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# AIRMAN CERTIFICATION AND ENFORCEMENT PROCEDURES

JOHN S. YODICE\*

## I. INTRODUCTION

THE Aircraft Owners and Pilots Association is particularly appreciative that *The Journal of Air Law and Commerce* has seen fit to devote an entire symposium issue exclusively to general aviation. It shows an awareness of the importance of general aviation as a segment of the aviation community, and of the very practical consideration that if a general practitioner is called upon to become involved in an aviation law matter, it will probably involve general aviation rather than air-carrier or military aviation. A symposium such as this can go a long way toward equipping the general practitioner to effectively handle such matters.

## II. IDENTIFICATION OF GENERAL AVIATION

First, it may be profitable to identify the general aviation community. General aviation is best defined as including all civil flying except that performed by the air-carriers operating large aircraft. It embraces a multitude of diverse and growing uses of aircraft ranging from personal and corporate transportation to such special uses as crop dusting, power and pipeline patrol, and aerial advertising.

In recent years there has been a strong up-trend in all phases of general aviation activity, and the forecast is for continued growth. As of January 1, 1971, there were approximately 137,000 active general aviation aircraft of United States registry.<sup>1</sup> This compares with some 79,000 aircraft at the beginning of 1961.<sup>2</sup> The number is expected to increase to 222,000 by 1981.<sup>3</sup> In other words, the general aviation fleet

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<sup>1</sup> Of these 134,000 about 111,100 were single-engine, piston-powered aircraft, and 16,300 were multi-engine piston aircraft. Some 2,400 were jet-powered aircraft. FEDERAL AVIATION AGENCY, AVIATION FORECASTS, FISCAL YEARS 1971-1982 at 36 (1971) [hereinafter cited as AVIATION FORECASTS].

<sup>2</sup> FEDERAL AVIATION AGENCY, STATISTICAL HANDBOOK OF AVIATION 35 (1961 ed.) [hereinafter cited as 1961 STATISTICAL HANDBOOK]. The exact figure given by the FAA was 78,760 active aircraft.

<sup>3</sup> AVIATION FORECASTS 36.

has almost doubled in the past ten years, and is expected to almost double again in the next ten years.

As of January 1, 1971, there were approximately 728,000 active general aviation pilots.<sup>4</sup> This is more than twice as many as there were at the beginning of 1961.<sup>5</sup> The growth in the number of general aviation pilots is expected to parallel the growth in the number of aircraft.<sup>6</sup>

Currently there are approximately 11,000 civil airports in the United States.<sup>7</sup> Less than 850 of these have airline service.<sup>8</sup> General aviation serves all of them. Of these airports about 330 have control towers where traffic statistics are kept.<sup>9</sup> At these tower controlled airports, general aviation constitutes 75% of the operations.<sup>10</sup>

### III. NEED FOR ATTORNEYS TO REPRESENT GENERAL AVIATION AIRCRAFT OWNERS AND PILOTS

These statistics reinforce the view that there is a need for lawyers to represent pilots and owners of general aviation aircraft, and that this need is growing at a fast pace. The legal problems for which these pilots and owners need representation cover a wide range. Two of the most usual types of aviation cases a general practitioner may be called upon to handle are: (1) the defense of a general aviation pilot against charges by the government that the pilot has violated the general operating and flight rules of the Federal Aviation Regulations,<sup>11</sup> and (2) representing the general aviation pilot in obtaining an FAA medical certificate he has been denied.<sup>12</sup> We can call the first type "FAA enforcement cases" and the second type "FAA medical cases." This discussion will cover the information and tactical considerations to enable one to effectively

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<sup>4</sup> Of these 728,000, 310,000 held private pilot certificates; 183,000 held commercial certificates; and 32,100 were airline-transport rated. AVIATION FORECASTS 49.

<sup>5</sup> As of January 1, 1961, there were 348,062 active airman certificates issued. 1961 STATISTICAL HANDBOOK 43.

<sup>6</sup> By 1981, the FAA expects 1,431,500 airmen, including 638,000 private pilots, 358,000 commercial pilots, and 42,800 airline-transport pilots. AVIATION FORECASTS 49.

<sup>7</sup> As of December 31, 1968, there were 10,442 airports. FEDERAL AVIATION AGENCY, STATISTICAL HANDBOOK OF AVIATION 49 (1969 ed.) [hereinafter cited as 1969 STATISTICAL HANDBOOK].

