UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **MAUNA KEA HELICOPTERS**	FAA Order No. 97-16 Served: May 23, 1997 Docket Nos. CP94WP0005, CP94WP0021, CP94WP0022

DECISION AND ORDER

Respondent Mauna Kea Helicopters (Mauna Kea) has filed a consolidated appeal from three separate initial decisions[1] of Administrative Law Judge Robert L. Barton, Jr., each finding violations of 14 C.F.R. §§ 91.7(a), 91.405(a), and 135.413(a).[2] This decision denies Mauna Kea's appeal and affirms the law judge's three initial decisions.

Each case involves an emergency or crash landing. The facts of the three cases are as follows.

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[1] Copies of the three written initial decisions are attached.

[2] 14 C.F.R. § 91.7(a) provides: "No person may operate a civil aircraft unless it is in an airworthy condition."

14 C.F.R. § 91.405(a) provides: "Each owner or operator of an aircraft-- (a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter . . . ."

14 C.F.R. § 135.413(a) provides: "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."

Docket No. CP94WP0005

In Docket No. CP94WP0005, Mauna Kea operated a Hughes Model 369D helicopter for the Hawaii County Police Department on a marijuana eradication mission. (Tr. 19-24.) After the police officers saw an unusual amount of smoke and oil coming from the helicopter, they told Scott Shupe, pilot of the helicopter and president of Mauna Kea, that they were unwilling to continue using the helicopter for the rest of the mission, and Mr. Shupe provided the police officers with another helicopter. (Tr. 28-29.)

Mauna Kea's records did not show any maintenance performed on the helicopter prior to the next Mauna Kea flight several hours later, which was a sight-seeing flight with several passengers aboard. (Tr. 81-82.) Less than 30 minutes after the start of the sight-seeing flight, the engine lost power and the pilot was forced to make an emergency landing on a road. (Tr. 324-25; 329-30; Respondent's Exhibit C.) Fortunately, the pilot managed to avoid hitting a tour bus, and the passengers aboard the helicopter were apparently uninjured; however, the helicopter was damaged. (Tr. 325; Respondent's Exhibit C-2.) The damage to the helicopter included a broken-off tail section and severe damage to the main rotor blades. (Tr. 67.) The engine teardown report indicated that the probable cause of the accident was oil starvation in the turbine section of the engine. (Tr. 72-73.)

The law judge did not credit Mr. Shupe's testimony that he did not notice any smoke. (Initial Decision at 5-6.) Moreover, the law judge held that even if Mr. Shupe had not personally observed the smoke or oil, he should have relied on the police officers' observations. (*Id.* at 14.) Despite Mauna Kea's claims to the contrary, the law judge specifically found that Mauna Kea failed to perform any

maintenance between the two flights. (*Id.* at 10.) The law judge imposed a $10,000 civil penalty. (Id. at 22.)

Docket No. CP94WP0021

In Docket No. CP94WP0021, a magnetic plug warning light in Mauna Kea's Hughes 369D helicopter illuminated during a passenger-carrying flight, leading the pilot to land at a nearby air base. (Tr. 154, 232.) Two Mauna Kea employees flew to the air base to provide assistance. (Tr. 232-33.) One of the employees removed, inspected, cleaned, and reinstalled the lower magnetic plug, but not the upper plug. (Tr. 155, 233.) The other employee then performed an operational check with a ground run for 5 minutes and flew the helicopter back to Mauna Kea's base without passengers aboard. (Tr. 233.) After landing, the helicopter idled for about 10 minutes before Mauna Kea operated it on another passenger-carrying flight. The engine failed during the passenger-carrying flight and the pilot was forced to make an emergency landing. (Tr. 233-34.) The teardown report's conclusion was that the engine's compressor had failed. (Tr. 158.)

The law judge held that Mauna Kea's employees deliberately failed to follow the maintenance manual's instructions by inspecting and cleaning only one plug and by failing to conduct a 30-minute ground operation check. (Initial Decision at 15, 17.) The law judge imposed a $15,000 civil penalty. (*Id.* at 18.)

