondent of the opportunity to examine it and refer to it in its post-hearing initial brief." (Initial Decision at 14.)

Under the circumstances, it was arbitrary and an abuse of discretion for the ALJ to reject the excerpt from FAA Order No. 2150.3A as filed too late for the following reasons. The ALJ did not establish a firm due date for the late-filed exhibit, and the FAA attorney had no reason to believe that the ALJ expected the excerpt to be submitted prior to the filing of the initial post-hearing brief. Moreover, although superseded by FAA Order No. 2150.3B, FAA Order No. 2150.3A remains accessible to the public.[32] Ventura and the ALJ knew from Rogers' testimony

[32] This order may be obtained at *http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgOrders.nsf/key/Order%202150.3A*.

which portions of that order the FAA considered relevant. Importantly, Ventura had an opportunity to comment about the excerpt when it filed its post-hearing *reply brief* in response to the FAA's arguments about sanction in its initial post-hearing brief. Hence, Ventura was not placed at a disadvantage by the submission of the excerpt as an attachment to the FAA's post-hearing initial brief.

2. A $15,000 Civil Penalty Is Appropriate.

The Administrator has broad authority to assess civil penalties against individuals for violations of the regulations. In 2006, when the violations in this case occurred, the Administrator had the authority to assess an $11,000 civil penalty per violation of the Federal Aviation Regulations (FAR), with each violation on each flight constituting a separate violation. 49 U.S.C. §§ 46301(a)(2) and (a)(4); 14 C.F.R. § 13.305(d) (2006) (regarding inflation-adjustment of civil penalty authority.)

An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations. [33] The Administrator provided policy guidance for agency employees to follow regarding sanctions for different types of violations of the Federal aviation statute and the FAR in the Compliance and Enforcement Order, FAA Order No. 2150.3A. The Sanction Guidance Table, contained in Appendix 4 of that order, was designed to provide "general guidance for the exercise of the agency's prosecutorial discretion" to "assure national consistency in enforcing the Federal Aviation Regulations." FAA Order No. 2150.3A, Appendix 4 at page 1. The Sanction

[33] The factors that the FAA will consider include: (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 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. *Warbelow's Air Ventures, Inc.*, FAA Order No. 2000-3 at 16-17, n.22, and 21 (February 3, 2000), *reconsideration denied*, FAA Order No. 2000-14 (June 8, 2000) and FAA Order No. 2000-16 (August 8, 2000), *petition for review denied, Warbelow's Air Ventures v. FAA*, No. 00-70423 (9th Cir. September 20, 2001).

Guidance Table in FAA Order 2150.3A, Appendix 4, recommends a minimum, moderate and/or maximum range sanctions for different types of violations committed by air carriers. When the FAA formulated these sanction ranges for different types of violations, the agency considered the nature, extent and gravity of each general type of violation as well as the individual's prior violation history (in that the table provides recommended penalties for first-time offenders.) *Folsom's Air Service, Inc*., FAA Order No. 2008-11 at 12 (November 6, 2008); *Schultz*, FAA Order No. 1989-5 at 12 (November 13, 1989).

The FAA later modified these ranges through the issuance of the Compliance/Enforcement Bulletin No. 92-1, included in Appendix 1 of FAA Order No. 2150.3A. The guidelines in Compliance/Enforcement Bulletin 92-1 were issued as "a means of placing a relatively equivalent deterrent effect on each air carrier that violates the same FAR, by considering the size of the carrier in determining an appropriate civil penalty."[34] Compliance/Enforcement Bulletin No. 92-1, FAA Order 2150.3A, Appendix 1, at 103. Under Compliance/Enforcement Bulletin No. 92-1, the maximum, moderate, and minimum civil penalty ranges vary depending upon the size of the carrier. [35]

The Sanction Guidance Table, paragraph O, explains that a maximum range civil penalty is appropriate in cases involving the use by an air carrier of an unqualified crewmember. The FAA did not introduce any evidence regarding Ventura's size. Consequently, it is appropriate to

[34] This Bulletin established a system for classifying air carriers by size. Under that Bulletin, air carriers were divided into four groups, with the largest air carriers belong to Group I and the smallest air carriers included in Group IV. Group IV included Part 135 operators having fewer than six aircraft or no more than three different types of aircraft, and employing fewer than six pilots. Generally speaking, Group I carriers are subject to higher civil penalties than the carriers in Group I.

[35] For example, the maximum civil penalty range (as adjusted for inflation) in 2006 for a violation by a Group I carrier (Part 121 and Part 135 air carriers with annual operating revenue of $100,000,000 or more) was $7,500 to $11,000. The maximum civil penalty range (as adjusted for inflation) in 2006 for a violation by a Group IV carrier (the smallest Part 135 air carriers) was $4,000 to $11,000 per violation.

apply the maximum civil penalty range for a Group IV operator. At the time of these violations, the maximum civil penalty range for Group IV operators, as adjusted for inflation, was $4,000 to $11,000 per violation for each flight. Compliance/Enforcement Bulletin No. 92-1, FAA Order No. 2150.3A, Appendix 1, at 106, and Appendix 4 at 6; 14 C.F.R. § 13.305(d)(2006).

The $15,000 civil penalty sought by the FAA is consistent with the sanction guidance in effect at the time for Ventura's violations of Sections 135.293(a)(1)-(4)-(8) on three flights. No additional penalty is appropriate for the violations of Section 91.13 because they were residual violations. The Sanction Guidance Table, as modified by the Compliance/Enforcement Bulletin, express the Administrator's sanction policy, and if an ALJ assesses a civil penalty that is not consistent with agency sanction policy, the Administrator on appeal may reverse the ALJ. *Folsom's Air Service*, FAA Order 2008-11 at 14.

