

Title 14—AERONAUTICS AND SPACE

Chapter I—Federal Aviation Agency

[Docket No. 6320; Amdt. 13-2]

PART 13—ENFORCEMENT PROCEDURES

Hearing Procedure

The purpose of this amendment is to effect improvements and clarifications in the hearing procedure, available at the option of respondents under section 13.19 (c) (4) of Part 13 (14 CFR 13.19). It is based on Notice of Proposed Rule Making 64-50, 29 F.R. 15580.

The amendments proposed for sections 13.45, 13.65, and 13.67 will not be adopted. These proposals would have provided authority for amending the Notice of Proposed Certificate Action to conform the allegations to the proof and to propose more severe action and would have broadened the subsidiary applicability of the Federal Rules of Civil Procedure. Upon further consideration and in light of the adverse comments received it was concluded that the procedural advantages expected from these proposals would be overbalanced by burdens and other disadvantages.

The proposed new section 13.37(b) is being adopted. It states expressly that Hearing Officers may exercise the Administrator's power under sections 313 (c) and 1004(i) of the Act to compel testimony in the face of a valid claim of the privilege against self-incrimination, by conferring immunity.

Section 1004(i) of the Federal Aviation Act (49 U.S.C. 1484) is the version of immunity statute which confers immunity on an individual compelled to testify or produce evidence "after having claimed his privilege against self-incrimination". This form of immunity statute is valid, *Smith v. United States*, 337 U.S. 137 (1949). Section 313(c) (49 U.S.C. 1354) expressly confers the powers of section 1004 on the Administrator. Those comments on proposed § 13.37(d) which attack the constitutionality, form, or propriety of section 1004, or the conferring of these powers upon the Administrator, are therefore not germane to the issues open for decision by the Administrator in this rule making proceeding.

Some comments asserted that § 13.37(d) is unnecessary since the Hearing Officers already have this power. While this may legally be so, it is considered preferable for clarity and certainty to insert a provision expressly delegating to the Hearing Officers the exercise of this power which the statute in terms confers on "the Administrator". There is no basis for the apprehension expressed in some comments that this provision would affect the scope of "the statutory guaranty" or express a policy in favor of frequent use of the power to compel testimony in exchange for immunity. This power in its nature is one to be used sparingly and only upon careful balancing of the public interest considerations. However, contrary to the view expressed in one of the comments, compelling a witness to testify under section 1004(i) confers immunity only on that witness and not on the respondent in the proceeding.

One comment objected to § 37.37(d) unless it was accompanied by a ruling on whether the immunity conferred by section 1004(i) extends to certificate action under section 609 of the Act (49 U.S.C. 1429) and to the imposition of civil penalties under section 901 (49 U.S.C. 1471). Since this issue involves an interpretation of the Constitution and of statutory standards not applicable to this Agency alone, it is considered appropriate to determine the issue in an actual case, on a full record and subject to judicial review rather than in the abstract by an interpretative rule.

The insertion of the "stale complaint" provision in § 13.49 was opposed by only one comment on the patently erroneous ground that it would impose a burden on the certificate holder. The language deviation from the corresponding § 301.27(c) of the Civil Aeronautics Board rules (14 CFR 301.27(c)) with respect to the event that tolls the running of the 6-month period—"mailing or other service of the Notice of Proposed Certificate Action" in proposed § 13.49(b) against "the Administrator's advising respondent" in the Board rule—is considered desirable because it removes uncertainty as to when the event happened. Whether the language in § 13.49(b) is inconsistent with that in § 301.27(c) is a matter of interpretation of the latter. On principle it is found that there should be no substantive differences between the Board and FAA rule. The proposed rule follows the Board's rule as closely as adherence to the drafting principles

governing the Federal Aviation Regulations permits.

The proposed amendment to § 13.61, making submission of written proposed findings and conclusions, and supporting reasons, discretionary with the Hearing Officer, is being adopted. It was opposed by only one of the comments on the ground that the parties may make these submittals as a matter of right. This is not so since these proceedings are not governed by section 8 of the Administrative Procedure Act.

Since the proposed amendment to § 13.45 is not being adopted, the reference thereto in § 13.67(a) is likewise omitted. However, the proposed rewording of this paragraph is adopted otherwise. The language is mandatory on the Hearing Officer, and does not absolve the Hearing Officer from responsibility for lack of clarity which would make his order insufficient for use as a complaint under § 301.26 of the Board's regulations.

In addition to the amendments proposed in the Notice, the following three amendments are made:

Section 13.41(b) as now written requires that the certificate holder's answer must be responsive to the allegations in the Notice of Proposed Certificate Action. Under this provision a general denial is not sufficient. It has been decided to ease the burden of pleading on respondents by permitting a general denial of those allegations of the Notice which go beyond identifying an airman or aircraft or describing airman or aircraft certificates, and § 13.41(b) is being amended accordingly.

Second, § 13.59(a), relating to evidence, is amended to make inadmissible in proceedings against a certificate holder who is a natural person any reports of accidents or incidents that this holder himself had to make to the Civil Aeronautics Board or this Agency. Reports required under Part 320 of the Safety Investigation Regulations of the Civil Aeronautics Board, or under §§ 91.3(c) and 91.75(c) and (d) of the Federal Aviation Regulations, fall under this new provision. This amendment codifies existing FAA practice.

