U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

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Washington, D.C. 20591

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Craig L. Fabian
VP Regulatory Affairs & Assistant General Counsel
Aeronautical Repair Station Association
121 North Henry Street
Alexandria, VA 22314-2903

RE: Interpretation of FAA Drug and Alcohol Testing Rules

Dear Mr. Fabian:

This responds to a request for a legal interpretation concerning refusals to test, and how they apply to the permanent disqualification under 14 C.F.R. §120.111. Your inquiry raised two separate questions. Our response to your inquiry follows.

We understood the two questions posed by your letter to be as follows. One, whether a person who previously obtained a verified positive drug test result on a DOT drug test and later fails to provide sufficient urine for a follow-up drug test without an adequate medical explanation for the failure, is subject to permanent disqualification from service under 14 C.F.R. §120.111? Two, whether a person's repeated failure to provide sufficient urine for a follow-up drug test without an adequate medical explanation for the failure requires the person to perpetually remain in a follow-up testing program?

Prior to answering the questions above, it is necessary to clarify certain aspects of your inquiry. Your letter states, "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 C.F.R. §120.109." (emphasis added) This is not correct. Section 120.109(e) – Return to duty drug testing – requires each employer to "ensure that before an individual is returned to duty to perform a safety-sensitive function after refusing to submit to a drug test … or receiving a verified positive drug test result … the individual shall undergo a *return-to-duty* drug test." (emphasis added) The section goes on to say,

> "No employer shall allow an individual required to undergo return-to-duty testing to perform a safety-sensitive function unless the employer has received a verified negative drug test result for the individual. The test cannot occur until after the Substance Abuse Professional has determined that the employee has successfully complied with the prescribed education and/or treatment."

Thus, before allowing a covered employee to return to duty to perform a safety-sensitive function after the employee refused a drug test or received a verified positive drug test result, the employer must first comply with the return-to-duty testing requirements under Section 120.109(e). Only upon returning such employee to a safety-sensitive function must the employer then implement a follow-up testing program for that employee in accordance with Section 120.109(f).

In response to your first question, we first note that Section 120.111(e)(1)-(2) states:

> "(1) An employee who has verified positive drug test results on two drug tests required by the 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.
>
> (2) An employee who has engaged in prohibited drug use during the performance of a safety-sensitive function after September 19, 1994, is permanently precluded from performing that safety-sensitive function for an employer."

An individual who is unable to produce a urine specimen for drug testing, without an adequate medical explanation for the failure, has refused a drug test under 49 C.F.R. §40.191(a)(5). A refusal to test is not a "verified positive result" nor does it, by itself, demonstrate that an employee "has engaged in prohibited drug use during the performance of a safety-sensitive function." Thus, absent a second verified positive drug test or that the person engaged in prohibited drug use during the performance of a safety-sensitive function, the combination of a verified positive drug test result and a subsequent refusal to test under your hypothetical would not subject the employee to permanent disqualification from service under Section 120.111(e).

Your second question assumes a situation where the employee has a verified negative result on a return-to-duty drug test, and has been reinstated in a safety-sensitive position. If the employee then fails to provide sufficient urine for a follow-up drug test without an adequate medical explanation for the failure, this does not trigger the permanent disqualification provisions of 14 C.F.R. §120.111, as discussed above. However, a refusal to test is a violation of FAA regulations, and an employee who refuses a required drug test, follow-up or otherwise, must be removed from safety-sensitive functions "until or unless the employee successfully completes the return-to-duty process," see 49 C.F.R. §40.23(d).

We appreciate your patience and trust that the above responds to your concerns. If you need further assistance, please contact my staff at (202) 267-3073. This response was prepared by Neal O'Hara, an attorney in the Air Traffic and Airman/Airport Certification Law Branch of the Regulations Division of the Office of Chief Counsel, and it was coordinated with the Drug Abatement Division of the FAA and the Department of Transportation Office of Drug and Alcohol Policy and Compliance.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel for Regulation, AGC-200