



AOPA-SA POSITION PAPER

VALIDITY OF PENALTY NOTICES ISSUED BY ENFORCEMENT OFFICERS.

1.0 Introduction

In a statement released on 30 May 2011, the South African Civil Aviation Authority (SACAA) announced that it will be implementing a monetary penalty system against those who transgress applicable civil aviation regulations. This new system, which becomes effective on Wednesday, 01 June 2011, is spelled out in Part 185.00.3 of the Civil Aviation Regulations.

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The statement further included that whilst the regulations are watertight in terms of dealing with severe contraventions, they also left a gap in terms of dealing with minor contraventions that did not pose any serious safety risks. So, instead of just warning and letting culprits walk away unpunished for minor contraventions, the SACAA now has in place a comprehensive system that can deter rampant disregard of all civil aviation regulations.

The fines to be imposed ranged between R5 000 and R20 000 for individuals and between R16 000 and R53 000 for organizations. The SACAA further asserted that the implementation of this regulation is in the interest of aviation safety and all stakeholders concerned and whilst aviation safety and security is its primary mandate, they are also responsible for ensuring development of the industry. In applying this new system, the SACAA will strive to strike a balance between ensuring safety and enabling the industry to flourish. Assurance was also stated that the SACAA has put mechanisms in place to discourage callous and overzealous implementation or abuse of this new system

2.0 Principles Involved.

From the above it appears that the approach of the SACAA and its Director can be seen as that of a "ZERO TOLERANCE" as to compliance with requirements in respect of aviation safety. Intentional

and severe contraventions were to be dealt with by prosecution and related court action, whilst less severe or minor contraventions were to be dealt with by administrative action through issuance of fines.

It is also understood that approval by Minister of Finance restricted use of the income from fines to that of accident investigation purposes.

3.0 Regulatory Empowerment to issue fines.

The empowerment to issue appears to be vested in regulation 185.00.3 of the Civil Aviation Regulations 1997 (CARs), which reads:

Administrative Monetary Penalties

185.00.3 (1) *An enforcement officer may assess and impose administrative monetary penalties for offences referred to in regulation 185.00.1.*

(2) *The administrative monetary penalty may be a spot fine or a fine following an investigation.*

Part 185 prescribes the procedure to be followed by an enforcement officer in processing the issuance of a Penalty Notice for the payment of a spot fine for example an Enforcement Officer must serve the alleged offender with a Notice of Intended Investigation, before issuing and serving a Penalty Notice for a fine following the relevant investigation. There is also an opportunity for an alleged offender, who feels aggrieved by the Final Ruling, to appeal to the Director against the terms of the Final Ruling within 14 days of the issue of Final Ruling.

4.0 Conflicts with the intent and application of the regulation in respect of Administrative Monetary Penalties

4.1 The current CARs 1997 do not contain any definition of an Enforcement Officer, the training nor the required qualifications to process the assessments prescribed and associated with the issuance of a penalty notice.

In the proposed Civil Aviation Regulations CARs 2011 (as yet not promulgated) a definition is now included which reads:

“enforcement officer” means an authorised officer, inspector or authorised person;

Part 13 of the CARs 1997 does however state:

Authority of authorised officers and inspectors

13.00.1 (1) *In addition to any specific power granted to or duty imposed on an authorised officer or inspector under any part of the regulations, such authorised officer or inspector may –*

.....

(g) *may assess and impose the Administrative Monetary Penalties prescribed in Part 185:*

[Note double *may*]

4.2 The above lack of an definition of an “enforcement officer” clearly implies lack of appropriate empowerment to issue a penalty notice or a spot fine and implies that any penalty notice issued

in terms of the CARs 1997 shall be issued under signature and identification of an authorised officer or an inspector and not as an enforcement officer.

- 4.3 The current format of the Penalty Notice contained in Annexure A to SA-CATS-OFF AND PEN - Offences and Penalties, only provides for identification of an Enforcement Officer.

