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Compliance and Enforcement: Aviation Safety in the Public Sector Part III: An Alternate Enforcement Program

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

PART III: An Alternative Enforcement Program

Laurence E. Gesell, Ph.D., and Robert Anderson

ABSTRACT

This is the final article of a three part series looking at sanctions imposed upon airmen for non-compliance with Federal Aviation Regulations. In Part I the Federal Aviation Administration's statutory authority and enforcement procedures were addressed. Part II looked at the current enforcement program and presented an overview of administrative and legal enforcement actions. Part III proposes an alternative, restitutive enforcement program which might provide for a more street level, less centralized form of justice.

INTRODUCTION

The Federal Aviation Administration (FAA) has developed a Compliance and Enforcement Program (FAA, 1988a) to fulfill its statutory oversight obligations. However, the current enforcement program, fundamentally retributive in effect, fails to consider the necessity for, and benefits of, more restitutive remedies.

Contained in Part II of this continuing series was an examination and analysis of the existing conflicts between stated enforcement policy objectives, contrasted with the effectiveness of the actual program. Ultimately, to reconcile the incongruities discovered, presented in Part III is a proposal for an alternative enforcement program described as Administrative Recision of Privileges (AROP).

It is well settled that the FAA has the authority and responsibility to be the predominant oversight mechanism for aviation safety in the U.S. In order to ensure that its regulations and procedures are followed, the FAA's compliance and enforcement program asserts that education, guidance, and understanding are the essential

elements necessary for successful compliance with its safety regulations. Moreover, the program further declares that voluntary compliance (with regulations) is integral to aviation safety and only when this fails should formal enforcement action ensue.

As discussed in Part II of this series formal enforcement action can include administrative action (e.g., warning letters etc.) and legal action (e.g., certificate suspension/revocation etc.). While administrative action is basically a restitutive approach to the problem, proffering only mild admonishment, legal action can be substantially retributive in nature and effect.

There are various examples of divergent conceptual philosophy between judicial and administrative interpretation regarding the legal basis (apart from technical qualification) upon which suspension, via legal enforcement action, of an airman's certificate can rest. The judicial interpretation, however, is the standard upon which the ultimate and effective reality surfaces. That is, suspension of an airman's certificate can be effected for disciplinary purposes

only to the extent that it acts as a deterrent to future violations to the involved violator or those of a comparable position. Discipline administered solely for the purpose of punishment is contrary to the punitive limitations established by legal precedent and is fundamentally inconsistent with authoritative agency policy.

CAUSE AND EFFECT

Clearly, the FAA has an obligation to carry out its enforcement goals and objectives through a program of considered response consistent with the cause of the violation and not just the effect. In addressing only the effect of an act of non-compliance, the response goes directly to the results of the violation, exclusively furthering the goals of retribution. However, if focus were shifted to the cause of the violation, then redress could be constructed from appropriate elements of restitution as well as retribution.

For example, assume that an errant airman inadvertently enters a Terminal Control Area (TCA) without having authorization as required by the Federal Aviation Regulations (FARs). In accordance with the Enforcement Sanction Guidance Table

in FAA Order 2150.3A, the appropriate sanction is certificate suspension for 60 to 90 days. In selecting a sanction outside of the 60 to 90 day recommended range, certain mitigating and aggravating factors may be considered. Among these are:

- (1) the degree of hazard created to other aircraft, persons, or property
- (2) whether the violation was inadvertent or deliberate
- (3) the violation history of the airman
- (4) the violator's level of experience and attitude
- (5) the type of activity, i.e. public or private, and
- (6) the effect of the sanction of the violator's livelihood (FAA, 1988a, Appendix 4, 2).

In this hypothetical case, if the moderately experienced airman's violation was inadvertent and he or she had a good attitude without a history of previous violations, then a suspension for 45 days might be appropriate. However, if the inadvertent action of entering the TCA without a clearance included a significant hazard to another aircraft, then, according to the guidance contained in FAA Order 2150.3, a suspension of 60 days or more is called for. It could be argued that if certificate suspension is to be administered for its deterrence value, then the effect of hazard to another aircraft is immaterial. The expected value of future deterrence goes to the pre-violation mental state of the airman involved, which is synonymous with cause, and is totally

disassociated with any resulting hazardous effect that the airman had no control over.

In addition to the relevance attached to a resulting hazard as discussed above, the FAA uses a similar standard of no significant unsafe condition existed as a factor in determining the applicability of administrative action as opposed to legal action (Title 14, 1988, Part 13.11). This determinant standard also considers effect separate from cause.

Without question, the issue of effect, even when hazard or lack of safety is a product of mere chance, is a central and predominant element utilized in determining the extent and severity of a certificate sanction. The consequence of this retributive philosophy is a failure to address and remedy the underlying cause of the violation.

