

Fall 1991

Compliance and Enforcement: Aviation Safety in the Public Interest Part I: Statutory Authority and Enforcement Procedures

Laurence E. Gesell

Robert Anderson

Follow this and additional works at: <https://commons.erau.edu/jaaer>

Scholarly Commons Citation

Gesell, L. E., & Anderson, R. (1991). Compliance and Enforcement: Aviation Safety in the Public Interest Part I: Statutory Authority and Enforcement Procedures. *Journal of Aviation/Aerospace Education & Research*, 2(1). <https://doi.org/10.15394/jaaer.1991.1054>

This Article is brought to you for free and open access by the Journals at Scholarly Commons. It has been accepted for inclusion in Journal of Aviation/Aerospace Education & Research by an authorized administrator of Scholarly Commons. For more information, please contact commons@erau.edu, wolfe309@erau.edu.

**COMPLIANCE AND ENFORCEMENT:
AVIATION SAFETY IN THE PUBLIC INTEREST**

Part I: Statutory Authority and Enforcement Procedures

Laurence E. Gesell and Robert Anderson

ABSTRACT

This is the first article of a three part series looking at sanctions imposed upon airmen for non-compliance with Federal Aviation Regulations. Part I addresses statutory authority and enforcement procedures. Part II will look at the current enforcement program with an overview of administrative and legal enforcement actions. In Part III, an alternative, restitutive enforcement program will be proposed which might provide for a more "street level" and less centralized form of justice.

INTRODUCTION

The Federal Aviation Administration (FAA) is a governmental agency subordinate to, and operating within, the U.S. Department of Transportation. The FAA's primary mission is "to promote safety and to provide for the safe use of airspace" (*Policy*, p.7). In fulfilling its mandates, the FAA has been delegated a wide range of authority and responsibility for the regulation of aviation. Embodied within its jurisdiction is a fundamental and predominant dictum of air safety and the public interest. In responding to these issues (air safety and the public interest), the FAA has created an oversight mechanism known as the Compliance and Enforcement Program. The operational effectiveness of this program, contrasted with the stated objective of the FAA's primary mission, is the underlying nucleus of this series. Presented in this opening article is an overview of the FAA's statutory enforcement authority.

STATUTORY AUTHORITY

Section 6(c)(1) of the Department of Transportation Act of

1966, provides that certain "functions, powers, and duties" of the Secretary, pertaining to aviation safety, be assumed by the FAA Administrator (hereinafter Administrator). The Administrator is given broad discretionary powers of authority and responsibility. The Administrator acts on behalf of the Secretary of Transportation, and his authority and responsibilities are outlined in sections 306, 307, 308, 309, 312, 313, 314, 1101, 1105, and 1111, and Titles VI, VII, IX, and XII of the Federal Aviation Act of 1958, (hereinafter Act), as amended. Specifically, and pertinent to the scope of this article, the Administrator's delegated responsibilities under the Act are as follows.

Under the provisions of Section 306, the Administrator is to give consideration to the requirements of national defense while exercising authority under the Act. Section 307 authorizes the development of plans and policy with respect to navigable airspace and the promulgation of rules and regulations with respect to the use of the airspace, and provides for limitations necessary in order to

ensure the safety of aircraft and efficient use of airspace. The Administrator may modify or revoke any rule or regulation developed pursuant to Section 307 when required "in the public interest." Additionally, the Administrator is responsible for providing personnel and facilities for the regulation and protection of air traffic; for prescribing rules and regulations regarding the flight of aircraft and the protection of persons and property on the ground; and for prescribing rules and regulations for the prevention of collision between two aircraft or an aircraft and another object. Furthermore, the Act requires that the provisions of the Administrative Procedures Act (5 U.S.C. Secs. 5 & 7) be implemented during the exercise of rule-making authority under section 307.

Section 313 authorizes the Administrator to conduct investigations, issue orders, and make rules and regulations, as deemed necessary to carry out the provisions of the Act. The Administrator may also amend as necessary, any order, rule, or regulation promulgated (within the Administrator's discretion)

Aviation Safety

under the Act. During the conduct of investigations, the Administrator is authorized to take evidence, issue subpoenas, take depositions, and compel testimony. All proceedings and investigations in which formal hearings have been held (and the results thereof) are reported in writing and published for public use.

Title VI, Section 601 of the Act directs the Administrator to promote the safety of flight of civil aircraft in air commerce by prescribing rules, regulations, minimum standards, methods, and procedures.

