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April 1, 2010

Sent by E-mail: rafaেল.ramos@faa.gov

Rafael Ramos  
Drug Abatement Division  
Room 803 (AAM-800)  
Independence Ave, SW  
Washington DC 20591

**RE:** Follow-up Drug Testing Refusal to Test and Permanent Disqualification from Service

Dear Mr. Ramos:

This letter is submitted by the Aeronautical Repair Station Association (ARSA) on behalf of its members<sup>1</sup> located in the United States that have implemented a drug and alcohol testing program under 14 CFR part 120.

Specifically, we ask for clarification of 14 CFR § 120.111 in situations involving a person's inability to test from a "shy bladder" condition during follow-up drug testing that resulted from a verified positive result. The pertinent section provides that:

*(e) Permanent disqualification from service. (1) An employee who has verified positive drug test results on two drug tests required by this subpart of this chapter, and conducted after September 19, 1994, is permanently precluded from performing for an employer the safety-sensitive duties the employee performed prior to the second drug test.*

Although we believe a permanent disqualification is not triggered in the situation we described, we are requesting this interpretation to remove existing industry uncertainty.

Our request also highlights the potential for certain covered employees to perpetually remain in a follow-up testing program under current rules.

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<sup>1</sup> ARSA is the premier association for the international aviation maintenance industry; ARSA members also include design and production approval holders and aircraft operators worldwide.

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**Analysis**

An employer is required to randomly drug test its covered employees.<sup>2</sup> Before allowing a covered employee to return to safety-sensitive work after testing positive for drugs, an employer must comply with the follow-up testing requirements of 14 CFR § 120.109.<sup>3</sup>

If, during the requalification program, an employee cannot provide a sufficient sample for non-medical reasons, the event is classified as a refusal to test.<sup>4</sup> A “refusal to submit to drug test” is clearly differentiated from a “verified positive drug test result.”<sup>5</sup>

If the person refusing to test is FAA certificated under parts 61, 63 or 65, the certificate actions in part 120 apply.<sup>6</sup> Otherwise, for covered employees not certificated by the FAA, an employer is instructed to re-direct the individual to a follow-up testing program.<sup>7</sup>

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<sup>2</sup> 14 CFR part 120, Subpart E. In this letter, the terms “employer” and “covered employee” follow the meanings assigned in 14 CFR § 120.7.

<sup>3</sup> The relevant portion of that section provides that:

(f) *Follow-up drug testing.* (1) Each employer shall implement a reasonable program of unannounced testing of each individual who has been hired to perform or who has been returned to the performance of a safety-sensitive function after refusing to submit to a drug test required by this subpart or receiving a verified positive drug test result on a test conducted under this subpart.

(2) The number and frequency of such testing shall be determined by the employer's Substance Abuse Professional conducted in accordance with the provisions of 49 CFR part 40, but shall consist of at least six tests in the first 12 months following the employee's return to duty.

(3) The employer must direct the employee to undergo testing for alcohol in accordance with subpart F of this part, in addition to drugs, if the Substance Abuse Professional determines that alcohol testing is necessary for the particular employee. Any such alcohol testing shall be conducted in accordance with the provisions of 49 CFR part 40.

(4) Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a safety-sensitive function. The Substance Abuse Professional may terminate the requirement for follow-up testing at any time after the first six tests have been conducted, if the Substance Abuse Professional determines that such testing is no longer necessary.

<sup>4</sup> 49 CFR §§ 40.193(d)(2) and 40.191(a)(5).

<sup>5</sup> See, 14 CFR § 120.7(o) and (r), respectively.

<sup>6</sup> See 14 CFR §§ 120.11, 120.13 and 120.15.

<sup>7</sup> See the follow-up testing requirements referenced in footnote 3.

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Since the follow-up drug testing timeframe limitation – 60 months – is measured from the time an individual returns to perform a safety-sensitive function, it appears that one could perpetually remain in the follow-up program without further consequence. That is, an individual, not certificated by the FAA, who is removed from their safety-sensitive position due to a verified positive drug test, could encounter a “shy-bladder” condition multiple times and simply re-enter a follow-up program anew after each occurrence.

The unlikely consequences of an individual’s refusal to test after receiving a verified positive result have raised questions in the industry and prompt this request.

We appreciate your assistance with this issue and look forward to your timely response.

Sincerely,



Craig L. Fabian

VP Regulatory Affairs & Assistant General Counsel