UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: HELICOPTER FLITE, INC.
FAA Order No. 2011-6

Docket No. CP09EA0015
FDMS No. FAA-2009-0579[1]

Served: June 13, 2011

DECISION AND ORDER[2]

Respondent Helicopter Flite, Inc., has appealed from the initial decision written by Administrative Law Judge ("ALJ") Isaac D. Benkin, holding that Helicopter Flite violated 14 C.F.R. § 135.25(b)[3] by failing to have exclusive use of the only aircraft that it was authorized to operate under its operations specifications. The ALJ assessed an $11,000 penalty. Helicopter Flite argues on appeal that: (1) its Sixth Amendment rights

[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] The regulation, in pertinent part, provides:

> Each certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications. In addition, for each kind of operation for which the certificate holder does not have the exclusive use of an aircraft, the certificate holder must have available for use under a written agreement (including arrangements for performing required maintenance) at least one aircraft that meets the requirements for that kind of operation.

14 C.F.R. § 135.25(b) (2008).

were violated when the ALJ denied its request for a continuance of the hearing after granting its counsel's motion to withdraw; (2) its Fourteenth Amendment rights were violated by being precluded from introducing evidence; (3) there was no violation; and (4) the $11,000 penalty was excessive. Helicopter Flite requests that the Administrator remand the case for a new hearing, or, in the alternative, reduce the civil penalty.

The FAA, in its reply brief, argues that the ALJ acted appropriately when he denied the motion for a continuance and granted the motion barring Helicopter Flite from introducing evidence at the hearing. The FAA argues further that the $11,000 civil penalty is consistent with sanction guidance. Regardless, the FAA submits, "remand of the case for a re-hearing, to give Appellant the opportunity for further preparation of the case … would be appropriate." (Reply Brief at 9.)

After consideration of the record and the briefs, it is held that in the absence of evidence of operation, a certificate holder cannot be found to have violated Section 135.25(b). Consequently, the FAA failed to prove that Helicopter Flite violated Section 135.25(b) because the FAA did not introduce any evidence that Helicopter Flite or any other entity operated the helicopter in question after the helicopter was sold.

I. Case History

Helicopter Flite, based in Weatherly, Pennsylvania, holds an air carrier certificate and operates an on-demand helicopter transportation service[4] under Parts 119 and 135 of the Federal Aviation Regulations (FAR).[5] Floyd Hoffman is Helicopter Flite's chief pilot.

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[4] Under its operations specifications, Helicopter Flite is authorized to conduct on demand Part 135 operations in common carriage.

[5] 14 C.F.R. §§ 119.1-119.71, and 135.1-135.443.

The FAA alleged in its Second Amended Complaint that between February 12, 2008, and September 15, 2008, Helicopter Flight did not have exclusive use of a Bell helicopter, identification number N407Z, which was the only aircraft that it was authorized to operate under its operations specifications.[6] The FAA alleged that Helicopter Flite violated 14 C.F.R. § 135.25(b), which provides that "[e]ach certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications." The term "exclusive use" is defined in 14 C.F.R. § 135.25(c) as follows:

> For the purposes of paragraph (b) of this section a person has exclusive use of an aircraft if that person has the sole possession, control, and use of it for flight, as owner, or has a written agreement (including arrangements for performing required maintenance), in effect when the aircraft is operated, giving the person that possession, control, and use for at least 6 consecutive months.

The FAA sought an $11,000 civil penalty for this violation. Helicopter Flight denied the allegations in its Answer to the Second Complaint.

The ALJ initially ordered the parties to exchange proposed exhibits and witness lists by December 8, 2009, and scheduled the hearing for December 22, 2009. After the FAA moved for a continuance, the ALJ postponed the hearing until January 26, 2010, and ordered the parties to exchange proposed exhibits and witness lists by January 12, 2010.

The FAA served its proposed exhibits and its witness list in a timely fashion, but Helicopter Flite failed to serve a witness list or any proposed exhibits. On January 19,

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[6] The FAA filed the original Complaint on June 30, 2009, alleging that Helicopter Flite violated 14 C.F.R. § 135.25(b) because it did not have exclusive use of a different aircraft, N407JG (which was the only aircraft listed on its operations specifications) after it was sold on July 9, 2008. The FAA filed its Amended Complaint on September 29, 2009, substituting N407Z for N409JG.

2010, one week before the hearing, the FAA filed a motion *in limine* seeking to preclude Helicopter Flite from offering into evidence any exhibits or testimony due to its failure to comply with the ALJ's order. Helicopter Flite did not reply to that motion.

