UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: FOLSOM'S AIR SERVICE, INC.
FAA Order No. 2008-11

Docket No. CP04NE0002
FDMS No. FAA-2004-17277[1]

Served: November 6, 2008

DECISION AND ORDER[2]

Complainant has appealed the initial decision written by Administrative Law Judge Isaac D. Benkin ("ALJ") and served on May 3, 2006.[3] The ALJ held that Complainant proved that Folsom's Air Service ("Folsom's") violated 14 C.F.R. §§ 119.5(l),[4] 119.49(c)(6)(ii),[5] 135.95(b),[6] 135.293(a)(2),[7] 135.293(a)(3),[8] 135.293(b),[9]

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[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: www.regulations.gov. For additional information, see http://dms.dot.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://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thompson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

[3] A copy of the ALJ's written initial decision is attached. (The ALJ's decision is not attached to the electronic version of this decision and it is not included on the FAA Web site.)

[4] 14 C.F.R. § 119.5(l) provides as follows:

> (l) No person may operate an aircraft under this part, part 121 of this chapter, or part 135 of this chapter in violation of an air carrier operating certificate, operating certificate, or appropriate operations specifications issued under this part.

[5] 14 C.F.R. § 119.49(c)(6)(ii) provides as follows:

> (c) Each certificate holder conducting on-demand operations must obtain operations specifications containing all of the following:
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> (6) Type of aircraft, registration markings, and serial number of each aircraft that is subject to an airworthiness maintenance program required by 135.411(a)(2) of this chapter.

135.299[10] and 135.343[11] (2003) on flights conducted on September 12 and 14, 2003, between Moosehead Lake in Greenville, Maine, and Horseshoe Pond in Bowdoin

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(ii) The certificate holder may not conduct any operation using any aircraft not listed.

[6] 14 C.F.R. § 135.95(b) provides as follows:

No certificate holder may use the services of any person as an airman unless the person performing those services –

(b) Is qualified, under this chapter, for the operation for which the person is to be used.

[7] 14 C.F.R. § 135.293(a)(2) and (3) provide 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 –

(2) For each type of aircraft to be flown by the pilot, the aircraft powerplant, major components and systems, major appliances, performance and operating limitation, 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.

[8] *See* previous footnote.

[9] 14 C.F.R. § 135.293(b) as follows:

(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 competence 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 a 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.

[10] 14 C.F.R. § 135.299 provides in pertinent part as follows:

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

College Grant West, Maine. Complainant sought a $50,000 civil penalty in the complaint, as amended,[12] but the ALJ assessed a $2,500 civil penalty.

Complainant limited its appeal to the issue of sanction, arguing that the $2,500 civil penalty assessed by the ALJ is too low and that the assessment of a $50,000 civil penalty would be appropriate. Folsom's disagrees and has presented its arguments in its reply brief.

After consideration of the record, including the briefs filed by the parties, Complainant's appeal is granted. The ALJ's rationale for lowering the civil penalty to $2,500 is rejected, and a $50,000 civil penalty is assessed.

Background

Folsom's is based in Greenville, Maine, on Moosehead Lake. At the time of the flights involved in this action, Folsom's held an air carrier certificate issued under 14 C.F.R. Part 119, authorizing it to operate as an air carrier and to conduct common carriage operations. (Complainant's Exhibit 5 at 1.) Under its operations specifications, it was permitted to conduct on-demand operations under 14 C.F.R. Parts 119 and 135. In addition to operations under its air carrier certificate, Folsom's provided flight

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> service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly.

[11] 14 C.F.R. § 135.343 provides as follows:

> 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. This section does not apply to a certificate holder that uses only one pilot in the certificate holder's operations.

[12] Complainant filed an amendment to the complaint on January 26, 2006.

instruction, conducted scenic rides under Part 91, performed aircraft maintenance, and sold aircraft. (Tr. 232, 233, 234.)

Its operations specifications listed two single-engine aircraft, a Cessna 172 and a Cessna 185. Consequently, Folsom's was authorized to use those two aircraft in operations under Parts 119 and 135. (Complainant's Exhibit 5 at 11 and 35, Tr. 107.) Folsom's also operated a Cessna 206, which was not listed on its operations specifications.

Folsom's operated some campsites, which it rented to customers, on nearby Horseshoe Pond, in Bowdoin College Grant West, Maine. The customers were allowed to use the docks, boats, canoes, paddles, oars, and cabins. (Tr. 207, 237.)