<sup>8</sup> *Id.*

<sup>9</sup> 1969 STATISTICAL HANDBOOK 48.

<sup>10</sup> *Id.*

<sup>11</sup> 14 C.F.R. §§ 91.1-.129 (1971). These sections of the Federal Aviation Regulations ("FAR's") prescribe operational minima, pilot responsibilities, and general air traffic control procedures.

<sup>12</sup> Airmen may be denied certification by the FAA Administrator when they fail to meet the standards set forth in: Medical Standards and Certification, 14 C.F.R. §§ 67.1-.39 (1971). Pursuant to 49 U.S.C. § 1422(b) (1971). The Administrator may also suspend or revoke any airman certificate after an investigation or reexamination. 49 U.S.C. § 1429 (1971).

represent a pilot in an FAA enforcement case, or in an FAA medical case.

#### IV. FEDERAL AGENCIES INVOLVED

Starting with some basic background, there are two federal agencies which are involved in such cases. The Federal Aviation Administration is one. It is a modal unit of the United States Department of Transportation.<sup>13</sup> The basic statute under which the FAA operates is the Federal Aviation Act of 1958.<sup>14</sup> It vests plenary authority in the Administrator of the FAA to control the aeronautical use of the navigable airspace of the United States, including authority

to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.<sup>15</sup>

The Act also confers on the Administrator the power to issue airman certificates, including medical certificates and pilot certificates<sup>16</sup> and the

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<sup>13</sup> 49 U.S.C. § 1655(c)(1) (1971).

<sup>14</sup> 49 U.S.C. § 1301 (1971).

<sup>15</sup> 49 U.S.C. § 1348(c) (1971).

<sup>16</sup> 49 U.S.C. § 1422 (1971) provides:

(a) The Administrator is empowered to issue airman certificates specifying the capacity in which the holders thereof are authorized to serve as airmen in connection with aircraft.

(b) Any person may file with the Administrator an application for an airman certificate. If the Administrator finds, after investigation, that such person possesses proper qualifications for, and is physically able to perform the duties pertaining to, the position for which the airman certificate is sought, he shall issue such certificate, containing such terms, conditions, and limitations as to duration thereof, periodic or special examinations, tests of physical fitness, and other matters as the Administrator may determine to be necessary to assure safety in air commerce. Except in the case of persons whose certificates are, at the time of denial, under order of suspension or whose certificates have been revoked within one year of the date of such denial, any person whose application for the issuance or renewal of an airman certificate is denied may file with the Board a petition for review of the Administrator's action. The Board shall thereupon assign such petition for hearing at a place convenient to the applicant's place of residence or employment. In the conduct of such hearing and in determining whether the airman meets the pertinent rules, regulations, or standards, the Board shall not be bound by findings of fact of the Administrator. At the conclusion of such hearing, the Board shall issue its decision as to whether the airman meets the pertinent rules, regulations, and standards and the Administrator shall be bound by such decision: Provided, That the Administrator may, in his discretion, prohibit or restrict issuance of airman certificates to aliens, or may make such issuance dependent on the terms of reciprocal agreements entered into with foreign governments.

(c) Each certificate shall be numbered and recorded by the Administra-

power to suspend or revoke these certificates.<sup>17</sup> These two statutory provisions are basic to this discussion.

The regulations promulgated by the FAA under this act are known as the Federal Aviation Regulations (FAR's). They are published in Title 14 of the Code of Federal Regulations,<sup>18</sup> and include the general operating and flight rules.

The second agency is the National Transportation Safety Board (NTSB). The NTSB is an independent agency which is housed in the Department of Transportation for housekeeping purposes.<sup>19</sup> One of the Board's functions is to sit in review of FAA certificate cases.<sup>20</sup> The Board has an Office of Hearing Examiners, which has the responsibility

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tor; shall state the name and address of, and contain a description of, the person to whom the certificate is issued; and shall be entitled with the designation of the class covered thereby. Certificates issued to all pilots serving in scheduled air transportation shall be designated 'airline transport pilot' of the proper class.

<sup>17</sup> 49 U.S.C. § 1429 (1971) provides:

The Administrator may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the Board and the Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Administrator shall be made a party to such proceedings.

