

SERVED: May 6, 2009

NTSB Order No. EA-5448

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 5<sup>th</sup> day of May, 2009

_____	)	
LYNNE A. OSMUS,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18382
v.	)	
	)	
JOSEPH F. CORRAO,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

Respondent, who proceeds pro se, has appealed the written order granting the Administrator's motion for summary judgment of Chief Administrative Law Judge William E. Fowler, Jr., issued on December 10, 2008.<sup>1</sup> By granting the Administrator's motion for summary judgment, the law judge denied respondent's appeal

<sup>1</sup> A copy of the law judge's order is attached.

of the Administrator's suspension order, based on respondent's alleged failure to comply with a Notice to Airmen (NOTAM) governing entry into the Washington, DC metropolitan area Air Defense Identification Zone (DC ADIZ).<sup>2</sup> We deny respondent's appeal.

On September 29, 2008, the Administrator issued an order suspending respondent's private pilot certificate for a period of 30 days. In the order, the Administrator alleged that respondent violated 14 C.F.R. §§ 91.139(c)<sup>3</sup> and 99.7<sup>4</sup> when he entered the DC ADIZ on February 2, 2008, without: filing a flight plan with the appropriate ATC facility; establishing and maintaining two-way radio communications with the appropriate ATC facility; and obtaining a discrete transponder code and transmitting the code while in the DC ADIZ. The Administrator's

---

<sup>2</sup> NOTAM FDC 7/0206, which became effective August 30, 2007, prohibits entry into the "Washington DC metropolitan area Air Defense Identification Zone (DC ADIZ)," unless aircraft operators fulfill certain requirements, including establishing two-way radio communications with air traffic control (ATC), obtaining a discrete transponder code, and filing and activating an approved flight plan prior to entering the DC ADIZ.

<sup>3</sup> Title 14 C.F.R. § 91.139(c) states that when a NOTAM has been issued under this section, no person may operate an aircraft within the designated airspace "except in accordance with the authorizations, terms, and conditions prescribed in the regulation covered by the NOTAM."

<sup>4</sup> Title 14 C.F.R. § 99.7 requires each person operating an aircraft in the DC ADIZ to comply with the Administrator's special security instructions in the interest of national security.

order alleged that respondent's failure to comply with the NOTAM resulted in the launch of a United States Coast Guard aircraft to investigate respondent's aircraft. The order also stated that respondent's operation of the aircraft within the DC ADIZ while not complying with the terms of FDC NOTAM 7/0206, "constituted a careless act that could potentially endanger the lives or property of others." Order at ¶ 8. As a result, the order alleged that respondent's unauthorized entry into the DC ADIZ amounted to a violation of 14 C.F.R. § 91.13(a).<sup>5</sup>

Respondent submitted an answer to the Administrator's order, in which he admitted all factual allegations in the order, and only denied that he had violated § 91.13(a). Respondent's answer also stated that, "[t]he special procedures required pursuant to FDC NOTAM 7/0206 are unique, complex, and ambiguous," and that the Administrator's proposed 30-day suspension was "disproportionate to the alleged violation." Respondent's Answer at ¶ 3. Respondent's answer did not include any statements regarding whether he reported his entry into the DC ADIZ pursuant to the Aviation Safety Reporting Program (ASRP).<sup>6</sup>

---

<sup>5</sup> Title 14 C.F.R. § 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

<sup>6</sup> Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety

Based on respondent's admissions to the allegations contained in the Administrator's order, the Administrator submitted a motion for summary judgment, in which the Administrator argued that respondent's admitted unauthorized entry into the DC ADIZ also constituted a violation of § 91.13(a). In support of this argument, the Administrator's motion included citations to several Board cases, in which we consistently held that the Administrator proves a violation of § 91.13(a) when the Administrator charges and proves an operational violation. See, e.g., Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (stating that when the Administrator charges a violation of § 91.13(a) that is residual, or based on the occurrence of an operational violation, then the Administrator need not show actual or potential endangerment, but can rely on the establishment of the operational violation(s) to prove the violation of § 91.13(a)). The Administrator's motion also stated that the 30-day

---

(..continued)

Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

suspension period was the lowest suspension available, according to the Administrator's Sanction Guidance Table.

Respondent contested the Administrator's motion and filed an amended answer to the Administrator's order.<sup>7</sup> Respondent's reply to the Administrator's motion contended that the Board's Lindstam doctrine<sup>8</sup> precluded a finding that respondent had violated § 91.13(a) as a result of his unauthorized entry into the DC ADIZ. Respondent's reply also stated that respondent had reported his entry into the DC ADIZ to NASA on February 7, 2008, and implies that he was eligible for a waiver of sanction under the ASRP. Respondent's reply further contended that his statement that the requirements of FDC NOTAM 7/0208 were "unique, complex, and ambiguous" constituted an affirmative defense. Respondent's reply concluded that the law judge should deny the Administrator's motion for summary judgment because a

---

<sup>7</sup> Respondent's amended answer presented no new issues, but instead reiterated respondent's position that he did not believe that his violation of the provisions of the NOTAM constituted a violation of § 91.13(a).