The ALJ gave several reasons for assessing only a nominal $1.00 civil penalty. The ALJ explained that "in the final analysis, as we have seen, Ventura made the wrong guess, but it can hardly be faulted for having to guess; that is what the regulatory atmosphere required of it." (Initial Decision at 15.) However, Ventura introduced no evidence to prove that any member of its management relied upon FAA Order No. 8400.10, paragraph 603, when deciding whether Tarascio was qualified to fly as co-pilot on the flights on April 1, 2, and 13, 2006. The evidence in the record shows only that Ventura's expert witness thought that Ventura's use of Tarascio did not constitute violations of Sections 135.293(a)(1) and (4)-(8), Ventura's expert witness, however, did not assign Tarascio to those flights. Hence, there is no evidence that Ventura "made the wrong guess" based upon the guidance contained in FAA Order No. 8400.10.

The ALJ also stated, when justifying the $1.00 civil penalty, that it was significant that Tarascio was "at all relevant times knowledgeable and skillful enough to pass all of the tests set

out in § 135.293(a)." (Initial Decision at 15.) However, the fact that Tarasciso passed the Sections 135.293(a)(1) and (4)-(8) testing approximately 1 month after the flights is fortunate, and at best, justifies a penalty at the lower end of the appropriate penalty range. The $15,000 civil penalty amounts to a $5,000 civil penalty for the violations on each of three flights, and consequently, is at the low end of the maximum penalty range for a Group IV carrier. It should be noted that taking and passing the knowledge test required under Sections 135.293(a)(1) and (4)-(8) after the flights in question defeated the purpose of the periodic testing requirement which is to ensure that a pilot retains the knowledge that he or she needs to fly persons or property for compensation or hire before flying.

The ALJ also justified the imposition of a nominal $1.00 civil penalty on the fact that the FAA did not introduce evidence of prior violations by Ventura. The sanction ranges set forth in FAA guidance, however, reflect the appropriate civil penalties for persons without a history of violations. FAA Order No. 2150.3A, Appendix 4, at 1.

VI. Conclusion

Ventura's appeal is denied, and the FAA's appeal is granted in part. A $15,000 civil penalty is assessed.[36]

[Original signed by Michael P. Huerta]

MICHAEL P. HUERTA
ACTING ADMINISTRATOR
Federal Aviation Administration

[36] 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).

Appendix I

Section 135.293, entitled "Initial and recurrent pilot testing requirements," provides in pertinent part as follows:

> (a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas –
>
> (1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;
>
> (2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operation procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;
>
> (3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;
>
> (4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;
>
> (5) Air traffic control procedures, including IFR procedures when applicable;
>
> (6) Meteorology in general, including the principles of frontal systems, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;
>
> (7) Procedures for –
>
> > (i) Recognizing and avoiding severe weather situations;
> >
> > (ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and
> >
> > (iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and
>
> (8) New equipment, procedures, or techniques, as appropriate.

Appendix II

Section 135.293(b) provides:

> No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft. The extent of the competency check shall be determined by the Administrator or authorized check pilot conducting the competency check. The competency check may include any of the maneuvers and procedures currently required for the original issuance of the particular pilot certificate required for the operations authorized and appropriate to the category, class and type of aircraft involved. For the purposes of this paragraph, type, as to an airplane, means any one of a group of airplanes determined by the Administrator to have similar means of propulsion, the same manufacturer, and no significantly different handling or flight characteristics. For the purposes of this paragraph, type, as to a helicopter, means a basic make and model.

Appendix III

The following definitions regarding training programs were set forth in Section 283 of FAA Order No. 8400.10 in effect in 2005-2006 (and are identical to the current definitions set forth in Paragraph 3-1072 of the current FAA Order No. 8900.1):

- *Training Program*: A system of instruction which includes curriculums, facilities, instructors, check airmen, courseware, instructional delivery methods, and testing and checking procedures. This system must satisfy the training program requirements of Part 121 or Part 135 and ensure that each crewmember … remains adequately trained for each aircraft, duty position, and kind of operation in which the person serves.

- *Modular Training*: The concept of program development in which logical subdivisions of training programs are developed, reviewed, approved and modified as individual units. Curriculum segments and modules may be used in multiple curriculums. The modular approach allows great flexibility in program development and reduces the administrative workload on both operators and instructors in the development and approval of these programs.

- *Categories of Training*: The classification of instructional programs by the regulatory requirement the training fulfills. Categories of training consist of one or more curriculums. The categories of training are initial new-hire, initial equipment, transition, upgrade, recurrent ,and requalification.

- *Curriculum*: A complete training agenda specific to an aircraft type, a crewmember … position and a category of training. An example is an "initial new- hire, Boeing 727 flight engineer curriculum." Each curriculum consists of several curriculum segments.

- *Curriculum Segment*: The largest subdivision of a curriculum containing broadly related training subjects and activities based on regulatory requirements. Curriculum segments are logical subdivisions of a curriculum which can be separately evaluated and individually approved. Examples are a "ground training" segment and a "flight training" segment. Each curriculum segment consists of one or more training modules.

- *Training Module*: A subpart of a curriculum segment which constitutes a logical, self-contained unit. A module contains elements or events which relate to a specific subject. For example, a ground training curriculum segment could logically be divided into modules pertaining to aircraft systems (such as hydraulic, pneumatic and electrical). As another example, a flight training curriculum segment is normally divided into flight periods, each of which is a separate module. A training module includes the outline, appropriate courseware and the instructional delivery methods. It is usually, but not necessarily, completed in a single training session.

- *Element*: An integral part of a training, checking, or qualification module that is not task-oriented but subject oriented. For example, an "electrical power" ground training module may include such elements as a [direct current] DC power system, an [alternating] AC power system, and circuit protection.

- *Event*: An integral part of a training, checking, or qualification module which is task-oriented and requires the use of a specific procedure or procedures. A training event provides a student an opportunity for instruction, demonstration, and/or practice using specific procedures. A checking or qualification event provides an evaluator the opportunity to evaluate a student's ability to correctly accomplish a specific task without instruction or supervision.