Under Title VI, Section 602, the Administrator may issue airman certificates upon a finding of proper qualification of applicants. Additionally, the Administrator is bound by findings of the National Transportation Safety Board (hereinafter Board), subsequent to an appeal being filed by an applicant in response to the FAA's denial of application for the issuance or renewal of a certificate.

Title VI, Section 609 authorizes the Administrator to reexamine any civil airman, and based on that examination, amend, suspend, or revoke any certificate held. Provided, however, that prior to any such action the Administrator shall advise the certificate holder of any charges relied upon for the proposed action. Moreover, except in an emergency, the certificate holder will be given the opportunity, by the Administrator, to explain why his or her certificate should not be suspended, revoked, or amended. The certificate holder may appeal any order issued by the Administrator to the Board, in which

case the subject order is stayed. The Board, during the conduct of an appeal hearing, is not bound by finding of fact made by the Administrator.

Title IX, Section 905 allows the Administrator to assess a civil penalty for a violation of the Act or a regulation, rule, or order issued thereunder. This action is to be taken subject to a finding of violation by the Administrator.

The 1958 Act is the primary vehicle under which the Administrator functions in carrying out his responsibilities as delegated to him by the Secretary of Transportation. Congress established the fundamental policies for aviation regulation in the United States through passage of the Federal Aviation Act, and it is within the limits of this public law that the Administrator operates with respect to aviation safety and the public interest.

As can be seen by the preceding review of the pertinent sections of the Act, the Administrator is bound by considerations of the public interest. More importantly, the Administrator structures his actions with a focus on safety in air commerce and air transportation. The issues of public interest and air safety are the predominant factors embodied within the government's oversight responsibilities.

The Administrative Procedures Act (APA), codified within Title 5 of the United States Code, is the procedural apparatus used for processing alleged violations of the Act. The Administrator, like directors of other federal agencies including the National Transportation Safety Board, is subject to the APA. Owing to the tremendous case load burdens

placed upon the court system, the APA provides another means of adjudication, outside of the normal judicial process. Actions which arise from activity under the purview of the various government departments and agencies such as the FAA are the primary focus of this quasi-legal system. In determining if the Act or regulations promulgated thereunder, have been violated, the respondent is afforded due process protections guaranteed under the U.S. Constitution. However, the plaintiff must generally expend all of the administrative remedies before appealing to the courts. But in the end, if warranted, the customary courts become the ultimate arbitrators in disputes which cannot be satisfied at the lower (administrative) level.

In order to carry out the government's oversight functions, rules, regulations, and orders have been developed under the authority of the Aviation Act. These functional mandates have the effect of law in that they were formulated under laws enacted through the legislative authority of the U.S. Congress. The various responsibilities, directly assumed or subsequently delegated, which are defined in the Act, are carried out through publications utilized by subordinates to effectuate the laws passed by Congress. Many of these rules and regulations are codified in the Code of Federal Regulations (CFR). Authoritative internal (FAA) directives known as Orders, are also important regulatory tools, and are issued by persons holding the appropriate level of authority.

Regulations originating within

the Federal Aviation Administration are contained in 14 CFR Parts 1-199, known as the "Federal Aviation Regulations" (FARs). Specifically, 14 CFR Part 13 provides for the delegation to various officials within the FAA the authority to investigate violations of regulations under the jurisdiction of the Administrator and to take appropriate enforcement action.

FAA Order 2150.3A is the Compliance and Enforcement Program. This document contains the policies and procedures to be utilized by certain employees of the FAA while conducting investigations of alleged non-compliance of the Federal Aviation Regulations or provisions of the Act.

Another internal document, FAA order 8710.4, Certification of Pilots and Flight Instructors, contains, among other things, guidance information for FAA Inspectors regarding the acceptance of custody of an airman certificate.

In 49 CFR Chapter VIII, there are regulations applicable to the National Transportation Safety Board. Parts 800 to 899 define the scope of the Board's procedural responsibilities mandated under the Act.

The statutory authority which allows and compels aviation oversight is quite complex. This complexity is generated not only through the enactment of laws, such as the Department of Transportation Act of 1966 or the Federal Aviation Act of 1958, but by the multitude of rules, regulations and procedures created to carry out the stipulations in the subject laws. It is within these regulatory devices that the greatest propensity for

subjectivity lies. However, with the latitude for subjectivity comes the capability for change. Amendments to rules, regulations, and orders are generally within the purview of the affected agency.

