Aeronautical Repair Station Association

121 North Henry Street
Alexandria, VA 22314-2903
T: 703 739 9543 F: 703 739 9488
arsa@arsa.org www.arsa.org

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BY E-MAIL TO: rebecca.macpherson@faa.gov

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Rebecca B. MacPherson,
Assistant Chief Counsel for Regulations (AGC-200)
Federal Aviation Administration
800 Independence Avenue, S.W.
Washington, DC 20591-0001

RE: Alteration Duties under Drug and Alcohol Testing Regulations

Dear Ms. MacPherson:

The Aeronautical Repair Station Association (ARSA) requests clarification from the Office of Chief Counsel regarding applicability of the drug and alcohol testing rules[1] to persons performing alterations.

This request stems from our strong disagreement with Federal Aviation Administration's (FAA's) conclusion that an alteration is considered a safety-sensitive function merely because it *may be* related to an overall maintenance activity. We also dispute a related statement from the FAA that any alteration is maintenance or preventive maintenance. Both positions were advanced in FAA's denial of Exemption 9865,[2] in a letter dated May 11, 2009, from Dr. Frederick E. Tilton, M.D.

That denial letter directly conflicts with an existing interpretation from the FAA Office of Chief Counsel.

As a result, we ask for a clear statement from the FAA that alteration activity is not maintenance and is therefore not a safety-sensitive function for the purpose of drug and alcohol testing. Providing this clarification will remedy errors presented in the denial letter, and resolve uncertainty in the rules.

[1] 14 CFR part 120

[2] Docketed at FAA-2008-1260 and published in the Federal Register on February 24, 2009 (74 FR 8301)

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Background

The facts behind the May 11, 2009 denial letter involved the requirement to remove a component part from an aircraft, and then send that part to its original manufacturer for alteration before re-installing the altered component on the aircraft. The obligation was driven by an FAA airworthiness directive (AD).

Since the manufacturer specified in the AD did not have a drug and alcohol testing program, the issue was originally couched in terms of an exemption request to immediately remove any uncertainty[3] for maintenance providers accomplishing the AD.[4]

The direct issue was the classification of alteration activity related to an overall repair.

Previous FAA interpretation: analogous circumstance

FAA has addressed situations involving fabrication of parts related to an overall repair. In such circumstances, the Office of Chief Counsel correctly stated that only *maintenance* action triggered the drug and alcohol testing requirements; any associated activity, including part fabrication did not. That analysis, contained in a letter dated August 7, 2006,[5] states that:

> We do not consider the fabrication of a part [for the purpose of being incorporated into a maintenance or repair activity] … as falling under the definition of maintenance. Subcontractor employees who fabricate a part are not repairing anything; rather they are producing a part, whether that production is done under a repair station's quality control system or under a manufacturer's own fabrication inspection system (FIS). Therefore, the fabrication of the part is not considered maintenance; rather it is the repair performed by a certificate holder that consumes the fabricated part that falls under the definition of maintenance. *(Emphasis added)*

Accordingly, ancillary activities do not automatically become maintenance, and therefore safety-sensitive functions, merely from their relationship to a repair. Instead, only direct maintenance tasks, as defined in the regulations, fall within the purview of drug and alcohol testing rules.

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[3] The hesitation among those performing the maintenance – in this case, AD accomplishment – resulted from the alteration, performed by the manufacturer, being directly related to the overall maintenance task; that direct relationship raised concerns that the alteration task could therefore be considered maintenance and subject to the drug and alcohol testing rules.

[4] Removal and installation of the component is clearly maintenance, as it fits squarely within the definition of maintenance (i.e., replacement of parts).