- *Checking and Qualification Module*: An integral part of a qualification curriculum segment which contains checking and qualification requirements specified under Part 121 or Part 135. For example, a qualification curriculum segment may contain a proficiency check module, a LOFT [Line-Oriented Flight Training] module, and an operating experience (qualification) module.

SERVED SEPTEMBER 24, 2009

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

IN THE MATTER OF

VENTURA AIR SERVICES, INC.,
Respondent.

FAA DOCKET NO. CPEA0008
(Civil Penalty Action)

DMS NO. FAA-2008-0505

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

The issue in this case is whether a second-in-command pilot employed by Respondent Ventura Air Services (Ventura), a Part 135 carrier,[1] was fully qualified in April 2006, when he served in that capacity as a member of the flight crew in three operations carrying passengers for hire. The Complainant, the Federal Aviation Administration (FAA) charged that Nicholas Tarascio, the pilot in question, was not fully qualified because he had not timely and successfully completed certain tests that are required under § 135.293(a) of the Federal Aviation Regulations (FAR) before a pilot may serve in that capacity in a Part 135 operation. The FAA has sought to assess a civil penalty of $15,000 against Ventura to punish the carrier for its use of an unqualified pilot. Ventura has denied the claim that Capt. Tarascio was unqualified, asserting that he was at all relevant times up to date on his periodic training and testing in accordance with § 135.293(a), when the regulation is construed in accordance with the FAA's guidance to its enforcement staff, Ventura's FAA-approved training manual and an interpretive ruling by the agency's Chief Counsel.

Section 135.293(a) of the FAR reads as follows:

> (a) No certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month

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[1] A Part 135 carrier transports passengers for hire in commuter or on-demand (air taxi and charter) service. 14 C.F.R. § 135.1(a)(1).

before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot, on that pilot's knowledge in the following areas—

(1) The appropriate provisions of parts 61, 91, and 135 of this chapter and the operations specifications and the manual of the certificate holder;

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitations, standard and emergency operating procedures, and the contents of the approved Aircraft Flight Manual or equivalent, as applicable;

(3) For each type of aircraft to be flown by the pilot, the method of determining compliance with weight and balance limitations for takeoff, landing and en route operations;

(4) Navigation and use of air navigation aids appropriate to the operation or pilot authorization, including, when applicable, instrument approach facilities and procedures;

(5) Air traffic control procedures, including IFR procedures when applicable;

(6) Meteorology in general, including the principles of frontal system, icing, fog, thunderstorms, and windshear, and, if appropriate for the operation of the certificate holder, high altitude weather;

(7) Procedures for—

(i) Recognizing and avoiding severe weather situations;

(ii) Escaping from severe weather situations, in case of inadvertent encounters, including low-altitude windshear (except that rotorcraft pilots are not required to be tested on escaping from low-altitude windshear); and

(iii) Operating in or near thunderstorms (including best penetrating altitudes), turbulent air (including clear air turbulence), icing, hail, and other potentially hazardous meteorological conditions; and

(8) New equipment, procedures, or techniques, as appropriate.

It will be noted that several of the subjects of mandatory testing are specific to the type of aircraft that the pilot or prospective pilot intends to fly. These subjects can be tested only by a check pilot (or FAA representative) who is fully qualified in that type of aircraft. These requirements posed a problem for Ventura and Capt. Tarascio, since Ventura had not operated jet aircraft (and specifically the Learjet Model 25 that Tarascio was hired to fly) and did not have on its staff a check pilot who was qualified in that make and model of aircraft.

Capt. Tarascio had been hired by Ventura in 2004. Tr. 176–77. Prior to that time, he had been employed by a company called Air East and had had experience on the flight deck of the Learjet Model 25. Tr. 176. He held a commercial license. Tr. 175. He was put through Ventura's "Reduced Initial New Hire Training Curriculum," as authorized for new crew members with previous experience under the carrier's training manual. Tr. 180-81. Ex. R-2 at 2-5. The record indicates that in December 2004, Capt. Tarascio had been tested on his knowledge of the items required under § 135.293(a)(1) and (a)(4)-(a)(8) by FAA Inspector Eva C. Mauro. Tr. 51; Ex. C-1. She did not, however, test him on the type-specific items required under paragraphs (2) and (3) of § 135.293(a) at that time. Tr. 51 (Rogers, Direct). This may have been the case because Ms. Mauro was not rated in the Learjet Model 25—although the record does not show that to have been the case. Id.

On February 3, 2005, Capt. Tarascio went on a check ride in a Learjet Model 25 with an FAA Inspector by the name of Susan Fraher. Tr. 182 (Tarascio, Direct). Ms. Fraher, who had qualified as a check pilot in the Learjet Model 25, was authorized to test Capt. Tarascio on all of the prescribed elements of the § 135.293(a) test, found that Capt. Tarascio possessed the knowledge required to pass that test in all respects (at least as a second-in-command) and so noted on the airman's FAA Form 8410. Tr. 52 (Rogers, Direct); Ex. C-1 at 2. The February 3, 2005 flight was what was called a "proving flight." Its purpose was to demonstrate to the FAA that Ventura was capable of safely operating the Learjet Model 25 which it had just acquired. Tr. 198. (Tarascio, Cross).[2]

In March 2005, Capt. Tarascio went to Florida for further training at a SimCom Training Center. Tr. 188. SimCom International, Inc., a firm that offered simulator training for pilots seeking to become proficient in Learjet Model 25 aircraft, had been approved by the FAA for both training and testing purposes. The FAA's approval, granted in April 2005, was subject to one caveat: Ventura was

[2] Ventura was required to conduct a proving test under § 119.33(c) of the FAR in order to obtain authority to conduct Part 135 operations using the Learjet Model 25. Capt. Tarascio's father, who was to be the pilot-in-command of the Learjet operations, was along on the February 3, 2005 flight and presumably satisfied the FAA inspector that he, too, was capable of functioning in the role that Ventura had planned for him.

specifically informed that SimCom was not authorized to perform the tests required under §§ 135.293(a)(1) and (a)(4)-(8). Ex. C-4 at 1. During his stay at SimCom, Capt. Tarascio successfully completed all of the tests that SimCom was authorized to give, i.e., the tests required under § 135.293(a)(2) and (a)(3).[3] On March 17, 2005, SimCom issued its certificate stating that Capt. Tarascio "has satisfactorily completed a Specialty Curriculum Part 135 Lear 35 Recurrent couurse [sic] with 25 Differences course in accordance with the standards of SimCom Training Centers." Ex. C-3.