ENFORCEMENT

As noted in the preceding pages, the statutory mandate and authority of government regulations with respect to aviation is in place. Most important to the discussion in this article are the elements of these regulations as they apply to certificate holding airmen. The Act defines an "airman" as:

any individual who engages, as the person in command and or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Administrator may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator. (Act, Sec. 101 [7])

The actions of airmen greatly influence the legislative philosophy embodied within the Act. Compliance with the provisions of the Act by airmen promotes safety in aviation and enhances the public interest; non-compliance is the antithesis

of the ideals envisioned by the framers of the law. The principles of aviation safety and public interest are the foundations of the compliance and enforcement program created pursuant to the Administrator's delegated responsibilities. The FAA's enforcement objectives and policy, in FAA Order 2150.3A, Chapter 2, states, in part, that "the agency has a statutory obligation to assure compliance with all regulations. This obligation is especially critical as it applies to holders of FAA certificates."

As a result of the mandates imposed on the FAA by the Act, a comprehensive program regarding the compliance with, and enforcement of, the laws and regulations attendant on aviation has evolved. The statutory authority, as well as the various rules and regulations promulgated thereunder, is the foundation for the procedural framework developed to meet the FAA's enforcement objectives.

Any person may file a complaint with the Secretary of Transportation (and by delegation, the Administrator) concerning contravention of any provision of the Act. In addition, the Secretary of Transportation or the Administrator is empowered at any time to institute an investigation on his or her own initiative relating to the enforcement of any of the provisions of the Act. (Act, Secs. 1002 [a] and [b]).

For the purpose of investigating alleged violations of the Act, the Administrator's authority has been delegated to various offices and individuals. Specifically, the FAA Chief Counsel,

Aviation Safety

Deputy Chief Counsel, Assistant Chief Counsel, and each Regional Counsel have the authority to respond on behalf of the Administrator during enforcement investigations (Title 14 CFR Sec. 13.3).

The FAA Counsels are authorized to exercise the Administrator's authority as specified under Section 905 of the Act. This section of the Act allows for the "assessment" of civil penalties (i. e., fines) by the FAA. Prior to December 30, 1987, however, the Administrator was authorized, under section 901 (a)(2) of the Act, only to "compromise" a civil penalty. The difference between these two actions (assessment and compromise) lies within the prosecutorial authority of the Administrator to make a finding of violation (i.e., conclusion of law).

Before December 30, 1987, when the Administrator could only "compromise" a civil penalty, reaching a compromise with the alleged violator was, in effect, settling the case out of court. Under this compromise program, the alleged violator was not under any obligation to pay the penalties proposed by the FAA. If the FAA was unable to effect a compromise, the case had to be referred to the U.S. Attorney for prosecution in a United States District Court (Amendment 13-8 2). This action ostensibly posed a burden on a judicial system already constrained.

In creating the assessment program "Congress observed that the inability or failure of the United States Attorney to prosecute civil penalty action resulted in an ineffective deterrent to individuals who

violate the Federal Aviation Regulations" (Amendment 13- 18 2). By vesting statutory authority in the FAA to make a finding of violation and assess a civil penalty, under Section 905 of the Act, the case remains in the quasi-judicial system of an administrative agency.

There are, however, appeal and hearing procedures similar to those for violations and findings under Section 609 of the Act (relating to airmen certificates).

In conducting investigations of alleged violations of the Act or any rules and regulations promulgated thereunder by certificate holding airmen, the representatives of the FAA Counsels are the Inspectors in the field offices. FAA Order 2150.3A, Chapter 3, orders field offices to "investigate, coordinate, and report violations of all regulations which are discovered within their geographical area and for which they have enforcement responsibility." Furthermore, this order contains the procedures and methods by which inspectors will conduct the investigations and assemble the final field report.

One very important aspect of the FAA's enforcement program is outlined under the authority of 14 CFR Section 13.11. This section of 14 CFR 13 deals with "administrative disposition of certain violations". Specifically, this regulation allows the FAA field office responsible for processing the case to determine that a violation or an alleged violation does not require legal enforcement action. If this determination is made, the FAA field office (supervising Inspector) may take administrative

action.

Administrative action does not constitute a formal adjudication of the matter, but may be taken by issuing a warning notice or letter of correction (Title 14 CFR 13.11 [b]). Neither the warning notice nor the letter of correction indicates that a finding of violation was made by the FAA. Rather, the intent of this type of action is to identify a situation in which there may have been a violation or in which corrective action would rectify a minor infraction, and to issue notice that these circumstances have been corrected or should not occur again.

The decision to take administrative action as opposed to legal enforcement action (certificate suspension, revocation, civil penalty, etc.) is based on the applicability of four specific conditions pertaining to the alleged violation: (a) no significant unsafe condition existed; (b) lack of competency or qualification was not involved; (c) the violation was not deliberate; and (d) the alleged violator has a constructive attitude toward complying with the regulations and has not been involved in previous similar violations (Compliance and Enforcement 17).

