UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **ALIKA AVIATION, INC.** **d/b/a ALEXAIR**	FAA Order No. 99-14 Served: December 22, 1999 Docket No. CP97WP0045

DECISION AND ORDER[1]

Respondent Alika Aviation, Inc., d/b/a Alexair ("Alexair") has appealed from the written initial decision of Chief Administrative Law Judge Roy J. Maurer,[2] in which the law judge held that Alexair violated 14 C.F.R. § 135.413(a)[3] and 135.421(a)[4], and

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[1] The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 64 Fed. Reg. 58879, 58895 (November 1, 1999).

[2] A copy of the law judge's initial decision is attached.

[3] It is provided in 14 C.F.R. § 135.413(a) as follows:

> Each certificate holder is primarily responsible for the airworthiness of its aircraft, including airframes, aircraft engines, propellers, rotors, appliances, and parts, and shall have its aircraft maintained under this chapter, and shall have defects repaired between required maintenance under part 43 of this chapter.

[4] It is provided in 14 C.F.R. § 135.421(a) as follows:

> Each certificate holder who operates an aircraft type certificated for a passenger seating configuration, excluding any pilot seat, of nine seats or less, must comply with the manufacturer's recommended maintenance programs, or a program approved by the Administrator, for each aircraft engine, propeller, rotor, and each item of emergency equipment required by this chapter.

assessed a $6000 civil penalty. After consideration of the briefs on appeal and the full record, Alexair's appeal is denied, and the law judge's initial decision assessing a $6,000 civil penalty is affirmed.

Alexair is a Part 135 operator in Hawaii. From October 24 to November 12, 1996, Alexair was the operator of a Hughes 369D helicopter, civil registration number N8625F,[5] which was type certificated for a configuration of 9 or fewer passenger seats (excluding any pilot seat).

On November 12, 1996, N8625F was involved in an accident. The next day, FAA Aviation Safety Inspector Andrew Colvin[6] was assigned as the FAA investigator-in-charge of the investigation into the cause of this accident. Inspector Colvin, accompanied by FAA Inspector Michael Robertson, went to Maui where they examined N8625F in Alexair's T-hangar.[7] Inspector Robertson noticed that the engine compressor was frozen. As a result, he requested Alexair's director of maintenance, Jeff Buchwald, to remove the engine to permit further examination. After the engine was removed from the helicopter, Inspectors Colvin and Robertson examined it. They noticed that the N1 and N2 tach generators, which each should have had 4 mounting nuts, only had 2 opposing mounting nuts each.[8] In addition, Inspector Robertson pointed out to Inspector

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[5] Tr. 250.

[6] Inspector Colvin holds an A & P mechanic certificate. At the time of the hearing, he had been with the FAA for 2 years, and had been a principal avionics inspector for 1½ years. He was not the principal maintenance inspector assigned to Alexair.

[7] The helicopter had not been flown out of the accident site, but instead had been brought back to Maui by another operator.

[8] The tach generators power the tachometers in the cockpit. The tach generators are located on the engine gearbox, also called the accessory gearbox. As explained by Inspector Colvin, the tach generators do not simply sit on top of the accessory gearbox. Instead, the tach generator and

Colvin that the oil pressure regulating valve did not have the required safety wire. (Tr. 61.)

Inspector Colvin explained that these are self-locking nuts, and that once the nuts are properly torqued, they will remain in position. (Tr. 66.) He said that a self-locking nut on the tach generators would not vibrate off with normal wear from use of the helicopter.[9] Inspector Colvin testified that the nuts would not have come off as a result of the accident. (Tr. 74-75.)

Inspector Colvin opined that it did not appear that these nuts had been removed when the engine was taken out of the helicopter. He explained that the removal of the self-locking nuts would have cleaned the threads of the studs, but the studs in fact were covered with dirt and rust. (Tr. 73-74.) He stated further that an experienced mechanic would know that it was unnecessary to remove the nuts to take the engine out. (Tr. 80-81.)