On Friday, September 12, 2003, six people paid Folsom's $140 apiece for a fishing weekend at Horseshoe Pond. The cost covered the flights to and from Horseshoe Pond, the rental of a cabin and the use of other items at the campsite. (Tr. 59, 74, 81, 84, 88.) Pilot Richard Dill, an employee of Folsom's, flew the group to Horseshoe Pond in the Cessna 206. He flew three passengers on the first flight, two passengers and their gear on the second flight, and one passenger on the third flight. (Tr. 63-64).

Flights from Greenville, Maine, to Horseshoe Pond

Date	**Pilot**	**Passengers/Cargo**	**Aircraft**	**Aircraft listed on op specs?**
Friday, 9/12/2003	Richard Dill	3 passengers	Cessna 206	No
Friday, 9/12/2003	Richard Dill	2 passengers plus cargo	Cessna 206	No
Friday, 9/12/2003	Richard Dill	1 passenger plus cargo	Cessna 206	No

On Sunday, September 14, 2003, another pilot, Peter Ryder, met the party at Horseshoe Pond. Ryder, who is the brother-in-law of Malcolm Folsom, the owner of

Folsom's, was helping out that day because Folsom was out of town.[13] (Tr. 235, 249.) Ryder flew two flights in the Cessna 185, carrying baggage and gear, from Horseshoe Pond to Greenville. Afterwards, Dill flew three of the individuals to Greenville, and then returned to Horsehoe Pond, picked up the remaining three passengers and took off for Greenville.

Flights from Horseshoe Pond to Greenville, Maine

Date	Pilot	Passengers/Cargo	Aircraft	Aircraft listed on op specs?
Sunday, 9/14/2003	Peter Ryder	cargo	Cessna 185	Yes
Sunday, 9/14/2003	Peter Ryder	cargo	Cessna 185	Yes
Sunday, 9/14/2003	Richard Dill	3 passengers	Cessna 206	No
Sunday, 9/14/2003	Richard Dill	3 passengers	Cessna 206 (crashed)	No

During the second passenger-carrying trip back to Greenville in the Cessna 206, the engine stopped as a result of fuel exhaustion. The Cessna 206 had reached approximately 200 feet in altitude when the engine quit. Dill realized that he had failed to switch from the empty fuel tank to the fuller fuel tank when he took off. He switched tanks and started a right turn back to Horseshoe Pond. The engine re-started but it was too late, and the Cessna 206 crashed into the ground. Dill was able to get out of the aircraft and to pull two passengers out of the aircraft, but he was unable to pull the third passenger out because of the flames. (Tr. 109.) The three passengers died. Folsom's surrendered its air carrier operating certificate to the FAA a few months later. (Tr. 233.)

In the complaint, as amended, Complainant alleged that the three flights on September 12, 2003, to Horseshoe Pond, and the four flights on September 14, 2003,

[13] Malcolm Folsom testified that Ryder was not paid for the flights on September 14th. (Tr. 249.)

from Horseshoe Pond, "were operated for hire under part 135 … or were required to be operated pursuant to the requirements of part 135." (Complaint, as amended, ¶ 7.)

After the accident, the FAA launched an investigation of Folsom's and the flights on September 12 and 14, 2003. Complainant concluded as a result of the investigation, and alleged in the complaint, that Folsom's violated provisions of Parts 119 and 135 during these flights. Complainant alleged that Folsom's should have complied with the requirements of 14 C.F.R. Part 135 when it conducted the flights on September 12 and 14, 2003, because these flights were on-demand flights for compensation or hire. Complainant alleged specifically that Folsom's violated various Part 135 requirements during these flights by: (1) flying an aircraft that was not listed on the company's operations specifications; (2) using a pilot (Ryder) who held a third-class medical certificate;[14] (3) using pilots (Dill and Ryder) who had not passed written or oral knowledge tests for these aircraft in a timely fashion; (4) using a pilot (Ryder) who had not passed a competency check in this class of aircraft in a timely fashion; (5) using a pilot (Ryder) who had not passed a flight check in that aircraft in a timely fashion; and (6) using pilots (Ryder and Dill) who had not completed the appropriate initial or recurrent training for the type of operation in a timely fashion. Complainant sought a $50,000 civil penalty for these alleged violations.

[14] Generally, under 14 C.F.R. § 135.243(b), no certificate holder may use a person as pilot in command of an aircraft under VFR unless that person holds at least a commercial pilot certificate. Further, under 14 C.F.R. § 61.23(a)(2), a person must hold at least a second-class medical certificate when exercising the privileges of a commercial pilot certificate. Hence, a pilot in command of flights for compensation or hire under Part 135 must hold at least a second-class medical certificate. Ryder only held a third-class medical certificate in September 2003.

