Federal Aviation Administration

Memorandum

Date: September 3, 2024

To: Jonathan Moss, Manager, Little Rock FSDO, AFG-600

From: Laura Megan-Posch, Assistant Chief Counsel for Regulations, Regulation Law Division, AGC-200

LAURA JANE MEGAN-POSCH

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Date: 2024.09.03 16:28:37 -04'00'

Prepared by: Jacob Keohane, Attorney Advisor, AGC-210

Subject: Response to request for interpretation for 14 CFR §43.3(d) and the meaning of the requirement for a repairman supervisor to be "in person."

This letter responds to your July 8, 2022, request for interpretation of the phrase "in person" under 14 CFR § 43.3(d), which states:

> A person working under the supervision of a holder of a mechanic or repairman certificate may perform the maintenance, preventive maintenance, and alterations that his supervisor is authorized to perform, if the supervisor personally observes the work being done to the extent necessary to ensure that it is being done properly and if the supervisor is readily available, *in person*, for consultation. However, this paragraph does not authorize the performance of any inspection required by Part 91 or Part 125 of this chapter or any inspection performed after a major repair or alteration.

(Emphasis added)

You asked whether a supervisor must be physically present at the site of the maintenance, or if he may supervise remotely, through Zoom, FaceTime, live feed TV, photographs, downloadable video, or other electronic means. Assuming remote supervision is allowed, you then asked if the supervising mechanic would be allowed to provide the documentation for return to service electronically.

The Office of the Chief Counsel finds that the phrase "in person" explicitly requires physical presence. Virtual presence, through a live video feed or other technological means, cannot replace the physical presence of a supervising mechanic.

The term "in person" is typically used to distinguish physical presence from mere virtual or remote presence, *e.g.* "Are we meeting in person today?" [1] Interpreting § 43.3(d) to allow supervision by Zoom or FaceTime would render the phrase "in person" redundant, but all parts of binding legal text must be given effect.[2]

This interpretation is consistent with previous administrative rulings. In Exemption No. 5139 (January 22, 1990), a petitioner asked to be allowed to train its own "workers" to perform preventative maintenance. This petition was denied. The FAA noted that:

> [I]t is not clear why the petitioner states that a non-certificated "worker" need not be physically observed by the certificated person "directly in charge" when maintenance is performed by the non-certificated worker. Section 43.3(d) states, in essence, that a certificated mechanic or repairman must be readily available, in person, when he is supervising maintenance performed by a non-certificated person.

In Re New Creations, Inc., FAA Exemption No. 5139, Jan. 22, 1990, at 3.

The phrase "readily available, in person, for consultation" contemplates a physical, hands-on approach to supervision. The certificated mechanic must be available, not just to answer questions, but to notice mistakes and take over if necessary. In *Blakey v. Sugen*, National Transportation Safety Board (NTSB) Order No. EA-5128 (December 10, 2004), the NTSB upheld the suspension of the respondent's Commercial Pilot Certificate for performing unsupervised maintenance—specifically, for performing some maintenance tasks while in earshot of certificated mechanics, but without any mechanic directly watching him. "One American Avionics employee testified, essentially, that he *observed respondent applying sealant* to the radome on his own, but this witness also conceded that he *didn't physically observe the installation* itself and 'assum[ed] he [respondent] probably had to have somebody [from American Avionics] over there to help him out.'" NTSB Order EA-5128 (2004), 5 (emphasis added, alternations in the original). In other words, mechanics must be able to physically intervene at every step of the process.

A live video feed does not allow for this level of supervision. A remote supervisor cannot take over maintenance and can only see what the camera is pointed at. Anything out of frame will go unnoticed by even the most experienced mechanic. In *Blakely*, the respondent was surrounded by mechanics and could have asked them to step in at any time, but nevertheless had his certificate suspended. This circumstance is similar to remote supervision. In the best-case scenario, a remotely supervising mechanic would be

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[1] *Cf.* MERRIAM-WEBSTER.COM, *available at* https://www.merriam-webster.com/dictionary/in%20person (defining "in person" as "in one's bodily presence").

[2] This common-sense proposition is commonly known as the "Canon Against Surplusage" or the "Surplusage Canon." *See, e.g.*, BRYAN A. GARNER & ANTONIN SCALIA, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE 2 (2015), *available at* https://judicature.duke.edu/articles/a-dozen-canons-of-statutory-and-constitutional-text-construction/.

available for questions at any time and could remotely observe most steps of the work, but crucial details might remain out of frame and the supervisor would have no power to step in if necessary. That best-case scenario still would not be enough under § 43.3(d).

Finally, § 43.3(d)'s "in person" language has remained consistent since its enactment in 1964.[3] It is worth noting that "in person," to the rule drafters of the late fifties and early sixties, could only have meant physical presence. Interpreting "in person" to mean something other than physical presence would therefore be a significant departure from the original meaning of the text. Interpretative rules issued pursuant to section 553(b)(A) of the Administrative Procedure Act (APA), such as this one, serve merely to "advise the public of the agency's construction of the rules and statutes which it administers." [4] They cannot change the meaning of the underlying substantive rules they construe.[5]

For these reasons, the Office of Chief Counsel finds that 14 CFR 43.3(d) does not allow for remote supervision of maintenance. Because remote supervision is not allowed, the question of electronically documenting the return to service is not raised and therefore is not addressed by this interpretation.

We appreciate your patience and trust that the above responds to your inquiry.

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[3] The language that now makes up 14 CFR 43.3(d) comes from Civil Aeronautics Manual (CAM) § 18.10-1 (December 15, 1959). *Compare* § 43.3(d) ("…if the supervisor personally observes the work being done to the extent necessary to ensure that it is being done properly and if the supervisor is readily available, in person, for consultation.") *with* CAM 18.10-1 ("*Direct supervision* means that the supervising mechanic personally maintains such observation of the work being performed as is necessary to insure [*sic*] that the work is being performed properly, and the supervising mechanic is readily available in person for consultation with the person performing the work."). In 1961, the FAA announced that it was consolidating Civil Aeronautics Board regulations, Civil Aeronautics Manuals, and other authorities into one unified chapter of Title 14. 26 FR 10698, November 16, 1961. Part 43 was added to the CFR on April 23, 1964, 29 FR 5451, as part of that consolidation project. The "in person" language has remained ever since.

[4] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947), 30 n.3, *available at* http://library.law.fsu.edu/Digital-Collections/ABA-AdminProcedureArchive/AttorneyGeneralsManual.pdf (explaining the difference between "substantive rules," "interpretative rules," and "general statements of policy").

[5] *See id.*