5.0 REVIEW AND CONCLUSION

Whilst the enforcement of compliance with a zero tolerance approach is commendable, it is also essential that the enforcer should be in full compliance with the rule of law. The SACAA as regulator and enforcer should have its own house in order and ensure that its actions are in compliance with all prescriptions as applicable. Its staff should be trained accordingly.

- 5.1 Actions by an authorised person or inspector are not those of an enforcement officer until such time as an appropriate definition of an enforcement officer is in place.

The intent of the empowerment of an enforcement officer as to those of an authorised person or inspector does differ. Not all authorised persons or inspector may necessarily have been adequately trained or experienced to be empowered to “assess and impose the Administrative Monetary Penalties prescribed in Part 185” by the director. Aviation is a highly skilled and technological developed environment requiring specialised knowledge and experience. The fact that the Minister (empowered to make regulations) differentiated between an authorised officer and an enforcement officer implies different roles for such officers. Section 88 of the Civil Aviation Act 2009 as in force, states that the Director may limit the powers of authorised officers, inspectors or authorized persons when designating such authorised officer, inspector or authorised person.

With reference to the wording of CARs Part 13.00.1 it becomes clear that the designation of the authorised officer or inspector should specifically include the empowerment “to *assess and impose the Administrative Monetary Penalties prescribed in Part 185.*”

The above implies that any notice issued by a person not specifically appointed as an enforcement officer therefore may not meet the intent of the regulation and as such not be in compliance with the Rule of Law. Such notices issued by a person other than an Enforcement Officer may be deemed to be *ultra virus* by a court of law.

The SACCA should ensure that this aspect be clarified.

- 5.2 What is of note is that in the event of a conviction where a criminal prosecution has been instituted in accordance with regulation 185.00.3 (3), the penalties referred to in the table may be used as guidance in determining the appropriate sentence.

It would therefore appear that contrary to the SACAA statement referred to in paragraph 1 above. Similar penalties are applicable to severe or intentional contraventions than minor contraventions. This does not seem appropriate. Penalties associated with severe or intentional contraventions should be more severe than minor contraventions or in some cases unintentional contraventions. The current guidance wording in Part 185 implies that minor contraventions are subjected to the same level of penalties as that associated with severe contraventions. This aspect should be reviewed.

- 5.3 It is clear that no clear correlation exists as to the regulations and the CATS forms in respect of the issuance of penalty notices and procedures. For example there is no statement in the CARs of what the final ruling consists of.)

6.0 PROPOSED FUTURE CORRECTIVE ACTION

AOPA-SA remains committed and supports the concept of voluntary compliance with aviation legislation and regulatory requirements.

This does not exclude enforcement action against those who intentionally do not wish to comply and wilfully disregards regulatory requirements thereby endangering the lives of other participants of aviation activities.

Should administrative or punitive action be inevitable AOPA-SA supports a “ZERO TOLERANCE” approach.

However, this demands that the enforcer (SACAA and its Director) procedures and processes should in all respects be in full compliance with the rule of law.

AOPA-SA therefore wishes to make the following recommendations as to future actions:

- 6.1 All aviation participants should voluntary commit to be in compliance and adhere to aviation legislation and associated requirements;
- 6.2 Safety oversight by the SACAA should be accepted and supported by aviation participants:
- 6.3 In turn the SACAA, it’s Director, inspectors and support staff should ensure that their actions are at all times clear, rational, fair and in compliance with the Civil Aviation Regulations and its prescribed procedures;
- 6.4 Designation and appointment of Enforcement Officers should be corrected to ensure compliance with the intent of the role of the regulator and appropriately designated to meet regulatory wording;
- 6.5 Wherever conflict or misinterpretation of requirements re identified, the SACAA through CARCOM should ensure that the Minister of Transport is speedily and appropriately advised to introduce the appropriate amendments to regulatory requirements.

AOPA_SA invites all aviation industry participants to support the above proposed corrective actions to ensure the fair and correct application of Administrative Monetary Penalties.

- END -

Issued by AOPA-SA

11 January 2012

Comments in respect of the above position paper are invited.

You are most welcome to become a member of AOPA-SA.

Together and with your support growth of our South African Aviation activities can be assured and expanded.