[5] FAA letter to Pratt & Whitney, United Technologies Research Center, dated August 7, 2006

Despite the clear framework provided by the Office of Chief Counsel, Dr. Tilton's letter decided instead that any activity directly *related* to an overall repair *is* maintenance. Specifically, it states that:

> Although manufacturing a part is not a safety-sensitive function, alteration of a part *related to* an overall repair is a safety-sensitive function as well as maintenance or preventative [sic] maintenance. Because alteration of a part *related to* an overall repair is maintenance or preventive maintenance, manufacturers engaged in this activity are subject to testing requirements. *(Emphasis added)*

Regulatory foundation for FAA's previous interpretation

The Chief Counsel's August 7, 2006 letter accurately reflects present regulatory requirements. In particular, that interpretation follows the rule which identifies employees who must be tested.[6] It provides that:

> Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this subpart must be subject to drug testing under a drug testing program implemented in accordance with this subpart. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision.
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> The safety-sensitive functions are:
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> (a) Flight crewmember duties.
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> (b) Flight attendant duties.
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> (c) Flight instruction duties.
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> (d) Aircraft dispatcher duties.
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> (e) Aircraft maintenance and preventive maintenance duties.
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> (f) Ground security coordinator duties.
>
> (g) Aviation screening duties.
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> (h) Air traffic control duties.
>
> *(Emphasis added)*

For maintenance providers, the safety-sensitive functions are clearly limited to aircraft maintenance and preventive maintenance duties.

[6] 14 CFR § 120.105

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As stated in the preamble to the 2004 final rule,[7] "**Maintenance and preventive maintenance are not defined differently for the purposes of drug and alcohol testing**." *(Emphasis added)*

Of course, maintenance and preventive maintenance are defined terms: [8]

> *Maintenance* means inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance.
>
> *Preventive maintenance* means simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations.

Notably, and like fabrication, alterations are not included in those definitions.

Major and minor alterations are independently defined:[9]

> *Major alteration* means an alteration not listed in the aircraft, aircraft engine, or propeller specifications—
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> (1) That might appreciably affect weight, balance, structural strength, performance, powerplant operation, flight characteristics, or other qualities affecting airworthiness; or
>
> (2) That is not done according to accepted practices or cannot be done by elementary operations.
>
> *Minor alteration* means an alteration other than a major alteration.

Although the term "alteration" is not defined in the regulations, FAA Order 8900.1[10] provides that "alter" means to change or modify.

Likewise, the performance rules of 14 CFR part 43[11] clearly treat alterations as a distinct activity, separate from maintenance. In fact, although manufacturers are not authorized to perform maintenance, they can perform alterations. The applicable section[12] provides that:

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[7] 69 FR 1844; discussing 14 CFR part 121 appendices I and J, the predecessor of 14 CFR part 120.

[8] 14 CFR § 1.1

[9] 14 CFR § 1.1

[10] Volume 4, chapter 9, paragraph 4-1178

[11] Titled, "Maintenance, Preventive Maintenance, Rebuilding, and Alteration"

[12] 14 CFR § 43.3(j)

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> A manufacturer may—
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> (1) Rebuild or alter any aircraft, aircraft engine, propeller, or appliance manufactured by him under a type or production certificate;
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> (2) Rebuild or alter any appliance or part of aircraft, aircraft engines, propellers, or appliances manufactured by him under a Technical Standard Order Authorization, an FAA-Parts Manufacturer Approval, or Product and Process Specification issued by the Administrator

Because alteration tasks are so clearly separated from maintenance tasks in the rules, we do not believe there is any question as to the inapplicability of drug and alcohol testing requirements for persons performing alterations. Alteration duties are not safety-sensitive functions.

As a result, we trust that your office will be able to provide our requested clarification, which is consistent with an existing, and directly related, Chief Counsel opinion. Since there is no doubt that a person performing both an alteration and maintenance would have to be subject to a federal drug and alcohol testing program, we would appreciate if you would limit your answer to situations where the individual only performs alterations.

We look forward to your favorable response, and we appreciate your assistance in clarifying this matter.

Sincerely,

Craig L. Fabian
VP Regulatory Affairs and Assistant General Counsel

cc: Rafael Ramos rafael.ramos@faa.gov
Carol Giles carol.e.giles@faa.gov