On January 20, 2010, Helicopter Flite's attorney filed a motion seeking leave to withdraw as counsel. The motion stated that Helicopter Flite's principal, Floyd C. Hoffman, no longer desired for this attorney to represent the company.

At the hearing held in Allentown, Pennsylvania on January 26, 2010, the ALJ granted Helicopter Flite's attorney's request to withdraw as counsel. (Tr. 4-5.) Mr. Hoffman, as the company's representative, then requested a postponement, but the ALJ denied the request. (Tr. 8-10.)

The agency attorney renewed the motion *in limine* at the hearing. (Tr. 11-12.) The ALJ granted the FAA's motion *in limine*, precluding Helicopter Flite from "put[ting] on a case in chief," and limited it to cross-examination of the FAA's witnesses. (Tr. 12.) Two witnesses testified for the FAA, and Mr. Hoffman cross-examined both of them.

After the FAA put on its case-in-chief, both Mr. Hoffman and the agency attorney presented oral closing arguments, and the hearing was adjourned. On February 4, 2010, the ALJ issued his written initial decision, holding that the FAA had proven by the preponderance of the evidence that Helicopter Flite violated Section 135.25(b).

II. Evidence

On November 12, 2007, Air Chopper, LLC, a holding company controlled by Mr. Hoffman, leased N407Z to Helicopter Flite for a three-year period beginning on November 12, 2007.[7] The lease provided that "both parties understand and agree that in

[7] The lease was signed by Mr. Hoffman for Air Chopper and by Marion Hoffman for Helicopter Flite.

the event the said helicopter is sold by Air Chopper, LLC, then this Lease shall automatically terminate."[8] (Exhibit A-6.)

Helicopter Flite's operations specifications provided, at paragraph A008, as follows:

> Exclusive Aircraft Use Requirements for Part 135 Operations. At least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications must remain in the certificate holder's exclusive legal possession and actual possession (directly or through the certificate holder's employees and agents) as specified in Section 135.25. This aircraft cannot be listed on any other Part 119 certificate holder's operations specification during the term of the exclusive use lease.

On January 30, 2008, the FAA approved operations specifications paragraph D085, authorizing Helicopter Flite to operate N407Z in commercial operations. N407Z was the only aircraft listed on Helicopter Flite's operations specifications at this time.

Less than two weeks later, on February 12, 2008, Air Chopper sold N407Z to Pumpco, Inc., a company based in Texas. (Exhibit A-5; Tr. 64-65.) Mr. Hoffman signed the bill of sale on behalf of Air Chopper.

On March 11, 2008, Mr. Hoffman sent via facsimile a copy of the lease dated November 12, 2007, to the Allentown Flight Standards District Office (FSDO), in response to an earlier request by the FSDO for documentation establishing that Helicopter Flite had operational control over the aircraft that it used. The FSDO had made similar requests for documentation to all the Part 135 certificate holders over which it had jurisdiction. (Tr. 70.)

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[8] It may fairly be questioned whether a lease with a provision like this one satisfies Section 135.25(c)'s requirement for a written agreement giving the certificate holder sole possession, control and use for flight *for at least 6 consecutive months*.

On May 30, 2008, Roberts Ranch Investments, LLC, another Texas-based company, purchased N407Z from Pumpco.

In September 2008, Hoffman contacted the FSDO to request a conformity inspection of another helicopter, N407JG, which Mr. Hoffman wanted to add to Helicopter Flite's operations specifications. (Tr. 42-43; Initial Decision at 2.) FAA Inspectors Eugene McCoy and William Rush inspected N407JG at Helicopter Flite's hangar on September 15, 2008.[9] (Tr. 44-46; Initial Decision at 2.) After inspecting N407JG, the inspectors, who were unaware that N407Z had been sold, asked Mr. Hoffman if they could inspect N407Z or examine its records. (Tr. 47.) Inspector McCoy testified that Mr. Hoffman replied that he had sold the aircraft recently and that he did not have the aircraft or the records. (Tr. 47-48.) Inspector McCoy wrote in his statement, dated September 18, 2008, that Mr. Hoffman explained that he "needed to get [N407JG] on the FAR 135 certificate as soon as possible." (Exhibit A-3.) According to the inspector's statement, Mr. Hoffman answered "that's correct" after being asked, "you mean that you don't have an aircraft for 135 at this time?" (Exhibit A-3; Tr. 54.)

The inspectors subsequently explained the situation to Frank Alotta, the principal operations inspector. (Exhibit A-3; Initial Decision at 2.)[10] Inspector Alotta sent a letter of investigation to Helicopter Flite on October 7, 2008, stating that "[y]our company's aircraft, the exclusive use aircraft, was sold … leaving the company without an aircraft." (Exhibit A-7.) The inspector requested Mr. Hoffman's pilot logbooks for inspection

[9] Due to certain discrepancies found during the conformity inspection, N407JG was not added to the Helicopter Flite's operations specifications until October 2008. (Tr. 45.)