The Initial Decision

A hearing was held on February 10, 2006. Folsom's argued at the hearing that it conducted the flights on September 12 and 14, 2003, under Part 91 of the Federal Aviation Regulations (FAR), and consequently, it did not commit any of the alleged violations of Parts 119 and 135. The ALJ rejected this argument. He held that the flights to Horseshoe Pond in the Cessna 206 on September 12, 2003, and the flights from Horseshoe Pond in the Cessna 185 and 206 on September 14, 2003, were unscheduled common carrier passenger and cargo flights for compensation or hire that should have been conducted in accordance with Parts 119 and 135. (Initial Decision at 11.)

Regarding the flights flown by Dill in the Cessna 206 on September 12 and 14, 2003, the ALJ held that Folsom's violated Sections 119.49(c)(6)(ii),[15] 135.293(a)(2), and 135.293(a)(3).[16] (Initial Decision at 11-12). He held that Complainant did not prove that Folsom's violated Section 135.343 when it used Dill to fly the Cessna 206 on September 12 and 14, 2003.[17] (Initial Decision at 13.)

[15] Folsom's violated this regulation because it used an aircraft that was not listed on its operations specifications during these flights.

[16] The ALJ wrote, "[b]y using a pilot [Dill] to fly a Cessna 206, when that pilot had not timely passed an oral or written test appropriate to a Cessna 206, Respondent is liable for violating 14 C.F.R. §§ 135.293(a)(2) and 135.293(a)(3). The ALJ also held that Dill had not been administered a check ride in the Cessna 206. (Initial Decision at 12.)

[17] The ALJ held that Dill's records showed that he had had a timely and complete training session for both the Cessna 185 and the Cessna 206 and therefore, the use of Dill on five flights did not constitute a violation of Section 135.343. (Initial Decision at 13.) Complainant explained in its appeal brief that it believes that the ALJ's finding in this regard was in error. However, Complainant explained, it is not challenging this finding because that determination "is not material to the issue of sanction," particularly because the ALJ did find that Folsom's violated Section 135.343 with respect to flights by Ryder. (Initial Decision at 6-7.)

As for the flights flown by Ryder in the Cessna 185 on September 14, 2003, the ALJ held that Folsom's violated Sections 135.95(b),[18] 135.293(a)(2) and (a)(3), 135.293(b), 135.299,[19] and 135.343.[20] (Initial Decision at 13-14).

The ALJ found that each of the above violations was contrary to the operator's operations specifications and, consequently, was a violation of 14 C.F.R. § 119.5(l).

Summary of Violations Found by the ALJ

Flights (date, pilot, aircraft)	119.49(c)(6)(ii)- using an aircraft not on op specs	135.95(b)- using pilot not qualified for the operation	135.293(a)(2) & (3)- using pilot not current on written or oral test	135.293(b)- using pilot not current on competence check	135.299- using pilot not current on flight check	135.343- using pilot not current re: training	119.5(l)- operated contrary to op specs
9/12/03, Dill, Cessna 206	Yes	Not alleged	Yes	Not alleged	Not alleged	No	Yes
9/12/03, Dill, Cessna 206	Yes	Not alleged	Yes	Not alleged	Not alleged	No	Yes
9/12/03, Dill, Cessna 206	Yes	Not alleged	Yes	Not alleged	Not alleged	No	Yes

[18] The ALJ held that Ryder was not qualified to serve as a pilot in command of the flights on September 14, 2003, because he did not hold a first-class or second-class medical certificate. (Initial Decision at 14-15.)

[19] The ALJ wrote:

> The pilot records of Peter Ryder, the pilot of the Cessna 185 on September 14, 2003, include FAA Form 8410-3, a "check ride" form … which indicates that an FAA Inspector performed an oral, flight, and line check on July 11, 2002 pursuant to 14 C.F.R. §§ 135.293(a), 135.293(b) and 135.299. The form expired on June 20, 2003. Inspector Enemark testified that his investigation did not reveal whether a subsequent check ride had been conducted before the flights at issue. There is nothing in the record suggesting that Mr. Ryder did receive another successful check ride before he piloted the flights at issue. Accordingly, I find that Respondent used a pilot to fly a Cessna 185 when that pilot had not passed a timely oral or written test, competency check or flight check.

(Initial Decision at 13-14.)

[20] The ALJ found that Ryder's most recently completed recurrent training form was signed and dated on July 11, 2002, and that Ryder did not complete a timely recurrent training session for the Cessna 185 before September 14, 2003. Hence, the ALJ held, Folsom's was liable for violating Section 135.343.

