

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

In the Matter of: DARBY AVIATION

FAA Order No. 2010-5

Docket No. CP08SO0025
FDMS No. FAA-2008-1191¹

Served: June 14, 2010

DECISION AND ORDER²

Complainant Federal Aviation Administration (“FAA”) has appealed Administrative Law Judge (“ALJ”) Isaac D. Benkin’s written initial decision,³ which granted the motion for decision of Respondent Darby Aviation (“Darby”), d/b/a Alpha Jet International.

On appeal, the FAA argues that the ALJ erred in granting Darby’s motion for decision. Specifically, the FAA contests the ALJ’s finding that a Darby pilot was qualified as a check pilot when he conducted certain check rides. This decision grants the FAA’s appeal, reverses the ALJ’s initial decision, and remands this case to the ALJ for a determination of the appropriate sanction amount.

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are available for viewing at <http://www.regulations.gov>.

² The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: http://faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ This decision, which is entitled, “Administrative Law Judge’s Order Granting Motion for Summary Disposition and Severing Proceeding,” is attached.

I. Background

This case involves two types of recurring pilot qualification checks:

(1) competency checks that under 14 C.F.R. § 135.293 must be administered before a pilot may be used in operations under 14 C.F.R. Part 135 (“293 competency checks”); and (2) instrument proficiency checks required by 14 C.F.R. § 135.297 (“297 instrument checks”).

The FAA filed a complaint on November 13, 2008, alleging that Darby used one of its pilots, Dane Rheinschmidt, as a check pilot when he was not qualified because he had not completed the necessary check(s), violating 14 C.F.R. § 135.337(b)(2).⁴ The complaint further alleged that Darby used another of its pilots, Jerry Standridge, who had taken a 293 competency check administered by the unqualified Rheinschmidt, thereby violating 14 C.F.R. § 135.293(b).⁵ The FAA sought a \$44,000 civil penalty from Darby.

⁴ 14 C.F.R. § 135.337(b)(2) provides:

(b) No certificate holder may use a person ... as a check airman (aircraft) in a training program established under this subpart unless, with respect to the aircraft type involved, that person—

...

(2) Has satisfactorily completed the training phases for the aircraft, including recurrent training, that are required to serve as a pilot in command in operations under this part ...

Although the FAA’s complaint alleged that Darby had violated paragraph (2), paragraph (3) is more appropriate. Paragraph (3) provides as follows:

(b) No certificate holder may use a person ... as a check airman (aircraft) in a training program established under this subpart unless, with respect to the aircraft type involved, that person—

...

(3) Has satisfactorily completed the proficiency or competency checks that are required to serve as a pilot in command in operations under this part.

In its reply to Darby’s motion for decision and in its appeal brief, the FAA referred to paragraph (3). (FAA Reply to Motion for Decision at 3-4 n.2; Appeal Brief at 2 n.4.) In its appeal brief, however, it continues to refer to paragraph 2 as well. (FAA Appeal Brief at 1, 3.)

On December 11, 2008, Darby filed a motion for decision in which it argued that Rheinschmidt was, in fact, qualified when he administered the checks at issue to Standridge. Darby's rationale was that, under 14 C.F.R. § 135.293(c), the 297 instrument check that Rheinschmidt had received substituted for his 293 competency check.⁶ On January 27, 2009, the ALJ issued an order consolidating the instant proceeding with another case against Darby. However, following a prehearing conference, the ALJ on February 26, 2009, issued a written initial decision severing the two proceedings, granting Darby's motion for decision in the instant case, and dismissing the case. The ALJ found that the 297 instrument check substituted for a 293 competency check; therefore, he held, Rheinschmidt was qualified to serve as a check pilot at the times in question.

II. Facts

Darby is an air carrier operating at all relevant times under 14 C.F.R. Part 135. On September 7, 2005, an FAA inspector administered a 293 competency check to Rheinschmidt in a PA-31T aircraft. (Darby Motion for Decision, Exhibit C.) A 293 competency check is valid until the end of the 12th month after it is taken. 14 C.F.R.

⁵ 14 C.F.R. § 135.293(b) provides:

(b) No certificate holder may use 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 ... to determine the pilot's competence in practical skills and techniques in the aircraft or class of aircraft.

⁶ 14 C.F.R. § 135.293(c) provides:

(c) The instrument proficiency check required by § 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check.