[10] Inspector Alotta then researched N407Z's status on the FAA's electronic database, and found records indicating that N407Z had been sold on February 12, 2008, and again on May 30, 2008. (Exhibits A-3, A-4, A-5; Tr. 61-64; Initial Decision at 2-3.)

"along with any evidence or statements you might care to make regarding this matter." (Exhibit A-7.)

Mr. Hoffman responded by letter dated October 10, 2008. He wrote that he had told the inspector that negotiations were underway for the sale of N407Z, and that he planned to replace N407Z with a new helicopter. He also wrote that he had left the inspector a voice message after N407Z was sold. (Exhibit A-8.) Mr. Hoffman explained that the inspector should schedule an appointment to inspect his pilot logbook at the hangar in Weatherly. (Exhibit A-8).

III. Initial Decision

In his initial decision, the ALJ held that the FAA proved by a preponderance of the evidence that from at least February 12, 2008, until September 15, 2008, Helicopter Flite lacked exclusive use and possession of the only aircraft listed in its operations specifications in violation of 14 C.F.R. § 135.25(b). (Initial Decision at 5.)

Although the ALJ had ruled that Helicopter Flite could not put on a case-in-chief, the ALJ found that Mr. Hoffman's allusions at the hearing (during cross-examination and argument) to an oral lease giving Helicopter Flite exclusive use of N407Z after its sale[11] "strained credibility." The ALJ explained, "prudent businessmen do not transfer exclusive use and possession of such valuable assets on the basis of a handshake or an 'oral lease.'" (Initial Decision at 5.) Furthermore, even if such an oral lease existed, the ALJ held, Helicopter Flite violated the regulation because "if a Part 135 operator seeks to satisfy the 'exclusive use' requirement by leasing an aircraft, the arrangement must take

[11] For example, in his opening statement, Mr. Hoffman asserted, "We had an oral contract that that aircraft would remain on the certificate until the Allentown FSDO was able to put [N407JG] on the certificate." (Tr. 26.) He claimed that Helicopter Flite still retained control of N407Z despite the fact that it had been sold and was in Texas. (Tr. 26.)

place under a written agreement." (Initial Decision at 5.) The ALJ also found that Hoffman "knowingly and deliberately tried to mislead" the FAA by providing a "false and fictitious" written lease for N407Z from Air Chopper to Helicopter Flite.[12] (Initial Decision at 8.)

In determining an appropriate civil penalty, the ALJ discussed the FAA sanction guidance set forth in FAA Order No. 2150.3B, entitled "FAA Compliance and Enforcement Program" ("FAA Order") and the testimony of Inspector Alotta regarding the application of the guidance to the facts of this case. The ALJ noted that the FAA sought an $11,000 civil penalty, which, under the guidance, is the highest penalty that should be assessed against a small business concern like Helicopter Flite for non-compliance with operations specifications resulting in the "likely potential or actual adverse effect on safe operation." (Initial Decision at 8, quoting FAA Order No. 2150.3B Appx. B, at B-12.) The ALJ wrote that he "would normally reduce this figure to take account of mitigating factors and the technical nature of the violations, as well as the realization that the Respondent is, after all, a small businessman." (Initial Decision at 8.) However, according to the ALJ, Hoffman's "reprehensible" attempt to mislead the FAA

[12] The evidence does not support the ALJ's finding that Helicopter Flite "had provided the FAA with a *false and fictitious* lease of the aircraft from Air Chopper to Helicopters Flites (sic) dated a month *after* the purported lessor had sold the aircraft." (Initial Decision at 6) (emphasis added). The lease agreement was signed on November 12, 2007, 3 months *before* Air Chopper, the lessor, sold N407Z to Pumpco on February 12, 2008. Consequently, there is also no support for the ALJ's finding that "when asked to submit his lease or other papers containing evidence of his right to exclusive use and possession, the Respondent *cooked up* a purported lease from another entity controlled by Mr. Hoffman." (Initial Decision at 8) (emphasis added.) Nonetheless, it does appear that Mr. Hoffman was trying to mislead the FAA when he sent the FAA a lease that he must have known was no longer in effect, because under its terms, the lease terminated when Air Chopper sold N407Z to Pumpco.

was an aggravating factor, that "warrant[ed] assessment of the maximum civil penalty," and as a result, he assessed an $11,000 civil penalty. (Initial Decision at 8-9.)

