U.S. Department
of Transportation
Federal Aviation Administration

Office of the Chief Counsel

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DEC 26 2012

Mr. Craig L. Fabian
Vice President Regulatory Affairs and
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121 North Henry Street
Alexandria, VA 22314-2903

Dear Mr. Fabian,

This letter is in response to your December 13, 2010 request that Federal Aviation Administration (FAA) retract a legal interpretation issued to Alexandra M. McHugh of United Technologies on May 18, 2010 ("McHugh") in which we clarified what activities may constitute duty for maintenance personnel and the application of the rest provisions under 14 CFR 121.377. For the reasons explained below, the FAA is rescinding that portion of the McHugh interpretation that was meant to clarify the application of the rest provisions under 14 C.F.R. § 121.377. A notice is being published in the Federal Register and placed in the docket (FAA-2011-0367) to apprise the general public of our decision. A copy of this letter will also be placed in the docket.

On April 15, 2011, the FAA published a notice requesting comments on the McHugh interpretation and whether we should retract McHugh as recommended in your request. The FAA received 16 comments on the proposed interpretation from: Pratt & Whitney, ARSA, the Professional Aviation Maintenance Association (PAMA), the Air Transport Association (now Airlines for America, "A4A"), the Transport Workers Union of America (TWU), and 6 individual commenters.

McHugh addressed what types of activities may be considered part of the duty period for maintenance personnel under § 121.377. In addition, the interpretation addressed the equivalency standard[1] found in the § 121.377 rest provisions. The interpretation provided that the FAA would not consider compliant a work schedule in which maintenance personnel were required to work several consecutive weeks without an uninterrupted, consecutive 24-hour rest period during any seven consecutive days.

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[1] Sec. 121.377 Maintenance and preventive maintenance personnel duty time limitations.

Within the United States, each certificate holder (or person performing maintenance or preventive maintenance functions for it) shall relieve each person performing maintenance or preventive maintenance from duty for a period of at least 24 consecutive hours during any seven consecutive days, *or the equivalent thereof within any one calendar month.(emphasis added).*

A number of commenters (ARSA, A4A, and TWU) argued that the proposed interpretation contradicts the plain meaning of § 121.377, stating that the "equivalent thereof" language in § 121.377 is not phrased as an exception and that the regulatory language in this section does not limit the "equivalent thereof" provision to only national emergency situations or unusual occurrences. Based on that argument, the commenters further assert that the Administrative Procedure Act (APA)[2] would require a rulemaking in order to limit the "equivalent thereof" provision in the manner specified in the interpretation.

These arguments are compelling. The word "or" as used in § 121.377 clearly allows for two methods of compliance. The conjunction "or" is "used as a function word to indicate an alternative, the equivalent or substitutive character of two words or phrases, or approximation or uncertainty."[3] So the only question is how to read the words "the equivalent thereof." McHugh treated the two sides of the conjunction as a specific standard (one day off in any seven consecutive days) and a general standard (or the equivalent thereof) and reasoned that the specific standard "cannot be rendered completely inoperative by the more general equivalent standard." However, this argument only looked at the two alternatives from one perspective. It would be equally true that the general standard cannot be rendered completely inoperative by the more specific standard. Thus, if the equivalent *amount of rest* is actually given (24 consecutive hours for each seven consecutive days within a calendar month) the equivalency required by the regulation is met. The requirement for equivalency lies in the amount of rest given, not in the way the schedule itself operates or is developed.

McHugh acknowledged this in stating that "(t)he regulatory flexibility found in § 121.377 allows maintenance personnel to work a schedule that maintains the "equivalent" to one day off every week even though that schedule might provide for more than six consecutive days of work." McHugh then went on to cite a previous interpretation which "allowed that a work schedule that provides for personnel to have a group of 4 days off followed by up to 24 days of work, or vice versa, would still meet the standard of being "equivalent" to one day off in every seven within a month." *See*, Legal Interpretation to Ron Webb from Donald P. Byrne, Assistant Chief Counsel, Regulations (Jun. 1991). McHugh then distinguished the Webb interpretation, stating that it was "issued prior to the findings relating fatigue to maintenance related errors in the air carrier industry discussed in Advisory Circular (AC) 120-72 (September 28, 2000)." However, an AC can only provide guidance for compliance with a regulation. It cannot change the requirements of the regulation itself.

Commenters cited additional interpretations that were issued prior to Webb. In Coleman, Interpretation 1987-15 (Jun. 1987), we stated: "The clause 'or equivalent thereof within any one calendar month' provides flexibility in the rule. It is intended to provide coverage for situation involving national emergencies as well as those unusual conditions that arise within the air carrier industry. Basically, it permits maintenance personnel to

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[2] Administrative Procedure Act § 5(d), 5 U.S.C. § 554(e) [2000]
[3] www.merriam-webster.com/dictionary/or

work continuously in any one calendar month, *provided that are given time off and away from work in that month equal to the actual hours they would have been relieved from duty, had they worked six days with the seventh day off throughout the specific calendar month under consideration. This relief from duty must be given in increments of not less than 24 consecutive hours* (emphasis added)."

In Interpretation 1991-11, Aviation Safety Inspector, Tennessee FSDO, (Mar. 1991), the FAA used language identical to the Coleman language above to describe the term "or the equivalent thereof in any 1 calendar month" in response to the following question: "Does it mean that we can work the entire month straight as long as we take 4 or 5 days off in a row sometime during the month?" The answer to the question was yes.

Commenters also asserted that mechanics and certificate holders have incorporated these prior longstanding interpretations into their operations and collective bargaining agreements, and that changing these interpretations would entail significant costs. TWU also asserted that there is no data to support the proposition that changing the understanding of § 121.377 in the manner proposed by the FAA would actually mitigate fatigue.

Conversely, Pratt & Whitney supported the proposed interpretation. Pratt & Whitney asserted that the plain text of the current § 121.377, specifically the "equivalent thereof" provision, is exceedingly vague, which leads to inconsistent interpretations of that section and recommended that this ambiguity be eliminated by rewriting § 121.377 to explicitly require one day of rest in a seven-day period. While these comments support the proposed interpretation, they also point to a need to rewrite § 121.377, which would require rulemaking. ARSA, A4A, PAMA, TWU and several of the individual commenters also stated that changing the longstanding interpretation of the equivalency language without rulemaking violates the APA and that the language is ambiguous and needs to be changed or amended.

Upon review of the comments, the FAA agrees that the proposed interpretation of the "equivalency language" found in the § 121.377 rest requirements for maintenance personnel would change prior longstanding precedent. As a result, the FAA is rescinding that portion of McHugh dealing with the "equivalency language" found in § 121.377.

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 letter has been prepared by Robert H. Frenzel, Manager, Operations Law Branch, Office of the Chief Counsel and coordinated with the Air Transportation and Aircraft Maintenance Divisions of Flight Standards Service.

Sincerely,

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