§ 135.293(b). As a result, Rheinschmidt's competency check on September 7, 2005, expired on September 30, 2006.⁷

On March 22, 2006, the FAA inspector administered a 297 instrument check to Rheinschmidt in the same PA-31T aircraft. (Darby Motion for Decision, Exhibit A.) A 297 instrument check is valid only until the end of the 6th month after the date of the check. 14 C.F.R. § 135.297(a). As a result, the instrument check also expired on September 30, 2006.⁸

On November 27, 2006, Rheinschmidt, who was a properly designated check pilot for Darby, administered a 293 competency check to Standridge using the PA-31T aircraft. (Darby Motion for Decision, Exhibit B.) Subsequently, Darby used Standridge to operate the PA-31T aircraft under Part 135 on eight occasions between December 10, 2006, and May 16, 2007.⁹

On May 24, 2007, Rheinschmidt also administered a 297 instrument check in the PA-31T aircraft to Standridge. (FAA Response to Motion for Decision, Item 3.)

⁷ 14 C.F.R. § 135.301(a) provides:

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.

Under 14 C.F.R. § 135.301(a), if Rheinschmidt had successfully completed the 293 competency check in October 2006, it would have been considered as having been completed in September 2006, the month in which it was required.

⁸ As with the 293 competency check, under 14 C.F.R. § 135.301(a), if Rheinschmidt had successfully completed the 297 instrument check in October 2006, it would have been considered as having been completed in September 2006, the month in which it was required.

⁹ The ALJ incorrectly wrote that “[t]he flights for which [Darby] was cited all took place within 1 year after May 24, 2007.” (Initial Decision at 4.) Each flight, in fact, took place before May 24, 2007. (FAA Response to Motion for Decision, Item 4.)

III. The ALJ's Decision

In his decision, the ALJ did not address whether Rheinschmidt was qualified to give Standridge the 293 competency check on November 27, 2006, and focused solely on the 297 instrument check on May 24, 2007. He found that Rheinschmidt was qualified to give Standridge the 297 instrument check. In reaching this conclusion, the ALJ explained that when Rheinschmidt administered the 297 instrument check on May 24, 2007, Rheinschmidt's competency check, based on the September 7, 2005, examination, had expired; nevertheless, in the interim, Rheinschmidt had successfully completed a 297 instrument check on March 22, 2006, which could be substituted for a 293 competency check under the regulations. Specifically, 14 C.F.R. § 135.293(c) provides as follows:

The instrument proficiency check required by § 135.297 [297 instrument check] may be substituted for the competency check required by this section [293 competency check] for the type of aircraft used in the check.

Consequently, the period for Rheinschmidt's competency check dated from March 2006. The ALJ held that the substituted 297 instrument check covered Rheinschmidt when he administered the 297 instrument check to Standridge on May 24, 2007.

The ALJ rejected the FAA's argument that the successful completion of the 297 instrument check does not meet the requirements of 14 C.F.R. § 135.293 unless the 297 instrument check includes all the elements of the 293 competency check. The ALJ stated that there was no basis in the regulation for the FAA's argument, and the FAA's analysis would read paragraph (c) out of the regulation.

IV. Discussion

On appeal, the FAA argues that even if Darby could substitute the 297 instrument

check for a 293 competency check,¹⁰ the 297 instrument check still had expired when Rheinschmidt administered the check rides to Standridge. The FAA is correct, and the ALJ erred in several respects. A 297 instrument check is valid until the end of the 6th month after the date of the check.¹¹ 14 C.F.R. § 135.297(a). Consequently, the ALJ erred in finding that the 297 instrument check was valid until the end of the 12th month after the date of the check. The March 22, 2006, instrument check was valid only until September 30, 2006, unless Rheinschmidt took another 297 instrument check, which he did not. Thus, the 293 competency check Rheinschmidt administered to Standridge on November 27, 2006, as well as the 293 competency check he administered on May 24, 2007, were performed when Rheinschmidt had no current instrument check.

By using Rheinschmidt as a check pilot when he was not current, Darby violated 14 C.F.R. § 135.337(b)(3), which prohibits using a person as a check pilot unless that person has satisfactorily completed all of the checks required to serve as pilot in command.¹² Darby also violated Section 135.293(b) by using Standridge when his competency check had been given by Rheinschmidt at a time when he was not qualified

¹⁰ The FAA states that it does not agree with the ALJ's finding that a 297 instrument check can be substituted for a 293 competency check, but on appeal, the agency is not challenging this finding. (Appeal Brief at 3 n.5.)

¹¹ 14 C.F.R. § 135.297(a) provides:

No certificate holder may use a pilot ... as a pilot in command of an aircraft under IFR [Instrument Flight Rules] unless, since the beginning of the 6th calendar month before that service, that pilot has passed an instrument proficiency check under this section administered by the Administrator or an authorized check pilot.