III. Discussion

Helicopter Flite argues in its appeal brief that the FAA sanction guidance pertaining to violations by air carriers and commercial operators does not specifically refer to situations in which the carrier or operator does not have exclusive use of an aircraft.[13] He concludes, as a result, that "in fact according to [the guidance] NO violation occurred."

Certificate holders authorized to conduct operations under Part 135 must comply with the requirements set forth in Part 135 of the Federal Aviation Regulations, 14 C.F.R. §§ 135.1 – 135.507. Section 135.25(b) requires that a certificate holder have exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in its operations specifications. The FAA did prove that Helicopter Flite did not have exclusive use of the only aircraft listed on its operations specifications between February 12, 2008, and September 15, 2008.

However, it makes no sense to enforce this requirement by imposing a civil penalty unless there is evidence that the certificate holder continued to operate during the time period that it did not have exclusive use of at least one aircraft. If there is no implicit operation requirement, then, for example, the FAA could assess a civil penalty

[13] The FAA has published the Administrator's guidance regarding sanctions for violations of those requirements in FAA Order No. 2150.3B, FAA Compliance and Enforcement Program. The pertinent sanction guidance, set forth in Figure B-1-c of FAA Order No. 2150.3B, provides that a minimum civil penalty is appropriate when an air carrier's operation constitutes a technical violation of its operations specifications. It also provides that a moderate or maximum civil penalty is appropriate for a violation involving an operation contrary to operations specifications involving "likely potential or actual adverse effect on safe operation."

once a certificate holder's exclusive use aircraft was destroyed by fire or natural disaster. Likewise, a certificate holder would not be able to sell its exclusive use aircraft and use the proceeds to purchase another aircraft without being in violation of Section 135.25(b).

The FAA did not introduce any evidence to show that Helicopter Flite operated any aircraft after the sale of N407Z. The evidence in the record shows only that:

- Helicopter Flite leased N407Z from Air Chopper on November 12, 2007,
- N407Z was added to Helicopter Flite's operations specifications on January 30, 2008;
- Air Chopper sold N407Z to Pumpco on February 12, 2008;
- Pumpco sold N407Z to Roberts Ranch Investments, LLC, on May 30, 2008.

Simply not having an exclusive use aircraft will not be considered as constituting a violation of Section 135.25(b), warranting the assessment of a civil penalty, absent evidence of operation under Part 135.[14] Hence, no civil penalty is warranted in this case.

IV. Conclusion

For the foregoing reasons, the ALJ's decision is reversed, and no civil penalty is assessed.

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[14] In light of this determination, there is no need to address Respondent's other arguments pertaining to violations of constitutional rights or regarding an excessive civil penalty.

SERVED FEBRUARY 4, 2010

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

IN THE MATTER OF

HELICOPTERS FLITE, INC.,
Respondent.

FAA DOCKET NO. CP09EA00015
(Civil Penalty Proceeding)

DMS NO. FAA-2009-0579

ADMINISTRATI VE LAW JUDGE'S INITIAL DECISION ASSESSING AN $11,000 CIVIL PENALTY

The question for decision in this civil penalty case is whether, during the period from February 12, 2008 to September 15, 2008, the Respondent had exclusive use and control of the only aircraft listed in its operations specifications, a Bell Model 407 helicopter bearing identification number N407Z.

The Respondent is Helicopters Flite, Inc. It operates a for-hire helicopter transportation service from the airport at Weatherly, Pennsylvania. It is a Part 135 carrier, so-called because regulations governing its activities are found in Part 135 of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 135.1-135.443. As a Part 135 carrier, the Respondent is obligated to observe the terms of its operations specifications, which were issued by the Federal Aviation Administration (FAA) and accepted on its behalf by its principal, Floyd Hoffman. Operations specifications include a listing of the specific aircraft that a Part 135 operator may fly. They require that "[a]t least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's specifications must remain in the certificate holder's exclusive legal possession and actual possession . . .". The "exclusive use" requirement is re-enforced by § 135.25(b) of the FAR, which states that each certificate holder must have the exclusive use of at least one aircraft that meets the requirements for at least one kind of operation authorized in the certificate holder's operations specifications.

