

Chapter 10 Deterrent Action

10.1 Introduction

The most important decision in the enforcement process is determining the appropriate deterrent action to impose when the evidence indicates that an individual has contravened a provision of the *Civil Aviation Act* or the *Nepalese civil Aviation Regulations*. This decision may significantly affect the individual's attitude towards aviation safety and towards compliance with the rules in the future. The intent of the procedures in this chapter and the other chapters in this part is to promote fairness and uniformity in the selection of the appropriate deterrent action.

10.2 Objectives of Deterrent Action

The major objectives of deterrent action are:

- (1) to protect the individual and the public from possible harm;
- (2) to encourage future compliance; and,
- (3) to deter others from contravening Aviation legislation.

Achieving these objectives will contribute to the advancement of aviation safety which is the primary aim of aviation regulation.

10.3 Types of Deterrent Action

There are two types of deterrent actions: judicial and administrative. Judicial action involves the prosecution of an alleged offender in the tribunals or courts and is only applicable to a few provisions of the *Act* and the *CARs*. Administrative action comprises all other measures taken by the DG CAAN pursuant to the provisions of the *Civil Aviation Act* and includes oral counselling, the suspension of documents and the assessment of monetary penalties. Administrative action is described in Chapter 11.

10.4 Selection of Appropriate Deterrent Action

The type of deterrent action permitted in response to an offence depends on the specific offence.

(1) Designated Provisions

A designated provision is a regulation that has been listed. Designated provisions may be enforced only by administrative action in the form of a monetary penalty or a suspension; no prosecutions may be commenced in respect of the contravention of a designated provision.

(2) Hybrid and Summary Conviction Offences

Where a person has contravened a non-designated provision, the DG CAAN must decide whether to take administrative action by way of suspension or to take judicial action. All alleged contraventions of the *Civil Aviation Act* or the CARs shall be dealt with by taking administrative deterrent action except where the criteria for judicial action are satisfied. The presumption is that a minimum enforcement sanction will be sufficient to achieve compliance. Stringent sanctions for a first offence are more likely to cause resentment than encourage future compliance. Moreover, administrative measures are usually more expeditious than prosecutions. (Criminal procedure is lengthy and expensive and courts are often unfamiliar with the significance of aeronautics offences.) Offenders may wish to have matters resolved with a minimum of delay while retaining the option for a review by a body that has expertise in aeronautics.

Where the alleged offender has been suspended in the past or has seriously jeopardized aviation safety, administrative action may be insufficient. In these cases judicial action may be more appropriate, particularly in light of the heavier sanctions normally imposed.

10.4.1 Joint Judicial-Administrative Deterrent Action

Judicial action and administrative action may be taken simultaneously where evidence discloses that a person has contravened two or more different provisions arising from the same incident provided that each provision violated does not rely on the same facts. For example, if a charge of reckless and negligent flying under *Civil Aviation Act 1995, Rule 10* of the CARs relied in part on the fact that the pilot was low flying, the pilot could not also be proceeded against for low flying under *Flight Operations Requirements of Nepal*.

A prosecution for one offence may be accompanied by suspension for another offence only where common facts are not relied on. Judicial and administrative deterrent action shall not be taken in respect of the same contravention. Either one or the other shall be selected depending upon the facts of the particular case.

10.5 Limitation Period

Civil Aviation Regulations, 2002 of the *Aviation act/ CARs* which expressly provides calendar limitation period on institution of proceedings under legal Provision of the *aviation Act/CARs* or by way of summary conviction. The period begins on the date of the infraction.

- (1) The limitation period only applies to the two following types of proceedings:
 - (a) the imposition of a monetary penalty for contravention of a Designated Provision; and,
 - (b) court action by way of summary proceedings.
- (2) For purposes of calculating the extent of the limitation period, "instituting a proceeding" means:
 - (a) in the case of the imposition of a monetary penalty, the issuance of a Notice of Monetary Penalty; and,

- (b) in the case of a summary proceeding, the laying of an information.
- (3) The limitation does not apply to proceedings brought by way of indictment or to administrative suspensions which address contravention of any provision. It is normally inappropriate, however, to impose a suspension instead of a monetary penalty on an alleged offender simply because the passage of time has made the limitation period rule applicable. In certain cases where the infraction is discovered long after the event and where the contravention is serious, it is appropriate to take deterrent action even though Calendar Period have passed. For example, Safety Board Investigations are often prolonged and information concerning a contravention may be late in being received by CAAN; contraventions involving airworthiness matters are often not discovered until long after the violation occurred but deterrent action remains appropriate.