¹² See *supra* note 4 for the text of 14 C.F.R. § 135.337(b)(3).

to be a check pilot.¹³

Conclusion

The ALJ erred in granting Darby's motion for decision and in dismissing the FAA's complaint. Darby violated 14 C.F.R. §§ 135.337(b)(3) and 135.293(b). This case is remanded for a determination of the appropriate civil penalty.¹⁴

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

¹³ Darby argues in its reply brief that the FAA raised the 6-month argument for the first time on appeal and it should therefore not be considered. Even if the FAA should have brought it up below, matters raised for the first time on appeal will be considered only in "most unusual circumstances," such as when the "public interest is implicated ... or manifest injustice would result." Federal Express Corp., FAA Order No. 2003-2 at 1 (May 6, 2003), quoting Procter & Gamble v. Haugen, 222 F.3d 1262, 1271 (10th Cir. 2000), quoting Smith v. Rogers Galvanizing Co., 128 F.3d 1380, 1386 (10th Cir. 1997). "Where the issue 'is purely a matter of law ... and ... its proper resolution is certain,'" however, it may be considered on appeal from an ALJ's decision. Federal Express, FAA Order No. 2003-2 at 1, quoting Procter & Gamble, 222 F.3d at 1271, quoting Ross v. United States Marshal, 168 F.3d 1190, 1195 n.5 (10th Cir. 1999). In the instant case, the public interest is implicated, the issue is a matter of law, and its resolution is certain.

¹⁴ Any arguments not addressed have been considered and found unworthy of discussion.

SERVED FEBRUARY 26, 2009

DEPT. OF TRANSPORTATION
FEB 26 2009

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

IN THE MATTER OF

DARBY AVIATION,
Respondent,

FAA DOCKET NO. CP08SO0026

DMS NO. FAA-2008-1192

IN THE MATTER OF

DARBY AVIATION,
Respondent,

FAA DOCKET NO. CP08SO0025

DMS NO. FAA-2008-1191

**ADMINISTRATIVE LAW JUDGE'S ORDER GRANTING
MOTION FOR SUMMARY DISPOSITION AND
SEVERING PROCEEDING**

This order grants the motion of the Respondent for summary disposition of the issues pending in Docket No. CP08SO0025 and severs that proceeding from the proceeding pending in Docket No. CP08SO0026. The severance will allow an immediate appeal from this order, notwithstanding the fact that I earlier denied a motion by the Respondent for summary disposition in Docket No. CP08SO0026.

In this case, the Respondent, an air carrier conducting operations under Part 135 of the Federal Aviation Regulations (FAR), has been charged with using a pilot, Jerry Standridge, who had not successfully passed a competency check within one year of his use as a pilot. Mr. Standridge had passed a competency check given by another Darby-employed pilot by the name of Dane Rheinschmidt, a competency check that in all respects was consistent with applicable provisions of the FAR. The question that animates this case, however, is whether Rheinschmidt was himself eligible to serve as a person who could give the requisite tests to Standridge. According to the charges launched by the Federal Aviation Administration (FAA), Rheinschmidt was not entitled to serve as check pilot for Standridge's testing because Rheinschmidt had not himself passed his required proficiency test within the preceding year.

The relevant regulations are found in § 135.293 of the FAR, 14 C.F.R. § 135.293. In pertinent part, they read 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 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 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.

(b) 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 helicopter, means a basic make and model.

(c) The instrument proficiency check required by § 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check.

The undisputed facts are as follows: The aircraft flown by Standridge was a Piper PA-31-T, twin-engine, turboprop machine. Standridge had passed a proficiency check in this type of aircraft on November 27, 2006. This meant that he was due for another proficiency check in the PA-31-T type of aircraft on or before December 1, 2007. He took and passed another proficiency check, administered by Rheinschmidt, on May 24, 2007. The flights for which the Respondent was cited all took place within one year after May 24, 2007. Rheinschmidt had last passed a proficiency check on September 7, 2005. He had, however, taken and passed an instrument proficiency check on March 22, 2006. The instrument proficiency check had been administered by an FAA Inspector at the local Flight Standards District Office. Hence, at the time Rheinschmidt administered the proficiency check to Standridge (May 24, 2007), he was out of time for his general proficiency check but was within a year of successfully completing his instrument proficiency check.

The Complainant's motion for summary disposition was opposed by the FAA, principally on the ground that Rheinschmidt had not passed his annual proficiency check in the same "type" of aircraft on which Standridge was tested. That is, the FAA claimed that Rheinschmidt's test had taken place in a Lear Jet Model 35, a multi-engine turbo-jet powered aircraft, also owned and operated by the Respondent, rather than the Piper PA-31-T turboprop aircraft on which he purported to qualify his colleague, Standridge. But by the time the FAA's counsel argued the motion during a prehearing conference on February 24, 2009, the FAA had apparently changed its position. It no longer argued that Rheinschmidt's proficiency had been checked in the wrong type of aircraft. During the conference, counsel for the FAA argued that Rheinschmidt was not qualified as a check pilot on May 24, 2007 because his successful completion of the instrument proficiency test did not qualify him under § 135.293 of the FAR to perform in that capacity. The Respondent, on the other hand, claims that Rheinschmidt's successful completion of the instrument proficiency test within a year of the date he administered the general proficiency test to Standridge made him eligible in this respect to serve as Standridge's check pilot.