A viable and more productive alternative, it would appear, is to give equal weight to the cause of a violation. By addressing cause in addition to effect, the compliance and enforcement program would embrace a restitutive solution balanced properly with needs of retributive deterrence.

A careful analysis of the cause of violations would reveal fundamental elements which need to be addressed by way of sanction. If a certain violation was deliberately made by an experienced airman with a poor attitude and a long history of past violations, then perhaps a suspension for a significant length of time would best meet the standard of deterrence. The pre-violation mental state of an

airman can sometimes reduce the perplexing issues surrounding cause and effect. If an airman makes an informed and deliberate decision which results in a violation of a safety regulation, then the cause is very closely associated with the effect. Under these circumstances, a purely retributive sanction (for deterrence purposes) void of unnecessary remedial elements also addresses restitution in a very conventional way. Specifically, the violator is deterred from precipitating a similar error in the future, thereby returning the system (or victim) to its original state.

Conversely, if a violation occurs as a result of lack of knowledge or awareness, then the sanction approach must be different. An appropriate sanction would address a retributive suspension (for deterrence purposes) and, at the same time, remedy the underlying cause. This should be done through a mandated program of enhanced awareness training or a reeducation process. A balanced program of this nature properly deals with the violation by utilizing retribution for the effect, and restitution for the cause.

As previously stated, a clear and thorough understanding of the safety regulations is necessary if compliance is to be achieved. The understanding of safety regulations extends to a working comprehension of the many complex and frequently perplexing operational procedures. Education and guidance are fundamental to achieving repeated compliance even by

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airmen who are predisposed to voluntary acceptance of these safety regulations. In the absence of relevant, contemporary information, an aviator is a detriment to self and to other users of the airspace system. Ignorance is frequently exposed through the FAA's enforcement process and the underlying cause must be isolated and addressed.

PROPOSAL

This series has demonstrated and defined the current enforcement procedures which are utilized in dealing with certain actions found to be in violation of FARs. It could be argued that the enforcement tools available and used by the FAA do not effectively address the shortcoming of airmen who are in a category herein defined as under-informed. The under-informed airman also suffers from lack of awareness and generally commits violations which are not deliberate and, in fact, are considered inadvertent. This category of airman must be the recipient of a balanced form of sanction with consideration of the merits of retribution as well as restitution. The existing program does not embrace this important dimension. A balanced alternative procedure would reach the needs of the airman involved, and, as a result, would satisfy safety in air commerce and the public interest.

The program being proposed would be unchanged through the investigation data collection phase. Once evidence was collected or received by the Flight Standards District Office

(FSDO) the decision for determining the appropriate enforcement tool would be made. If it was determined, by the FSDO Field Inspectors, that the involved violation occurred as a result of an under-informed action, then selection of the proposed alternative process would be initiated. The proposed program would be known as Administrative Recision of Privileges (AROP).

The AROP program would involve the following procedural steps:

- (1) determination that the airman met the criteria for AROP
- (2) analysis of the causal factors precipitating the violation
- (3) selection, by the investigating Inspector, of the sanction which would involve:
 - (a) mandatory reeducation administered and endorsed by an FAA designated Examiner/Check Airman or other agent acting for the FAA, and
 - (b) recision of airman certificate privileges for a period equal to one half (or less) of that which is stipulated in FAA Order 2150.3A, Appendix 4
- (4) the airman's certificate would be deposited in the local FSDO under the supervision of the investigating Inspector
- (5) upon completion of the reeducation and recision

period, the certificate would be returned to the airman

- (6) and, importantly, that no finding of violation would be made
- (7) record in the FAA Enforcement Information Subsystem (EIS) data base would show administrative action only.

In order for an airman to qualify for the proposed AROP program, the violation would have to meet the following criteria:

- (1) a lack of competency was not involved, and
- (2) the violation was not deliberate, and
- (3) the alleged violator had a constructive attitude toward complying with the regulations, and
- (4) the alleged violator has not been involved in similar violations.

The specific elements listed above are almost identical to those which currently exist with regard to the imposition of normal administrative action (Title 14, 1988, Part 13.11) The elements not present in the AROP program which are listed in the normal administrative action program are that: (a) no significant unsafe condition existed, and (b) lack of qualification was not a factor. As previously discussed, the resulting and unplanned existence of a significant unsafe condition is separate and totally disassociated from any underlying causal element. By excluding an airman from the AROP program because an unsafe condition (which the airman did not anticipate nor

have control over) resulted from under-informed action, then clearly the airman's fundamental shortcoming would not be addressed. Further, if lack of qualification is an element from which categorical exclusion from the AROP program would result, it would fail to address the precipitating causal factor inherent in the violation. Instead, this exclusionary element, mandatory in normal administrative action, provides the impetus for certificate action (punishment) solely in response to an airman's qualification, such as an expired medical certificate.