<sup>18</sup> The regulations which most directly affect general aviation operations are Subchapter D—Airmen, 14 C.F.R. §§ 60-67 (1971) and Subchapter F—Air Traffic and General Operating Rules, 14 C.F.R. §§ 91-105 (1971).

<sup>19</sup> 49 U.S.C. § 1654(f) (1971).

<sup>20</sup> *Id.* § 1654(b)(2); *Id.* § 1422(b).

of conducting all formal hearings<sup>21</sup> under procedures established in regulation 421.<sup>22</sup>

## V. FAA ENFORCEMENT CASES

There are generally three types of enforcement actions available to the FAA when they believe that there has been a violation of the general operating and flight rules. The first is the safety compliance notice,<sup>23</sup> the second is certificate action,<sup>24</sup> and the third is the civil penalty.<sup>25</sup>

### A. Safety Compliance Notice

The safety compliance notice involves rule violations of a minor nature and therefore does not usually entail legal representation. But it is important for counsel to be aware of this device in order to properly advise a client faced with such action and because it sometimes can be used to effect a compromise remedy in a more serious case.

The safety compliance notice is issued by an FAA inspector, not an FAA attorney.<sup>26</sup> Once the inspector determines that the violation is of such a minor nature as not to require legal enforcement action, the matter is then disposed of administratively by the inspector through the issuance of a safety compliance notice on the prescribed FAA form. This notice may be issued with a letter of reprimand or a letter of correction stating the action to be taken to cure the violation.<sup>27</sup> If the corrective action is taken, the matter terminates. If not, a certificate action may ensue.<sup>28</sup>

One of the reasons the safety compliance notice does not involve legal representation is that the FAA takes the position that no appeal may be taken to the NTSB from the safety compliance notice.<sup>29</sup> To my knowledge, this position has never been tested, probably because of the minor nature of the violation charged. This fact should be kept in mind if one has a client who feels strongly enough to want to challenge a safety compliance notice. Ordinarily a full blown hearing to challenge a safety compliance notice is not warranted.

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<sup>21</sup> 14 C.F.R. § 400.2(d) (1971).

<sup>22</sup> *Id.* §§ 421.1-.50.

<sup>23</sup> *Id.* § 13.11.

<sup>24</sup> *Id.* § 13.19.

<sup>25</sup> *Id.* § 13.15.

<sup>26</sup> The notice may be issued by an inspector from the Flight Standards Division, or other appropriate official. *Id.* § 13.11(a).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* § 13.11(b).

<sup>29</sup> This position is apparently based on the fact that standing to appeal to the NTSB is based on whether one's airman certificate is "affected" by an "order" of the Administrator. 49 U.S.C. § 1429 (1971). The safety compliance notice is not classed as an order, nor does it directly affect an airman certificate.

An important role for counsel in this type of enforcement action is to advise his client that if he believes that the Administration's view of the matter is correct, he should write an explanatory letter and ask that it be included in the file on the case. The file will then reflect both sides of the case.

If the matter is not so minor as to be disposed of by a safety compliance notice, we come to the second and third enforcement actions available. In these cases the inspector conducts a thorough investigation<sup>30</sup> and prepares a violation report package which contains all of the evidence at hand. Somewhere early in his investigation he writes the alleged violator a Notice of Investigation letter and invites a reply.<sup>31</sup> If the airman submits a reply, it is included in the package. The case is then reviewed by an attorney in the FAA Regional Office; he reviews the package and determines what course of action is appropriate. At this stage it is usually determined to proceed either by civil penalty or by certificate action.

If counsel gets the case before the airman has responded to the Notice of Investigation, he is fortunate. Ordinarily, an airman receiving such a letter feels compelled to respond to it, and usually makes very damaging admissions in doing so. There appears to be no legal or moral compulsion for a pilot to reply to an FAA Notice of Investigation letter. Despite the fact that the FAA letter does not contain a warning that the reply might be used as evidence in a certificate action proceeding against the airman, the NTSB has held that such replies are admissible against the airman.<sup>32</sup> Therefore, it is not usually wise for a pilot to respond to the FAA. Yet, there are some things that may be helpful to the pilot for the FAA to know. Many times it is helpful for the FAA to know the pilot's side of the story, especially any extenuating circumstances. The FAA has been known to drop cases once it became aware of both sides of an incident. It is sometimes helpful for the FAA to know that a pilot flies for a living and that suspension may impair his ability to earn a livelihood. Counsel can be very effective at this stage. Counsel can respond for the airman telling the FAA everything he feels the FAA should know while keeping the reply, and thus the record, free from damaging admissions.

