UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: 12/21/92

FAA Order No. 92-72

In the Matter of:	
SALVATORE GIUFFRIDA	Docket No. CP91EA0289

PETITION FOR RECONSIDERATION GRANTED

Complainant has petitioned for reconsideration of FAA Order No. 92-37 (June 15, 1992). In that order, the Administrator granted Respondent's appeal and reduced the civil penalty from $500 to $200 based upon Respondent's inability to pay.[1/] Complainant argues in its petition for reconsideration that the civil penalty was reduced improperly based only upon an unsworn and unsubstantiated written statement concerning Respondent's total income and expenses. Complainant also argues that the Complainant was denied the opportunity to test Respondent's unsworn and unsubstantiated assertions about his financial condition because Respondent

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1/ Complainant sought a $1000 civil penalty against Respondent for his violation of Section 121.317(h) of the Federal Aviation Regulations, 14 C.F.R. § 121.317(h), which prohibits smoking in any aircraft lavatory. The law judge had reduced the civil penalty to $500, and Complainant did not appeal from the law judge's decision.

did not attend the hearing. Respondent has not responded to the petition for reconsideration.

The goal of the FAA civil penalty program is not merely to punish persons who violate the regulations, but to deter those persons and others from committing similar violations in the future. These ends can be achieved without turning a blind eye toward the financial circumstances of individuals. Thus, it is necessary and appropriate for law judges to consider financial hardship, if any, when determining the amount of the civil penalty.

The burden of proving the affirmative defense of financial hardship falls on the respondent who claims to be unable to pay a penalty. 14 C.F.R. § 13.224(c);[2/] In the Matter of Lewis, FAA Order No. 91-3 at 10 (February 4, 1991). This assignment of the burden of proof is reasonable and necessary because the respondent has sole control of his financial information. Id.

The problem in this case is whether Respondent proved his affirmative defense of inability to pay by a preponderance of the reliable, probative and substantial evidence, as required

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2/ Section 13.224(c) of the Rules of Practice provides:

> A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

14 C.F.R. § 13.224(c).

by 14 C.F.R. § 13.223.[3/] Indeed, if the information in Respondent's letter is true, Respondent is not only unable to pay the $1000 civil penalty sought in the complaint, but also unable to pay the $500 civil penalty assessed by the law judge. There is no question that hearsay evidence, such as the letter in question, is admissible under the Rules of Practice in Civil Penalty Actions. 14 C.F.R. § 13.222(c).[4/] The only question is whether that hearsay evidence is sufficient to support the finding that Respondent is unable to pay the $500 civil penalty. Because, upon reconsideration, it is held that the hearsay evidence in question here is insufficient to support a factual finding of inability to pay, the Administrator reluctantly reverses FAA Order No. 92-37.

3/ Section 13.223 of the Rules of Practice provides:

> The administrative law judge shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record. In order to prevail, the party with the burden of proof shall prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence.

14 C.F.R. § 13.223.

4/ Section 13.222(c) provides:

> Hearsay evidence. Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

14 C.F.R. § 13.222(c).

The Supreme Court in Richardson v. Perales held that hearsay may constitute substantial evidence if it has sufficient indicia of reliability and probativeness. Richardson v. Perales, 402 U.S. 389 (1971). The Court found that there were sufficient factors assuring the underlying reliability and probative value of the written medical reports in question in that case. Those factors included: 1) the reports submitted by the agency to support its case were written by unbiased physicians; 2) the claimant did not take advantage of the opportunity afforded him under the applicable rules to subpoena the physicians or to request a supplemental hearing; 3) the reports were on file and available for inspection by the claimant prior to the hearing; 4) it would be unduly burdensome to require that the physicians who had prepared the written reports actually testify at all social security hearings; 5) medical reports have been admitted in evidence at trial as exceptions to the hearsay rule. Id. at 402-407.

On reconsideration, it is determined that the hearsay evidence relied upon in FAA Order No. 92-37 does not constitute substantial evidence to support the finding of inability to pay. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. at 402, quoting Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938). The letter written by Respondent, with the assistance of his wife, is far different than the written reports of

medical experts admitted in Richardson. This decision does not turn simply on the self-serving nature of the hearsay evidence at issue here,[5/] but also on the likelihood that far more reliable records could have been produced regarding Respondent's economic circumstances. Respondent has not explained why he did not submit pay stubs, a lease, tax returns, or such other records as a reasonable person would accept as reliable and probative on the issues of income and expenses. Also, although Complainant's counsel apparently had a copy of the letter prior to the hearing, the letter was dated November 20, 1991, and the hearing was held 13 days later. That was hardly enough time for Complainant to obtain copies of Respondent's financial records through discovery. Since Respondent did not file an answer, Respondent had not previously made his financial circumstances an issue.

This decision should not be construed as standing for the proposition that the Administrator will apply a substantial evidence standard when reviewing the factual findings of an administrative law judge on appeal.[6/] Section 13.233(b)(1)

5/ In determining whether hearsay constituted substantial evidence, courts will consider whether the out-of-court declarant was a disinterested or otherwise reliable person. E.g., Keller v. Sullivan, 928 F.2d 227, 230 (7th Cir. 1991); Johnson v. U.S., 628 F.2d 187, 191 (D.C. Cir. 1980); School Board of Broward County, Florida, v. HEW, 525 F.2d 900, 906-907 (5th Cir. 1976).

6/ As stated in one case regarding what standard of review an agency should use when considering an appeal of a decision

(Footnote 6 continues on next page.)

of the Rules of Practice specifies that a party may appeal to the Administrator to determine whether each finding of fact by the law judge is supported by a "preponderance of reliable, probative, and substantial evidence." 14 C.F.R. § 13.233(b)(1). While the ultimate question is whether the factual findings are supported by a preponderance of the evidence, the preliminary question is whether the evidence that had been introduced is reliable, probative and substantial. In this case, the only evidence that was introduced was hearsay evidence. Although hearsay evidence may, under certain circumstances, support a factual finding, the hearsay evidence in question in this matter cannot, as explained above, be considered to be reliable, probative and substantial. Thus, Respondent failed to sustain his burden of proof.

(Footnote 6 continued from previous page.)

by an administrative law judge:

> To be sure, on judicial review of agency action, administrative findings of fact must be sustained when supported by substantial evidence on the record considered as a whole. But that rule implicates only the reviewing court; the yardstick by which the agency itself is to initially ascertain the facts is something else again.... [I]n American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating "something less than the weight of the evidence."

Charlton v. FTC, 543 F.2d 903, 907 (D.C. Cir. 1976).

Consequently, FAA Order No. 92-37 is reversed. Respondent is assessed a $500 civil penalty, payable in 10 monthly installments of $50.[7/]

THOMAS C. RICHARDS, ADMINISTRATOR
Federal Aviation Administration

Issued this 17th day of December, 1992.

7/ 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. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).