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

Office of the Chief Counsel

800 Independence Ave., S.W.
Washington, D.C. 20591

AUG 2 9 2016

Mr. Scott Ray
Rose Aircraft Services, Inc.
132 Flight Lane, P.O. Box 1850
Mena, Arkansas 71953

Re: 14 Code of Federal Regulations part 120 Definition of terms in part 120.109

Dear Mr. Ray:

This is in response to your letter of April 18, 2016, requesting a legal interpretation of the definition of the terms, "specific, contemporaneous physical, behavioral, or performance indicators of probable drug use," as they are used in § 120.109(d) of Title 14 Code of Federal Regulations.

Section 120 .109(d) requires an employer to drug test each employee who, under the language of the regulation, is reasonably suspected of having used a prohibited drug. The decision to test must be based on a reasonable and articulable belief that the employee is using a prohibited drug on the basis of specific contemporaneous physical, behavioral, or performance indicators of probable drug use.

In your request for a legal interpretation, you ask the FAA to define the terms "specific, contemporaneous physical, behavioral, or performance indicators of probable drug use." The FAA noted in the preamble to the Notice of Proposed Rulemaking on an Anti-Drug Program for Personnel Engaged in Specified Aviation Activities (53 Fed. Reg. 8368-01, March 14, 1988) that testing based on reasonable cause would be based on a reasonable and articulable belief. The preamble says, "Even if no mistakes are made at work, the employee may demonstrate a change in character or behavior that could be symptomatic of drug use. Such changes are normally characterized by mood swings and changes in appearance, attitude, and speech."

In addition, the FAA has made available on the Drug Abatement Division's webpage a "Suggested Reasonable Cause/Reasonable Suspicion Documentation Form," (http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/drug_alcohol/forms/media/FAAReasonableCauseorSuspicionForm.docx) a copy of which is enclosed with this letter. This form includes a checklist containing 48 different observations, divided in categories such as; appearance, behavior, motor skills, speech and odor, which could be used to document the determination that a reasonable cause drug test was necessary.

I hope that this response is helpful to you. If you need more information or have additional questions, please do not hesitate to contact my staff at (202) 267-3073. This response was prepared by Neal O'Hara, an attorney in the Office of the Chief Counsel, Regulations Division.

Sincerely,

Lorelei Peter
Assistant Chief Counsel for Regulations

Rose Aircraft Services, Inc.
Intermountain Municipal Airport (M39)
132 Flight Lane, P.O. Box 1850
Mena, Arkansas 71953
Telephone 479-394-2551 or 800-392-2551
FAX 479-394-5391
www.roseaircraft.com

DATE: April 18, 2016

TO: FAA/Office of the Chief Counsel

FROM: Scott Ray

RE: Legal Interpretation

We had requested the FAA Drug Abate Division to define "specific, contemporaneous physical, behavioral, or performance indicators of probable drug use" as stated in regulation 14 CFR 120.109.

We received the response [copied below] from that division and are now requesting this legal interpretation from your office as directed.

We would appreciate your interpretation so we can resolve this issue as soon as possible.

Sincerely,
Scott Ray,
H.R. Director

Dear Mr. Ray:

Unfortunately, I cannot provide you with a legal interpretation on behalf of the agency. Please submit your request to the following office:

FAA/Office of the Chief Counsel
International Law, Legislation, & Regulations Division, AGC-200
800 Independence Avenue, SW.
Washington, DC 20591

When sending your request, I would recommend that you include some additional details to explain the situation that transpired around the tests conducted on March 26, 2015, as it relates to the determination made for conducting the reasonable cause drug testing. Based on our inspector's review of the information provided during your inspection, we determined that your trained supervisor did not meet the requirement to conduct DOT/FAA-mandated reasonable cause drug testing based on the requirement in 14 CFR § 120.109(d).

To help employers train supervisors, or assist the supervisor in making and documenting the decision whether to conduct a DOT reasonable cause/suspicion test, we developed a Reasonable Cause/Reasonable Suspicion Documentation Form on our web site. Keep in mind that when the trained supervisor observes the employee and the behaviors do not meet the indicators described in part 120 or on the sample form, you do have the option of conducting a company test under your own authority.

Please let us know if you have any additional questions.

Sincerely,

Vicky Dunne
Manager, Program Policy Branch
Drug Abatement Division
Ofc: 202-267-8442
Fax: 202-267-5200

From: Scott Ray [scott@roseaircraft.com]
Sent: Tuesday, April 12, 2016 9:01 AM
To: 9-AWA-AVS-AAM800-DrugAbatement (FAA)
Cc: jkrose@roseaircraft.com
Subject: Question regarding interpretation of regulation

Please define "specific, contemporaneous physical, behavioral, or performance indicators of probable drug use" as stated in regulation 14 CFR 120.109.

Scott Ray
Human Resources Manager
Rose Aircraft Services, Inc.
PO Box 1850
132 Flight Lane
Mena, AR 71953
Phone: 479-394-2551

I am also enclosing the response to the FAA Drug Abatement Division I was requested to send to that office regarding why our company felt the need to perform the DOT reasonable cause/suspicion test on the identified employees.