According to Inspector Colvin, the main risk associated with having 2 opposing nuts missing from each tach generator is that the tach generators might loosen, resulting in an oil leak. (Tr. 100-102.) He did not think that the tach generators would come off the accessory gearbox due to 2 missing nuts. (Tr. 119.)

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the accessory gearbox are are connected. As the engine turns, the gears in the gearbox will turn, driving the tach generators and causing the indications to appear on the N1 and N2 tachometers in the cockpit. The N1 tachometer provides information regarding RPM for the gas generator and the N2 tachometer provides information regarding the RPM of the power turbine. Oil flows between the tach generator and the gearbox.

The tach generators are technically part of the airframe. The accessory gearbox is attached to the engine and is a part of the engine.

[9] He based this opinion on his conversation with a representative of Allison Engine Company. The inspector had been informed by Allison that no incident reports had been filed that indicated that such self-locking nuts had come off through normal wear. (Tr. 227-228.)

The oil pressure regulating valve looks like a round plug, with a rectangular knob, called a tang, in the center. (Tr. 168-169.) There is supposed to be a stainless steel double stranded twisted safety wire attached at one end to the tang on the valve and attached at the end to another tang to the right of the valve itself. The safety wire is needed to keep the oil pressure regulating valve in place because the valve is not self-locking. The safety wire is required under the type design. (Tr. 127-128.)

Inspector Colvin testified that the risk resulting from the absence of this safety wire is that the valve will back out, possibly causing a massive oil leak. He said that in the worst case scenario, an engine fire, oil loss, or engine seizure could result from the backing out of the valve. (Tr. 129.) Inspector Colvin said that there is no evidence that the safety wire broke off as a result of the accident. (Tr. 129-130.)

Inspector Colvin testified that in his opinion the aircraft had been operating with these defects at least since the last 100-hour inspection. (Tr. 130, 138-139). On the date of the accident, the aircraft had been flown approximately 71 hours since its last 100-hour inspection.[10] The inspector concluded based on his inspection of the logbook entry for this inspection that the mechanic who performed the 100-hour inspection had used the 100-hour inspection checklist contained in the Allison Engine Company manual. (Tr. 132-134.) Alexair's FAA-approved operations specifications require Alexair to use the Allison Engine Company manual for maintenance of this engine.

Paragraph 1 of the 100-hour inspection checklist directs as follows:

> Inspect the entire engine for loose or missing bolts, broken or loose connections, security of mounting accessory and broken or missing lockwire. Check accessible areas for obvious damage and evidence of fuel or oil leakage. Check B-nuts for

[10] Agency counsel stated at the hearing that she did not know how many flights had been made during these 71 hours. (Tr. 152.)

> presence and alignment of torque stripes. B-nuts with torque stripes must be loosened and retorqued before application of new stripes.

Complainant's Exhibit 4 at 1. According to Inspector Colvin, this item of the checklist includes checking the N1 and N2 tach generators for missing nuts and the oil pressure regulating valve for a missing safety wire. (Tr. 135-136.) He testified further that the missing nuts and safety wire would have been hard to see but a mechanic performing a 100-hour inspection properly using this checklist could have seen these defects if he had used a mirror and a flashlight. (Tr. 136.) The defects, he opined, should have been detected by a mechanic during the 100-hour inspection. (Tr. 139.)[11]

Steve Alexander, the General Manager of Alexair, testified at the hearing that prior to the accident, his company had been flying N8625F about 200 hours per month, and was performing 100-hour inspections on this helicopter about twice each month. (Tr. 256.) Mr. Alexander testified that he did not think that safety was an issue with the missing nuts on the N1 and N2 tach generators and the safety wire on the oil pressure regulating valve. (Tr. 281.)

In his written initial decision, Judge Maurer concluded that the allegations contained in the complaint had been proven. He prepared rather extensive findings of fact. (*See* Initial Decision at 3-5.) The law judge held specifically that the violations were not mere technical violations, but instead, as long as the helicopter was operated with these defects, there was the possibility of oil leakage that could, in turn, cause an engine fire. (Initial Decision at 7.)

