UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: STEBBINS AVIATION, INC.
FAA Order No. 2006-3

Docket No. CP00SW0014
DMS No. FAA-2000-7576[1]

Served: February 7, 2006

DECISION AND ORDER[2]

Respondent Stebbins Aviation, Inc. (Stebbins) has appealed Chief Administrative Law Judge (ALJ) Ronnie A. Yoder's decision granting Complainant Federal Aviation Administration's (FAA's) Motion for Decision[3] and finding that Stebbins violated the requirements for an air carrier anti-drug program (drug program) and alcohol misuse prevention program (alcohol program). The ALJ assessed Stebbins a $9,200 civil

[1] Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's (DOT's) Docket Management System (DMS) at the following Internet address: 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, Thomson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS and WestLaw. For additional information, see the website.

[3] Section 13.218(f)(5) provides:

> Motion for decision. A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

14 C.F.R. § 13.218(f)(5).

penalty.[4] The main questions on appeal are whether the ALJ properly found that Stebbins failed to implement a drug program and whether the ALJ's civil penalty was too high. This decision affirms the ALJ's decision and his assessment of a $9,200 civil penalty.

I. Facts

On April 18, 1988, the FAA issued Stebbins, a company in Longview, Texas, a certificate permitting it to operate as an on-demand air carrier under 14 C.F.R. Part 135. The regulations required a certificate holder to test its employees who performed safety-sensitive functions for prohibited drugs.[5] The FAA approved Stebbins' drug program on August 10, 1990. Stebbins agreed in its drug program to comply with: (1) FAA drug program rules in 14 C.F.R. Part 121, Appendix I; and (2) DOT drug program rules in 49 C.F.R. Part 40. At the time of Stebbins' agreement, the alcohol program regulations were not yet in existence. They did not come into effect until March 17, 1994.[6]

On June 6, 1995, Stebbins surrendered its Part 135 air carrier certificate to the FAA,[7] and the FAA canceled Stebbins' certificate on August 18, 1995. On June 11, 1996, the FAA reissued another air carrier certificate to Stebbins with the same number, and Stebbins began operating again.

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[4] A copy of the ALJ's written decision is attached. (The ALJ's decision is not attached to the electronic versions of this decision nor is it included on the FAA website.)

[5] Under 14 C.F.R. § 135.251(a), entitled, "Testing for prohibited drugs," "[e]ach certificate holder or operator shall test each of its employees who performs a function listed in appendix I to part 121 of this chapter in accordance with that appendix." Section 135.251 became effective on December 21, 1988. 53 Fed. Reg. 47061 (Nov. 21, 1988).

[6] 59 Fed. Reg. 7397 (February 15, 1994).

[7] The record does not disclose the reason for the surrender.

On or about March 25, 1998, FAA Inspector Valinda Lewis Cook visited Stebbins' facility to examine its drug and alcohol testing records. She determined that Stebbins had failed to implement its drug program. Inspector Cook also found that Stebbins had failed to: (1) establish an alcohol program; (2) submit a certification statement for an alcohol program; and (3) implement the alcohol program before beginning operations. On June 11, 1998, Stebbins sent the FAA an alcohol program certification statement.

II. Case History

On November 17, 1998, the FAA issued Stebbins a final notice of proposed civil penalty. On July 14, 2000, the FAA filed a complaint alleging that Stebbins failed to: (1) implement its FAA-approved drug program;[8] (2) establish an alcohol program;[9] (3) submit an alcohol program certification statement before beginning operations under its June 11, 1996, air carrier certificate;[10] and (4) implement an alcohol program.[11] The

[8] The rules required Stebbins to do so before beginning operations. Under 14 C.F.R. Part 121, App. I, ¶ IX.A.2(a), "[t]he program shall be implemented not later than the date of inception of operations."

[9] Under 14 C.F.R. § 135.255(a), "[e]ach certificate holder and operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter."

[10] According to 14 C.F.R. Part 121, App. J, ¶ VII.A.1(c): "Each employer that holds a part 135 certificate and directly employs ten or fewer covered employees … shall submit a certification statement [regarding its alcohol program] to the FAA by July 1, 1995." In addition, 14 C.F.R. Part 121, App. J, ¶ VII.A.4 provided: "Any person who applies for a certificate under the provisions of parts 121 or 135 of this chapter after the effective date of the final rule shall submit an alcohol misuse prevention program (AMPP) certification statement to the FAA prior to beginning operations pursuant to the certificate …."