According to his records, Capt. Tarascio's next § 135.293(a) testing took place on May 8, 2006, when he was tested by FAA Inspector Mark Rogers and found to have satisfactorily demonstrated his knowledge of the matters set forth in paragraphs (a)(1) and (a)(4-8). Ex. C-1, last page. On that occasion, Inspector Rogers had asked Capt. Tarascio to bring his training records to the proficiency check session. Tr. 38. Going through those records, Inspector Rogers testified, he noticed a "discontinuity" in that Taracsio had not been tested on the items specified in § 135.203(a)(1) and (a)(4-8) since February of 2005. Tr. 30, 38-9. That was more than the one-year deadline for periodic testing set forth in the introductory subsection of § 135.293; in fact it was longer than the one-year period coupled with the "grace month" allowed by § 135.301(a) of the FAR. Under the latter provision, a crewmember who is required to be tested (or flight-checked) may delay the test or check until the end of "the calendar month before or after the month in which it is required." 14 C.F.R. § 135.301(a). Hence, the requirement for a yearly test of the crewmember's knowledge is met if the crewmember is tested during the thirteenth month following the month in which he was last tested. But even giving Capt. Tarascio the benefit of the "grace month" did not keep him in compliance with the annual testing requirement, according to Inspector Rogers. Looking at Capt. Tarascio's training records, Rogers determined that since he had last been tested in February 2005 on his knowledge of all the material required under § 135.293(a), his next testing session was due to occur no later than the end of March 2006. Tr. 39. When Capt. Tarascio came to Inspector Rogers for testing in May of 2006, this crewmember was more than a month out of time for testing on the subjects for which SimCom was not qualified to test him. Tr. 43. Inspector Roger concluded that Capt. Tarascio was not qualified to serve on the flight deck of any Part 135 flights that took place after March 31, 2006. Id. Inspection of Ventura's records turned up irrefutable evidence that Capt. Tarascio had flown as First Officer on Ventura Part 135 flights on April 1, 2006, April 2, 2006 and April

[3] Ex. C-1 at 3-4. The SimCom simulator was of a different Learjet model than the one Capt. Tarascio was training to fly. However, it was possible to qualify him on the Model 25 by using so-called "differences." Tr. 58 (Rogers, Direct).

13, 2006. Tr. 43-44; Ex.C-5 at 1-2. Inspector Rogers began an enforcement proceeding to exact a civil penalty from Ventura. Tr. 93; Ex. C-6.

After Ventura requested a hearing, the FAA's complaint was filed on April 22, 2008. The complaint charged that the Respondent had violated both § 135.293(a) and § 135.293(b) of the FAR. As we have seen, the former pertains to the requirement for annual testing of the airman; the latter, however, requires crewmembers to complete certain training requirements. On December 18, 2008, blaming a clerical error, Complainant withdrew the charge that the use of Capt. Tarascio as a pilot violated § 135.293(b). But the amount of the civil penalty sought by the FAA in its original complaint ($15,000) was not reduced.

In May 2008, the case was referred to the Department's Office of Hearings. Initially, the Chief Judge assigned it to himself. On September 11, 2008, he reassigned the case to me. Both parties engaged in extensive discovery. In addition, both parties filed motions for summary disposition, alleging that there were no disputed material issues of fact to be decided. In an order served on January 5, 2009, I denied both of the dispositive motions. The two-day hearing took place in Islip, New York on April 7-8, 2009.[4] Thereafter, initial briefs were submitted by the parties, the Respondent filed a reply brief,[5] and the case is now ripe for decision.

As we have seen, the Complainant's theory of the case is that the FAR requires each pilot successfully to be tested once in every year (plus the "grace month") on all of the subjects mentioned in § 135.293(a) of the FAR. Capt. Tarascio, by the FAA's lights, failed to comply with that requirement when, having completed the testing process on February 3, 2005, he was not again tested on all of those subjects specified in § 135.293(a)(1) and (a)(4)-(a)(8) until May 8, 2006. The Respondent's theory relies on language found in FAA Order No. 8400.10, excerpted in Ex. R-1, and in Ventura's FAA-approved training manual, Ex. R-2. FAA Order No. 8400.10 was published for the purpose of giving guidance to the agency's staff "who are responsible for the certification, technical administration, and surveillance" of Part 121 and 135 air carriers (Ex. C-12 at ¶ 1); however, it has been made available to the public and is generally regarded as authoritative in the aviation community. Section 10 of the applicable version of FAA Order No. 8400.10 deals with the requirement for recurrent training of flight crewmembers who, like Capt. Tarascio, have been previously trained and qualified for their jobs.[6] Paragraph 603 of § 10 states that "[w]hen an operator adopts a modular ap-

[4] Islip is near MacArthur Airport, Ventura's base of operations.
[5] The Complainant elected not to file a reply brief.
[6] The version of Order 8400.10 that was in effect at the time the alleged violations occurred was Change 5, dated June 30, 1991.

proach to recurrent training, all such training elements and events must be grouped into specific modules to be administered and recorded as a recurrent curriculum segment." It goes on to state that when a crewmember completes his or her training within a three-calendar-month period,

> the month in which the qualification curriculum segment is completed is then considered to be that crewmember's training/checking month. If the training has been completed within the 3-month period, the operator may make a single record of the entire curriculum without noting when individual events occurred. Subsequent scheduling of recurrent training may then be based on the training/checking month.