10.6 Deterrent Action: Air Carriers

Different considerations apply regarding deterrent action for contraventions committed by air carriers than apply to contraventions committed by pilots and others. This is because sanctions imposed in respect of a contravention affect not only the carrier but also the carrier's employees and the public the carrier serves. Safety remains the overriding factor. Deterrent measures must impress upon the carrier that unsafe operation at the risk of public safety will not be tolerated.

10.6.1 Administrative Action

Four types of administrative action which may be taken where an air carrier contravenes a provision or regulation are:

- (1) oral counselling;
- (2) a monetary penalty;
- (3) a suspension of an aviation document; or,
- (4) a cancellation of an aviation document.

Suspension or cancellation of an aviation document would be appropriate where the carrier had repeatedly contravened the regulations even though the safety implications were minimal. Cancellation would also be appropriate where suspensions or monetary penalties are not having the desired effect.

10.6.2 Judicial Action

Prosecution of an air carrier for a contravention of a non-designated provision is recommended in all cases where, in the opinion of the DG CAAN the contravention is such that it would be appropriate to seek a significant fine in court.

10.6.3 Emergency Action

Occasionally, the contravention of a regulation by an air carrier may pose an immediate threat to aviation safety. Two courses of action are available in such a situation.

(1) Aircraft Detention for Immediate Threat to Aviation Safety

Where the threat arises from a particular aircraft that is unsafe or likely to be operated in an unsafe manner, that aircraft may be detained pursuant to Civil Aviation Regulations, 2002 (Rule 64) of the CARs. The detention shall remain in effect until the unsafe condition is corrected.

(2) Air Operator Certificate Suspensions for Immediate Threat to Aviation Safety

Where the threat arises from the operations of the carrier (instead of a single aircraft), the DG CAAN may decide to suspend the Air Operator Certificate under Civil Aviation Regulations, 2002 (Rule 6) of the CARs. This sort of suspension must be viewed as a last resort to be carried out with extensive consultation among the various branches as appropriate. The DG CAAN must be satisfied that the immediate threat to aviation safety exists or is likely to occur as a result of an act or thing having been, being or proposed to be done under the authority of the document to be suspended. The DG CAAN would usually be the suspending authority. The AOC suspension shall come into effect immediately and remain in effect until such time as the threat to aviation safety is removed.

10.6.4 Punitive Suspension or Cancellation of an Air Carrier Air Operator Certificate Under Civil Aviation Regulations, 2002 (Rule 6) of CARs

The authority for cancelling an Air Operator Certificate under Civil Aviation Regulations, 2002 (Rule 6) rests with the Director General, Civil Aviation at CAAN. A punitive suspension of an AOC should only be considered when the carrier has a history of repeat offences (two or more significant offences) and when, in the opinion of the suspending authority other measures (e.g. monetary penalties) would not promote future compliance. The suspending authority is responsible for reviewing the factors affecting the choice of sanction before the decision is made to suspend an Air Operator Certificate. The suspending authority should consult with various branches, as appropriate, to discuss:

- (1) the technical accuracy of the evidence and findings;
- (2) the coordination of concurrent regulatory actions, if applicable; and,
- (3) the severity of the sanction as a response to the violation;

Once a final decision to suspend has been made, the suspending authority is responsible for following the procedure in Chapter 11. Standard practice is to provide an opportunity for an informal meeting with the carrier. The suspending authority may involve the Director, Flight Safety Standard Department (FSSD) in the meeting with the air carrier representative. See Section 11.3 for guidelines on the informal meeting process.

The imposition of a punitive cancellation of an AOC should follow the same procedure as that for a suspension.

10.7 Sanction Determination in Cases of Multiple or Continuing Violations

10.7.1 Multiple Violations

Multiple violations involve a series of distinct and separate contraventions of a particular regulation or regulations over a period of time. Each time, the circumstances of the offence may be different. For example, an aircraft could be operated in an overloaded condition each time it was flown during a certain period. Each time, the amount of overload could be different but there would be a violation every time. The contravention was not caused by something "inherent" in the aircraft, rather by factors present during the preparation of the flight.

In cases of multiple violations, the following procedures shall be used:

(1) Administrative Action

For multiple violations of the Designated Provisions, the Notice of Suspension or of Monetary Penalty shall state in the statement of offence the particulars of each offence including the dates and times of each flight in violation, and the sanction proposed in respect of each. Evidence to prove each individual infraction shall be secured so that in the case of a review by the Government the evidence can be presented.