9/14/03, Ryder, Cessna 185	Not alleged	Yes	Yes	Yes	Yes	Yes	Yes
9/14/03, Ryder, Cessna 185	Not alleged	Yes	Yes	Yes	Yes	Yes	Yes
9/14/03, Dill, Cessna 206	Yes	Not alleged	Yes	Not alleged	Not alleged	No	Yes
9/14/03, Dill, Cessna 206	Yes	Not alleged	Yes	Not alleged	Not alleged	No	Yes

Regarding civil penalty, the ALJ wrote that he had "found that one regulatory violation charged [§ 119.5(l)] was multiplicitous, that Respondent is not liable on one of the charges [§ 135.343], and that Respondent is liable on the remaining six charges."[21] He concluded that the maximum statutory civil penalty for six violations of the FAR would theoretically be $66,000 because the maximum civil penalty per violation under 49 U.S.C. § 46301, as adjusted under 14 C.F.R. § 13.305 for inflation, is $11,000. (Initial Decision at 15.) The ALJ noted that, regardless, $50,000 is the maximum civil penalty that can be assessed in this case. (Initial Decision at 16.)[22]

The ALJ held that "[p]recedent dictates … that $50,000 would be an excessive penalty in the circumstances of this case" citing In the Matter of Blue Ridge Airlines,

[21] This is not correct. The ALJ found that Folsom's did not violate Section 135.343 on the five flights flown by Dill in the Cessna 206, but did violate Section 135.343 on the two flights flown by Ryder in the Cessna 185. As a result, the ALJ actually found that Folsom's violated eight different regulations at least once, including one regulation – Section 119.5(l) – that was "multiplicitous" of the others.

[22] Under 49 U.S.C. § 46301(d)(8)(A)(i), $50,000 is the highest civil penalty that the Administrator may impose against any person for violations occurring before December 12, 2003, of the Federal aviation statute or regulations listed in 49 U.S.C. § 46301(d)(2). The Federal district courts have exclusive jurisdiction of civil actions involving a penalty exceeding $50,000 for violations of the Federal aviation statute or regulations listed in 49 U.S.C. § 46301(d)(2) occurring before December 12, 2003. 49 U.S.C. § 46301(d)(4).

Also, the Administrator may not assess on appeal a civil penalty that exceeds the civil penalty sought in the complaint. 14 C.F.R. § 13.16(j) (formerly 14 C.F.R. § 13.16(h)).

FAA Order No. 1999-15 (December 22, 1999), *petition for review dismissed*, Haynes v. FAA, No. 00-9503 (10th Cir. May 3, 2001). In that case, the Administrator affirmed the assessment of a $1,600 civil penalty against Blue Ridge Airlines for regulatory violations including violations of Sections 135.293(a) and (b), 135.299, 135.343 and 135.95, based upon the violator's limited financial circumstances.

The ALJ also noted that:

- Folsom's had surrendered its Part 135 air carrier operating certificate a few months after the accident;
- "the record does not reflect that Respondent was a consistent or willful violator of the FARs;" and
- the accident put the carrier out of business and "resulted in a massive potential civil liability."

(Initial Decision at 16.) He concluded that "[t]here is no point in piling Pelion on Ossa" and found that a $2,500 civil penalty is a sufficient sanction in this case. (*Id.*)

The Appeal

Complainant, on appeal, challenges the ALJ's assessment of a $2,500 civil penalty. Complainant argues that the $2,500 civil penalty is inconsistent with the agency's sanction guidance and that the record does not sufficiently support the ALJ's determination that Folsom's cannot pay the $50,000 civil penalty proposed in the complaint, as amended. (Appeal Brief at 4.)

The Administrator has broad authority to assess civil penalties against individuals for violating the Federal Aviation Regulations.[23] At the time that the violations in this

[23] "An administrative agency is entitled to substantial deference in assessing the civil penalty appropriate for a violation of its regulations." NL Industries, Inc., v. Dep't of Transp., 901 F.2d 141, 144 (D.C. Cir. 1990). A court will not reverse an agency's sanction determination unless it is unwarranted in law or without justification in fact. (*Id.*)

case occurred, the Administrator had the authority to assess an $11,000 civil penalty per regulatory violation under the Federal aviation statute, as adjusted for inflation, with each violation on each flight constituting a separate violation. 49 U.S.C. §§ 46301(a)(2)[24] and (a)(4) (2003), 14 C.F.R. § 13.305(d) (2003) (regarding inflation-adjustment of civil penalty authority.)[25]

An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations. The FAA has determined that it will consider a variety of factors when determining an appropriate civil penalty, including: (1) the nature and circumstances of the violation; (2) the extent and gravity of the violation; (3) the person's degree of culpability; (4) the person's history of prior violations, if any; (5) the person's ability to pay the civil penalty; (6) the effect on the person's ability to stay in business; and (7) other matters as justice may require. In the Matter of 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); In the Matter of Northwest Airlines, Inc., FAA Order No. 1990-37 at 12 n.9 (November 7, 1990).