Docket No. CP94WP0022

In Docket No. CP94WP0022, Mauna Kea operated a Hughes 369HS helicopter on a passenger-carrying flight. The engine failed and the helicopter crash-landed, damaging the aircraft and causing minor injuries to several passengers. (Tr. 133.) Afterwards, when an FAA inspector inspected the aircraft,

he discovered that the aircraft's anti-icing valve was disconnected. (Tr. 134.) Mauna Kea's Director of Maintenance, Lloyd Boren, told the inspector that the anti-icing valve had been disconnected in accordance with "common practice throughout the islands." (Tr. 137.) The inspector who prepared the engine teardown inspection report testified that the engine had been exposed to excessive temperatures, possibly as a result of the disconnected anti-icing valve. (Tr. 140.) In addition, according to the inspector, the turbine outlet temperature indicator was faulty, reading lower than the engine's actual temperature. (Tr. 143.) Under the parts manual, which is part of the type certification basis of the aircraft, the icing system is necessary for operating the helicopter. (Tr. 146.) Before the emergency landing, Mauna Kea had conducted at least seven inspections on the helicopter, and following each inspection, it certified the aircraft as airworthy. (Complainant's Exhibit E.) After the accident, Mauna Kea terminated Mr. Boren as maintenance director. (Tr. 342.)

The law judge rejected Mauna Kea's argument that the helicopter would not encounter freezing temperatures in Hawaii, and therefore, the anti-icing valve was unnecessary. (Initial Decision at 11.) The law judge noted that Mauna Kea offered no evidence to support this argument. (*Id.* at n.6.) The law judge found that a large penalty was warranted because Mauna Kea not only deliberately failed to connect the anti-icing valve, but it also failed to note that fact in the log books after seven separate inspections. The law judge imposed a $30,000 civil penalty. (*Id.* at 16.)

* * *

The first issue Mauna Kea raises on appeal is whether the Administrator has jurisdiction over its consolidated appeal. Mauna Kea argues that the statute

granting the Administrator jurisdiction violates the due process and equal protection clauses of the United States Constitution, as well as the Administrative Procedure Act (APA). Mauna Kea states that it is challenging:

> the participation of the Administrator and presumably his legal staff as decisionmakers, as they are neither knowledgeable, neutral, or impartial. Their job is to legally defend the administrative decision in most instances, now, however, they are the appellate judges.

(Appeal Brief at 4.) Mauna Kea further asserts that "[n]o other law enforcement agency can act in such an incestuous manner." (*Id.*)

The Administrator has jurisdiction, under 49 U.S.C. § 46301(d), over the instant appeal. Mauna Kea is free, however, to challenge the Administrator's jurisdiction in an appeal from this decision to an appropriate U.S. Court of Appeals. Indeed, the U.S. Courts of Appeals constitute a more appropriate forum for Mauna Kea to challenge the FAA's adjudicatory system as inconsistent with the U.S. Constitution and the APA.[3]

Note, however, that in previous cases, the courts have upheld administrative adjudicatory systems, like the FAA's, in which employees of a single agency serve as both prosecutors and decisionmakers.[4] More directly, the courts have upheld the FAA's specific adjudicatory system,[5] which ensures fairness by providing for:

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[3] In the Matter of Continental Airlines, FAA Order No. 90-12, 1990 FAA LEXIS 166, at *9 (April 25, 1990).

[4] *See, e.g.*, Blinder v. SEC, 837 F.2d 1099, 1104-1106 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 869 (1988), citing Withrow v. Larkin, 421 U.S. 35 (1975).

[5] In the Matter of Ronald C. Terry and Christopher J. Menne, FAA Order No. 91-12 (April 12, 1991), *reconsideration denied*, FAA Order No. 91-31 (August 2, 1991), *review denied, aff'd*, Ronald C. Terry and Christopher J. Menne v. Busey, Administrator, Federal Aviation Administration, *reported as table case at* 976 F.2d 1445, 1992 U.S. App. LEXIS 36047, 298 U.S. App. D.C. 141, *full-text slip opinion reported at* 1992 U.S. App. LEXIS 27483 (D.C. Cir. 1992); In the Matter of Budde Playter, FAA Order No. 90-15 (March 19, 1990), *aff'd*, Playter v. FAA, *reported as table case at* 933 F.2d 1009, 1991 U.S. App. LEXIS 16821, *full-text slip opinion reported at* 1991 U.S. App. LEXIS 10759 (6th Cir. 1991).

- separation of agency employees who serve as prosecutors from those who advise the decisionmaker;[6]
- independent administrative law judges to conduct a hearing and issue an initial decision;[7] and
- judicial review of the agency's final decision.[8]

Thus, Mauna Kea's challenge to the FAA's adjudicatory system is rejected, though Mauna Kea is free to renew this argument in an appeal from the instant decision.

Mauna Kea also argues that it was denied due process because it has never received a copy of the law judge's initial decision in Docket No. CP94WP0022. Mauna Kea claims that it did not receive the initial decision in Docket No. CP94WP0022 from the law judge, though it did receive the initial decisions in Docket Nos. CP94WP0005 and CP94WP0021.[9] Mauna Kea concedes, however, that it was aware that the law judge assessed it a $30,000 civil penalty in CP94WP0022 because of footnotes included by the law judge in the other two initial decisions.