<sup>8</sup> Under Administrator v. Lindstam, 41 C.A.B. 841 (1964), the Administrator need not allege or prove specific acts of carelessness to support a violation of § 91.13(a). Instead, using circumstantial evidence, he may establish a prima facie case by creating a reasonable inference that the event would not have occurred but for respondent's carelessness. The burden then shifts to respondent to promulgate an alternative explanation for the event that casts reasonable doubt on, or overcomes the inference of, the Administrator's claim of carelessness. Id.; Administrator v. Stepovich, NTSB Order No. EA-4931 (2002).

factual issue existed concerning whether respondent's admitted failure to comply with the requirements of the NOTAM was careless or reckless.

The law judge granted the Administrator's motion, based on respondent's admissions in his answer, and the fact that the Administrator had imposed the lowest suspension period available, according to the Sanction Guidance Table. Respondent, in his appeal of the law judge's order, restates the arguments that he articulated in his reply to the Administrator's motion. The Administrator contests respondent's arguments, and points out that respondent did not allege that he was eligible for a waiver of sanction under the ASRP in his answer, but instead first included this contention in his reply to the Administrator's motion.

We note that, under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no factual issues exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that Federal courts have granted summary

judgment when no genuine issues of material fact exist. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).<sup>9</sup>

We find that respondent's arguments concerning the application of the Lindstam doctrine and whether respondent violated § 91.13(a) are unavailing. In the order, the Administrator alleged that respondent's violation of §§ 91.139(c) and 99.7 also indicated that respondent acted in a careless or reckless manner, in violation of § 91.13(a). Given that the Administrator's § 91.13(a) charge was based on respondent's admitted violation of §§ 91.139(c) and 99.7, our line of cases concerning residual violations of § 91.13(a) applies. As stated above, we have long held that, "[u]nder the Administrator's interpretation of [her own] regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven." Seyb, supra, at 4 (citing Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002), and Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002)). Respondent's apparent contention that the fact that the terms of the NOTAM at issue are unique and complex, and that such intricacy indicates that

---

<sup>9</sup> A *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

respondent could not have acted carelessly or recklessly, ignores our long-held precedent concerning residual violations of § 91.13(a). Based on Seyb and similar cases involving this issue, we reject respondent's argument that he did not violate § 91.13(a).

Our analysis also indicates that the Lindstam doctrine does not apply, because the operational violations are not in dispute. See generally, e.g., Administrator v. Winton, NTSB Order No. EA-5415 at 22 (2008) (finding the Lindstam doctrine inapposite where the Administrator proved operational violations); accord Administrator v. Rice, NTSB Order No. EA-5408 at 9 n.8 (2008). The law judge's granting of the Administrator's motion for summary judgment on this issue was therefore appropriate.

With regard to respondent's contention that he is eligible for a waiver of sanction pursuant to the terms of the ASRP, we first note that we have previously stated that a respondent's allegation that he or she complied with the ASRP constitutes an affirmative defense. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1564 (1986) (citing Ferguson v. NTSB, 678 F.2d 821, 824 (9th Cir. 1982), and Administrator v. Montgomery, 3 NTSB 2150, 2153 (1980)). Moreover, section 821.31(b) of our Rules of Practice requires respondents to include the affirmative defenses that they seek to utilize in their answer to the

Administrator's complaint. Where a respondent has not included an affirmative defense in his or her answer, we have previously refused to consider such an affirmative defense in subsequent pleadings. Administrator v. Coughlan, NTSB Order No. EA-5197 (2005). Here, respondent did not include any indication that he may be eligible for a waiver of sanction under the ASRP until he replied to the Administrator's motion. Therefore, the law judge's disposition of the issue of sanction via summary judgment was appropriate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's order is affirmed; and
3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>10</sup>

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, and SUMWALT, Members of the Board, concurred in the above opinion and order.

---

<sup>10</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

SERVED: December 10, 2008

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\*\*\*\*\*

ROBERT A. STURGELL  
ACTING ADMINISTRATOR  
Federal Aviation Administration

Complainant,

v.

JOSEPH CORRAO,

Respondent.

Docket No.: SE-18382

\*\*\*\*\*

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

SERVICE:

JOSEPH CORRAO  
8116 TWELFTH CORPS DRIVE  
FREDERICKSBURG, VA 22407  
(BY CERTIFIED MAIL)

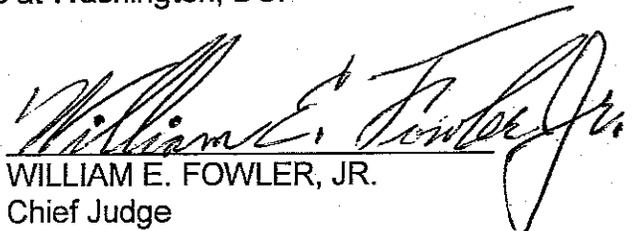
JAMES CONNEELY, ESQ.  
FEDERAL AVIATION ADMINISTRATION  
800 INDEPENDENCE AVENUE, SW  
WASHINGTON, DC 20591  
(BY FAX ONLY)

Administrator's Motion for Summary Judgment filed herein on November 17, 2008 and Respondent's reply in opposition thereto filed herein on November 24, 2008 all of the above having been carefully and duly considered, Administrator's Motion for Summary Judgment is GRANTED.

Respondent in his answer to Administrator's complaint admitted all operational violations in the complaint as well as the corresponding factual allegations. The Administrator has imposed the lowest sanction contemplated by the range in the applicable sanction guidance, there are no material issues of fact for hearing thus a hearing in this matter would served no useful purpose.

IT IS SO ORDERED.

Entered this 10<sup>th</sup> day of December, 2008 at Washington, DC.

  
WILLIAM E. FOWLER, JR.  
Chief Judge