In order for AROP program to be deemed viable, its primary benefit over the existing programs must be greater. It is suggested that there are three basic enhancements embodied within its structure which act to separate it from and make it superior to other enforcement tools. First, there would be a balance between a retributive and restitutive sanction in consideration of potential tension between cause and effect. Second, there would result a significant reduction in resource expenditure necessary to effectively deal with the subject category of (under-informed) violator. Third, there would be a relatively short time between commission of the violation and the effectuation of a remedy.

SERIES SUMMARY

This series has examined the FAA's statutory authority with regard to pilot sanctions, and the FAA's compliance and enforcement program. It was established that there exists a conflict

between the FAA's stated enforcement policy objectives and the effectiveness of the actual program. Ultimately, to reconcile the conflicts, a proposal was presented for an alternative enforcement tool, AROP program, to be infused into the existing program.

Currently, the primary effect of the FAA's compliance and enforcement policy is retributive in nature. That is, it is based upon punishment to the offender. Retribution, and the deterrent effects thereof, seemingly, are intrinsic to any enforcement process, and are not necessarily undesirable.

For example, many of the enforcement actions undertaken by the FAA are the result of an airman's negligent and willful disregard for the rules and regulations. As such, any future deterrence to intentional non-compliance gained through an appropriate retributive sanction (e.g., suspension of an airman's certificate) advances the overall safety objectives of the FAA in the public interest.

In many circumstances the FAA's enforcement program fails to subjectively consider the underlying cause of infractions committed by those who are predisposed toward voluntary compliance, but violate the rules nevertheless. This failure is demonstrated by the retributive nature of the sanctions imposed. These airmen operate outside the FAA's "clear awareness and understanding" standard and should, therefore, be subjected to a restitutive sanction, effectively balanced with an appro-

priate level of retribution. This type of action would facilitate a rehabilitative approach and should be coexistent with the need for future deterrence.

In order to meet the FAA's stated goals and objectives with respect to the under-informed select category of violator, an alternative enforcement tool must be infused into the current process, and a balance between retributive deterrence and restitutive reeducation would provide the framework for a more efficacious solution to certain incidents of non-compliance. The proposed Administrative Recision of Privileges program would provide an alternative process and a shift in the contemporary retributive policy to a more restitutive form.

Ultimately, this new tool, AROP, could maximize limited resources, address the cause and not just the effects of the violation, and meet the demands of expediency. These benefits would provide the system with informed compliance and an airman predisposed to work within the regulatory mechanism instead of avoiding it (through uninformed deterrence).

In sum, the national airspace system and its associated technology are rapidly evolving and becoming vastly more complex. This evolutionary process requires an increased level of aeronautical skill and knowledge in order to achieve the high degree of safety necessary in the public interest. Unquestionably, this fact illustrates the need for a critical assessment and positive shift in the FAA's current compli-

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ance and enforcement program.

The clear awareness and understanding standard espoused by the FAA (FAA, 1988a, p. 11) must be considered in the face of the changing technological environment. Without an elevated level of competency precipitated through informed compliance, system integrity is unavoidably reduced. The informed compliance standard is the essential goal of the AROP program.

AROP IN REVIEW

The preceding overview of the proposed AROP program seeks to define the various issues relevant in FAA enforcement policy and philosophy. The current enforcement program effectively addresses a significant portion of airman violations with due consideration of the involved cause and effect circumstances. There is, however, an equally important segment of airmen subjected to enforcement who, seemingly, do not receive an appropriate response from the FAA subsequent to certain incidents deemed to be in non-compliance with the FARs. The solution to this dichotomy is manifest within the AROP proposal.

The AROP program identifies those airmen who meet specified conditions within a category where there is ignorance or a lack of awareness. The airman meeting the criteria for inclusion into the AROP program is not considered to be incompetent, nor no longer satisfying the minimum standards attendant to the certificate involved. There is currently an existing procedure

embodied within the authority of the Federal Aviation Act of 1958 (Act, Sec. 609) wherein this degree of inability is dealt with.

Specifically, whenever the FAA has reason to believe that a certificate-holding airman may not be qualified to hold a certain certificate or rating, he/she can be required to undergo a reexamination (FAA, 1988a, p. 101).

The type of airman targeted for the AROP program (subsequent to a violation) would meet the minimum standards of his/her certificate. Given the minimum standards that are currently required for certification, in addition to the nature of an extremely complex aviation structure, the occurrence of violations precipitated by under-informed activity would seem inevitable. Setting the foundation for enforcement decisions upon a standard of performance expected in any operational situation or environment belies the reality of a many faceted system.