Id. at ¶ 603A(1). The Order goes on to say that the "eligibility period is a 3-month period comprised of the calendar month before the month in which training is due, the month in which training is due, and the calendar month after the month in which training is due." Id. at ¶ 603B.

The Respondent claims that the foregoing language entitles it, if it chooses to "adopt[] a modular approach" for recurrent training of crewmembers such as Capt. Tarascio, to train and test him over a three-month period, which includes the month in which his recurrent training was due, and to regard all training and testing completed during that period as having been completed at the end of the period. Resp't Post-Hearing Brief at 18. It points to language in its training manual (Ex. R-2), which states that for flight deck crewmembers with documented FAR Part 135 employment experience, "Ground and Flight Training shall consist of the Operator Specific modules . . . of the Basic Indoctrination Curriculum and the Recurrent Training Modules of other curriculums [sic] as appropriate." Ex. R-2 at 1; Resp't Post-Hearing Brief at 8. This demonstrates, according to the Respondent, that at the time Capt. Tarascio was hired and qualified, the carrier had adopted "a modular approach" to his training and testing requirements. Resp't Post-Hearing Brief at 8.

It follows, says the Respondent, that the February 2005 testing that Inspector Fraher administered was only the earliest module of Capt. Tarascio's recurrent training and testing. Resp't Post-Hearing Brief at 28. The balance of the testing and training was completed at SimCom in March of 2005. Id. As Order No. 8400.10 requires, however, as long all the modules are completed within the same three-month period, the testing/training month is deemed to be the month in which the last module is completed. Resp't Post-Hearing Brief at 12. That month was March 2005. Id. Giving effect to the "grace month" concept built into § 135.301(a) of the FAR means that Capt. Tarascio next needed to be tested no

later than the end of April 2006. Id. That means he was fully qualified on April 1, 2 and 13, 2006, when the flights in question took place. Id. So runs Respondent's theory of the case.

According to Respondent, its theory is supported by an interpretive opinion that its counsel received from Rebecca MacPherson, an attorney with the Operations Law Branch of the Office of Chief Counsel of the FAA. Resp't Post-Hearing Brief at 30 (citing Ex. R-7). Respondent's Counsel had inquired about whether, if recurrent training is administered in modules, the air carrier must record when each element of the module is completed, record when each module is completed or make one record when all modules of the training are complete. Ex. R-7 at 1. In responding to the question, Ms. MacPherson's September 6, 2006 letter attempted to deal with a question that turns out to be very significant in this case: What is the meaning of the term "module?" "The modules for Part 135," she responded, "are composed of two parts."

> One part consists of the written or oral test elements, and the other part consists of the flight training and checking events. Because the ground and flight training elements are distinct and separate parts, they may be completed at different times. Nevertheless, they comprise a single module. An operator may record when each module is complete or may record when all of the modules are complete but is not required to record when each element of a module is complete.

Id.

The Respondent's definition of the term "module" was further explicated by its expert witness, Richard C. Peck. Mr. Peck has been in the civil aviation field since 1974 and, in 2005, retired after 33 years of service with the FAA. Ex R-8. Having reviewed the Ventura training manuals, he was of the opinion that Ventura followed a modular approach to training and testing. Tr. 257–58. Such an approach is followed when it is difficult to complete all of the required training and testing within a relatively brief period of time, Mr. Peck explained. Tr. 258. Much of the testing related to specific aircraft types must be completed by using check pilots or FAA personnel who have qualified in that type of aircraft and are approved by the agency to provide the testing. When an operator, such as Ventura, does not employ its own qualified check pilots and is located at or near an FSDO that itself lacks personnel qualified in the type of aircraft that the operator wishes to use, it is difficult to schedule testing time with an FAA inspector who is qualified to perform the testing and training that crewmembers may need under § 135.293 of the FAR. Tr. 258. Mr. Peck testified that it may take an operator

three to six weeks to accomplish all of the required training and testing elements. Tr. 259. That, said Mr. Peck, is why Order No. 8400.10 allows the training and testing to take place over a three-month period. Id.

But as long as all the required testing and training is completed within that three-month period, the crewmember's "base" month is set at the month in which the last element is completed, said Mr. Peck. Tr. 262–63. In the case of Capt. Tarascio, it was his opinion that the first element of his testing took place on February 3, 2005, Tr. 279–80, and that this crewmember became fully qualified (from a testing standpoint) on March 16, 2005, when he was tested at SimCom, Tr. 277–78; 285. Hence, Mr. Peck concluded, Ventura did not violate § 135.293(a) by using Capt. Tarascio as second-in-command of a Learjet 25 flight in April of 2006, during his "grace" month. Tr. 288.

To rebut Mr. Peck's testimony, the Complainant sponsored the testimony of its own expert witness. At the date of the hearing, Roy M. Sees had been employed by the FAA for ten years. He had served four and a half years as a Contracting Officer's Technical Representative for Outside Agency Training. Ex. C-10. He had also been an instructor at the FAA's training academy in Oklahoma City, Oklahoma. Tr. 388–90.[7] It was Mr. Sees' opinion that, as of the beginning of April 2006, Capt. Tarascio was not qualified under § 135.293 because he had not been fully tested in accordance with subsection (a) of that section since February 2005. Tr. 402. According to Mr. Sees, a pilot training program has six categories (such as "initial new hire" or "recurrent"), each of which has five segments (such as "basic indoctrination" or "aircraft ground training"). Tr. 404. Each segment would have one or more modules—for example, in the aircraft ground training segment, "aircraft electrical system" or "aircraft fuel system." Id. The only purpose of authorizing the use of modular training, according to Mr. Sees, was to facilitate individual FAA approval of modules that can be used in connection with several different training programs, i.e., for multiple curricula. Tr. 405. For example, the "electrical system" module, once approved for the "initial new hire" category, could also be taught in the "recurrent" category without the agency having to approve it a second time. Id. Hence, it was Mr. Sees' hypothesis that Ventura's adoption of a "modular" approach to training and testing had "no bearing" on whether Capt. Tarascio was qualified when he served on the flight deck of the April 2007 flights. Id.