[24] "A person operating an aircraft for the transportation of passengers or property for compensation (except as airman serving as an airman) is liable to the Government for a civil penalty of not more than $10,000 for violating" certain provisions of the Federal aviation statute, including chapter 447 of the statute, and the regulations or orders issued under that chapter. 49 U.S.C. § 46301(a)(2) (2003). The regulations at issue in this case were promulgated under chapter 447, entitled "Safety Regulation" of the Federal aviation statute.

[25] *See* n.28, *infra*.

The Administrator provided policy guidance for agency employees[26] to follow regarding sanctions for different types of violations of the Federal aviation statute and the FAR by different persons in the Compliance and Enforcement Order, FAA Order No. 2150.3A.[27] 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 greater national consistency in enforcing the Federal Aviation Regulations." FAA Order No. 2150.3A, Appendix 4 at page 1. "[I]n the formulation of the … Sanction Guidance Table, … the FAA considered the nature, circumstances, 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)." In the Matter of Schultz, FAA Order No. 1989-5 at 12 (November 13, 1989).

Further, Compliance/Enforcement Bulletin No. 92-1, included in Appendix 1 of FAA Order No. 2150.3A, amends the sanction ranges included in the Sanction Guidance Table, to reflect the agency's position that the size of a civil penalty should vary depending upon the size of the carrier.[28] The guidelines contained in Bulletin No. 92-1

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[26] In the Introduction to FAA Order No. 2150.3A, the Administrator wrote:

> This order has been prepared to provide compliance and enforcement program and procedural guidance for all agency personnel. The order … is designed … for use at all levels of the agency in the investigation, reporting and legal processing of enforcement cases.

FAA Order No. 2150.3A, at page i.

The Administrator updated the guidance by issuing FAA Order No. 2150.3B, effective October 1, 2007. The revised order, however, does not apply to this case because the violations occurred before the issuance of the new order.

[27] FAA Order No. 2150.3A may be found at http://www.airweb.faa.gov.

[28] In the introduction to the Sanction Guidance Table, the FAA sets out minimum, moderate, and maximum range sanctions for violations committed by air carriers. FAA Order No. 2150.3A, Appendix 4 at page 3. These ranges do not take into account the differences in the sizes of air carriers.

"are 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 amount of civil penalty." FAA Order No. 2150.3A, Appendix 1, at page 103.

While the policy guidance was intended for use by agency employees involved in the investigation and prosecution of enforcement cases, it also serves another function. The Sanction Guidance Table, as amended by Bulletin No. 92-1, reflects the Administrator's general views about the civil penalty ranges that are appropriate for different types of violations. Consequently, it also serves to advise the public – as well as the ALJs – of the sanction policy that the Administrator intends to establish through the adjudication of individual cases.[29] As shown in past cases, the Administrator uses the

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In Compliance/Enforcement Bulletin No. 92-1, issued on January 16, 1992, the FAA amended the sanction ranges for single violations committed by air carriers provided in the Sanction Guidance Table's introduction. The amendment was designed 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 amount of civil penalty." Compliance/Enforcement Bulletin No. 92-1, FAA Order No. 2150.3A, Appendix 1, at page 103. When Compliance/Enforcement Bulletin No. 92-1 was issued, $10,000 was the maximum civil penalty against a person operating an aircraft for the transportation of passengers or property for compensation or hire who had violated a safety regulation. 49 U.S.C. § 46301(a)(2) (2003). For that reason, it was stated in the Bulletin that the high end of the maximum civil penalty was $10,000.

In 1996, the FAA issued regulations to adjust civil monetary penalties in conformity with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. These regulations are set forth in 14 C.F.R. Part 13, subpart H. According to the inflation adjustment regulations applicable at the time of these violations, the maximum civil penalty for violations of the provisions of the Federal aviation statute listed in 49 U.S.C. § 46301(a)(1) or in the regulations issued thereunder was $11,000. Hence, the maximum civil penalty for a single violation of a safety regulation was $11,000 at the time of the violations in this case, rather than $10,000 as stated in the Compliance/Enforcement Bulletin, issued 11 years earlier.

[29] It has been explained:

> In *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974), this court delineated the distinction between a substantive rule and a policy statement. The court noted that 5 U.S.C. § 553(b)(A) allows an agency to issue a general statement of policy, which differs from a substantive rule in that a policy statement is "neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in further rulemakings or adjudications." *Id*. at 38.

sanction guidance in FAA Order No. 2150.3A as a starting point in his analysis of whether the civil penalty assessed by the ALJ in an individual case is appropriate. The policy, as expressed in FAA Order No. 2150.3A, does not "bind" the Administrator, but instead constitutes useful guidance in the exercise of the Administrator's broad discretion to assess a civil penalty.