In 1987, 850 pilot deviations were discovered in the FAA's Western-Pacific Region. Of this number, 593 resulted in enforcement action. Further, 300 pilot deviations involved TCA incursions. A review of the airspace in and around the Los Angeles area, for example, would reveal that operation in this environment is demanding for even the most skilled aviator. The multitude of complex airspace structures, difficult to see navigation points, and an air traffic control system necessarily rife with non-standard site-specific

procedural requirements, obviously exceeds the knowledge levels of many aviators. This circumstance is poignantly illustrated through the FAA's enforcement program.

Retributive sanctions imposed for deterrence purposes, as a result of certain violations of FARs, should not be the extent of the FAA's involvement. After all, the FAA's technical name for its program is Compliance and Enforcement. Restitution by reeducation and awareness training should be mandated when appropriate. The AROP program offers this balance.

The inexperienced airman is not the exclusive target of the AROP program. Even the most proficient and professional operator is subjected to the vicissitudes of the complex operating environment. In spite of the precept of system wide standardization and of clear, concise regulations, an inherent subjectivity is interwoven into every element of day-to-day operation. The FAA's oversight mechanism, nevertheless, is designed to construe each non-compliant act as a breach of a rule or regulation that should have been followed. There is, as previously noted, an opportunity for mitigating (and aggravating) circumstances to be addressed following a violation. However, any finding in this area is limited to a modification of the sanction and not justification for occurrence of the violation.

A navigation error or deviation from an altitude clearance might best be addressed through mandatory awareness training.

This restitutive reeducation would be coexistent with a retributive deterrent in the form of privilege rescission as indicated in the AROP program. The goals and objectives of the FAA's enforcement policy would be met with added emphasis on future compliance and not just deterrence. Clearly, informed compliance with a regulation is not the same as deterrence from committing a future violation of the same regulation.

With an FAA Designated Examiner or other representative of the FAA oversee the chosen reeducation of the violator, an acceptable degree of control could be maintained. If ground instruction was the type of training decided upon, the examiner would be paid the prevailing rate by the violator. Awareness training, such as spending time at an air traffic control facility or attending FAA sponsored safety seminars, could easily be validated and not involve a direct expense.

Rescinding pilot privileges, rather than suspending a particular certificate, acts as a deterrent to the violator in much the same manner. The primary differences are a reduced length of time, an almost immediate implementation of sanction, and no finding of violation. By utilizing one-half or less of the time stipulated within FAA guidelines (FAA, 1988a, Appendix 4), the period without pilot privileges is much more palatable to the under-informed violator.

Inherent within the wording of Section 609 of the Aviation Act is

the assumption that a mandatory legal process must ensue prior to depriving an airman of his/her certificate. The AROP program is not an argument with the legality of certificate suspension, to the contrary, it is a process designed to embrace a current procedure of rescinding privileges under specified conditions. Specifically, the FAA now allows an airman to deposit his/her certificate with the district office pending reexamination (under Sec. 609 of the Act). Under the existing policy an airman may voluntarily give up pilot privileges, or portion thereof, while preparing for the reexamination. This current procedure allows for up to 60 days (possibly more under some conditions) of certificate deposit time within the local FSDO (FAA, 1978, p. 5). This concept ostensibly allows an airman whose competence is being questioned to delay the reexamination for a period of time necessary for some type of (re)training. The acceptance of this procedure by the airman allows for delay of the reexamination process (or another attempt at it), in lieu of the FAA taking enforcement action to suspend the involved certificate for lack of qualification (competence).

The process just described is specifically prohibited from being used to resolve a violation (FAA, 1978, p. 5 [b]). It is suggested that the AROP program could utilize the fundamental concept incorporated in the reexamination program, which amounts to an administrative rescission of privileges. This action, in concert

with the other elements of the AROP program, allows for an effective resolution for certain violations.

Equally as important in the AROP program, as opposed to the current legal enforcement process, is that the FAA would not make a finding of violation. Just as in the current administrative program, this amounts to a compromised concession in favor of some level of restitution.

The proposed AROP program, alternatively, would be an administrative action and would be voluntary when offered by the investigating field office. It would be offered when deemed appropriate in lieu of legal enforcement action. If the alleged violator desired, this person would always have the opportunity for the due process available through the legal enforcement procedure. The foundation of the AROP program, however, is a mutual agreement between the Investigating Inspector and the airman that there had been a technical violation. If the alleged violator elected to dispute the circumstances and not accept AROP, then legal enforcement would be the only alternative.

AROP offers an effective, timely, and less expensive alternative for those violations not appropriate for the current administrative or legal enforcement programs. The exact numbers and categories of violations which would ultimately meet the criteria for AROP is unclear. Certainly, a significant portion of the large system-wide volume of pilot deviations would be likely candidates. The under-

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lying theme being developed, however, is a conceptual shift to emphasis on compliance, in advance of and in preference to, the limited enforcement tools currently available. An informed and compliant airman who has not been turned against the system because of an unpalatable level of retribution becomes a cooperative and future element of safety.■

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