

SERVED: August 14, 1998

NTSB Order No. EA-4688

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 11th day of August, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14944
v.)	
)	
DENNIS J. GUNDER,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued at the conclusion of an evidentiary hearing held on December 9, 1997.¹ By that decision, the law judge affirmed the

¹ An excerpt from the hearing transcript containing the law judge's oral initial decision is attached.

Administrator's immediate revocation² of respondent's airman certificate pursuant to 49 U.S.C. § 44710(b)(2).³ We deny the appeal.

In the June 13, 1997, Order of Immediate Effectiveness, later filed and amended as the complaint in this proceeding, the Administrator alleged:

1. You are now, and at all times hereinafter mentioned were, the holder of Airman Pilot Certificate No. 2112384 with commercial pilot

² Respondent waived the expedited procedures applicable to a revocation order with immediate effectiveness.

³ 49 U.S.C. § 44710 provides, in relevant part, as follows:

§ 44710. Revocation of airman certificates for controlled substance violations

* * * * *

(b) Revocation. . . .

* * * * *

(2) The Administrator shall issue an order revoking an airman certificate issued an individual under section 44703 of this title if the Administrator finds that--

(A) the individual knowingly carried out an activity punishable, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), by death or imprisonment for more than one year;

(B) an aircraft was used to carry out or facilitate the activity; and

(C) the individual served as an airman, or was on the aircraft, in connection with carrying out, or facilitating the carrying out of, the activity.

* * * * *

privileges.

2. On divers occasions between about April 28, 1993[,] and April 22, 1994[,] you possessed and transported marijuana aboard Civil Aircraft N105TA, a [Piper Cherokee Six], between various points in western Alaska including several rural villages.⁴
3. You acted as pilot-in-command or were aboard such aircraft on the flights referenced in paragraph 2 above.
4. The marijuana was then distributed to various individuals in those villages.
5. Marijuana is a controlled substance as defined by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802).
6. The possession, transportation and distribution of marijuana as referenced above is punishable by a period of imprisonment in excess of one year under both federal law as provided in the United States Code and state law as provided in the Alaska statutes.

Respondent admitted the allegations contained in paragraphs one, five and six, so the issue at the hearing was, essentially, whether respondent used an aircraft to distribute marijuana. We think the record supports the law

⁴ Respondent argues that the law judge improperly assumed the role of an advocate for the Administrator when he asked counsel for the Administrator, after he professed a pleading error in that the complaint described respondent's aircraft as a Cessna 185 when, in fact, the Administrator's evidence demonstrated it to be a Piper Cherokee Six, whether he "wish[ed] to make a motion to amend." We find no error. To be sure, the law judge's question does not, under the circumstances, rise to the level of advocacy, and, instead, we think it merely exhibits an exercise of control over the orderly presentation of evidence that is properly committed to a law judge's discretion. See Transcript ("Tr.") at 23-24.

judge's finding that he did.

In April of 1994, two United States probation officers searched respondent's home in Bethel, Alaska, and discovered approximately a half pound of marijuana in a bag in a closet. One of the officers, William S. Merza, testified that he had a candid conversation with respondent during which he told respondent that their search revealed only the single large bag of marijuana and that this seemed to indicate that respondent, himself, was not using the drug. Respondent, according to Merza, claimed that he was not using the drug and, instead, confessed to distributing smaller lots to his friends, many of whom lived in remote bush communities, by use of his airplane. Merza also testified that:

Gunder again reiterated to myself and [the other probation officer, Eric D.] Odegard . . . that, you know, he was not in this for big money; he was just supplying his friends. And he was flying out to the bush communities and selling marijuana basically at cost, and he kind of looked at it as providing a service. He wasn't in it for the money, per se; he was just helping people out. In his own way, that's the way he phrased it.

Tr. at 20.⁵ Odegard corroborated Merza's recollection of respondent's statements. Tr. at 45-46. Although respondent disputes that he told the officers that he used his airplane to transport and distribute marijuana, the law judge

⁵ At the time, respondent was on parole after serving time in prison for a federal controlled substance distribution conviction.

credited Merza and Odegard, and it is well-settled that we defer to such credibility assessments. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

Respondent argues that the 38 months which elapsed from the time of his alleged admission to the issuance of the Administrator's order of immediate effectiveness is an improper delay that prejudiced him from defending against the Administrator's charges. The Administrator issued a Notice of Proposed Certificate Action ("NOPCA") within 6 months of learning, in 1996, of the events in April of 1994, however, and we therefore find no unreasonable delay attributable to the Administrator.⁶

Respondent also argues that in failing to identify which state or federal narcotics law he allegedly violated, the Administrator's complaint gave him insufficient notice of the allegations he would be called upon to defend.

⁶ Oddly, the Administrator initially proceeded with this case on a routine basis -- issuing a NOPCA for revocation, and even holding an informal conference with respondent -- before apparently deciding, approximately seven months after issuing the NOPCA, to issue an order making revocation immediately effective. Respondent's complaints about that subsequent decision invite us to evaluate something over which we have no jurisdiction. See, e.g., Administrator v. Poole, NTSB Order No. EA-4425 at 3 (1996) ("[i]t is well-settled . . . that the Board is not empowered to review the reasonableness of the Administrator's determination that an emergency requiring immediate action exists"). Nonetheless, no delay attributable to that decision could have had any prejudicial impact on respondent's ability to defend himself, for he had notice of the allegations of misconduct -- and thus the type of evidence to be preserved -- as of the earlier issuance of the NOPCA.

Respondent, however, never sought clarification on the matter, either through a motion for a more definitive statement or otherwise, and, in any event, he admitted in his answer to the Administrator's complaint that his alleged conduct, if proven, implicated imprisonment for more than one year under both federal and state law. In sum, respondent has raised no issue which warrants disturbing the law judge's affirmation of the Administrator's order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's revocation of respondent's airman certificate is affirmed.

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