As explained previously, the ALJs are not agency personnel and therefore are not expressly required by the provisions of FAA Order No. 2150.3A to follow its guidance. Nonetheless, if an ALJ assesses a civil penalty that is not consistent with agency sanction policy, the Administrator on appeal may reverse the ALJ. In the Matter of Northwest Airlines, Inc., FAA Order No. 1990-37 at 8-9. In other words, the Administrator may impose the agency's sanction guidance through the administrative appeals process. *Id*; *see also* In the Matter of Warbelow's Air Ventures, Inc., FAA Order No. 2000-3 at 20 (stating that the "the Administrator has both the authority and duty to impose the agency's [sanction] policy on appeal.") Consequently, the ALJs should consider the guidance presented in FAA Order No. 2150.3A before assessing a civil penalty.

In determining whether the $2,500 civil penalty assessed by the ALJ was appropriate, it is necessary to consider the nature of the violations involved in this matter.

> In this sense, a policy statement is "like a press release" in that it presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications." *Id.; see also American Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1046-47 (D.C. Cir. 1987) (analyzing the nature of policy statements.)
>
> This advance-notice function of policy statements yields significant informational benefits, because policy statements give the public a chance to contemplate an agency's views before those views are applied to particular factual circumstances. ….

Panhandle Eastern Pipe Line Co v. F.E.R.C., 198 F.3d 266, 269 (D.C.Cir. 1999). While serving this informational function, a general policy statement does not constitute a "binding norm." Pacific Gas, 506 F.2d at 38. "In other words, a policy statement has neither the force of a substantive rule adopted pursuant to rulemaking nor the binding effect of an order following an adjudication. Panhandle, 198 F.3d at 269.

The violations arising from Dill's four flights of the passengers in the Cessna 206, an aircraft that was not listed on the operations specifications, are serious. An aircraft must be inspected and meet certain equipment standards before it can be added to a carrier's operations specifications. (*I.e.*, 14 C.F.R. §§ 135.25, 135.361-135.399.) Once on the certificate, the aircraft must be maintained in accordance with the requirements of Part 135. (Tr. 122; 14 C.F.R. §§ 135.411-135.443.) To ensure a high level of safety on passenger and cargo-carrying flights for compensation or hire, the maintenance, including inspections, required of aircraft operated under Part 135 is more rigorous than that required of aircraft operated under Part 91. The Part 135 maintenance program that Folsom's used did not apply to its Cessna 206, and as a result, there is no reason to believe that the Cessna 206 was maintained in accordance with the more stringent requirements of a Part 135 program.

Dill and Ryder had not demonstrated through timely testing that they had the requisite knowledge about the type of aircraft that they flew on September 12 and 14, 2003. As a result, there is no way to know whether they had the actual knowledge required of pilots flying under Part 135 when they made the passenger and cargo-carrying flights for compensation or hire involved in this matter. Ryder also had not had the competence check required by Section 135.293(b), the flight check required under Section 135.299, or the training required under Section 135.343. Part 135's testing and training requirements are designed to ensure that air carriers provide the highest level of safety, and consequently, failure to comply with these requirements is a serious matter.

Further, Ryder only held a third-class medical certificate, when he was required under the regulations, to hold at least a second-class medical certificate.[30] The medical standards for a second-class medical certificate are somewhat higher than those required for a third-class medical certificate. *Compare* 14 C.F.R. §§ 67.201-67.215 with 14 C.F.R. §§ 67.301–67.313. Also, under 14 C.F.R. § 67.23, a pilot who flies operations requiring a commercial pilot certificate must submit to an examination to renew his second-class medical certificate every 12 months, while the privileges associated with a third-class medical certificate last for either 2 or 3 years, depending upon the pilot's age.

The sanction guidance pertaining to the violations involved in this case reflects the seriousness of these safety violations by an air carrier. Air carriers have a statutory mandate to perform their services with the highest possible standard of care. *I.e.*, In the Matter of Warbelow's Air Ventures, Inc., FAA Order No. 2000-3 at 5. According to the sanction guidance applicable in 2003, violations arising from operations contrary to an air carrier's operations specifications warrant a maximum range civil penalty. FAA Order No. 2150.3A, Appendix 4, at 4, § I.C.2. Violations arising from the failure to train specific personnel adequately deserve a moderate to maximum range civil penalty. *Id*., at § I.F.2. Violations arising from an air carrier's use of an unqualified crewmember warrant a maximum civil penalty. *Id*., at § I.O. The agency sanction guidance applicable at the time regarding proportional civil penalties, as adjusted for inflation, provided that the maximum civil penalty range for a small air carrier, like Folsom's,[31] for a single,

[30] *See* n.16, *supra*.