The controversy turns upon the meaning of the language of § 135.295(c): "The instrument proficiency check required by § 135.297 may be substituted for the competency check required by this section for the type of aircraft used in the check." It is the Respondent's position that this exception to the general rule of § 135.295(a) covered Rheinschmidt at the time he administered the general proficiency test to Standridge.

As a matter of pure construction of the language of §135.295(c), it appears that the Respondent is correct. Rheinschmidt's case, as of the date he administered the proficiency test to Standridge, fell squarely within the meaning of that language: He was substituting his successful completion of an instrument proficiency check given under § 135.297 for the general proficiency test specified in § 135.295.

According to the argument of Complainant's counsel at the prehearing conference, Rheinschmidt's successful completion of the instrument proficiency test could not be substituted for successful completion of the general proficiency test. This is the case, the Complainant argued, because the instrument proficiency test did not cover all of the subjects that are required to be tested in a general proficiency test under § 135.295(a)(1)-(8). Proof of that, says the FAA, can be seen if we examine the test score sheet, Form 8410-3, that the person who administered the test filled out when he examined Rheinschmidt to determine whether he would pass the instrument proficiency test. Several of the blocks are not filled in to show that Rheinschmidt met applicable requirements for the general proficiency test. Hence, his successful completion of the instrument proficiency test provides no assurance that he met all of the general proficiency requirements set forth in § 135.295(a)(1)-(8) and (b).

In short, it is the FAA's position that successful completion of the instrument proficiency test does not satisfy the requirements of § 135.295 unless the instrument proficiency test includes all of the elements of the general proficiency test.

There are two significant problems with the FAA's approach.

First, there is no basis for it in the language of the regulation. Paragraph (c) of § 135.293, while not a model of skillful draftsmanship, is clear enough in the context of this controversy. It allows a pilot who has successfully completed an instrument proficiency check under § 135.297 to substitute that achievement for successful completion of the general proficiency check under §135.293. There is nothing in the language of paragraph (c) that suggests that in order to use the instrument proficiency check as a substitute for the general proficiency check, the pilot must have been tested on those subjects which, although irrelevant to an instrument proficiency check, would be subjects tested during a general proficiency check.

The second problem with the FAA's analysis is that, as a practical matter, it would read paragraph (c) out of the regulation. If successful completion of an instrument proficiency check is insufficient to qualify a pilot as having passed the general proficiency requirements unless the instrument proficiency check includes all of the elements of a general proficiency check, there would appear to be no purpose in allowing those who pass the instrument proficiency check to substitute it for the general proficiency check. That is the case because the instrument proficiency check would include all of the elements of the general proficiency check, so a pilot seeking to demonstrate his proficiency in IFR operations might just as well take both tests. If paragraph (c) has any purpose, it is to avoid such unnecessary multiple testing.

This is not to say that the FAA's position is totally unwarranted. For an agency concerned with maximizing the safety of flight, the possibility of licensing a pilot who is capable of passing the instrument proficiency test but who cannot successfully complete the general proficiency check might be a matter of concern. If that is the case, it might be advisable to require someone like Mr. Rheinschmidt to demonstrate his general proficiency at least once every year even though he may also during that year become qualified as an instrument pilot. To do so, however, one would have to change the language of the regulation. That is something that I cannot do, nor is it something the FAA can accomplish through the medium of prosecuting a civil penalty claim.

For the foregoing reasons, and subject to review by the Administrator as provided in § 13.233 of the Rules of Practice, 14 C.F.R. § 13.233, IT IS ORDERED that –

1. The proceeding in Docket No. CP08SO0025 is severed from the proceeding in Docket No. CP08SO0026;
2. The Respondent's motion for summary disposition in Docket No. CP08SO0025 is granted; and
3. The complaint in Docket No. CP08SO0025 is dismissed with prejudice.



Isaac D. Benkin
Administrative Law Judge

Attachment-Service List

[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. The appeal must be perfected with a written brief or memorandum not later than 50 days after service of this decision. The Notice of Appeal and brief or memorandum must either be mailed to the Federal Aviation Administration, Wilbur Wright Building, 800 Independence Avenue, S.W., Washington, D.C. 20591, Attention: Docket Clerk, or delivered personally or via expedited courier service to the Federal Aviation Administration, 600 Independence Ave., S.W. Washington, D.C. 20591, Attention: Hearing Docket Clerk, AGC-430. A copy of the Notice of Appeal and brief or memorandum should also be sent to counsel for the FAA in this proceeding.]