### B. Certificate Action

Let us suppose that the Regional Office has decided to proceed by way of certificate action. This proceeding is governed by Section 609

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<sup>30</sup> FAA investigatory powers and procedures originate in 49 U.S.C. § 1354 (1971) and are particularized in 14 C.F.R. § 13.3 (1971).

<sup>31</sup> These letters are established by the FAA's internal policies and are not specifically authorized by the FAR's.

<sup>32</sup> *Administrator v. Leon Salkind*, NTSB Docket No. SE-1015 (1970).

of the Act.<sup>33</sup> Section 609 empowers the Administrator to suspend or revoke an airman's certificate if "he determines that safety in air commerce or air transportation and the public interest requires."<sup>34</sup> This is a very broad standard. As a practical matter the FAA will usually charge specific violation of the FAR's. Prior to suspending or revoking, the Administrator must advise the airman of the charges or other reasons for the certificate action, and must give the airman an opportunity to answer the charges.<sup>35</sup> This notice comes as a second letter to the airman, called a "Notice of Proposed Certificate Action."<sup>36</sup> Unlike the Notice of Investigation, this letter is signed by an FAA attorney. It cites the alleged violations, proposes a certain certificate action, and offers the airman certain options. Among them is an opportunity for an informal conference.<sup>37</sup> This conference can be very helpful in learning the evidence against your client, and also in giving you a feel for what the FAA will accept in compromise. A good number of cases are settled at the informal conference.

The other options include admitting the charges and surrendering the certificate, answering the charges in writing, and requesting the issuance of the order of suspension or revocation to permit immediate appeal to the NTSB.<sup>38</sup>

Unless the case is settled, the Administrator issues the order of suspension or revocation. At this point the airman may appeal the order to the National Transportation Safety Board.<sup>39</sup> It is important to note that an appeal to the NTSB stays the effectiveness of the order.<sup>40</sup> The revocation or suspension does not become effective until the airman has exhausted his appeal rights through the NTSB.<sup>41</sup>

There is one exception to these procedures, and it is known as an "emergency" case. If the FAA feels that an emergency exists such that safety requires the immediate effectiveness of the certificate action, then the FAA need not comply with the advance notification and opportunity to answer requirements of the statute. In such a case, the FAA may immediately issue an order, which stays in effect during the pendency

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<sup>33</sup> 49 U.S.C. § 1429 (1971).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 14 C.F.R. § 13.19(c) (1971).

<sup>37</sup> *Id.* § 13.19(c)(3).

<sup>38</sup> *Id.* §§ 13.19(c)-(d).

<sup>39</sup> 49 U.S.C. § 1429 (1971), 14 C.F.R. § 13.19(d) (1971). The regulations specify the contents, filing and service requirements of the appeal and require that it be filed within 10 days of the service of the FAA's order. 14 C.F.R. § 421.21 (1971).

<sup>40</sup> 49 U.S.C. § 1429 (1971); 14 C.F.R. § 13.19(d) (1971).

<sup>41</sup> If the airman loses before the NTSB and seeks judicial review under the statute, the Administrator's order, as modified by the NTSB, will be effective pending the appeal. 49 U.S.C. § 1496 (1971).

of any appeal.<sup>42</sup> In order to mitigate whatever harm may be done to the airman because his certificate is revoked during the appeal, the statute requires that the NTSB must finally dispose of the appeal within sixty days of the FAA's satisfying the Board of the emergency nature of the case,<sup>43</sup> which is a day or two after respondent files his appeal. The NTSB provides accelerated proceedings in order to meet the time requirements of the statute.<sup>44</sup>

Once the Board receives the appeal, the case is referred to a hearing examiner for hearing.<sup>45</sup> Then the FAA files a complaint<sup>46</sup> or uses its order as a complaint.<sup>47</sup> Respondent then must file an answer,<sup>48</sup> and may file various motions.<sup>49</sup> The answer can be a general denial to put the FAA to its proof.<sup>50</sup>

