

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 65**

[Docket No. FAA-2004-17334; SFAR No. 103]

RIN 2120-A118

**Process for Requesting Waiver of
Mandatory Separation Age for Certain
Federal Aviation Administration (FAA)
Air Traffic Control Specialists**

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This final rule establishes procedures and some standards by which an air traffic controller in a flight service station, en route or terminal facility, or at the David J. Hurley Air Traffic Control System Command Center may request a waiver of the mandatory separation age. By taking this action, the Secretary of the Department of Transportation (DOT) implements congressional authority to issue such exemptions.

DATES: This final rule is effective January 7, 2005. Comments must be submitted on or before February 7, 2005.

ADDRESSES: You may send comments (identified by Docket Number FAA-2004-17334) using any of the following methods:

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.
- Governmentwide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.
- Fax: 1-202-493-2251.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: To read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Wanda Reyna, ATO Workforce Services (ATO-A) Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3056.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA is adopting this final rule without prior notice and prior public comment in light of Congressional direction to issue this final rule by March 1, 2004. The Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 1134; February 26, 1979), however, provide that, to the maximum extent possible, operating administrations for the DOT should provide an opportunity for public comment on regulations issued without prior notice. Accordingly, we invite interested persons to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. We also invite comments relating to environmental, energy, federalism, or international trade impacts that might result from this amendment.

Please include the regulatory docket or amendment number and send two copies to the address above. We will file all comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, in the public docket. The docket is available for public inspection before and after the comment closing date.

Privacy Act: Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <http://dms.dot.gov>.

The FAA will consider all comments received on or before the closing date for comments. We will consider late comments to the extent practicable. We may amend this final rule in light of the comments received.

Commenters who want the FAA to acknowledge receipt of their comments

submitted in response to this final rule must include a preaddressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. FAA-2004-17334." The postcard will be date-stamped by the FAA and mailed to the commenter.

Availability of Final Rule

You can get an electronic copy using the Internet by:

- (1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (<http://dms.dot.gov/search>);
- (2) Visiting the Office of Rulemaking's Web page at <http://www.faa.gov/avr/arm/index.cfm>; or
- (3) Accessing the Government Printing Office's Web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-9680. Be sure to identify the docket number, notice number, or amendment number of this rulemaking.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. Therefore, any small entity that has a question regarding this document may contact their local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at our site, <http://www.gov/avr/arm/sbreffa.htm>. For more information on SBREFA, e-mail us 9-AWA-SBREFA@faa.gov.

Background

Section 8335(a) of Title 5 of the United States Code mandates that the Secretary, under such regulations as he may prescribe may exempt a controller having exceptional skills and experience as a controller from the automatic separation provisions or mandatory separation provisions of the statute until that controller becomes 61 years of age. This direction to the Secretary to create regulations, in consultation with the Administrator of the Federal Aviation Administration, to allow individual air traffic controllers to delay mandatory separation was restated in the Transportation, Treasury,

and Independent Agencies Appropriations Act for fiscal year 2004, H.R. 2673, 108th Cong. (2004). Pursuant to this direction, this final rule establishes procedures by which an air traffic control specialist may request a waiver of the mandatory separation age.

FAA air traffic control II specialists in flight service stations, enroute and terminal facilities, and at the David J. Hurley Air Traffic Control System Command Center seeking to waive the mandatory separation age must submit a written request through their official chain of command. The request must be received no earlier than the twelfth and no later than the sixth month prior to the month in which the employee turns 56. Recommendation to approve or deny a request by the specified deciding officials in the individual's chain of command will be forwarded to the Administrator. The Administrator will issue the final decision, pursuant to delegation from the Secretary. This delegation is published in 49 CFR 1.47. The decision to grant a waiver is discretionary and is to be treated as the exception as opposed to the rule. There is no right to appeal or grieve a denial or termination of a waiver.