At all relevant times, the operations specifications of Helicopters Flite listed only one aircraft: a Bell model 407 helicopter bearing registration number N407Z. As we have noted, Helicopters Flite's principal and point of contact for the FAA's Allentown, Pennsylvania Flight Standards District Office (FSDO) was Floyd Hoffman. The Allentown FSDO had surveillance and approval authority over the Respondent. Hoffman had spent many years in the aviation business and, in addition to being the pilot for Helicopters Flite, dealt in the purchase and sale of used helicopters. Mr. Hoffman had a practice of purchasing helicopters and applying to the FAA to add them to his firm's Part 135 operations specifications. Then, after the machine was on the operations specifications, it would be sold at a profit. When a Part 135 operator seeks to add an aircraft to its operations specifications, the FAA will perform a very thorough "conformity inspection" of the machine, requiring it to be in first-class operating condition before approval will be granted. This practice is said to have resulted in an increase in the value of the machine on the used-aircraft market.

In September 2008, Eugene McCoy, then an avionics inspector at the Allentown FSDO,[1] received a request from the Respondent to perform a conformity inspection of a helicopter, N407JG, that was in its hangar and that Mr. Hoffman wished to add to his company's operations specifications. Inspector McCoy arranged to inspect the machine on September 12, 2008. In company with another Inspector, William Rush, he went to Respondent's facility. When they arrived, they noted that helicopter N407Z was missing. When asked about its whereabouts, Mr. Hoffman replied that the aircraft had been sold "recently." He also said that he could not produce the logbooks for the aircraft because they were with the helicopter. Inspector McCoy said to Mr. Hoffman, "you mean you don't have an aircraft for 135 at this time?" Hoffman said that was correct but that the deal had been completed in the last few weeks. McCoy reminded Hoffman that his operations specifications required him to have an exclusive-use aircraft. (The conversation is reported in Ex. 3.) McCoy and Rush inspected the "new" helicopter and pointed out several discrepancies requiring attention before it could be added to the certificate. Then they left and returned to their office.

When they arrived, McCoy told one of his colleagues, FAA Inspector Frank Alotta, about his conversation with Hoffman. Alotta then researched the status of N407Z in the FAA's electronic data base. He found that the aircraft had been sold several times prior to the date of McCoy's visit, and that the first transaction, far from being "recent" or "in the last few weeks," had taken place on February 12,

[1] McCoy has since been promoted to the position of Assistant Manager of the Allentown FSDO.

2008, more than seven months earlier. (See Ex. A-5.) On that date, according to the FAA's records, a firm called Pumpco, Inc., of Gittings, Texas had purchased the helicopter from Air Chopper, LLC. This was significant because on March 11, 2008, Respondent had answered an FAA request for its lease agreement by sending the Allentown FSDO a copy of a lease (Ex. A-6), under which the Respondent represented it had leased the same aircraft from Air Chopper, LLC.[2] In other words, it appeared to the FAA inspectors that Helicopters Flite had represented to the agency that it had exclusive use of the machine under lease from an owner who had sold the helicopter a month earlier! In addition, the lease contained a clause stating that it would automatically terminate in the event the helicopter was sold by Air Chopper. Through their research, the FAA's inspectors learned that in fact the machine had been sold by Air Chopper before the date on which the Respondent had sent the document to the FSDO, representing that it was a current lease under which Helicopters Flite had "exclusive use" of the Bell Model 407. Further research into the status of the helicopter indicated that Pumpco, the party that had bought it from Air Chopper, had itself sold the aircraft to another party, Roberts Ranch and Investments, LLC, in May of 2008. See Ex. A-4. (Both Roberts Ranch and Pumpco list addresses in Gittings, Texas; however, the record does not disclose what relationship, if any, they may have had to one another.)

At that point, it appeared to the FAA's investigators that the Respondent was out of compliance with the "exclusive-use-and-possession" requirements in § 135.25(b) of the FAR and the co-ordinate provisions in its operations specifications. A Letter of Investigation (LOI) was prepared and sent to the Respondent. See Ex. A-7. The letter suggested that the sale of N407Z to a Texas firm had left the Respondent without an aircraft. It invited the Respondent to provide the FAA with any evidence it might care to submit, showing the contrary, and specifically asked Mr. Hoffman to provide his pilot's logbooks for inspection. Mr. Hoffman's reply, dated October 10, 2008 (Ex. A-8) conceded that the Bell 407 had been sold and asserted that he planned to replace it with a newer machine and place the new one (presumably N407JG) on the company's operations specifications.[3] Mr. Hoffman's response to the request for his logbooks was to invite the investigators to inspect them by appointment at Respondent's Weatherly, Pennsylvania hangar. What is most significant about the response to the LOI is that the Respondent at no time claimed that helicopter N407Z remained under

[2] At some earlier time, there had been a serious aviation accident at Teterboro Airport in New Jersey. Investigation of the accident showed that one of the involved aircraft had been leased, and it was virtually impossible to ascertain who was the real operator of the aircraft and responsible for its maintenance. As a result, the FAA ordered its FSDOs to contact lessees and to ask them to produce for inspection copies of their leases.