Legal enforcement and administrative actions are vehicles utilized by the FAA to carry out its enforcement responsibilities as mandated under authority of the Aviation Act. In fulfilling these enforcement responsibilities, delegation of authority is necessary and is carried out as specified in the Act as well as within the various rules, regulations, and orders created by the Act. The individ-

uals involved in the enforcement process, from the Administrator to the FAA Counsel to the FAA field office Inspector, are charged with the responsibility to formulate their reply to alleged violations with consideration of air safety and the public interest.

PROCEDURE

In order to properly understand the FAA enforcement program, a clear understanding of the procedures involved is important.

When an alleged violation by a certificate holding airman is investigated and processed, the entire procedure is governed by laws, rules, and regulations. The laws, such as the Department of Transportation Act, the Federal Aviation Act, the Administrative Procedures Act, and the various rules and regulations instituted thereunder, provide a consistent line of inquisition which is supposed to promote fairness to both sides of the dispute. The alleged violator is afforded certain Constitutional protections during the process and can seek to have his or her case heard by the highest courts.

An investigation of an alleged violation by a certificated airman can come from a variety of sources. Air traffic control facilities, accident investigations, and public complaints are normal sources from which violation investigations originate. When information is made available to an FAA field office regarding an alleged violation, a letter announcing the initiation of an investigation is sent to the individual believed responsible. This letter advises the individual that certain facts and circumstances made available to the FAA indicate that a violation may

have occurred. In the letter, the involved individual is given the opportunity to respond to the allegations and advise the FAA field office of his/her position with regard to the matter (Compliance and Enforcement 42). Eventually, after the field office has completed its investigation, a report of the findings is forwarded to the appropriate Regional Counsel.

14 CFR Section 13.19 states that FAA Counsels have the authority to act on behalf of the Administrator during investigations of alleged violations. This regulation, in addition to section 609 of the Act (Title 49 U.S.C. 1429), also stipulates that as a result of any investigation, when it is determined that safety in air commerce or air transportation and the public interest require, an order amending, modifying, suspending, or revoking, any airman certificate may be issued. If, after review of the investigatory data, the FAA believes a violation of the Act or rule or regulation issued thereunder has occurred, counsel will issue the appropriate order. If action against an airman's certificate is proposed (as opposed to other forms of enforcement), the FAA Counsel issues a "Notice of Proposed Certificate Action."

This notice states the charges or other reasons upon which the Administrator has based the proposed action and contains four options which the alleged violator may choose from in answering the charges: (a) Admit the charges and surrender his or her certificate; (b) answer the charges in writing; (c) request that an order be issued in accordance with the notice of proposed certificate action so

that the certificate holder may appeal to the National Transportation Safety Board; or (d) request an opportunity to be heard in an informal conference with the FAA counsel. (Title 14 CFR 13.19)

If the airman elects the third option and appeals the case to the Board, the Administrator's order amending, modifying, suspending, or revoking the affected certificate is stayed (Title 49 U.S.C. 1429) unless the FAA finds that an "emergency" requiring immediate action exists in respect to safety in air commerce. In this case the order of the Administrator takes effect immediately, and any appeal to the Board by the affected airmen does not stay the action of the mandate (Act Sec. 1005 [a]).

In appealing the Administrator's finding to the Board, the certificate holding airman evokes a process governed by the regulations of Title 49 CFR Chapter VIII, pertaining to the National Transportation Safety Board. Part 800 of Title 49 CFR defines the organization and functions of the Board. Pertinent to this article are the Board's functions as outlined in 49 CFR 800.3 (b) which stipulates that the Board "reviews in quasi-judicial proceedings, . . . orders by the Administrator modifying, amending, suspending, or revoking certificates." It states further that the proceedings are conducted under the provisions of the Administrative Procedures Act (5 U.S.C. 551 et al.).

The Board's appeal hearings are conducted by a duly appointed Administrative Law Judge. This judge, after hearing the case in which the Administrator's previous order is now a

Aviation Safety

complaint against the alleged violator, renders an initial decision. In the conduct of the hearing, the Board is not bound by the findings of fact by the Administrator (Title 49 U.S.C. 1429) and the burden of proof is upon the FAA. It is interesting to note that when answering the complaint of the Administrator (this is the appeal process to the Board), the certificate holding airman is obligated to deny the allegation or it may be construed as an admission of guilt (Title 49 CFR 821.31). Simply desiring a day in court, without being prepared to show where the order of the Administrator is incorrect, could be tantamount to an admission of wrong-doing.