[11] Part 121, App. J, ¶ VII.A.4 provided: "The AMPP [alcohol misuse prevention program] shall be implemented concurrently with beginning such operation or on the date specified in paragraph A.1 of this section, whichever is later …." While the complaint sets forth the failure to establish an alcohol program and the failure to implement it as separate violations, this decision treats them as one.

complaint sought an $11,500 civil penalty.

On August 8, 2000, Stebbins filed an answer denying the allegations. As an affirmative defense, Stebbins argued that it relied on the representations of FAA employees that it was complying with the regulations. Stebbins also contended that the penalty should not exceed $1,000 and that it could not withstand the proposed penalty of $11,500.

On March 13, 2003, about 2 ½ years after it filed its answer, Stebbins filed a "Position Paper" asserting, among other things, that it accomplished all required drug testing in 1997 and that it simply could not locate its 1997 drug testing records. Attached to the Position Paper was an Affidavit from Stebbins' chief pilot, who also served as Stebbins' drug and alcohol program manager, attesting that the Position Paper was true to the best of his knowledge.

On April 17, 2003, Stebbins filed a Pre-Hearing Brief arguing, as it did in its Position Paper, that it had implemented its drug program and that it simply could not locate its drug testing records for 1997. On April 18, the FAA filed its Pre-Hearing Brief. On April 29, 2003, the FAA filed a Reply to Stebbins' Position Paper and Pre-Hearing Brief.

On May 23, 2003, FAA filed a Motion for Decision under 14 C.F.R. § 13.218(f)(5), arguing that there was no genuine issue of material fact and that it was entitled to a decision in its favor as a matter of law. Regarding Stebbins' drug testing, the FAA argued that Stebbins:

(1) tested for more substances than allowed in one pre-employment test conducted in 1996, and in random drug tests conducted in 1996 and 1998;[12]

[12] As explained in the regulatory history, the Department of Transportation determined that it was inadvisable to permit employers to test the DOT sample for additional drugs due to the Fourth

(2) set an impermissibly restrictive limit for drug metabolites, below that set by regulation, in random drug tests conducted in 1996 and 1998;[13]

(3) failed to have test results verified by a medical review officer in 1996 and 1998;

(4) failed to use the required Federal Drug Testing Custody and Control Form for pre-employment and for random drug tests conducted in 1996 and 1998; and

(5) failed to conduct any random drug tests during 1997.

Attached to the FAA's Motion for Decision, among other documents, was an Affidavit from FAA Inspector Cook attesting that: (1) none of Stebbins' drug testing records showed proper drug testing under the regulations; (2) the FAA did not receive an alcohol program certification statement from Stebbins until after the FAA inspection; (3) none of Stebbins documents identified any alcohol testing; and (4) Stebbins' drug and alcohol program manager told her that he did not know how to implement a drug or alcohol program, which led her to give him a list of consortia that could help. Stebbins did not file a response to the FAA's Motion for Decision. [14]

Amendment and other concerns (though an employer could test for additional drugs using a second, separate sample). 54 Fed. Reg. 49854, 49855. The regulations limit DOT testing to: (1) marijuana; (2) cocaine; (3) opiates; (4) phencyclidine (PCP); and (5) amphetamines. *Id*. Stebbins, however, tested its samples not just for these drugs, but for the following as well: (1) barbiturates; (2) benzodiazepines; (3) methadone; (4) methaqualone; and (5) propoxyphene.

[13] For example, although the regulation set the upper limit for marijuana metabolites at 50 nanograms per milliliter, Stebbins used an upper limit of only 20 nanograms per milliliter. The government intentionally set the limit at 50 nanograms because a more stringent limit could lead to more false positives (from passive inhalation, cross-reactivity, and food) and higher program costs (from more initial tests requiring confirmation). *See* 54 Fed. Reg. 49854, 49857 (explaining the rationale for the drug testing levels the DOT set).