[3] So far as the record shows, No. N407JG was never placed on the Respondent's operations specifications. Its fate is undisclosed.

lease to it, nor was a copy of a lease to Helicopters Flite enclosed with the letter. If such a document had existed, it would have made the Respondent's problems with the FAA instantly go away, as it is well-established that the "exclusive use" requirement may be satisfied by leasing an aircraft to the holder of the Part 135 certificate.

On June 30, 2009, the FAA filed a complaint against the Respondent, seeking an $11,000 civil penalty for violation of § 135.25(b) of the FAR, failure to have exclusive use of at least one aircraft cited in its operations specifications. The Respondent's answer asserted that it had exclusive use of an aircraft which it had leased and continued to lease. The Respondent, through counsel, also requested a hearing. The case was assigned to me for the conduct of the hearing under Part 13 of the FAA's regulations. At a later date, the FAA amended its complaint twice to specify that the aircraft, the status of which was at issue was Bell No. N407Z, not N407JG, as its original complaint had alleged, and to assert specifically that during the period from February 12, 2008 until September 15, 2008, the Respondent did not have exclusive use of the only aircraft listed in its operations specifications.

In a prehearing order served on July 28, 2009, I set the case for hearing in Allentown on December 22, 2009. The order also required the parties to exchange proposed exhibits and lists of intended witnesses two weeks before the date of the hearing. On motion of the Complainant, I postponed the date of the hearing until January 26, 2010 and the date for exchange of witness lists and proposed exhibits to January 12, 2010. On the latter date, the Complainant submitted its proposed exhibits and a list of its witnesses, but nothing was heard from the Respondent. On January 21, 2010, five days before the hearing was scheduled to begin, I received a motion from counsel for the Respondent seeking leave to withdraw as attorney for Helicopters Flite. The motion stated that "Helicopters Flite, Inc., through it's [sic] principal, Floyd C. Hoffman no longer wishes me to act as his attorney in the matter." At the outset of the January 26, 2010 hearing, I granted Respondent's former counsel's request and was advised that Mr. Hoffman himself would represent the Respondent. I also granted a motion in limine, submitted by counsel for the Complainant, precluding the Respondent from offering in evidence documents not disclosed in advance or the testimony of a witness whose identity had not been disclosed in accordance with my prehearing order.

At the hearing, the Complainant sponsored the testimony of two witnesses, Inspectors McCoy and Alotta. Mr. McCoy testified generally about his meeting with Mr. Hoffman in September 2008, while Mr. Alotta testified about the results of his research into the status of N407Z. Mr. Hoffman cross-examined both of

them vigorously. His cross-examination was aimed at showing that both of the FAA investigators shared a personal animus against him because his practice of "flipping" helicopters on to his operations specifications and then promptly selling them resulted in an increase workload for the inspectors who would have to perform a detailed inspection of the machine each time it was added to the certificate. In general, it appeared to me that the effort to show personal bias was a failure. Though it was clear that neither Mr. Hoffman, on the one hand, nor Inspectors McCoy and Alotta, on the other, could accurately be described as "bosom buddies," there is no evidence that these FAA employees were engaged in anything more than their legitimate duties to detect violations of the FAR and to take enforcement action when warranted. Indeed, it appears that Mr. Hoffman has failed to "perceive the beam in his own eye." If there were a legitimate lease of N407Z to Respondent, all he had to do was to exhibit a copy of that lease, and the case would be over. The fact that he did not do so when twice given the opportunity (and has not done so to this day) speaks volumes. During the hearing, Mr. Hoffman adverted to the existence of an "oral lease." That strains credulity. N407Z was, and is, a top-of-the-line machine worth about one million dollars in the marketplace. Prudent businessmen do not transfer exclusive use and possession of such valuable assets on the basis of a handshake or an "oral lease." Moreover, the regulations specify that if a Part 135 operator seeks to satisfy the "exclusive use" requirement by leasing an aircraft, the arrangement must take place under a written agreement. 49 C.F.R. § 135.25(b).

At the hearing, the Respondent made much of the fact that neither Inspector McCoy nor Inspector Alotto had asked the purchasers of the aircraft whether it was subject to Respondent's exclusive use, even though it was located in Texas. They might have done so. The question raised by the Respondent, however, is not whether they should have conducted a more thorough investigation. The critical question is whether the FAA's failure to inquire of the new owners about the status of the helicopter vitiates the evidence that they did find to the point where it can be said that the FAA has failed to sustain its burden of coming forward with proof that the Respondent was in violation of § 135.25(b) of the FAR. I am unable to find that it did so. The FAA's representatives at the Allentown FSDO had found enough evidence, which they presented at the hearing, to establish by a preponderance of the evidence that Helicopters Flite, from at least February 12, 2008 on, and especially on September 15, 2008, did not have exclusive use and possession of the only aircraft listed in its operations specifications.