Last, § 13.65 is deleted. It provided for subsidiary applicability of the Federal Rules of Civil Procedure. Instead, Part 13 will be amended from time to time as the need for procedural rules not now expressly provided may appear.

These three amendments may be made without notice of rule making since they are procedural in nature. They do not impose a burden on any person but relax existing requirements.

All relevant matter presented in this proceeding has been fully considered.

This rule making action is taken under the authority of section 303(d), 313(a), (c), 609, 1001, 1002, 1004, and 1005 of the Federal Aviation Act of 1958 (49 U.S.C. 1344, 1354, 1429, 1481, 1482, 1484, and 1485).

In consideration of the foregoing, Part 13 of the Federal Aviation Regulations (14 CFR Part 13) is hereby amended, effective June 27, 1965, as follows:

1. By redesignating paragraphs (d) through (j) of § 13.37 as (e) through (k), respectively, and inserting a new paragraph (d) reading as follows:

§ 13.37 Hearing Officer's powers.

(d) Rule on claims of privilege against self-incrimination and compel testimony by conferring immunity under section 1004(i) of the Federal Aviation Act of 1958 (49 U.S.C. 1484);

§ 13.41 [Amended]

2. By adding the following new sentence at the end of § 13.41(b): "However, allegations other than those identifying an airman, stating the number and type of his certificate and ratings, or identifying an aircraft, its number and type, may be answered by a general denial."

3. By amending § 13.49 as follows:

(a) By amending the heading of paragraph (a) to read "(a) Motion to dismiss for insufficiency";

(b) By redesignating present paragraphs (b) through (g) as (c) through (h), respectively; and

(c) By inserting a new paragraph (b) reading as follows:

§ 13.49 Motions.

(b) Motion to strike stale allegations. If the Notice of Proposed Certificate Action contains an allegation of a violation that occurred more than 6 months before the date of mailing or other service of the Notice, the respondent may move to strike that allegation in any of the following cases:

(1) In any case in which the Notice does not allege lack of qualification of the certificate holder, Agency counsel is required to show by answer filed within seven days of service of the motion that good cause existed for the delay, or that if the allegations are proved, the imposition of a sanction is warranted in the public interest notwithstanding the delay or the reasons therefor. The respondent may file a reply to the answer within the time fixed by the Hearing Officer. The Hearing Officer may require Agency counsel to make his factual allegations of good cause more definite, certain or detailed. A hearing on the issue of good cause is held only if the respondent raises a genuine, pertinent, and substantial issue of fact. If the Hearing Officer does not find that good cause for the delay existed or that the public interest requires imposition of sanctions, notwithstanding the delay, if the allegations are proved, he orders the stale allegations stricken and proceeds to adjudicate only the remaining portions, if any, of the Notice.

(2) In any case in which the Notice alleges lack of qualification of the certificate holder the Hearing Officer determines first whether an issue of lack of qualification is presented if the stale allegations, standing alone or together with the timely allegations, are true. If the Hearing Officer finds that the issue is not presented, he orders the stale allegations stricken and proceeds to adjudicate the remaining portions, if any, of the Notice. If he finds a qualification issue presented, he proceeds to hearing, advising the respondent that he is to defend against the allegation of lack of

qualification to hold his certificate and not only against a proposed remedial sanction.

A motion to strike under this paragraph may be combined with a motion to dismiss any remaining parts of the Notice under paragraph (a) of this section.

* * * * *
§ 13.59 [Amended]

4. By adding the following new sentence at the end of § 13.59(a): "In a proceeding against a certificate holder who is a natural person, any report filed by that holder as required by the Civil Aeronautics Board or the FAA is not admissible in evidence. However, such a report may be used to impeach the testimony of the certificate holder."

§ 13.61 [Amended]

5. By amending the last sentence of § 13.61 to read as follows: "At the end of the hearing the Hearing Officer may, in his discretion, allow each party to submit written proposed findings and conclusions and supporting reasons for them."

§ 13.65 [Deleted]

6. By deleting § 13.65.

7. By amending § 13.67(a) to read as follows:

§ 13.67 Final order of Hearing Officer.

(a) If the final order of the Hearing Officer makes a decision on the merits it contains a statement of his findings and conclusions on all material issues of fact and law. If the Hearing Officer determines that safety in air commerce or air transportation and the public interest so require, he may issue a reprimand or an order amending, suspending, or revoking the respondent's certificate. However, the certificate action imposed may not be more severe than that proposed in the Notice of Proposed Certificate Action. If the Hearing Officer finds that the allegations of the notice have not been proved or that no sanction is required, he orders the notice dismissed. If the Hearing Officer finds it to be equitable and in the public interest, he may order the proceeding terminated upon payment by the respondent of a civil penalty in an amount agreed upon by the parties.

Issued in Washington, D.C., on May 21, 1965.

N. E. HALABY,
Administrator.

[F.R. Doc. 65-5627; Filed, May 28, 1965;
8:45 a.m.]