After the judge makes an initial decision, if desired, the certificate holding airman (respondent) can appeal this decision to the full National

Transportation Safety Board. On appeal, the full Board will consider only procedural issues: Are the findings of fact (in the initial decision) each supported by a preponderance of reliable, probative, and substantial evidence? Are conclusions made in accordance with precedent and policy? Are the questions on appeal substantial? And lastly, have any prejudicial errors occurred? (Title 49 CFR 821.49)

The full Board has the authority to change the initial decision of the judge. If after receiving the decision and finding of the full Board, the respondent still desires to appeal, the provisions of Title 49 U.S.C. 1486 apply. This law, in part, stipulates that "any order, affirmative or negative, issued by the Board . . . shall be subject to review by the Courts of Appeals of the United

States. . . ." There is also a review process of this court's judgment by the U.S. Supreme Court upon certification or certiorari as provided in section 1254 of Title 28, U.S.C.

SUMMARY

The focus of this first article has been upon the authority vested in the Federal government, specifically in the FAA, to promulgate and enforce rules and regulations necessary to ensure safety in the national airspace system. Also addressed was an overview of the enforcement process.

Part II of this continuing series will address the retributive (versus restitutive) effects of certificate suspension as an appropriate way to deal with airmen found to be in non-compliance with the Federal rules.

Laurence E. Gesell received his Ph.D. in Justice Studies from Arizona State University in 1990. He has been in the aviation industry for more than 25 years as pilot, airport manager, and consultant. He is currently an Associate Professor of Aeronautical Technology at Arizona State University.

Robert Anderson has been in the aviation industry for 20 years, and holds an Airline Transport Pilot certificate. He received his Masters of Technology in Aviation Management from Arizona State University in 1989.

REFERENCES

- Black, D. (1976). *The Behavior of Law*, New York: Academic Press.
- Black, D. (1987a). The Elementary Forms of Conflict Management in School of Justice Studies, Arizona State University (1990), *New Directions In The Study Of Justice, Law And Social Control*, New York: Plenum, Chapter 3.
- Black, D. (1987b). Compensation And The Social Structure Of Misfortune. *Law and Society Review*, 21 (4).
- Durkheim, E. (1933), *The Division Of Labor In Society*, Glencoe, Illinois: The Free Press.
- Federal Aviation Act* (1958), as amended, Public Law 85-726, August 23.
- Federal Aviation Administration (1985), *Policy Statement of the Federal Aviation Administration*, Order 1000.1A, Washington, D.C.: U.S. Government Printing Office.

- Federal Aviation Administration (1988), *Program Management Report*, Los Angeles: Western-Pacific Region, FY Third Quarter.
- Gesell, L. (1990) *Airline Re-Regulation*, Chandler, Arizona: Coast Aire Publication.
- Giddens, A (1972), *Emile Durkheim: Selected Writings: Cambridge: The University Press*.
- "Rules and Practice for FAA Civil Penalty Actions" (1988) Amendment 13-18, *Federal Register*, Vol 53.
- Stone, A. (1982), *Regulation and its Alternatives*, Washington, D.C.: Congressional Quarterly, Inc.
- Title 5, United States Code (1988), *Government Organization and Employees*, Washington, D.C.: U.S. Government Printing Office.
- Title 14, Code of Federal Regulations, Chapter I (1988), *Federal Aviation Regulations*, Washington D.C. U.S. Government Printing Office.
- Title 49, United States Code (1988), *Transportation*, Washington, D.C.: U.S. Government Printing Office.
- U.S. Department of Transportation, Federal Aviation Administration (October 11, 1990), "Training Alternatives Following Violations" Notice (N8700.4).
- U.S. Department of Transportation, Federal Aviation Administration (1988), *Compliance and Enforcement Program*, Order 2150.3A, Washington, D.C.: U.S. Government Printing Office.
- U.S. Department of Transportation, Federal Aviation Administration (1978), *Certification: Pilots and Flight Instructors*, Order 8710.4, Washington, D.C.: U.S. Government Printing Office.
- U.S. Department of Transportation, Research and Special Programs (1988), *Aviation Standards Statistical Summary*, Washington, D.C.: Transportation Systems Center, June.
- U.S. Department of Transportation, Federal Aviation Administration (July 27, 1990), "Air Carrier Internal Evaluation Program" Action Notice (A8430.65).
- Western-Pacific (wp fs) (1987), *Compliance and Enforcement Handbook*, Los Angeles: Western-Pacific Region, Federal Aviation Administration