At the time these charges were prepared, the FAA investigators had evidence indicating that the Respondent no longer had exclusive use of that

machine. The most significant piece of evidence was Mr. Hoffman's statement to Mr. McCoy on September 15, 2008 that the aircraft was no longer on his premises because it had been sold "recently" and Mr. Hoffman's failure to demur when McCoy said, "you mean you don't have an aircraft for 135 [service] at this time." During the same meeting, Hoffman declined to allow the investigators to examine N407Z's logs, presumably because they were in the hands of the new owner. To add verisimilitude to their suspicions, the inspectors then learned that FAA records showed that the aircraft in question had been sold—not once but twice—to parties in Texas, and the first of the sales had taken place in February 2008, more than seven months earlier. This evidence contradicted Mr. Hoffman's story about a sale that had occurred "recently." The records check also showed that in March the Respondent had provided the FAA with a false and fictitious lease of the aircraft from Air Chopper to Helicopters Flite dated a month after the purported lessor had sold the machine. Finally, in response to the LOI, the Respondent had said not a word about its entitlement to exclusive use of N407Z. Instead, it spoke about its efforts to add a different helicopter, N407JG, to its operations certificate.

In these circumstances, it is little wonder why the FAA's investigators concluded that they did not have to persevere any further with their inquiries. They believed they had a clear case of violation of the "exclusive-use" requirement against Helicopters Flite. And they were right.

When we add to this combination of events the Respondent's inability or unwillingness to show the investigation team, or provide for the record in this case, any bona fide written lease or other agreement giving it exclusive use and possession of the only aircraft on its operations specifications, the conclusion becomes irresistible that, during the period in question, February 12, 2008 through September 15, 2008 (and perhaps thereafter), the Respondent did not have exclusive use of any aircraft that met the requirements for the kind of operation authorized under its operations specifications. This means that, throughout that period, the Respondent was in violation of § 135.25(b) of the FAR, and I so find.

It is worth inquiring at this point why the FAA would concern itself with the right to exclusive use and possession of an aircraft on the part of a Part 135 operator. The reason, it appears, is that the relationship between the FAA and a Part 135 operator is one of special trust and confidence. By authorizing the operator to use the aircraft to transport passengers for hire, i.e., the general public, the FAA is in effect representing to the public that the operation of that machine by that operator meets its most stringent safety regulations. That is why the agency puts an aircraft listed on the operations specifications through such an onerous

series of checks and inspections before it will permit the listing. That is also why the FAA carefully vets the Part 135 operator before it grants the authority to operate a for-hire service: the grant of authority is a representation on the part of the government agency that this operator is fully qualified to maintain the aircraft in tip-top condition and to fly it safely. If the aircraft is listed on a Part 135 operator's certificate and yet is not subject to the Part 135 operator's exclusive use and control, the FAA's promise may be illusory: someone who has not successfully completed the inspection-and-investigation process is now in charge of the maintenance and operation of the aircraft, and the public is subject to the risk that that operator may not come up to the high standards expected of a genuine Part 135 operator.

This, at least, was the explanation given by Mr. McCoy and Inspector Alotta when, at the hearing, they were asked whether the Respondent's violation of § 135.25(b) had the potential to impair aviation safety. The hypothesis that a potential passenger would inquire about the operator's Part 135 status before boarding an aircraft may, at first glance, seem rather far-fetched -- particularly to those of us who are accustomed to fly on aircraft operated by the likes of American Airlines or U.S. Airways. Nevertheless, there is some merit to it. By failing to maintain exclusive use and control of at least one aircraft listed on its operations specifications, the Part 135 operator has betrayed the special confidence that the FAA vested in it at the time it certificated the carrier as a Part 135 operator. It causes one to doubt the overall integrity of the carrier; for if it has failed to comply with the exclusive-use requirement, the question that arises is: What other regulatory requirements is the carrier violating?

So there is some sense to the notion that a carrier, such as the Respondent, who is in violation of §135.25(b) should pay a substantial civil penalty. Under the statutory authority found in 49 U.S.C. § 46301(a)(5), the Respondent, as a small business, is liable for a civil penalty of not more than $10,000 for violation of an FAA regulation. The ceiling on liability was increased to $11,000 by the Federal Civil Penalty Inflation Adjustment Act of 1990, 28 U.S.C. § 1461 (note). See also 14 C.F.R. § 13.305(d). In this case, the FAA has sought the maximum penalty, even though it has not sought to give effect to its theory that each day the violation continues may warrant a separate, and additional, penalty.