The matter is then set for hearing, conducted much like a court trial except that the rules of evidence are relaxed somewhat.<sup>51</sup> The FAA has the burden of proof.<sup>52</sup> The burden which the FAA must sustain is not proof beyond a reasonable doubt,<sup>53</sup> but proof by a preponderance of substantial, reliable and probative evidence.<sup>54</sup>

It has happened that the FAA has called the respondent as a witness against himself in the NTSB hearing. This raises a very interesting and presently unresolved question involving the privilege against self-incrimination and immunity. Prior to the 1970 Organized Crime Control Act,<sup>55</sup> Section 1004 (i) of the Federal Aviation Act expressly recognized the privilege against self-incrimination, and permitted the NTSB to grant immunity upon the claim of privilege "on the ground, or for the reason, that the testimony or evidence, documentary or otherwise, re-

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<sup>42</sup> 49 U.S.C. § 1429 (1971).

<sup>43</sup> 49 U.S.C. § 1429 (1971).

<sup>44</sup> 14 C.F.R. § 421.50 (1971). These regulations shorten the period for notice and answer, and restrict the pretrial motions which can be made. Expedited appeal to the full Board is also provided.

<sup>45</sup> *Id.* §§ 421.23, 421.29.

<sup>46</sup> *Id.* § 421.24, which further provides that the Administrator must file this complaint within 20 days of service upon him of an appeal from his order.

<sup>47</sup> *Id.* § 421.26.

<sup>48</sup> *Id.* § 421.25, which requires that the answer be filed within 20 days of service of the complaint and provides that any allegations of the complaint not denied are deemed admitted, and 14 C.F.R. § 421.26 (1971) which establishes answer procedure where the Administrator files the order as a complaint.

<sup>49</sup> The primary motions involved are the motion to dismiss and the motion for more definite statement. *See* 14 C.F.R. §§ 421.27-28 (1971).

<sup>50</sup> *Id.* § 421.25.

<sup>51</sup> *Id.* § 421.32.

<sup>52</sup> *Id.* § 421.22.

<sup>53</sup> *Sabinske v. CAB*, 346 F.2d 142, 144 (5th Cir. 1965).

<sup>54</sup> *Sisto v. CAB*, 179 F.2d 47, 51 (D.C. Cir. 1949).

<sup>55</sup> 84 Stat. 922 (1970) (codified in scattered sections of 7, 11, 12, 15, 16 and 18 U.S.C.).

quired of him may tend to incriminate him or subject him to a penalty or forfeiture."<sup>56</sup> To the extent that a certificate action is punitive, this provision appeared to apply. In the two cases where the FAA has called my client as a witness, I have had him claim the privilege, and I have argued that under Section 1004 (i) he cannot be compelled to testify unless granted immunity, and that the grant of immunity would nullify the certificate action. In those two cases the hearing examiners sustained my position and honored the claim of privilege. But Section 1004 (i) has been repealed by the 1970 Organized Crime Control Act.<sup>57</sup> I understand that this act has narrowed the scope of the privilege, and that the constitutionality of this aspect of the act is presently before the United States Supreme Court.<sup>58</sup> Even though this area of the law is presently unsettled, I would suggest that the client not be permitted to testify against himself as an FAA witness if his testimony would be incriminating. Remember, the FAA would not call the client as a witness unless it needed him to prove its case. The client's claim of privilege might win the day.

Sometime after the conclusion of the hearing, the hearing examiner will issue an initial decision.<sup>59</sup> Either party may appeal this initial decision to the full Board.<sup>60</sup> This latter appeal is usually on written briefs. Oral argument may be requested, but its grant is discretionary with the Board and is not usually granted.<sup>61</sup>

Appeal from the full Board decision may be taken by the airman, but not by the government. This appeal is to the United States Court of Appeals in the circuit where the airman resides or in the District of Columbia.<sup>62</sup> To this point, in non-emergency cases, the airman's certificate remains in effect.<sup>63</sup> However, if the full Board affirms the FAA, the appeal to the Court of Appeals does not automatically stay the revocation or suspension.<sup>64</sup> A stay may be requested of the Court.<sup>65</sup>

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<sup>56</sup> 49 U.S.C. § 1484(i) (1970).

<sup>57</sup> 49 U.S.C. § 1484(i) (1970) was repealed by the 1970 organized Crime Control Act, 18 U.S.C. § 6001 (1971).

