

SERVED: February 26, 1998

NTSB Order No. EA-4635

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 5th day of February, 1998

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JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-14605
v.	)	
	)	
DAVID ORTIZ,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

Respondent, pro se, has appealed from the decision of Administrative Law Judge William A. Pope, II, granting the Administrator's Motion for Summary Judgment.<sup>1</sup> By that decision,

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<sup>1</sup>On April 28, 1997, the law judge granted the Administrator's Motion for Summary Judgment, affirming the revocation of respondent's commercial pilot certificate based on 14 C.F.R. § 61.15(a) and 49 U.S.C. § 44710. Subsequently, the Administrator withdrew his allegation that respondent's certificate must be revoked under 49 U.S.C. § 44710, and asked the law judge to modify the summary judgment order to reflect this change. On May 9, 1997, the law judge modified his earlier

the law judge found that there was no issue of material fact, in that respondent was convicted of Conspiracy to Engage in Racketeering, in violation of 18 U.S.C. § 1962(d). The activity which led to the conviction included operating an aircraft that was carrying large quantities of cocaine into the United States.<sup>2</sup>

Respondent, citing 21 U.S.C. § 862 (part of the Anti-Drug Abuse Act of 1988), subsections (a) and (e), argues that his commercial pilot certificate is a "Federal benefit" and that his conviction may not be used as the basis to revoke his certificate because he cooperated with the government, testified for the prosecution in related cases, and is now in the witness protection program.<sup>3</sup> Since no reply brief was filed, we must

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order, granting summary judgment in favor of the Administrator solely on the section 61.15(a) violation. Both orders are attached.

On May 7, 1997, respondent filed a brief on appeal of the order granting summary judgment, then later filed an appeal of the order granting reconsideration and modification. The Administrator did not file a reply.

<sup>2</sup>The indictment to which respondent pleaded guilty lists respondent as one of the pilots who transported cocaine for the Medellin Cartel.

<sup>3</sup>Under 21 U.S.C. § 862(a), someone convicted of a federal or state crime involving the distribution of a controlled substance may be, at the discretion of the court, "ineligible for any or all Federal benefits...." A federal benefit is defined as "the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States...." 21 U.S.C. § 862 (d)(1)(A).

Subsection (e), however, states that the penalties of section 862 shall not apply to an individual who cooperates with the government or is in a government witness protection program.

decide respondent's appeal without the benefit of an articulated position from the Administrator on the applicability of section 862 to airman certificate revocation actions based on section 61.15(a) of the FARs.<sup>4</sup> Nevertheless, we find respondent's argument unavailing.

Section 862 addresses when a court, in its discretion, may consider drug traffickers and drug dealers ineligible for federal benefits. Nothing in the plain language of that statute leads us to believe that Congress intended to limit the Administrator's authority to revoke, in the interest of aviation safety, the certificate of a convicted drug trafficker under FAR section 61.15.<sup>5</sup>

Pursuant to her explicit statutory authority, as set forth in 49 U.S.C. § 44709, the Administrator revoked respondent's commercial pilot certificate after determining that he is not qualified to hold that certificate.<sup>6</sup> The decision to revoke

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<sup>4</sup>We would hope that if, in the future, the issue arises of the applicability of section 862 to revocations based on 49 U.S.C. § 44710(b), discussed *infra*, n. 5, the Administrator will file a brief setting forth her view of the relationship between the statutes.

<sup>5</sup>The Administrator is also empowered to revoke an airman's certificate under the Aviation Drug-Trafficking Control Act, which directs the Administrator to revoke the certificate of any airman convicted of a drug-related offense, if 1) that offense occurred after October 19, 1984; 2) the offense was punishable by more than one year in prison; 3) an aircraft was used in the crime; and 4) the airman operated or was on board the aircraft. 49 U.S.C. § 44710(b). As originally enacted, the statute called for a mandatory five-year revocation period. After amendment in 1988, a mandatory permanent revocation was imposed.

<sup>6</sup>This case may be distinguished from Jensen v. FAA, 641 F.2d 797 (9<sup>th</sup> Cir. 1981), vacated as moot, 680 F.2d 593 (9<sup>th</sup> Cir.

respondent's certificate is entirely consistent with precedent.

Summary judgment is appropriate where, as in this instance, there is no genuine issue of material fact. The Board has recognized that an airman who participates in an illegal drug-trafficking enterprise evidences a lack of compliance disposition and that is incompatible with aviation safety. Administrator v. Piro, NTSB Order No. EA-4049 (1993), at 3-4, aff'd sub nom, Piro v. NTSB, 66 F.3d 335 (9<sup>th</sup> Cir. 1995). Accord Administrator v. Hale, NTSB Order No. EA-4590 at 3 (1997); Administrator v. D'Antonio, NTSB Order No. EA-4526 at 6 (1997).

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(..continued)

1982), where the court found that the FAA acted in contravention of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (the Alcoholism Act) by denying an airman's application for recertification of his second-class medical certificate based on FAA regulations that disqualified all former alcoholics from obtaining a medical certificate.

The Alcoholism Act prohibits the denial of a federal license based solely on the grounds of prior alcoholism and, under the FARs as they then existed, an applicant with a history of alcoholism was automatically disqualified. This differs from the instant case. Under 21 U.S.C. § 862(e), government witnesses may not be denied federal benefits that would otherwise be denied under other provisions of section 862 only. The Administrator's authority to revoke respondent's airman certificate does not flow from 21 U.S.C. § 862.

The instant case may also be distinguished from Mines v. NTSB, 862 F.2d 617 (6<sup>th</sup> Cir. 1988), where the court found that a conviction which had been set aside under the Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (repealed 1984), could not be considered a conviction for purposes of revoking an airman's certificate under 14 C.F.R. § 61.15(a).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The law judge's order granting summary judgment affirming the Administrator's order revoking respondent's commercial pilot certificate under the provisions of FAR section 61.15(a) is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.