In Playter v. FAA, the U.S. Court of Appeals for the 6th Circuit cited 2 K. Davis, Administrative Law Treatise, § 13.02, p. 175 (1958) for the proposition that "the case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . . ." 1991 U.S. App. LEXIS 10759, at *6. The court noted that there is a presumption that those making adjudicative decisions within the agencies are unbiased. *Id.* In Terry and Menne v. FAA, the U.S. Court of Appeals for the D.C. Circuit stated that the FAA's separation of functions regulations measure up to the APA's requirements. 1992 U.S. App. LEXIS 27483, at *6.

[6] 14 C.F.R. § 13.203.

[7] 14 C.F.R. § 13.205.

[8] 14 C.F.R. § 13.235.

[9] The service list for the initial decision in Docket No. CP94WP0022 includes both Mauna Kea's counsel, Christopher D. Ferrara, and the President of Mauna Kea, Scott Shupe. Although Mauna Kea's counsel moved his office shortly after the hearing, the record contains no indication that counsel advised the law judge of his change of address.

Mauna Kea has not shown that it made reasonable efforts to obtain a copy of the initial decision. In its appeal brief, Mauna Kea does not explain what efforts it made. Complainant states that it verified with the law judge's office that there is no record of a request from Mauna Kea for re-service of the decision; Complainant also states that Mauna Kea's counsel admitted to Complainant's counsel that he had never requested a copy of the decision from the regional counsel's office. (Reply Brief at 16, n.9.) Notably absent from Mauna Kea's brief is any legal authority supporting Mauna Kea's argument that its failure to receive the initial decision under the circumstances of this case constitutes a violation of its right to due process.[10] For these reasons, Mauna Kea's argument that it was denied due process is rejected.

Mauna Kea's next argument is that the law judge erred in rejecting the testimony of David Passmore. (Appeal Brief at 5.)[11] Seeking a reduction in the civil penalties in the three cases, Mauna Kea offered Mr. Passmore's testimony to support its claim of financial hardship. In each of the three initial decisions, the law judge characterized Mr. Passmore's testimony as "weak and vacillating" and "vague and uncorroborated by documentary evidence." (*See, e.g.*, Initial Decision in

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[10] Note that the law judge's decision is now available on LEXIS, one of the computer-assisted legal research systems widely used by lawyers. In the Matter of Mauna Kea, FAA Docket No. CP94WP0022, 1995 FAA LEXIS 396 (May 4, 1995). In addition, a copy of the law judge's decision is attached to the instant decision, which will be served on Mauna Kea.

[11] The law judge warned Mauna Kea at the pre-hearing conference that it must provide Complainant documentary evidence supporting its claim of financial hardship *prior* to the hearing, so that Complainant would have an opportunity to prepare for cross-examination. (Pre-Hearing Conference at 19.) Despite this warning, Mauna Kea failed to produce any financial documentation before the hearing. As a result, the law judge refused to admit Mauna Kea's documentation, which consisted in any event only of a one-page balance sheet and a one-page statement of operations. The law judge did, however, permit Mr. Passmore to testify regarding the company's financial condition. (Tr. 423.)

CP94WP0022 at 15.) On appeal, Mauna Kea argues that the law judge erred in rejecting Mr. Passmore's testimony because it was uncontraverted and under oath. (Appeal Brief at 5.) Mauna Kea asserts that documentation of financial hardship is not necessary where there is live testimony. (*Id.*)

It is possible that in certain, exceptional cases, the testimony of a credible, independent witness would be sufficient to prove financial hardship, even without supporting documentary evidence. Here, however, Mr. Passmore was too weak a witness to support such a finding. Mr. Passmore was a personal friend of Mauna Kea's President, Scott Shupe. Although Mr. Passmore is an accountant, he testified that he did not provide services to Mauna Kea as a certified public accountant under generally accepted accounting principles or generally accepted auditing standards. (Tr. 404-405.) He further stated that he was not testifying as a certified public accountant. (*Id.*) He relied only upon bank statements, loan papers, and the oral representations of Mr. Shupe, Mr. Shupe's wife, his attorney, and other employees of Mauna Kea. (Tr. 403-404, 408-409.) As Complainant points out, the record does not clearly show that Mr. Passmore verified each of the representations made, using source documents, nor that he reviewed all relevant documents. (Reply Brief at 20.)