[7] At the hearing, I ruled, over the objection of the Respondent, that Mr. Sees was qualified to testify as an expert on training requirements. Tr. 390–99. The Respondent's initial brief attacked that ruling and again asked me to disqualify Mr. Sees. Resp't Post-Hr'g Br. at 30-36. I have reconsidered my ruling and remain persuaded of Mr. Sees' qualifications based upon his long tenure on the staff of the FAA.

According to Mr. Sees, Capt. Tarascio could not have taken his qualifying tests in February 2005, as Ventura claimed. At that time, Mr. Sees noted, all of the pilot's training had not been completed. It is absurd, thought Mr. Sees, to claim that an airman could successfully complete § 135.293(a) testing before he had completed his training, because the latter precedes the former. Hence, the tests that Inspector Fraher gave to Capt. Tarascio must be regarded as the completion of his initial training. Tr. 410–12. The March activities at SimCom, said Mr. Sees, were part of Capt. Tarascio's recurrent training and testing, which were done eleven months before they were required to be done. Tr. 412. The problem with Ventura's theory, according to Mr. Sees, is that the recurrent training in March 2006 did not include testing required by § 135.293(a)(1) and (a)(4)-(a)(8), since SimCom was not qualified to provide that type of test. Tr. 416. To demonstrate the correctness of his view, Mr. Sees noted that the certificate that Capt. Tarascio received from SimCom (Ex. C-3) specifically said that this airman had completed a "Recurrent course." Tr. 419-20; 432-33. He also cited to an affidavit by Ventura's Director of Operations, which had been filed in support of Ventura's motion for summary disposition. Tr. 414-15. In that affidavit, Mr. Ryder had said that Capt. Tarascio had "completed an initial training program and successfully completed an Airman Proficiency/Competency Check in accordance with 14 C.F.R. 135.293 in February 2005." Ex. C-8 at 1 (emphasis added). This shows, Mr. Sees testified, that there were two distinct sets of training-and-testing curricula. One was for initial qualification, which concluded in February 2005, when Capt. Tarascio was tested by Inspector Fraher. Tr. 418-19. The other was begun when Capt. Tarascio went to SimCom and was concluded in May 2006, when Capt. Tarascio successfully completed his § 135.293(b) training and testing. Tr. 419-20. Hence, Mr. Sees concluded, Capt. Tarascio was not fully qualified one month earlier, in April 2006. Tr. 416-25.

Each of these theories is plausible on its face. Yet each of them suffers from severe problems. In short, this is a close and most difficult case.

The principal problem with the Respondent's theory is that it is not rooted in the language of the governing regulation. Nothing in the text of § 135.293(a) supports the notion that a requirement for an annual test of a crewmember's knowledge really allows a crewmember to be tested only once in a period of 15 months. Yet, that is the result we would reach if the Respondent's theory were adopted. If a crewmember were tested on the first day of the year and completed the testing program on March 31, for example, under the Respondent's version of the "modular" hypothesis and giving effect to the Respondent's thesis that only the last event in the three-month testing-and-training cycle counts in calculating when the next

training-and-testing cycle must take place, the crewmember would not be due for re-testing until the end of March of the following year. Indeed, if we combine the Respondent's view of how the "modular" hypothesis is applied with the notion of a one-month "grace" period, the deadline would extend to the end of April of the following year. That means that almost 16 months will have elapsed since the crewmember was previously tested on the material set forth in § 135.293(a). Interpreting a requirement for "annual" tests to allow that result constitutes quite a stretch. It is extremely doubtful that the authors of § 135.293(a) intended to permit such a lengthy hiatus.

Another, equally serious, problem with Respondent's "modular" hypothesis is that the Respondent has failed to define in a satisfactory way what constitutes a "module." Under the Respondent's theory, the non-type-specific subjects on which Capt. Tarascio was tested in February 2005 constituted a "module." The Respondent, however, has pointed to nothing that supports that claim. The fact is that neither of the authorities on which the Respondent principally relies—Order No. 8400.10 or the Ventura training manual—defines either the term "module" or the term "modular." Of the two expert witnesses who testified, only the Complainant's witness, Mr. Sees, attempted a definition of "module." A module, according to him, consists of a grouping of systems all of which have the same general purpose. Avionics, for example, would be a module, as would fuel systems or meteorology and weather. But there appears to be no justification for treating the variety of subjects specified in § 135.293(a)(1) and (a)(4)-(8) as a separate module. The opinion of the Office of Chief Counsel, from which Ventura took considerable comfort, defined the term "module" as including all on-the-ground testing and training; such a definition does not square with the manner in which the Respondent is seeking to use the term "module" in this case.

We must remember that Capt. Tarascio was not a novice when he qualified to fly the Lear Model 25 on behalf of Ventura. He had previously qualified in that make and model of aircraft at his last employer. Hence, under Ventura's training manual, he was subject to the "Reduced Initial New Hire Training Curriculum," a program that eliminated some of the training (and testing) requirements that would have been applied to a newcomer. In this context, it makes very little sense to talk in terms of the training "modules" that would be used in the case of a brand-new jet pilot. Instead, an experienced new hire, such as Capt. Tarascio, would be expected to go through sufficient training and testing to assure his new employer that he had retained his skills as the pilot of a Lear 25. That, one supposes, is what Ms. Fraher thought she was doing when she tested this individual in February of 2005: She was attempting to ascertain whether it was safe to allow Capt. Tarascio to

serve as co-pilot on a "proving" flight of the new aircraft. There is no indication in the record that the February 3, 2005 check flight was scheduled to complete one or more "modules" in Capt. Tarascio's recurrent training or testing.