Regarding sanction, the law judge wrote:

> I agree that the explanation for what happened appears to be that there was an oversight by the mechanic performing the 100-hour inspection. Complainant is seeking half --$5000 -- of the maximum allowable civil penalty for each of the two violations [$10,000 total for both violations]. Given that the violations are more than technical under the regulations, this represents a considerable reduction, at the outset, in the penalty amount.
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> The record herein discloses, on the other hand, that 100-hour inspections were being performed on the Hughes helicopter about twice a month. They were not, then few and far between. In addition, discovery of the nuts defect was not a matter of merely looking at the engine; it required a mirror and flashlight. The FAA inspector testifying in this case has emphasized that the nuts defect, or even the safety wire defect, would not have been discoverable during intervening required inspections for this aircraft, such as a mechanic's daily inspection or a pilot's preflight inspection. In these circumstances, this was somewhat of a difficult maintenance matter to be on top of and I will reduce the civil penalty amount slightly, to $3000 for each violation. *See e.g.,* Horizon Air Industries, Inc., FAA Order No. 95-11 at 13 (May 10, 1995).

(Initial Decision at 7.)

On appeal, Alexair is not contesting the law judge's finding of violations. Instead, as at the hearing, Alexair is arguing that the $10,000 civil penalty sought by Complainant at the hearing was too high and that $2000 would be an appropriate civil penalty. As will be further explained, in many ways Alexair seems oblivious to the fact that at this stage of the proceeding, its appeal is from the law judge's initial decision assessing a $6,000 civil penalty.

Alexair argues that the law judge was in error when he excluded evidence regarding the settlement offer made by Complainant. According to Alexair, the law judge should have admitted evidence of the settlement offer made by Complainant because the offer illustrates the excessiveness of the $10,000 civil penalty sought by Complainant at the outset of these proceedings.

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[11] The inspector testified that he would not expect a pilot to detect these defects during a preflight inspection or a mechanic to detect them during a 25-hour inspection. (Tr. 137, 211.)

The law judge was correct in excluding the evidence of the settlement amount. It is provided in Federal Rule of Evidence 408 in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, ... a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. ... This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation.

F.R.Evid. 408. In this case, Alexair wanted to introduce the settlement offer so as to show the invalidity of the amount of the claim (civil penalty) and not for a permissible reason.

Moreover, the introduction of the amount offered by Complainant to settle the case would shed little light on what an appropriate sanction would be. It is to be expected that if the agency counsel offers to settle, that the offer will be less than that proposed in the Notice of Proposed Civil Penalty (or in the Final Notice of Proposed Civil Penalty or the Complaint, depending upon the stage of the proceedings). Unless a settlement offer is less than the proposed civil penalty, why would the respondent even consider it? In determining a civil penalty to offer in a settlement, the agency counsel will undoubtedly consider factors such as the difficulty and cost of presenting the case that would not otherwise be considerations. It is stated in the Compliance and Enforcement Program Order, FAA Order No. 2150.3A,[12] paragraph 204(e)(4/20/94), "Subsequent to the initiation of a case, agency attorneys, in consultation with the concerned program office, may settle cases, when in their judgment, the settlement is warranted by the facts and law, other litigation risks, and would prevent unnecessary litigation."

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[12] Hereinafter referred to simply as FAA Order No. 2150.3A.

Alexair argues that:

> [T]he parties approached the informal conference with highly divergent expectations; while ALEXAIR expected to be informed of the conclusions and determinations of the FAA decisionmaker, FAA counsel viewed the sessions as a 'plea-bargaining' session. Following the inability of the informal conference to resolve the purported bad enforcement history of ALEXAIR, or the methodology of the sanction determination, ALEXAIR (sic) only recourse was to expend the funds required for a review by an independent decision-maker.