<sup>58</sup> *Ziccavelli v. New Jersey Comm'n of Investigation*, 55 N.J. 249, 261 A.2d 129 (1970), *prob. juris. noted*, 49 U.S.L.W. 3375 (U.S. Mar. 1, 1971) (No. 69-4).

<sup>59</sup> 14 C.F.R. § 421.40 (1971) provides that the decision may be delivered orally at the close of the hearing, or may be rendered in writing at a later date. The heavy case-load pending before the examiners has resulted in more frequent resort to oral opinions.

<sup>60</sup> *Id.* § 421.45, which requires that notice of appeal be filed and served within 10 days of the rendering of the factual decision. Respondent's brief must be filed with the NTSB within 15 days of service of the appellate brief. *Id.* § 421.46(c).

<sup>61</sup> *Id.* § 421.46(e).

<sup>62</sup> 49 U.S.C. § 1486(b) (1971).

<sup>63</sup> See notes 39-41 *supra* and accompanying text.

<sup>64</sup> See note 41 *supra*.

<sup>65</sup> 49 U.S.C. § 1486(d) (1971).

### C. Civil Penalty

Section 901 puts the third major string to the FAA's enforcement bow.<sup>66</sup> It permits the imposition of a civil penalty, essentially a fine, for violation of certain provisions of the Act and the orders and regulations promulgated under these provisions.<sup>67</sup> This section is used in general aviation cases less frequently than the certificate action.

There is no hard and fast rule dictating which sanction should be imposed in particular cases, but as a general rule, the civil penalty is used for violations deemed to be of a non-operational nature and certificate actions are used in operational violation cases. The FAA has a policy of not imposing both types of sanction for the same offense. As far as counsel is concerned, the question of which sanction is sought is usually academic because by the time counsel receives the case, the FAA has most likely already decided which way it is going. The FAA is extremely reluctant to change the nature of the sanction once it has made a decision on which one to use. But if there are considerations unknown to the FAA which make a pending certificate action unfair or unjust to the airman, you should make these considerations known to the FAA and ask for a civil penalty. If the considerations are compelling, so that the temporary loss of license would impose a burden much more severe than is warranted by the nature of the violation, the FAA will be responsive.

An administrative hearing is not available in a civil penalty case. If the matter is to be contested, it must be contested in a United States District Court.<sup>68</sup> The statute provides for a civil penalty not to exceed \$1,000.00 for each violation.<sup>69</sup> If the violation is a continuing one, each day of violation constitutes a separate offense.<sup>70</sup> The most significant aspect of the statute is that it empowers the Administrator to compromise any civil penalty.<sup>71</sup>

A case gets started by a letter which is sent to the airman advising him of the violation or violations which he is alleged to have committed. The letter concludes that a civil penalty is appropriate and states that the FAA would be willing to accept a compromise of the civil penalty<sup>72</sup> in a specified amount, which is usually substantially less than \$1,000.00 for each violation. The typical general aviation civil penalty

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<sup>66</sup> 49 U.S.C. § 1471 (1971).

<sup>67</sup> *Id.*

<sup>68</sup> 49 U.S.C. § 1473 (1971), 14 C.F.R. § 13.15(e) (1971).

<sup>69</sup> 49 U.S.C. § 1471(a)(1) (1971). The FAA may soon seek a higher limit, possibly as high as \$15,000, in order to strengthen its hand in dealing with commercial operators and air carriers.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 1471(a)(2).

<sup>72</sup> 14 C.F.R. § 13.15(b) (1971).

compromise ranges between \$50.00 and \$250.00. If for any reason the airman refuses to compromise the civil penalty, the matter is then referred to the Department of Justice, which may prepare and file a civil complaint in the United States District Court seeking civil penalty.<sup>73</sup>

When an airman receives such a letter and retains counsel to represent him in the matter, it is a good idea to take advantage of the informal conference which the FAA offers.<sup>74</sup> At this informal conference one can learn a good deal about the case against the client, as well as get a feeling for what the FAA would consider a fair compromise. Then, in most cases, it is best to go ahead and compromise.

The case can present a dilemma if the airman feels that the charges are unjustified or ill-founded. It will cost him a good deal more to litigate the matter than to compromise it on the basis suggested by the government. It is my practice to explain to the airman that these matters can be compromised without admitting the violations charged. If my client agrees that the matter should be compromised, I send a letter to the appropriate regional attorney offering to compromise in a certain specified amount,<sup>75</sup> and saying very clearly that this offer is not an admission of the charges made in the civil penalty letter and is merely being made in an effort to resolve the situation to the satisfaction of both sides. There are additional reasons this should be done. For example, if the civil penalty action arose from an accident, the payment of the civil penalty may be considered an admission for purposes of civil suits arising out of the accident.