[14] Certain attachments to the FAA's Pre-Hearing Brief and to the FAA's Motion for Decision include information protected by the Privacy Act, such as employee drug tests, social security numbers, and home addresses. The public disclosure of such information is inappropriate, as it is counter to the Privacy Act, 5 U.S.C. § 552a, is not in the public interest, and is not required by law. *Cf.* 14 C.F.R. § 13.226(a) (ALJ in FAA civil penalty cases must order information withheld if disclosure would harm aviation safety, would not be in public interest, or information is not otherwise required to be made publicly available); In the Matter of WestAir Commuter Airlines,

III. ALJ's Decision

On August 30, 2004, the ALJ granted the FAA's Motion for Decision, finding that the FAA was "entitled to judgment as a matter of law as to the violations alleged in the complaint." (Initial Decision at 14.) The ALJ rejected Stebbins' argument that it implemented its drug program and simply could not locate the documentation for its 1997 testing. In this regard, the ALJ cited Part 121, App. I, ¶ VI.A, requiring employers to: (1) develop a well-documented procedure for handling urine specimens; (2) maintain records of positive drug tests for 5 years and negative tests for 12 months; and (3) permit the FAA to examine its records. According to the ALJ, even if supported by the evidence, Stebbins' assertion that it implemented its drug program would not raise an issue of material fact, given that it was uncontested that Stebbins failed to meet the recordkeeping requirements to implement its drug program.

The ALJ also held that the FAA established the violation of failing to submit an alcohol program certification before beginning operations. He noted that it was undisputed that Stebbins did not submit its certification until after the re-issuance of its air carrier certificate, on or about June 15, 1998.

Further, the ALJ pointed out that the FAA had an Affidavit stating that: (1) Stebbins failed to present any documents showing alcohol testing of covered employees; and (2) Stebbins' drug and alcohol program manager stated he did not know how to implement a drug or alcohol program. Thus, the ALJ stated, it was uncontested

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Inc., FAA Order No. 1997-13 at 2 (February 26, 1997) (record sealed under 14 C.F.R. Part 191, which prohibited disclosure if detrimental to aviation safety). Therefore, as part of this order, the above-mentioned privacy-related information shall be withheld from public disclosure. In this case, I am ordering the withholding of the information *sua sponte*; however, in future cases involving similar privacy concerns, the agency attorney should move at the earliest opportunity to protect such information.

that Stebbins did not implement an alcohol program.

The ALJ reduced the proposed civil penalty of $11,500 by 20% to $9,200, reasoning that the FAA had not considered Stebbins' "corrective action" of: (1) contracting with a consortium sometime after May 4, 1998, to conduct its drug program; and (2) submitting its alcohol program certification statement. The ALJ did not reduce the penalty any further due to financial hardship because Stebbins had not proved it. Stebbins filed a timely Notice of Appeal and Appeal Brief.

IV. Analysis

A. Violations

On appeal, Stebbins has abandoned its claim that it did not commit the alcohol program violations. Its appeal concerns only the alleged drug program violations.

In response to the ALJ's comment that Stebbins had not submitted a reply to the FAA's Motion for Decision, Stebbins argues that there was no requirement for it to do so. Stebbins is correct that filing a reply to a motion is permissive rather than mandatory. [15] At the same time, the right to file a reply is an invaluable opportunity to present arguments, affidavits, and other evidence, which are particularly important in the case of a Motion for Decision, where the ALJ may render a decision in the opposing party's favor if there is no genuine issue of material fact.[16]

[15] 14 C.F.R. § 13.218(d) provides: "Answers to motions. Any party may file an answer, with affidavits or evidence in support of the answer, not later than 10 days after service of a written motion on that party."

[16] Stebbins also contends that the ALJ failed to consider its Position Paper and Pre-Hearing Brief. The ALJ's analysis expressly refers to each of these documents, showing that the ALJ did consider them. *See, e.g.*, Initial Decision at 5, 12, 13.

Stebbins argues that the ALJ failed to address any of its arguments that it implemented its drug program. This is inaccurate. Stebbins argued that it had performed the 1997 drug tests and simply could not locate the records for them. But even if Stebbins did test for drugs in 1997, the ALJ correctly pointed out that the regulations still required Stebbins to maintain records of positive drug tests for 5 years and negative tests for 12 months. 14 C.F.R. Part 121, App. I, ¶ VI.A.[17] Given that FAA Inspector Cook examined Stebbins' records in March 1998, the regulations required Stebbins still to have records of 1997 drug tests, but Stebbins did not.