Appeal Brief at 10. Alexair argues further:

> Inasmuch as the sanction, and the procedures by which the sanction was determined, were the critical items in the case, ALEXAIR sought to demonstrate that FAA counsel have a duty and procedure under their own enforcement manuals to meet and consider the arguments and issues presented by the target of a civil penalty action. ALEXAIR took the position that the informal conference is not a plea bargaining session as much as an opportunity for informal hearing/resolution of contested issues on a summary basis; it was also the only proceeding at which the FAA could or should reveal its administrative findings behind the Notice of Proposed Civil Penalty which become final if no hearing is requested.

Appeal Brief at 11.

Alexair apparently misunderstands the purpose of the hearing and the role of the law judge. In general, what happened at the informal conference is not at issue at the hearing.[13] The issue before the law judge at the hearing is not whether the agency counsel complied with the agency's internal procedures, but whether the alleged violation or violations occurred, and if so, what the appropriate civil penalty is. In the Matter of

[13] An agency attorney's conduct at an informal conference may be the subject of an internal investigation by the Office of the Chief Counsel or the appropriate Regional Counsel in response to an allegation that the agency counsel did not afford a respondent with an opportunity to present information or arguments pertinent to an alleged violation.

American Airlines, FAA Order No. 89-6 at 7-8 (December 21, 1989). The law judge apparently understood this, and explained it to counsel for Alexair, but to no avail.[14]

By way of guidance, however, it should be noted that the purpose of the informal conference is not plea bargaining. While arriving at a settlement is an option at informal conferences, the primary purpose of the informal conference is to provide the recipient of a notice or final notice of proposed civil penalty with an opportunity to speak to an agency counsel and to present evidence or information in response to the proposed enforcement action. FAA Order No. 2150.3A, paragraph 1207a (7/16/96). The agency counsel is to evaluate the evidence or information presented at the informal conference to determine whether it disproves any of the allegations, and if the proposed penalty is excessive. If, in the agency counsel's judgment, any allegations are disproved, then they are to be withdrawn. Likewise, if in the agency counsel's judgment, the proposed sanction is excessive, then it is to be reduced. FAA Order No. 2150.3A, paragraph 1202e (12/14/88) and paragraph 1207a (7/16/96).

Alexair argues that the original agency counsel should not have considered past administrative actions against Alexair in determining the sanction. Appeal Brief at 8-9. Alexair acknowledges that Ms. Toscano, the second agency attorney assigned to the case, denied that the sanction was based on a poor violation history. Appeal Brief at 10, fn. 6. Once again, this is a precomplaint matter that is not at issue in this case. The law judge, and the Administrator on review, will not second-guess the agency counsel's determination that an administrative action (*e.g.*, letter of correction, warning letter) is inappropriate. The law judge may only determine what is the appropriate *civil monetary*

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[14] *See,* for example, Judge Maurer's statement that he had no supervisory authority over the conduct of the agency counsel prior to the hearing stage of the proceedings at Tr -17.

penalty, if any, in light of any finding of violations.[15] There is no evidence that the law judge was influenced by Alexair's past enforcement history when he assessed the $6,000 civil penalty.[16]

Alexair argues that the civil penalty should have been reduced based upon the fact that Alexair fired the mechanic who did not discover the missing nuts and safety wire during the 100-hour inspection. Alexair cites In the Matter of Delta Air Lines, FAA Order No. 92-5, for the proposition that "reduction of an otherwise reasonable civil penalty is appropriate when there is sufficient specific evidence of swift or comprehensive corrective action."

This is not a compelling argument because the evidence does not indicate that Mr. Buchwald's termination was swift or comprehensive. Mr. Alexander testified that the mechanic was not fired for about 3 to 6 months after the accident. Moreover, Mr.

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[15] Moreover, consideration of a past history of administrative actions by the agency counsel is appropriate in determining whether administrative enforcement action (i.e, warning notice, letter of correction) or legal enforcement action (i.e., suspension, revocation or civil penalty) is appropriate. If an entity has been the subject of several administrative actions in the past, then an agency counsel would be justified in deciding that administrative action will not be an effective means of bringing about compliance by that entity and that a more stringent sanction would be necessary.