## VI. MEDICAL CASES

The FAA certifies airmen. A pilot needs two certificates to act as a pilot-in-command of a civil aircraft. One is a pilot certificate with appropriate ratings,<sup>76</sup> and the other is a medical certificate.<sup>77</sup> The FAA medical case arises because the pilot has applied for, and has been denied, a medical certificate. Part 67 of the Federal Aviation Regulations deals with medical certification and the standards for certification.<sup>78</sup> There are three classes of medical certificates. A first class medical

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<sup>73</sup> 49 U.S.C. § 1473(b)(1) (1971), 14 C.F.R. § 13.15(e) (1971).

<sup>74</sup> Unlike certificate action cases, there is no regulatory provision for informal conferences in civil penalty actions. Note 37 *supra* and accompanying text. However, such a conference is within the spirit of 14 C.F.R. § 13.15(b) (1971).

<sup>75</sup> The offer of compromise must be accompanied by a certified check or money order for that amount. 14 C.F.R. § 13.15(c) (1971).

<sup>76</sup> 14 C.F.R. § 61.3(a) (1971).

<sup>77</sup> *Id.* § 61.3(c). Medical certificates are not required to pilot a glider, however, under this rule.

<sup>78</sup> 14 C.F.R. §§ 67.1-31 (1971).

certificate<sup>79</sup> is required for a pilot-in-command of an air-carrier aircraft.<sup>80</sup> A second class medical certificate<sup>81</sup> is required for other commercial flyings<sup>82</sup> and a third class medical certificate<sup>83</sup> is required for private flying.<sup>84</sup>

Section 602 of the Federal Aviation Act is the basic statute involved in medical cases.<sup>85</sup> It provides for review by the National Transportation Safety Board of the denial of a medical certificate.<sup>86</sup> Before one is entitled to this statutory review there must be a formal denial.<sup>87</sup> The failure to appreciate this formal requirement has led to some premature petitions to the NTSB. What is confusing is that there is one stage at which an airman can receive an informal denial. The FAA has delegated to certain private doctors throughout the country the authority to issue, or initially deny airman medical certificates.<sup>88</sup> If the doctor denies the certificate, this is not a "denial" within the meaning of the statute.<sup>89</sup> In order to preserve his rights, the airman must apply to the Federal Air Surgeon for reconsideration of the denial.<sup>90</sup> After reconsideration, a denial made by the Federal Air Surgeon, or his delegate, is a "denial by the Administrator" under Section 602 of the Act.<sup>91</sup>

According to FAA regulations, a certificate issued by a private doctor can be reversed within 60 days,<sup>92</sup> and that action would constitute a denial under the Act.<sup>93</sup> In such a case there is a good legal question whether this is a denial of a certificate governed by Section 602<sup>94</sup> (as the FAA will contend) or the revocation of an existing certificate governed by Section 609<sup>95</sup> (as the airman should contend). The difference is burden of proof.<sup>96</sup>

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<sup>79</sup> 14 C.F.R. § 67.13 (1971). This certificate must be renewed within six months, 14 C.F.R. § 61.43(a) (1971).

<sup>80</sup> 14 C.F.R. § 61.143(e) (1971).

<sup>81</sup> *Id.* § 67.15. This certificate must be renewed within 12 calendar months. 14 C.F.R. § 61.43(b) (1971).

<sup>82</sup> *Id.* § 61.111(c). A commercial license enables the airman to fly for compensation or hire. *Id.* § 61.131(a).

<sup>83</sup> *Id.* § 67.17. A third class certificate must be renewed within 24 calendar months. 14 C.F.R. § 61.43(c) (1971).

<sup>84</sup> *Id.* § 61.81(c). The flight privileges of private pilots are detailed in *Id.* § 61.101.

<sup>85</sup> 49 U.S.C. § 1422(b) (1971).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> 14 C.F.R. §§ 67.23, .25(a) (1971).

<sup>89</sup> *Id.* § 67.27(b)(1).

<sup>90</sup> *Id.* § 67.27(a).