Under 14 C.F.R. § 135.251(a), each certificate holder must test each employee who performs a safety-sensitive function in accordance with Appendix I to 14 C.F.R. Part 121. Appendix I states that it "contains the standards and components that must be included in an anti-drug program …."[18] It explains the requirements for implementing a drug program. Maintaining records of drug testing results is one of these requirements.[19] Given that Stebbins admits that it failed to maintain drug testing records for 1997, the ALJ correctly found, even apart from the other irregularities in Stebbins' drug program, that Stebbins failed to implement its drug program.[20]

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[17] Under Part 121, App. I, ¶ VI.A: "Each employer shall maintain all records related to the collection process, including all logbooks and certification statements, for two years. Each employer shall maintain records of employee confirmed positive drug test results and employee rehabilitation for five years. The employer shall maintain records of negative test results for 12 months."

[18] *Id.*

[19] *Id.*

[20] Regarding the FAA's allegation that Stebbins failed to have its drug test results reviewed by a medical review officer from 1996 through 1998, Stebbins argues that there is no "requirement that the medical review officer's evaluation be in writing" (Appeal Brief at 14), particularly if the report is negative, as in the instant case. The FAA has failed to cite any regulation requiring a

B. Sanction

Stebbins argues that the $9,200 civil penalty assessed by the ALJ is too high. Although the FAA took financial hardship into account in proposing its civil penalty, Stebbins argues that the civil penalty should be even lower due to financial hardship.

Stebbins has failed to introduce into the record any proof of financial hardship. While it is true that Stebbins' chief pilot, also acting as Stebbins' drug and alcohol program manager, attested to the truth of Stebbins' Position Paper, this document states only that Stebbins had already presented the FAA with financial information. It does not include any specifics relating to Stebbins' financial situation, such as tax records or other documentation. Further, it is unclear that Stebbins' chief pilot was qualified to attest to the details of Stebbins' financial condition, given that there is no indication in the record that he was sufficiently familiar with Stebbins' finances or had any financial expertise.

Without adequate proof of financial hardship, it would be inappropriate to reduce the civil penalty any further due to financial hardship. In the Matter of Blue Ridge Airlines, FAA Order No. 1999-15 at 10 (December 22, 1999) (*when proven*, financial hardship may constitute grounds for reduction of penalty); In the Matter of Conquest Airlines, FAA Order No. 1994-20 at 3 (June 22, 1994) (unsubstantiated statements by alleged violators are insufficient evidence of inability to pay), citing In the Matter of Giuffrida, FAA Order No. 1992-72 at 3 (December 21, 1992). Stebbins bore the burden of proving its affirmative defense of financial hardship, In the Matter of Conquest Helicopters, FAA Order No. 1994-20 at 3 (June 20, 1994), and has failed to substantiate its claim.

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written report of negative results, and Stebbins is correct that there is no requirement that the review of negative results be in writing.

Stebbins argues that the FAA should not have listed "an adverse effect on safety" as one of the factors justifying its proposed civil penalty of $11,500, because Stebbins' drug tests were more stringent than those required by DOT rules. The FAA's proposed penalty, however, encompassed more than the irregular drug tests. It also encompassed such matters as the failure to have any alcohol program in place at all for several years, which without question had a negative effect on air safety.

Stebbins also argues that its more stringent drug program requirements should not count in setting the penalty because its drug program, which was FAA-approved, states that it was "part of [Stebbins'] overall Anti-Drug Program." To Stebbins, this shows that the FAA knew and approved of its more stringent drug requirements.

First, Stebbins has cited nothing to indicate that its more stringent requirements weighed heavily in the ALJ's sanction determination. Second, Stebbins fails to cite to any portion of its FAA-approved drug program that would have indicated to the FAA that Stebbins' testing requirements would violate the regulations. Indeed, Stebbins' FAA-approved drug program states: "Prohibited Drug – As used in this Plan refers to marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines," the five drugs that air carriers must test for under DOT rules. Motion for Decision, Exhibit A at 23. Stebbins' drug program does *not* state that Stebbins would be testing for further, impermissible drugs, nor does it state that it would be testing for the appropriate drugs at more stringent levels than permitted. Stebbins fails to cite to any other evidence in the record showing that the FAA knew and approved of its more stringent drug testing requirements.