[16] Alexair similarly argues that agency counsel may have sought such a high civil penalty against it because there was an accident. There is no evidence that the accident was a factor in the agency counsel's selection of the $10,000 civil penalty. Moreover, regardless, the internal deliberations of agency employees pertaining to the selection of the sanction to propose is irrelevant. In the Matter of American Airlines, No. 89-6 at 7 (December 21, 1989). The law judge did not mention the accident in his decision as a factor that he considered in determining that a $6,000 civil penalty would suffice.

In several places in the appeal brief, Alexair's counsel attacks the professional expertise, competence and credibility of the agency counsel who handled this matter. For example, he questions Ms. Toscano's credibility when she asserted that the accident did not influence the civil penalty proposal. Such *ad hominem* attacks on counsel – whether impugning the integrity or qualifications of counsel for either party – are not appreciated by the Administrator and do nothing to advance a party's arguments. Counsel are well-advised to refrain from making such attacks in their briefs.

Alexander evaded answering the question regarding the reason that Mr. Buchwald had been fired. (Tr. 269-270.)[17]

The Administrator has held that to result in a penalty reduction, the corrective action must be positive in nature, such as sending employees to special training or instituting programs to ensure compliance with the safety regulations. In the Matter of Detroit-Metropolitan County Airport, FAA Order No. 97-23 at 5 (June 5, 1997.) The Administrator has also held that terminating an employee does not provide the basis for reducing a civil penalty. Administrator v. Mauna Kea Helicopters, FAA Order No. 97-16 at 10 (May 23, 1997). Terminating an employee simply eliminates someone who made a mistake (either intentionally or inadvertently), but it does nothing positive to ensure that other or future employees do not make this same mistake.

As at the hearing, Alexair argues on appeal that the low civil penalty assessed against the mechanic who performed the faulty 100-hour inspection proves that the penalty sought by Complainant was excessive. Alexair contends that the mechanic was more at fault than the company itself. However, Alexair is comparing oranges and apples. By statute, an individual, such as the mechanic, is liable for a civil penalty not exceeding $1,000 per violation of a Federal Aviation Regulation, while a person operating an aircraft for the transportation of passengers or property for compensation or hire is liable for a civil penalty not exceeding $10,000 per violation. 49 U.S.C. §§ 46301(a)(1) and (2).

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[17] He did not testify that Mr. Buchwald, the mechanic, had been fired because of this incident. He simply stated that the reason that Mr. Buchwald was no longer employed at ALEXAIR was rather "ticklish." (Tr. 269.)

Alexair refers to a number of civil penalty cases, arguing that they prove that the penalty sought by Complainant was arbitrary and capricious. Alexair cites In the Matter of Stout for the proposition that the Rules of Practice do not require the law judge to defer to the FAA inspector's sanction determination and that Complainant bears the burden of proving the appropriate sanction amount.[18] The law judge was well aware that Complainant bore the burden of proof on the sanction issue, and indeed, he reduced the sanction sought by Complainant by 40%.[19] The other cases that Alexair referenced in its brief do not prove that the $6,000 civil penalty assessed by the law judge was excessive and do not prove that a $2,000 civil penalty would have been more appropriate.[20]

Alexair argues that it seeks:

> a sanction which recognizes that it must rely upon maintenance personnel who are independently certified by Complainant FAA. As such, it cannot economically retain a second (also FAA certified inspector to follow the first around re-checking every single inspection or item of maintenance. ... Alexair had no reason to believe that the maintenance technician was not properly trained; additionally, there were no "schedule" pressures on the maintenance staff. There was no "command influence" or other improper pressures utilized to speed up maintenance; there was simply a mechanics (sic) error for which Alika sees a reasonable and proportionate penalty.

Appeal Brief at 21.

The Administrator recognizess that a Part 135 operator must rely upon its employees to do their jobs properly, and that on occasions, despite the best efforts of the

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[18] In the Matter of Stout, FAA Order No. 98-12 at 12 (June 16, 1998).

[19] *See e.g.* Tr. 145, where the law judge sustained Alexair's counsel's objection to a question regarding the appropriateness of the sought $10,000 civil penalty; the law judge stated: "I'll handle the civil penalty in the case."