<sup>91</sup> *Id.* § 67.27(b)(2).

<sup>92</sup> *Id.* § 67.25(b).

<sup>93</sup> *Id.* §§ 67.27(b)(2)-(3).

<sup>94</sup> 49 U.S.C. § 1422 (1971).

<sup>95</sup> 49 U.S.C. § 1429 (1971).

<sup>96</sup> In certificate action proceedings under 49 U.S.C. § 1429 (1971), the burden of

Once there has been a denial, counsel must carefully read the section of Part 67<sup>97</sup> upon which the denial is based, and review the medical facts, in order to determine his proper course thereafter. It is at this stage where inexperienced counsel seem to consistently make a procedural error. The NTSB will not review the reasonableness or the validity of the medical standards of Part 67. NTSB will only review the factual determination on whether the airman meets the particular standard.<sup>98</sup> So, if there is no question of fact concerning the airman's qualification, it is fruitless to ask for review by the NTSB. A typical case is that of an airman who has suffered a heart attack. An established medical history or clinical diagnosis of myocardial infarction—so called "heart attack"—is absolutely disqualifying.<sup>99</sup> The Board receives petitions from time to time where there is no question but that the airman suffered a heart attack. The Board cannot provide relief.

The Board can provide relief if there is a fact question, as, for example, if there is a fact question of whether the airman has the disqualifying condition. A typical case involves a condition which is disqualifying if the Federal Air Surgeon finds that it makes the applicant unable to safely perform the duties or exercise the privilege of the airman certificate that he holds or for which he is applying.<sup>100</sup> If the airman has competent medical evidence that he can safely perform despite his condition, this is the kind of question that can be presented to the Board.

When the airman says he has been denied a medical certificate, counsel must first determine that he has received a statutory denial, and if so, must then determine whether there is any factual question as to whether he meets the pertinent medical standards. If there is a fact question then counsel can petition the NTSB for review. The hearing and appeal procedures are essentially the same as in the section 609 proceedings<sup>101</sup> except that the burden of proof is on the airman in the medical case.<sup>102</sup>

If there is no factual question, the only possible relief is a petition to the FAA for an exemption from the medical standard, or a judicial challenge of the validity of the standard.

Counsel can also be of assistance in handling a petition for exemption.<sup>103</sup> This petition is addressed to the Federal Air Surgeon, to whom

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proof rests with the Administrator. 14 C.F.R. § 421.22 (1971). In appeals from a denial of certificate issuance under 49 U.S.C. § 1422(b), the burden is on the airman. 14 C.F.R. § 421.16 (1971).

<sup>97</sup> 14 C.F.R. §§ 67.1-31 (1971).

<sup>98</sup> 14 C.F.R. § 421.47 (1971) lists the issues which NTSB will consider on appeal.

<sup>99</sup> See 14 C.F.R. §§ 67.13(e)(1), 67.15(e)(1), 67.17(e)(1) (1971).

<sup>100</sup> See *Id.* §§ 67.13(f)(2), 67.15(f)(2), 67.17(f)(2).

<sup>101</sup> 49 U.S.C. § 1429 (1971).

<sup>102</sup> 14 C.F.R. § 421.16 (1971). See note 90 *supra* and accompanying text.

<sup>103</sup> See *Id.* § 67.19.

the function of granting or denying exemptions has been delegated.<sup>104</sup> It should be supported by as much medical opinion as can be mustered to the effect that the exemption can be granted without endangering public safety.<sup>105</sup> An order denying exemption is not appealable to the NTSB.

### CONCLUSION

Annually, the FAA initiates an estimated 3,000 enforcement cases, comprised of both certificate actions and civil penalty cases. About 300 of the certificate actions are appealed to the NTSB each year. Additionally, approximately 350 cases arise each year out of FAA denials of medical certificates. Such actions account for the majority of general aviation's need for legal counsel, and are thus the type of aviation questions which the general practitioner is most likely to encounter.

It is the author's hope that the foregoing discussion of the legal and tactical aspects of dealing with these cases will enable the reader to more knowledgeably and efficiently serve as counsel in this growing area of need.

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<sup>104</sup> *Id.* §§ 67.19(a)(1), 11.55.

<sup>105</sup> *See Id.* § 67.19(a)(1). Many individuals with various handicaps have been granted these exemptions.