A final point here is closely related to the first of the problems with Respondent's theory, discussed above. The authorities on which the Respondent relies are, at best, secondary authorities. Order No. 8400.10 is, as we have noted, a document written for members of the FAA's staff. The fact that it is widely known and widely copied in the aviation industry does not transmute it into a definitive interpretation of a section of the FAR adopted with all the dignity and deliberation required by the Administrative Procedure Act. It cannot alter or eliminate the duty of a Part 135 carrier to use only crewmembers who have fulfilled the obligation under § 135.293 to "have completed various recurrent training and checking events within 12 calendar months." Order No. 8400.10 ¶ 603, at 3.343 (June 30, 1991). Under the Respondent's theory of the case, the term "12 calendar months" would be construed to mean "15 calendar months plus 30 or 31 days." The English language cannot be stretched that far.

Ventura's reliance on the terms of its training manual to change the unambiguous meaning of a regulation is equally misplaced. It is true that the training manual of this carrier was initially approved by the local FAA FSDO, as is the case with carrier training manuals generally. But it would be fundamentally inimical to the FAA's mission, and a miscarriage of justice, to allow an air carrier to eliminate its duty to comply with a provision of the FAR simply because it has managed to slip some ambiguous language past the FAA's busy reviewers of its training manual. Once again, a carrier must comply with the regulations as written, regardless of what its training manual or the agency's "guidance" to its staff may say. The same thing is true of opinions emanating from the Chief Counsel's Office, though in this case, I do not believe that the opinion that we find in Ex. R-7 actually says what the Respondent claims it says.

There are also problems with the Complainant's theory of the case. For one thing, the language of the relevant regulation does not specify that the requisite training and testing must be done in any particular order; nor does the regulation require that a crewmember who seeks to pass his annual testing requirements must do so on the basis of training recently received. If a pilot wishes to take one or more of the tests specified in § 135.293(a) without first undergoing training, there is nothing in the regulation (or anywhere else) to prevent him from doing so. Indeed, one presumes that a pilot, such as Capt. Tarascio, who had been flying the Lear Model 25 on virtually a daily basis would be fully competent to pass tests on his knowledge of the matters set forth in paragraphs (a)(1)-(8) without much addi-

tional training. In short, Mr. Sees' view that recurrent training must necessarily precede recurrent testing seems to me to be mistaken.

The fact remains, however, that both Order No. 8400.10 and the Chief Counsel's September 6, 2006 opinion speak in terms of a three-month period in which the tests and training exercises mentioned in § 135.293 may be completed. They say, moreover, that the date on which the airman completes the training-and-testing cycle starts his or her annual period for periodic re-qualification. How can this be squared with the clear language of the regulation itself, which contemplates that re-qualification shall take place once every 12 calendar months and, except for the "grace period" allowed under § 135.301, at no later time? The answer, I believe, lies in the fact that the airmen to whom these prescriptions apply consist of two distinct groups.

There are, on the one hand, individuals who have not previously qualified in the type of aircraft on which they are being trained and tested. For such a person, Mr. Peck's explanation of the three-month period for training and testing rings true. As he testified, § 135.293 imposes a burdensome and time-consuming set of requirements, which may take considerable time to complete, even for the most talented of candidates. Hence, these individuals are given a reasonable period of time—three months in this case—to fulfill all of the requirements. Such an allowance would also be appropriate for someone whose qualifications in the particular type of aircraft had lapsed through lack of experience flying that type or from some other cause. That person would necessarily have to start the training-and-testing cycle from square one and would need up to three months to complete it.

By contrast, a crewmember such as Capt. Tarascio presents an entirely different case. At all relevant times, he was, and continues to be, employed in piloting the Learjet Model 25 on a daily basis. He should be expected to complete training and testing on the subjects set forth in § 135.293 in a relatively brief period of time. He did not need a three-month period in which to fulfill all of the requirements, including those applicable to a specific aircraft type. Proof of this is that Capt. Tarascio, based on his experience in the Learjet 25, was able to satisfy Inspector Fraher concerning his competence and knowledge in just one "proving" flight and successfully completed his SimCom training and testing in only two days.[8] For a pilot as experienced and well qualified as Capt. Tarascio, Mr. Peck's notion that the training-and-testing process is so arduous and attenuated as to require three months from beginning to end simply makes no sense. It is equally

[8] The record shows that his Airman Competence Proficiency Check took place on March 15, 2005,Ex.C-1 at 3, and that he was issued his course completion certificate on March 17, 2005,Ex. C-3.

nonsensical, in my view, to regard Capt. Tarascio's successful completion of the § 135.293 tests in February of 2005 as having been accomplished in March. Respondent's claim that Capt. Tarascio's testing under §§ 135.293(a)(1) and (a)(4)-(8) should be regarded as having been accomplished in March, rather than February when it actually took place, is rejected.

For these reasons, I conclude that, as a technical matter, Capt. Tarascio was out of time when he made the three flights in question in April of 2006. His one-year-plus-a-grace-month hiatus for testing under § 135.293(a)(1) and (a)(4)-(8) had expired at the end of March 2006. As of April 1, 2006, he was no longer qualified under § 135.293(a), and consequently Ventura has been shown by a preponderance of the evidence to have used an unqualified second-in-command pilot on three Part 135 operations in early April 2006.

This brings us to the question of the appropriate sanction to be assessed against the Respondent in this case.

The FAA has introduced virtually no evidence into the record on the subject of the sanction. We also know that the agency's complaint sought a civil penalty of $15,000 based on the charge that Ventura had violated both subsection (a) and subsection (b) of § 135.293 of the FAR. The charge of violating subsection (b), which deals with requirements for crewmember training was withdrawn, leaving the Respondent charged with violating only subsection (a), which deals with testing of crewmembers. Nevertheless, the amount of the penalty the FAA sought was not reduced. When asked about this apparent discrepancy, FAA witness Rogers, the person who initiated the case against Ventura, said that he had recommended that the claim against the carrier should amount to $33,000, or $11,000 per violation. He sought to justify this by pointing to the FAA's Sanction Guidance, Order No. 2150.3B. It turned out, however, that Inspector Rogers was working with a version of Order No. 2150 that did not exist when the alleged violations took place.[9] Hence, the version that the FAA had proffered for the record was not received in evidence.