[20] As stated in a previous case, "[I]t is often difficult to compare sanctions across cases because there are so many variables involved in each case." In the Matter of Pacific Aviation International, FAA Order No. 97-8 at 7 (February 20, 1997).

employer, the employees may make mistakes which constitute a violation or violations of the Federal Aviation Regulations. Nonetheless, a Part 135 operator remains responsible for the violations of its employees and responsible for the condition of its aircraft. In particular, 14 C.F.R. § 135.413(a) provides that "each certificate holder is primarily responsible for the airworthiness of its aircraft, including airframes ... [and] aircraft engines ... and shall have its aircraft maintained under this chapter, and shall have defects repaired between required maintenance under part 43 of this chapter." The Administrator has held that air carriers are responsible for the acts and omissions of their employees within the scope of their employment. In the Matter of TWA, FAA Order No. 98-11 (June 16, 1998); In the Matter of USAir, Inc., FAA Order No. 92-48 at 7 (July 22, 1992), *petition for reconsideration denied*, FAA Order No. 92-70 at 5-6 (December 21, 1992); *accord*, In the Matter of Pacific Aviation International, FAA Order No. 97-11 at 5 (February 20, 1997); In the Matter of Horizon Air Industries, FAA Order No. 96-24 (August 13, 1996). The employer/air carrier remains responsible for the actions/omissions of its employees, regardless of whether there is a showing that the employer was derelict in its duty to supervise, although a failure of supervise or to train as required may constitute an aggravating factor.

Alexair should be assessed a civil penalty that is commensurate with the nature of the violations and is commensurate with its degree of responsibility.[21] The $6,000 civil

[21] The number of flights with these defects will not be considered in this case because Complainant offered no proof regarding the how many flights had occurred since the last 100-hour inspection, although it was established that the aircraft had been in operation for approximately 71 hours between the date of the inspection and the accident. In light of Complainant's failure to prove the number of flights, the law judge decided to regard this case as simply involving two violations: a single violation of § 135.413 and a single violation of § 135.421. Complainant has not appealed from that finding by the law judge.

penalty assessed by the law judge meets these criteria. As previously stated, under 49 U.S.C. § 46301, a Part 135 operator may be fined up to $10,000 per violation. The circumstances of this case do not warrant the maximum statutory penalty of $20,000 ($10,000 multiplied by 2 violations)

Under the sanction guidance provided in the Sanction Guidance Table included in FAA Order 2150.3A, Appendix 4, the civil penalty range for this type of violation is $7,500 to $10,000.[22] Referring to the proportionality analysis set forth in Compliance/Enforcement Bulletin No. 92-1[23] (included in FAA Order No. 2150.3A, Appendix 1), the maximum range per violation generally for a small Part 135 operator[24]

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[22] Sanction Guidance Table, in FAA Order No. 2150.3A, Appendix 4, at 3 and 5. Complainant argued that the applicable section of the table is Part I, D --failure to provide adequately for proper servicing, maintenance, repair and inspection of facilities and equipment. The recommended sanction for such a violation is a maximum civil penalty to suspension until proper servicing, maintenance, repair and inspection of facilities and equipment is provided.

Another applicable section would be Part I, I – failure to perform or improper performance of maintenance, for which a maximum civil penalty is also recommended. Appendix 4 at 5.

[23] The guidelines set forth in Compliance and Enforcement Bulletin No. 92-1 are designed to assist in the determination of the relatively equivalent deterrent effect on each air carrier that violates the same regulations. Unlike the Sanction Guidance Table in Appendix 4 of FAA Order No. 2150.3A, the proportionality analysis provided in Compliance and Enforcement Bulletin No. 92-1 takes the size of the carrier into consideration. As explained in that bulletin, "[a] civil penalty which may be a mere 'cost of doing business' to a major air carrier might compel a small air carrier to go out of business." Compliance and Enforcement Bulletin No. 92-1 included in FAA Order No. 2150.3A, Appendix 1 at 103.