At the hearing, the Complainant placed in evidence excerpts from FAA Order No. 2150.3B as of October 10, 2007, which sets forth the agency's policy on the calculation of civil penalties for various types of violations of the FAR. Mr. McCoy testified that, by using the Order, he and his colleagues had arrived at the

conclusion that a penalty of $11,000 was warranted in this case. The analysis starts with a table called "Figure B-1-c" listing types of violations pertaining to operations specifications of domestic air carriers. Failure to have exclusive use and/or possession of an aircraft is not specifically listed, but "Operation contrary to ops specs" is listed twice. The first listing deals with "technical noncompliance" and provides that a "Minimum" civil penalty is warranted. The second listing speaks to "likely potential or actual adverse effect on safe operation" arising out of non-compliance with operations specifications. It calls for a "Moderate to Maximum" civil penalty for such violations. According to Mr. McCoy's testimony, the Respondent's non-compliance fell into the second of these two categories, though he acknowledged that this was a judgment call. Having decided that a "Moderate to Maximum" penalty was appropriate, the enforcement staff then turned to pages B-3, B-4 and B-5 of the regulation, which categorized the violators by their size and the nature of the offense. He testified that Helicopters Flite fell into Group IV, a small business concern that had committed a violation covered by 49 U.S.C. § 46301(a)(5)(A). For such a firm the amounts listed are as follows:

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

So it can be seen that the FAA's enforcement staff selected the highest amount that Order No. 2150.3B would allow (absent a daily penalty) for the violation committed by the Respondent. I would normally reduce this figure to take account of mitigating factors and the technical nature of the violation, as well as the realization that the Respondent is, after all, a small businessman. There is, however, a powerful consideration that cuts the other way.

The fact is, as the evidence clearly shows, that the Respondent's principal knowingly and deliberately tried to mislead the local FSDO, and the agency as a whole, about the provenance of his asserted exclusive right to the use and possession of N407Z. When asked to submit his lease or other papers containing evidence of his right to exclusive use and possession, the Respondent cooked up a purported lease from another entity controlled by Mr. Hoffman, Air Chopper. The document appears to have been completely spurious because Air Chopper had sold the machine some time previously and, in any event, the lease by its terms terminated when and if such a sale took place. Yet, Mr. Hoffman, acting on behalf of Helicopters Flite, furnished it to the FAA knowing that the agency would rely upon it to establish his bona fides under the exclusive-use provisions of the FAR. This was reprehensible. In my judgment, it is an aggravating circumstances that

warrants assessment of the maximum civil penalty that can lawfully be imposed. That is what the FAA's enforcement staff has recommended, and I agree with them that this is an appropriate occasion on which to impose it.

One final word before this decision can be concluded. Throughout the hearing, Mr. Hoffman protested mightily about my refusal to postpone the hearing to allow him to replace his counsel, whom he had discharged a few days earlier. He first asked for the postponement after the hearing had begun, when there were assembled FAA witnesses and counsel, as well as the reporter and administrative law judge, several of whom had come great distances to Allentown, a location chosen to suit Mr. Hoffman's convenience. The discharge of an attorney on the eve of the hearing is an often-attempted gambit on the part of parties who want to protract the proceeding as long as possible. In the U.S. District Courts, the judges deal with this tactic by simply refusing the allow the party's retained counsel to withdraw his or her representation of the client. See, e.g., United States v. Castro, 972 F.2d 1107, 1109-10 (9th Cir. 1992); Dan River, Inc. v. Humik Fabrics Corp., 1979 U.S. Dist. LEXIS 11051 (S.D.N.Y. 1979). But administrative law judges have no such authority. So it becomes evident that the remedy for the dilatory tactic of discharging an attorney within days of the scheduled start of a hearing is simply to require the hearing to go forward and the Respondent to be represented by a designated representative. That is what occurred in this case. In the circumstances, I cannot agree that the conduct of the proceeding deprived the Respondent of even a soupçon of due process.

WHEREFORE, IT IS ORDERED, subject to appeal to the Administrator as provided in § 13.233 of the Rules of Practice and Procedure, 14 C.F.R. § 13.233, or review on the Administrator's own motion, that –

1. The Respondent, Helicopters Flite, Inc., is liable to the United States of America, as represented by the Federal Aviation Administration, for a civil penalty in the amount of eleven thousand dollars ($11,000.00); and

2. The amount for which the Respondent has been held liable herein shall be paid 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).]