Paperwork Reduction Act

There are no new requirements for information collection associated with this amendment.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

Good Cause for Immediate Adoption Without Notice and Comment

Sections 553(b)(3)(A) of the Administrative Procedures Act (APA) (5 U.S.C. section 553(b)(3)(A)) authorizes agencies to dispense with certain notice procedures for rules of agency organization, procedure, or practice. These regulations describe the process for agency employees applying for a waiver of the mandatory separation age for air traffic controllers. Therefore, notice and comment procedures are not required by the Administrative Procedure Act.

Section 553(d)(3) allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30-day delayed effective date

requirement in section 553. The FAA has determined that good cause exists for adopting these regulations without delay so that FAA air traffic controllers who are approaching mandatory retirement can be made aware of these procedures immediately. The FAA anticipates using the waiver process to help address projected air traffic staffing requirements that may arise in the next few years.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and benefits of a regulatory change. We are not allowed to propose or adopt a regulation unless we make a reasoned determination that the benefits of the intended regulation justify its costs. Our assessment of this proposal indicates that its economic impact is minimal. Since its costs and benefits do not make it a "significant regulatory action" as defined in the Order, we have not prepared a "regulatory impact analysis." Similarly, we have not prepared a "regulatory evaluation," which is the written cost/benefit analysis ordinarily required for all rulemaking proposals under the DOT Regulatory and Policies and Procedures. We do not need to do the latter analysis where the economic impact of a proposal is minimal.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601–612, directs the FAA to fit regulatory requirements to the scale of the business, organizations, and governmental jurisdictions subject to the regulation. We are required to determine whether a proposed or final action will have a "significant economic impact on a substantial number of small entities" defined in the RFA. If we find that the action will have a significant impact, we must do a "regulatory flexibility analysis."

This final rule informs FAA employees of an available administrative process. It involves no small entities within the meaning of the RFA. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small entities.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The

statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this rulemaking and has determined that it will have only a domestic impact and therefore no effect on any trade-sensitive activity.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act), enacted as Public Law 104–4 on March 22, 1995, is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in a \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action."

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, we determined that this final rule does not have federalism implications.

Environmental Analysis

FAA Order 10501D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act (NEPA) environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j) this rulemaking action qualifies for a categorical exclusion.

List of Subjects in 14 CFR Part 65

Air traffic controllers, Aircraft, Airmen, Airports, Alcohol abuse, Drug abuse, Reporting and recordkeeping requirements.

The Amendment

■ For the reasons set forth above, the Federal Aviation Administration amends 14 CFR part 65 as follows:

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

■ 1. The authority citation for part 65 is revised to read as follows:

Authority: 5 U.S.C. 8335(a); 49 U.S.C. 106(g); 49 U.S.C. 40113; 49 U.S.C. 44701–44703; 49 U.S.C. 44707; 49 U.S.C. 44709–44711; 49 U.S.C. 45102–45103; 49 U.S.C. 45301–45302.

■ 2. Add Special Federal Aviation Regulation Number 103 (SFAR No. 103) to part 65 to read as follows:

Special Federal Aviation Regulation No. 103—Process for Requesting Waiver of Mandatory Separation Age for a Federal Aviation Administration Air Traffic Control Specialist In Flight Service Stations, Enroute or Terminal Facilities, and the David J. Hurley Air Traffic Control System Command Center

1. *To whom does this SFAR apply?* This Special Federal Aviation Regulation (SFAR) applies to you if you are an air traffic control specialist (ATCS) employed by the FAA in flight service stations, enroute facilities, terminal facilities, or at the David J. Hurley Air Traffic Control System Command Center who wishes to obtain a waiver of the mandatory separation age as provided by 5 U.S.C. section 8335(a).

2. *When must I file for a waiver?* No earlier than the beginning of the twelfth month before, but no later than the beginning of the sixth month before, the month in which you turn 56, your official chain-of-command must receive your written request asking for a waiver of mandatory separation.

3. *What if I do not file a request before six months before the month in which I turn 56?* If your official chain-of-command does not receive your written request for a waiver of mandatory separation before the beginning of the sixth month before the month in which you turn 56, your request will be denied.