Stebbins also argues that the sanction is too high because the FAA did not prove

that any employees ever abused alcohol or drugs or traced any incidents to the violations. It is impossible to know whether Stebbins' employees abused alcohol or drugs during the periods in which Stebbins failed to test. As for the fact that the FAA could not trace any incident to alcohol or drug abuse, this is merely fortuitous and is not a reason to mitigate an otherwise reasonable sanction. In the Matter of TCI, FAA Order No. 1992-77 at 3 (December 21, 1992). As the ALJ stated, substance abuse poses a potential for "public calamity," and Stebbins operated for an extended period with improper drug and alcohol programs. (Initial Decision at 11.)

Finally, Stebbins argues that the FAA and ALJ improperly treated the failure to submit an alcohol certification statement and the failure to establish an alcohol program as two separate violations for the purpose of sanction. Assuming for the sake of argument that this is true, when one includes the drug program violations, there were multiple violations of the regulations, each with a maximum civil penalty of $10,000 (before the adjustment to $11,500 for inflation).[21] Thus, the $9,200 civil penalty was well within the basic parameters.

In addition, the exact number of violations does not, by itself, determine the appropriate penalty. In the Matter of Warbelow's Air Ventures, Inc., FAA Order No. 2000-3 at 20-21 (February 3, 2000), *petition for reconsideration denied*, FAA Order

[21] Given the threat to aviation safety that these types of violations pose, the agency's practice is to seek a penalty in the maximum range. The maximum range for a carrier of this small size (Group IV), according to FAA Order No. 2150.3A, Compliance and Enforcement Program, Change 30, Appendix 4 at 1-3 (November 15, 2001) was $4,000 to 10,000 per violation, for the violations that occurred leading up to January 21, 1997. Effective January 21, 1997, there was an adjustment for inflation, and the maximum civil penalty for a carrier of Stebbins' size became $11,000. 14 C.F.R. Subpart H, Civil Monetary Penalty Inflation Adjustment. Here, the violations continued until March 25, 1998, when Inspector Cook examined Stebbins' records and discovered the violations.

No. 2000-14 (June 8, 2000), *petition for reconsideration denied,* FAA Order No. 2000-16 (Aug. 8, 2000), *petition for review denied,* Warbelow's Air Ventures v. FAA, 2001 U.S. App. LEXIS 20820 (9th Cir. Sept. 20, 2001). It has been held many times that it is inappropriate to take a mathematical, formulaic approach of simply multiplying the number of violations by a set dollar amount. *See, e.g.*, In the Matter of Interstate Chemical Company, FAA Order No. 2002-29 at 15 (December 2, 2002).

Far more important in determining the appropriate sanction is the totality of the circumstances. This includes the nature, extent, and gravity of the violations, the violator's degree of culpability, history of prior violations, and financial situation, as well as any other matters that justice requires. In the Matter of Luxemburg, FAA Order No. 1994-18 at 6 (June 22, 1994), citing In the Matter of Northwest Airlines, FAA Order No. 1990-37 at 12 n.9 (November 7, 1990). Stebbins failed to have any alcohol program at all for several years, it failed to maintain essential records concerning its drug program, and it failed to implement its drug program properly. These violations are serious.[22] Based on the totality of the circumstances, which the ALJ thoroughly set forth in his decision, as well as on the fact that Stebbins' arguments for reducing the civil penalty are without merit, the civil penalty of $9,200 is affirmed.[23]

[22] The FAA has not raised, and therefore this decision does not reach, the issue of whether the ALJ erred in reducing the civil penalty due to the "corrective action" of submitting its alcohol certification statement and joining a consortium to implement its drug and alcohol program. Submitting the statement and selecting a way to implement its program were arguably things that Stebbins needed to do anyway to avoid further penalties. In any event, the $9,200 civil penalty is appropriate and should be sufficient to deter future violations.

[23] Any arguments not discussed have been considered and rejected.

For the foregoing reasons, this decision affirms the ALJ's finding of violations and assessment of a $9,200 civil penalty.[24]

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

[24] Under the Rules of Practice, unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision is an order assessing civil penalty. 14 C.F.R. §§ 13.16(d)(4) and 13.233(j)(2) (2005).