[31] Bulletin No. 92-1 established a system for classifying air carriers by size. Under that Bulletin, air carriers were divided into four categories, with the largest air carriers belonging 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

inadvertent violation was $4,000 to $11,000[32], and the moderate range was $2,000 to $4,000 for a single, inadvertent violation. FAA Order No. 2150.3A, Appendix 1 at page 106.

It is of concern that Folsom's had not taken steps to ensure that its pilots complied with these requirements when conducting flights for compensation or hire. Malcolm Folsom did not provide any guidance to his pilots regarding whether they were to conduct operations under Part 91 or Parts 119 and 135 when they flew passengers to the fishing camps. He testified that he allowed them to make their own judgments whether a flight was under Part 91 or Parts 119 and 135 because they were holders of commercial or airline transport pilot certificates and knew the regulations. (Tr. 261-262.)[33] Hence, the multiple violations in this matter were systemic in nature, warranting a higher civil penalty than if the violations were inadvertent and isolated.

Despite the foregoing, it would be inappropriate to simply multiply the number of violations in this case by a maximum range civil penalty to determine the civil penalty. In a case like this one, involving multiple violations compounded by multiple flights, it is inappropriate to take a mathematical, formulaic approach of simply multiplying the

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six pilots. FAA Order No. 2150.3A, Appendix 1 at 104-105. Generally speaking, Group I carriers are subject to higher civil penalties than the carriers in Group IV, under the Bulletin. For example, the maximum civil penalty range for Group I carriers was $7,500 to $10,000 ($11,000 as adjusted for inflation), while the maximum civil penalty range for Group IV carriers was $4,000 to $10,000 ($11,000 as adjusted for inflation.) Inspector Enemark testified that Folsom's belonged in Group IV. (Tr. 142.)

[32] *See* n.28, *supra*.

[33] The ALJ held Folsom's had "sufficient notice" that the flights were subject to Part 135. (Initial Decision at 8.) The ALJ, quite rightly, found that "[i]t seems far-fetched to say that the flights at issue were merely incidental to Respondent's business of the renting of the cabins" (Initial Decision at 11) so that Part 91, rather than Parts 119 and 135, applied. (*See* 14 C.F.R. §§ 91.501(b)(5) and 1.1.)

number of violations by a set dollar amount. If, in this case, the Administrator assessed the maximum civil penalty ($11,000) for each regulatory violation on each of the seven flights, the resultant civil penalty would be well over $100,000 and that figure is clearly excessive for a variety of reasons, including the small size of Folsom's.

Indeed, the Administrator is limited to assessing a $50,000 civil penalty in this case under statutory limits[34] and agency guidance. Bulletin No. 92-1 provides that the maximum total civil penalty for multiple inadvertent systemic violations for a carrier the size of Folsom's is $50,000. In light of the foregoing, a $50,000 civil penalty – as sought by Complainant – is within agency sanction guidance policy for these serious, systemic violations compounded by seven flights.

The Administrator has held that financial hardship, when proven, may constitute grounds for a reduction of an otherwise appropriate civil penalty. *I.e.*, In the Matter of Conquest Helicopters, FAA Order No. 1994-20 at 3 (June 22, 1994). Respondent has the burden to prove financial inability to absorb a civil penalty. *Id*. The Administrator has held that vague and uncorroborated testimony regarding income and expenses is insufficient to prove financial hardship. In the Matter of Lewis, FAA Order No. 1991-3 at 10 (February 4, 1991). Further, an unsworn and unsubstantiated statement by a respondent is insufficient evidence of inability to pay. In the Matter of Giuffrida, FAA Order No. 1992-72 at 4 (December 21, 1992). "Records that may establish inability to pay include pay stubs, leases, tax returns and other such records as a reasonable person would accept as reliable and probative on the issues of income and expenses." In the Matter of Conquest Helicopters, FAA Order No. 1994-20 at 4. The Administrator has

[34] *See* n.22, *supra*.

held that in certain, exceptional cases, the testimony of a credible, independent witness could be enough to prove financial hardship, even without supporting documentary evidence. *See e.g.*, In the Matter of Blue Ridge Airlines, FAA Order No. 1999-15 at 11.[35] In that case, one of Complainant's witnesses, an airport employee who was in a position to know and who was, if anything, hostile to Blue Ridge Airlines, testified about Blue Ridge Airlines' extremely limited income, that it had operated only two flights under its air carrier certificate, and that it was no longer in operation. *Id*.

