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NTSB Order No. EA-4572

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of July, 1997

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. ADRIAN JON SCOTT, Respondent.	Docket SE-14909

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on June 24, 1997, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed, in substantial part, an order of the Administrator revoking, on an emergency basis, respondent's commercial pilot and flight

[1]An excerpt from the hearing transcript containing the initial decision is attached.

instructor certificates for his alleged violations of section 61.3(c) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61).[2] For the reasons that follow, we will deny the appeal.[3]

On August 15, 1996, in an earlier emergency order not appealed to the Board, the Administrator revoked the respondent's first class medical certificate on the ground that he had intentionally or fraudulently falsified the application submitted to obtain it. The emergency order of revocation, issued May 7, 1997, which is the subject of this appeal, alleges, in effect, that between August 31 and December 1, 1996, respondent, notwithstanding the revocation of his medical authority, engaged in flight operations for which possession of a medical certificate was necessary by acting as a required flight crew member on six flights (i.e. as a safety pilot while his student was flying the aircraft under simulated instrument conditions) and as a pilot-in-command on one flight (namely, when he gave a

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[2]FAR section 61.3(c) provides as follows:

> § 61.3 **Requirement for certificates, rating, and authorizations.**
>
> (c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter....

[3]The Administrator has filed a reply opposing the appeal. He did not appeal from the law judge's determination not to sustain the revocation of respondent's ground instructor certificate.

check ride to another pilot who was not current). The law judge concluded that respondent's violations of the medical certification requirement were deliberate.

On appeal, the respondent essentially concedes that he now understands that he needed a valid medical certificate in order for him to lawfully conduct the flights referenced in the revocation order (the complaint here). However, he argues, first, that an erroneous ruling by the law judge on a discovery issue kept him from introducing evidence demonstrating that at the time of the flights he reasonably believed that he could perform the subject flights without possessing a medical certificate. Second, respondent contends that even if a violation finding were warranted in the circumstances presented, the appropriate sanction under the Administrator's published guidance table should have been a suspension of between 30 and 180 days, not revocation. We find no merit in either argument.

On June 5, 1997, the law judge issued an order requiring the parties to respond to each other's discovery requests by June 11. The Administrator complied with this directive; the respondent, without explanation or request for additional time, did not. When counsel for the Administrator called counsel for respondent on the morning of June 20, she was assured that the discovery responses, which respondent's counsel had had about a month to answer, would be faxed to her by noon that day. However, because counsel for respondent later had to attend to a medical emergency at about 10:00 a.m., an occurrence which apparently prompted his

withdrawal from the case, whatever responses to the Administrator's discovery requests he may have already prepared were not forwarded as promised. At the hearing four days later, respondent's replacement counsel neither had the long awaited discovery responses for the Administrator, nor volunteered any reason why they had not been provided on time. Although the law judge denied a motion by the Administrator to preclude the respondent from advancing *any* evidence in his defense, he in effect noted his willingness to entertain evidentiary objections related to specific matters the respondent had not responded to in discovery. The respondent's first argument on appeal derives from the law judge's sustaining of just such an objection.

One of the Administrator's discovery requests had sought information relevant to respondent's affirmative defense that he had been advised by personnel in the FAA's San Diego Flight Standards District Office ("FSDO") that he could lawfully perform flights such as those at issue here. Counsel for the Administrator consequently objected when respondent, testifying in his own behalf, sought to establish on direct examination that he had received such advice from the San Diego FSDO. The law judge sustained that objection, as well as her objections to similar questions asking whether such advice had been obtained from the Riverside FSDO or from the Aircraft Owners and Pilots Association ("AOPA"). Counsel for the respondent did not note an exception to these rulings on the record, and he did not make an

explicit offer of proof on the matter.[4] He nevertheless argues to us that the law judge should have allowed the testimony. We disagree.

The law judge was clearly well within his discretion in declining to permit respondent to adduce at the hearing evidence that he had inexplicably failed to produce in discovery, for aside from the fact that it would have been patently unfair to let respondent gain an advantage by disregarding his discovery obligations, the Administrator would have been prejudiced because his ability to effectively cross examine respondent on a subject clearly identified in discovery, and to develop and present

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[4]Respondent does purport to make such an offer of proof on appeal, although it, in reality, conveys little more information than the discussion of the affirmative defense and discovery request at the hearing provided. He asserts that:

> had he been allowed to testify regarding his efforts to ascertain the legality of his instruction without a medical certificate, he would have stated that he had sought the advice of several people at both the San Diego and Riverside FSDO's and the AOPA concerning his status and his ability to continue instructing. He would further state that each of those entities told him that as long as there was a qualified pilot as "student," and they neither flew into instrument flight conditions, nor filed IFR, he would be "legal."

Apart from the fact that respondent is still, in this proffer, declining to name names, it does not appear to us that such testimony, had it been admitted, would have exculpated him, or changed the law judge's opinion that respondent knew he had to have a medical to perform the flights the complaint lists. He does not assert, for example, that he was advised that he would not need a valid medical to be a safety pilot with see and avoid responsibilities while his qualified "student" pilot was under the hood, and he does not suggest that these unnamed sources told him that he could, without a valid medical, give a check ride to another pilot who was *not* qualified to be pilot-in-command because he was not current.

evidence in rebuttal, if necessary, had been significantly compromised by the lack of an opportunity before the hearing to evaluate and investigate the assertions underlying respondent's affirmative defense.[5]

Respondent's position on sanction fares no better. He argues that because the Administrator's Sanction Guidance Table[6] only specifies a suspension range of from 30 to 180 days for operations conducted without a valid medical certificate, the law judge could not defer to the Administrator's position that respondent's violation was more akin to "Operation while pilot certificate is suspended," an offense for which the Table contemplates emergency revocation. We are not persuaded that deference was not warranted.

An airman who simply operates an aircraft when he does not have a valid medical certificate has not necessarily revealed an attitude antithetical to the responsibility to comply with all applicable regulatory requirements. However, an airman such as the respondent, who purposely exercises flight privileges that

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[5]Moreover, we are not persuaded that the preclusion of respondent's testimony in this narrow respect had any significant impact on the outcome of the case. Respondent was not, after all, prepared to come forward with live witnesses or sworn statements from anyone who might have corroborated his self-serving account that he had been told he could lawfully perform the flights the record before us establishes he could not. Since the law judge was well aware of the general basis for respondent's affirmative defense, his conclusion that respondent had deliberately violated the regulation embraced a negative credibility assessment that would not likely have been affected by additional, uncorroborated testimony bearing on intent from the respondent alone.

[6]See FAA Order 2150.3A at page 15.

have been taken away from him because of prior regulatory action, evinces not just a failure to comply with a specific known obligation, but a predisposition to refuse to comply. Such individuals, by operating despite suspended or revoked authorizations, demonstrate a contempt for the Administrator's authority to regulate, in the interest of aviation safety, their use of the airways, thereby establishing they do not possess the care, judgment and responsibility required of a certificate holder. As to these kinds of violators, and consistent with Board precedent in such cases, revocation is appropriate. It follows that deference was properly accorded the Administrator's imposition of that sanction here.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the emergency order of revocation, as amended by the law judge, are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not participate.