Moreover, the record supports the law judge's assessment of Mr. Passmore's testimony as weak, vacillating, vague, and uncorroborated. For example, when Mauna Kea's counsel asked Mr. Passmore his opinion of the financial health of Mauna Kea, he responded:

> I don't know the -- that's a difficult question to answer, simply because I don't know the fair market value of all of the assets that he holds. I'm not an expert in the valuation of helicopters.

(Tr. 426.) Mauna Kea negates the importance of documentation, stating:

> [H]ow do you prove a company is in dire straits financially by documentation? It is, of course, easy to prove it has money, difficult to prove it does not.

(Appeal Brief at 5.) This argument is rejected. It is no easier to prove that a company has assets than that it does not. It is, however, easier to claim financial hardship than to prove it. Anyone can make unsupported claims. The law judge did not err in finding that Mauna Kea failed to sustain its burden of proving financial hardship.

Mauna Kea's final argument is that the law judge imposed excessive civil penalties in each of the three cases. The law judge imposed $10,000 in Docket No. CP94WP0005, $15,000 in Docket No. CP94WP0021, and $30,000 in Docket No. CP94WP0022. Although Mauna Kea claims that the civil penalties are excessive because of the time that has passed since the infractions, it cites no legal authority indicating that a civil penalty may be reduced based on the length of time that has passed since the violation, regardless of the gravity of the violation. In the instant cases, the law judge specifically found that the violations were serious and that accidents had occurred.[12]

Mauna Kea also argues that the civil penalties assessed by the law judge are excessive given the remedial actions it has taken. It states, "Mr. Shupe testified that all maintenance personnel were counseled and/or terminated." (Appeal Brief at 6.) First, regarding Mauna Kea's "counseling" of its maintenance personnel, the Administrator has stated that "[s]imply reviewing procedures and preexisting

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[12] CP94WP0005, Initial Decision at 22; CP94WP0021, Initial Decision at 20; CP94WP0022, Initial Decision at 16.

responsibilities with employees after an incident does not justify a reduction of a reasonable civil penalty."[13]

Neither does Mauna Kea's decision to terminate some of its employees provide a basis for reducing the civil penalty. For purposes of reducing the civil penalty, the Administrator has required corrective action to be positive in nature -- *e.g.*, sending employees to special training, or instituting programs to ensure compliance with the safety regulations.[14] A decision to terminate an employee does not represent the type of positive corrective action that warrants reduction of a reasonable civil penalty.

Although Scott Shupe testified that Mauna Kea sent Eric Pacheco, Mauna Kea's Director of Maintenance, to an engine school (Tr. 357), this testimony does not provide sufficient, specific evidence of swift or comprehensive corrective action to merit a reduction in the civil penalties. Mauna Kea provided no documentary evidence to corroborate this claim, and the record does not indicate that the action was either swift or comprehensive. The Administrator has indicated that a civil penalty may only be reduced on the basis of corrective action where there is

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[13] In the Matter of [Air Carrier], FAA Order No. 96-19 at 12, 1996 FAA LEXIS 1223, at *20 (June 4, 1996), citing In the Matter of Delta Air Lines, Inc., FAA Order No. 92-5 at 7, FAA LEXIS 289, at *5 (January 15, 1992); In the Matter of [Airport Operator], FAA Order No. 91-41 at 7, FAA LEXIS 325, at *7-9 (October 31, 1991).

[14] *See* In the Matter of Toyota Motor Sales, USA, Inc., FAA Order No. 94-28, 1994 FAA LEXIS 275, at *17 (September 30, 1994), *clarified*, FAA Order No. 95-12, 1995 FAA LEXIS 378 (May 10, 1995), *petition for review voluntarily dismissed*, Toyota Motor Sales, USA, Inc. v. Federal Aviation Administration, No. 95-1341 (D.C. Cir. June 5, 1996), and In the Matter of TCI Corporation, FAA Order No. 92-77 at 22, 1991 FAA LEXIS 281, at *27 (December 22, 1992) (both holding that a decision not to handle hazardous materials in the future does not represent the type of positive corrective action that warrants consideration in determining the penalty.)

"sufficient, specific evidence of swift or comprehensive corrective action."[15] Thus, it is not appropriate to reduce the civil penalties in these three cases based on remedial action.

For the reasons stated above, the law judge's decisions are affirmed and civil penalties of $10,000 in CP94WP0005, $15,000 in CP94WP0021, and $30,000 in CP94WP0022, are assessed.[16]

BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 22 day of MAY, 1997.

[15] In the Matter of Delta Air Lines, Inc., FAA Order No. 92-5 at 7, 1992 FAA LEXIS 289, at *5 (January 15, 1992).

[16] 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) (1996).