The evidence of financial hardship is almost non-existent in this case. Contrary to the ALJ's assertion, Folsom's was not driven out of business. The evidence, on the contrary, indicated that Folsom's continues to operate, providing flight instruction, conducting scenic flights under Part 91, performing aircraft maintenance and selling aircraft. (Tr. 233-234.) Further, as the ALJ noted, Folsom's did not claim financial hardship or inability to pay. (Initial Decision at 16.) The evidence regarding the financial circumstances of Folsom's amounted to little more than Malcolm Folsom's assertion, in essence, that it is difficult to make a living in the small town of Greenville, Maine. (Tr. 233.)[36]

The ALJ was also influenced by the fact that Folsom's surrendered its air carrier operating certificate. In the absence of evidence of inability to pay, the surrender of the

[35] In the Matter of Mauna Kea Helicopters, FAA Order No. 1997-16 at 8 May 23, 1997) (although in this case, the Administrator found that the witness's testimony was too weak to support a finding of financial hardship), *petition for review voluntarily dismissed*, Mauna Kea Helicopters v. FAA, No. 97-70838 (9th Cir. January 20, 1998).

[36] Folsom testified that his father started Folsom's in 1946, and that he bought the company from his father in 1988. He said that over the years, they had run several businesses. (Tr. 232.) In answer to the question on direct examination about whether it is necessary in Greenville, Maine, to have so many businesses, Folsom testified, "You have to put it all in one bucket and if you were lucky, you made a living at the end of it, basically." (Tr. 233.)

air carrier operating certificate does not obviate the need for the imposition of a substantial civil penalty with punitive and deterrent effect when there is a finding of regulatory violations.[37] Air carriers cannot be allowed to avoid the imposition of civil penalties commensurate with their violations by voluntarily surrendering their operating certificates. As discussed above, in this case, there was no such evidence of inability to pay. The voluntary surrender of its operating certificate does not change the fact that Folsom's flew passengers and cargo on multiple on-demand flights for compensation or hire without meeting several of Part 135's requirements. Moreover, it should be noted that there is nothing in Part 119 precluding Folsom's from applying for an air carrier operating certificate in the future. Consequently, the $2,500 civil penalty assessed by the ALJ is too low.

In light of the foregoing discussion, a $50,000 civil penalty will be assessed. The Administrator believes that a $50,000 civil penalty is commensurate with the seriousness of the violations by Folsom's and gives appropriate consideration to its small size. Further, a $50,000 civil penalty is substantial enough to deter Folsom's and other similarly situated entities from committing similar violations in the future.

The ALJ relied in large part upon the Blue Ridge Airlines case in determining that a $2,500 civil penalty would be appropriate. His reliance upon that case, however, is misplaced, although, as the ALJ noted, that case involved violations of the same regulations as found in the case at bar. It should be noted, regarding reliance upon

[37] In the Matter of Lifelite, FAA Order No. 2000-28 at 3 (December 21, 2000); In the Matter of California Helitech, FAA Order No. 2000-18 at 11-12 (August 11, 2000); *see* In the Matter of Offshore Air, FAA Order No. 2002-7 at 4 (April 16, 2002)(dictum), *petition for reconsideration dismissed,* FAA Order No. 2002-18 (June 18, 2002), *petition for review dismissed as untimely,* Offshore Air v. FAA, No. 02-1233 (D.C. Cir. March 4, 2004).

previous cases to resolve sanction issues, that "it is often difficult to compare sanctions across cases because there are so many variables involved in each case." In the Matter of Alika Aviation, Inc., FAA Order No. 1999-14 at 12, n.20 (December 22, 1999), *quoting* In the Matter of Pacific Aviation International, FAA Order No. 1997-8 at 7 (February 20, 1997), *petition for reconsideration dismissed,* FAA Order No. 1997-14 (May 2, 1997), *dismissed for lack of prosecution,* Pacific Aviation International v. FAA, No. 97-1298 (9th Cir. June 11, 1997). Reductions of an otherwise appropriate civil penalty based upon inability to pay must be determined on a case-by-case basis, depending upon the financial circumstances of the respondent. Hence, the civil penalty amount itself in a case in which inability to pay was a mitigating factor has little precedential value even in other cases involving the same violations. In the Blue Ridge Airlines case, the civil penalty assessed by the Administrator reflected the evidence of the respondent's extremely limited financial circumstances, as well as the fact that the respondent had used its air carrier certificate to fly only a few flights. There is no evidence in the record in this case, in contrast, that Folsom's cannot afford to pay the civil penalty.

In light of the foregoing, Complainant's appeal is granted. A $50,000 civil penalty is assessed.[38]

[Original signed by Robert A. Sturgell]

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

[38] This decision 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 (2007). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).