There is no evidence in the record that the proportionality analysis was used by agency counsel in the course of determining what civil penalty to seek in this case. However, the penalty sought was within the range set forth in Compliance and Enforcement Bulletin No. 92-1.

[24] Under the proportionality analysis of Compliance and Enforcement Bulletin No. 92-1, Part 135 operators are divided into four groups as follows:

> Group I: All air carriers, Part 121 and 135, with annual operating revenue of $100,000 or more.
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> Group II: All air carriers that hold Part 121 operations specifications and large Part 135 operators (50 or more pilots or 25 or more aircraft on operations specifications), with annual operating revenue of less than $100,000,000.

is $4,000 to $10,000.[25] In light of guidance provided in Compliance and Enforcement Bulletin No. 92-1 and the small size of Alexair's operation, the $6,000 civil penalty assessed by the law judge appears reasonable.

If anything, it is Alexair's argument that the carrier should not have been assessed more than a $2,000 that is arbitrary. A $2,000 civil penalty is not consistent with any agency guidelines and is not justified by any of the case law cited by Alexair in its appeal brief.

Alexair argues further the law judge concluded the hearing after one day and did not give Alexair sufficient time in which to develop an argument concerning financial inability to pay. Alexair argues as follows:

> In the instant case, Judge Maurer went off the record and sought the parties (sic) agreement to conclude in one day, but only did so late in the afternoon. Tr. at 266. He also provided ALEXAIR with additional time to submit financial information. The testimony of Mr. Steve Alexander included not just his oversight of the company, but the economic distress in Hawaii generally and the tour industry particularly. Because he was allowed less than 30 minutes to makes (sic) ALEXAIR'S complete case, he could not present orally a full presentation.
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> It was both stunning and disingenuous for Judge Maurer to then conclude that ... ALEXAIR had not argued, directly or indirectly, an inability to pay.

Appeal Brief at 23.

Group III: All Part 135 operators that do not meet the criteria for Group II with:

1. 6 to 49 pilots; or
2. 6 to 24 aircraft; or
3. 5 or fewer aircraft.

Group IV. All other Part 135 operators.

At the time of the hearing, Alexair had 2 aircraft, including an A-star, which has 6 passenger seats. Alexair was considering buying another A-Star. (Tr. 279.)

[25] A maximum civil penalty range for a Group III carrier is $5,5000 to $10,000, and a maximum civil penalty range for a Group IV carrier is $4,000 to $5,000. Compliance/Enforcement Bulletin 92-1, in FAA Order No. 2150.3A, Appendix 1 at 106.

Alexair's counsel mentioned in the beginning of the hearing that inability to pay was one of his client's defenses (Tr. 8), although neither inability to pay nor financial hardship was alleged as a defense in Alexair's answer. Before Mr. Alexander took the stand, Alexair's counsel asked the law judge what the schedule for the remainder of the hearing would be, and the law judge replied that he intended to take a taxi to the airport and leave at 5:00. (Tr. 244.) The law judge then explained that since Alexair had not brought its complete financial data to the hearing, the law judge was ordering Alexair to provide all of the financial data in writing. (Tr. 245.) Alexair's counsel stated then that "that will cut down the testimony quite a bit then." (Tr. 245.) Alexair did not make any objection on the record to the presentation of its case regarding financial resources in writing. After the hearing, Alexair submitted financial data. Interestingly, Alexair has never presented any argument based upon an analysis of the financial data that it could not afford to pay the $10,000 civil penalty sought originally by Complainant or the $6,000 civil penalty assessed by the law judge. Indeed, even in this appeal, Alexair has not explained why his client cannot pay the penalty assessed by the law judge based upon the financial information that he submitted on behalf of Alexair. Likewise, Alexair has not explained what it would have elicited in testimony that it did not present in writing after the hearing. Consequently, Alexair's argument that the law judge erred in ending the hearing when he did is rejected.

In light of the foregoing, Alexair's appeal is denied, and the law judge's written initial decision is affirmed in its entirety. Alexair is assessed a $6,000 civil penalty.[26]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day, of December, 1999.

[26] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110, this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)(1999.)