At the time this rather embarrassing disclosure occurred, I offered to allow counsel for the Complainant to submit the correct version of Order No. 2150, or whatever sanction guidance the FAA had in force in April 2006, as a late-filed exhibitor to entertain a request to take judicial notice of its contents. He agreed to locate the document and provide it for the record on that basis. But he never did so. Instead, he attached it to his post-hearing brief, which was far too late in the pro-

[9] Order No. 2150.3B carries an issue date of October 1, 2007.

ceeding and deprived the Respondent of the opportunity to examine it and refer to it in its post-hearing initial brief. Hence, I am rejecting the Complainant's belated proffer of Order No. 2150. As a result, the record is devoid of evidence in support of the $15,000 claimed by the FAA, or any other amount, as the appropriate civil penalty.

The text of the relevant statute, 49 U.S.C. § 46301, supplies the essential criteria for the assessment of civil penalties in cases such as this one. Subsection (e) of § 46301 provides that, in determining the amount of the civil penalty, the following matters shall be considered: "(1) the nature, circumstance, extent, and gravity of the violation; (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue doing business; and (3) other matters that justice requires."

This is one of the rare cases in which the last criterion is, in my judgment, the most significant. The record of this case makes it abundantly clear that Ventura, in deciding how to deal with Capt. Tarascio's qualifications, was faced with an ambiguous regulatory situation. For reasons that are not entirely clear, the FAA had published "guidance" that was virtually at war with the text of its regulation. While § 135.293 told the aviation community that flight deck crewmembers must be trained and tested on an annual basis,[10] another section of the FAR, some distance away from § 135.293, went on to say that the annual test or flight check requirement can be fulfilled once every 13 months. Then, to add further ambiguity to the requirement for annual testing, the FAA published § 10 of Order No. 8400.10, which appears to say that the requirement for an annual test of piloting skills (meaning a test every 13 months) can be met in certain circumstances by "adopt[ing] a modular approach," performing the training, the testing, or both, over a three-month period and then treating all of the testing as if it had been done on the last day of that three-month period. To add an additional enigma to the regulatory program, the agency's chief counsel then issued an interpretation which can be construed to extend the annual training-and-testing cycle to some 15 months! Is it any wonder that a relatively small carrier, such as Ventura, was confused by what it must do in order to assure that its flight crews were at all times fully qualified under the FAR? Can this Respondent be faulted for following the guidance of its own, FAA-approved training manual?

In these circumstances it seems unfair and inequitable to fasten a heavy financial liability upon Ventura because it read the various "guidance" documents

[10] Admittedly, in somewhat confusing terms: "since the beginning of the 12th calendar month before that service" is hardly a pellucid way of saying "at least once a year." But it's clear enough.

published and approved by the FAA in a manner that seemed to require the least amount of new training and testing of Capt. Tarascio that could be defended under the existing authorities. In the final analysis, as we have seen, Ventura made the wrong guess, but it can hardly be faulted for having to guess; that is what the regulatory atmosphere required of it.

It is also significant, in my view, that Capt. Tarascio was at all relevant times knowledgeable and skillful enough to pass all of the tests set out in § 135.293(a). We have in the record of this case all of this airman's training records. They show, without exception, that he never failed to pass a test of his knowledge and flying skills. His prior experience had equipped him with that knowledge and those skills and, so far as the record shows, he never lost them. Hence, the gravity of Ventura's violation seems rather low, in that the safety of the public was never at risk during the few days early in April 2006 when Capt. Tarascio acted as second-in-command of three of Ventura's flights.

There is no evidence that Ventura had a history of prior violations of the FAR. The FAA did not attempt to introduce such evidence, and because it is the keeper of the records of prior violations, I conclude that its failure to proffer such evidence means that there were no such prior violations in Ventura's aviation history.

Finally, the record indicates that Ventura took steps to get Capt. Tarascio fully tested in accordance with the views of Inspector Rogers of its local FSDO as soon as it learned that Rogers believed that Tarascio had exceeded the time limit for his annual testing and training. According to Inspector Rogers's testimony, he examined Capt. Tarascio's training records in May 2006. Exhibit C-1 shows that the Inspector administered the relevant tests to Capt. Tarascio on May 8, 2006. This tends to demonstrate that Ventura's violation was neither extraordinarily blameworthy, intentional nor deliberate.

In these circumstances, I conclude that a nominal civil penalty will serve the interests of justice.

In consideration of the foregoing, and subject to appeal to the Administrator as provided in § 13.233 of the Rules of Practice and Procedure, 14 C.F.R. § 13.233, IT IS ORDERED that –

1. Respondent Ventura Air Services, Inc. is liable to the United States of America as represented by the Federal Aviation Administration for a civil penalty in the amount of one dollar ($1.00); and

2. Respondent Ventura Air Services, Inc. shall pay the sum of one dollar ($1.00) to the Federal Aviation Administration forthwith.

Isaac D. Benkin
Administrative Law Judge

[Note: This decision may be appealed to the Administrator of the FAA. The Notice of Appeal must be filed not later than 10 days after service of this decision (plus five additional days, if this decision is served by mail). 14 C.F.R. §§ 13.233(a), 13.211(e). The appeal must be perfected with a written brief or memorandum not later than 50 days after service of this decision (plus five additional days, if this decision is served by mail). 14 C.F.R. §§ 13.233(c), 13.211(e). The Notice of Appeal and brief or memorandum must be either (a) mailed to the Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430, Wilbur Wright Building—Suite 2W1000, or (b) delivered personally or via expedited courier service to the Federal Aviation Administration, 600 Independence Ave., S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591, Attention: Hearing Docket Clerk, AGC-430. 14 C.F.R. §§ 13.233(a), 13.210(a)(2), (1). A copy of the Notice of Appeal and brief or memorandum should also be sent to counsel for the FAA in this proceeding. 14 C.F.R. § 13.233(a).]