(2) Prosecution

In the case of a summary conviction offence involving multiple violations, where prosecution is the desirable option, the government shall be advised of CAAN's intention to lay charges in respect of each flight conducted in contravention of the regulations, that is, each flight should be set out as a separate count in the information.

10.7.2 Continuing Violations

There are a number of offences which could be repeated over a period of time as the result of a continuing condition or state of affairs. These generally relate to aircraft or personnel aviation document requirements, modifications or additions to aircraft equipment outside of airworthiness specifications and entries made in a log.

In view of the fact that separate acts which are successive and cumulative, comprising a continuous series, can be considered as one offence at the discretion of the DG CAAN/Government the following procedures shall apply in the disposition of such cases:

(1) Administrative Action

In all cases of suspension or monetary penalty determination, each separate flight conducted in violation of the regulations shall be considered as a separate offence. The Notice shall provide the dates and times of each flight during the period of non-compliance, together with particulars and the sanction in respect of each offence.

(2) Termination of a Continuing Violation

A continuing violation which was the subject of enforcement action, but has not ceased, may need further action to secure compliance. If the violation was in respect of provisions not affecting airworthiness requirements, detention of an

aircraft pursuant to Civil Aviation Regulations, 2002 (Rule 64) may not be possible. When the violations involve an air carrier, a viable option is to suspend the Air Operator Certificate relating to the particular aircraft operation under Civil Aviation Regulations, 2002 (Rule 6) in addition to any Enforcement action.

10.7.3 Flights with Intermediate Stops

Flights involving intermediate stops made on a scheduled or unscheduled basis should, where circumstances warrant, be treated as one flight. Where the facts giving rise to the violation remain the same on a flight with intermediate stops, e.g. a commercial aircraft is operated in violation of FOR on a flight ABC-JKL-XYZ, it is appropriate to lay charges in respect of the entire flight, as opposed to considering the flight as two separate offences. A submission may be made in speaking to sentence, emphasizing the fact that during each segment of the flight there was a decision to operate in violation of the regulations.

10.7.4 Assessment of Sanction

The assessment of the sanction in all administrative cases shall consider each count separately following the guidelines in Chapter 12. A brief reason for sanction shall be recorded for each count. The total amount of monetary penalty or period of suspension shall be the sum total of the sanctions imposed for each count. Where exceptional circumstances warrant, the final sanction may be modified. The DG CAAN should record the reasons for the modification in the case file.

10.8 Disclosure of Deterrent Action

10.8.1 Disclosure to Employers

Employers of Nepalese Civil aviation document holders should be advised of the deterrent action taken if the contravention took place while the alleged offender was on company business. If the alleged offender was not on company business at the time of the contravention, the disclosure of deterrent action to their employer is prohibited unless an exception under the regulations applies. An exception may exist where the deterrent action taken against a professional pilot affects the pilots employment, e.g. suspension of licence privileges. An exception may also exist where it would definitely be in the public interest, usually in terms of aviation safety, to inform the employer, e.g. a pilot who has been detected flying while under the influence of alcohol. The question of whether or not to inform an employer must be addressed on a case-by-case basis. The DG CAAN will decide if disclosure to the employer is appropriate.

10.8.2 Notification of Detection Source

The Director, Flight Safety Standard Department (FSSD) shall ensure that the detection source is advised of the outcome of the case and record this action.

Aviation Enforcement Procedure Manual

Figure 10-1 **Table of Judicial and Administrative Action**

		CLASS OF OFFENCE			
		Designated Provisions	Non-Designated Provisions		
Optional Actions	Oral Counselling				
	Administrative Suspension of <u>Nepalese Civil</u> Aviation Document				
			Summary Conviction Offences	Hybrid Offences	
Proceedings	Administrative	Court Prosecution		Court Prosecution	
		By Way of Summary Conviction	By Way of Summary Conviction	By Indictment	
Punishment Individuals	Maximum Monetary Penalty	Maximum Fine		Maximum Fine	No Maximum Fine
		No Imprisonment		Imprisonment up to one year	Imprisonment up to five years
		Prohibition		Prohibition	Prohibition
Corporations	Maximum Monetary Penalty	Maximum Fine		Maximum Fine	No Maximum Fine
		Prohibition		Prohibition	Prohibition
Commercial Services	Air	Wilful misuse of documents -			Forfeiture
Recourse	- Review by Director General Civil Aviation Government		- Appeal to a Higher Authority	- Appeal to a Higher Authority	- Appeal to a Higher Authority

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