4. *How will the FAA determine if my request meets the filing time requirements of this SFAR?*

a. We consider your request to be filed in a timely manner under this SFAR if your official chain-of-command receives it or it is postmarked:

- i. After 12 a.m. on the first day of the twelfth month before the month in which you turn 56; and
- ii. Before 12 a.m. of the first day of the sixth month before the month in which you turn 56.

b. If you file your request by mail and the postmark is not legible, we will consider it to comply with paragraph a.2

of this section if we receive it by 12 p.m. of the fifth day of the sixth month before the month in which you turn 56.

c. If the last day of the time period specified in paragraph a.2 or paragraph b falls on a Saturday, Sunday, or Federal holiday, we will consider the time period to end at 12 p.m. of the next business day.

5. *Where must I file my request for waiver and what must it include?*

a. You must file your request for waiver of mandatory separation in writing with the Air Traffic Manager in flight service stations, enroute facilities, terminal facilities, or the David J. Hurley Air Traffic Control System Command Center in which you are employed.

b. Your request for waiver must include all of the following:

- i. Your name.
- ii. Your current facility.
- iii. Your starting date at the facility.
- iv. A list of positions at the facility that you are certified in and how many hours it took to achieve certification at the facility.
- v. Your area of specialty at the facility.
- vi. Your shift schedule.
- vii. Your statement that you have not been involved in an operational error, operational deviation or runway incursion in the last 5 years while working a control position;
- viii. A list of all facilities where you have worked as a certified professional controller (CPC) including facility level and dates at each facility;
- ix. Evidence of your exceptional skills and experience as a controller; and
- x. Your signature.

6. *How will my waiver request be reviewed?*

a. Upon receipt of your request for waiver, the Air Traffic Manager of your facility will make a written recommendation that the Administrator either approve or deny your request. If the manager recommends approval of your request, he or she will certify in writing the accuracy of the information you provided as evidence of your exceptional skills and experience as a controller.

b. The Air Traffic Manager will then forward the written recommendation with a copy of your request to the senior executive manager in the Air Traffic Manager's regional chain-of-command.

c. The senior executive manager in the regional chain-of-command will make a written recommendation that the Administrator either approve or deny your request. If the senior executive manager recommends approval of your request, he or she will certify in writing the accuracy of the information you have provided as evidence of exceptional skills and experience.

d. The senior executive manager in the regional chain-of-command will then forward his or her recommendation with a copy of your request to the appropriate Vice President at FAA Headquarters. Depending on the facility in which you are employed, the request will be forwarded to either the Vice President for Flight Services, the Vice President for Enroute and Oceanic Services, the Vice President for Terminal Services or the Vice President for Systems Operations. For example, if you work at a flight service station at the time that you request a waiver, the request will be forwarded to the Vice President for Flight Services.

e. The appropriate Vice President will review your request and make a written recommendation that the Administrator either approve or deny your request, which will be forwarded to the Administrator.

f. The Administrator will issue the final decision on your request.

7. *If I am granted a waiver, when will it expire?*

a. Waivers will be granted for a period of one year.

b. No later than 90-days prior to expiration of a waiver, you may request that the waiver be extended using the same process identified in section 6.

c. If you timely request an extension of the waiver and it is denied, you will receive a 60-day advance notice of your separation date simultaneously with notification of the denial.

d. If you do not request an extension of the waiver granted, you will receive a 60-day advance notice of your separation date.

e. Action to separate you from your covered position becomes effective on the last day of the month in which the 60-day notice expires.

8. *Under what circumstances may my waiver be terminated?*

a. The FAA/DOT may terminate your waiver under the following circumstances:

- i. The needs of the FAA; or
- ii. If you are identified as a primary contributor to an operational error/deviation or runway incursion.

b. If the waiver is terminated for either of the reasons identified in paragraph 1 of this section, the air traffic control specialist will receive a 60-day advance notice.

c. Action to separate you from your covered position becomes effective on the last day of the month in which the 60-day notice expires.

9. *Appeal of denial or termination of waiver request:* The denial or termination of a waiver of mandatory separation request is neither appealable nor grievable.

Issued in Washington, DC on December 29, 2004.

Marion Blakey,

Administrator.

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