

SERVED: January 12, 2011

NTSB Order No. EA-5565

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 10th day of January, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Dockets SE-18900
v.)	SE-18901
)	and SE-18902
EMMA WILKIE, PATRICK SELVA,)	
AND JENNIFER HEATH,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

Respondents, in this consolidated proceeding, appeal the decisional order of Administrative Law Judge Patrick G. Geraghty, issued on July 29, 2010, granting the Administrator's motion for summary judgment.¹ By granting the motion, the law

¹ A copy of the law judge's order is attached.

judge denied respondents' appeal of the Administrator's suspension order, based on respondents' alleged failure to submit to competency reexaminations because they had not completed the 120 hours of flight training required for commercial pilot certification. We deny respondents' appeal.

On June 29, 2010, the Administrator issued emergency orders² suspending respondents' commercial pilot certificates until such time that they successfully completed a reexamination pursuant to 49 U.S.C. § 44709.³ Respondents obtained flight training for their commercial pilot certificates through South Sky Aviation Corporation (hereinafter, "SSAC"). SSAC was the respondent in a separate enforcement action related to respondents' case, which the Board dismissed on November 16, 2010, for failure to file a timely brief. NTSB Order No. EA-5560. In their answer to the complaint, respondents raised an affirmative defense—that 14 C.F.R. § 141.77(c)⁴ permitted SSAC to credit excess hours from

² Respondents subsequently waived the expedited procedures normally applicable to emergency proceedings.

³ Title 49 U.S.C. § 44709(a) provides that, "[t]he Administrator of the Federal Aviation Administration may ... reexamine an airman holding a certificate issued under section 44703 of this title."

⁴ Section 141.77(c), prior to the current version, provided:

A student may be given credit towards the curriculum requirements of a course for previous pilot experience and knowledge, provided the following conditions are met:

(1) If the credit is based upon a part 141-approved

prior certificate training at SSAC toward the 120 hours required for completion of commercial pilot training.⁵

The Administrator submitted a motion for summary judgment based upon respondents' admissions and FAA Principal Operations Inspector Helene Porche's un rebutted affidavit establishing the remaining facts.⁶ Respondents filed a reply to the Administrator's motion contemporaneously with their own motion for summary judgment. In their reply, respondents again asserted the affirmative defense under 14 C.F.R. § 141.77(c). Respondents did not contest any factual allegations contained in the complaint.

The law judge granted the Administrator's motion for summary judgment, based on respondents' admissions in the answer and the fact that respondents did not contest any of the

(..continued)

training course, the credit given that student for the previous pilot experience and knowledge may be 50 percent of the curriculum requirements and must be based upon a proficiency test or knowledge test, or both, conducted by the receiving pilot school.

⁵ In addition to the enforcement action the Board dismissed on November 16, 2010, SSAC was also the subject of a prior enforcement action in 2009. SSAC raised this same affirmative defense in the 2009 action, which Administrative Law Judge William A. Pope, II, rejected. SSAC did not appeal that finding to the Board.

⁶ In her affidavit, Inspector Porche noted that she sent a letter to each respondent between December 10, 2009, and April 13, 2010, requesting they appear for a reexamination. Though each respondent, through counsel, acknowledged Inspector Porche's letters, none of them agreed to appear for a reexamination or had scheduled a reexamination as of July 21, 2010.

statements in Inspector Porche's affidavit. The law judge found no material facts in dispute. He further held that respondents' affirmative defense was contrary to the plain language of 49 C.F.R. § 141.77(c). Finally, the law judge stated the Administrator "sustained his burden of showing that a reasonable basis exists as to require each individual [r]espondent to present for the required re-examination." Decisional Order at 3-4.

Respondents raise two issues on appeal. They argue that the Administrator did not provide them with adequate opportunity to comply with the request for reexamination. Respondents assert that when they contacted the FAA about scheduling their reexaminations, they were informed by the FAA they could set up the reexaminations at a later time, but that the Administrator served them with the emergency revocation orders before giving them a chance to comply.⁷ Additionally, respondents restate their affirmative defense under § 141.77(c). The Administrator contests both arguments.

With regard to the first contention, we note that respondents failed to raise this factual argument below. We have long held that we will not, on appeal, entertain new evidence or attempt to resolve factual conflicts that the

⁷ Respondent Wilkie attached an "affidavit" to the appeal brief, which was not notarized.

parties could have, but did not, litigate before the law judge.⁸ Therefore, we find respondents waived the right to assert this factual challenge to the law judge's order on appeal.

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 moving party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(b). 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.⁹ In this regard, we recognize that federal courts grant summary judgment when no genuine issues of material fact exist.¹⁰

Based upon the facts presented in pleadings to the law

⁸ Administrator v. Yarsley, 6 NTSB 524, 526 (1988) (citing 49 C.F.R. § 821.49 and stating that, "[t]he consideration of new evidence is outside the scope" of the issues that a party can present on appeal); see also Administrator v. Dayberry, NTSB Order No. EA-4434 at 4 (1996) (rejecting evidence that the respondent could have, but did not, present to the law judge); accord Administrator v. Barry, NTSB Order No. EA-4456 at 4 n.5 (1996); Petition of Bonk, NTSB Order No. EA-4332 at 3 (1995).

⁹ Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)).

¹⁰ Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). 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.

judge, the law judge concluded that no material issue of fact existed. Respondents chose not to raise any factual issues to the law judge, but instead articulated a legal argument concerning the interpretation of § 141.77(c). Additionally, respondents filed their own motion for summary judgment, further indicating that no material issue of fact existed.

We likewise reject respondents' affirmative defense that § 141.77(c) allowed them to count training hours they earned during prior certificate training at SSAC toward their commercial pilot training. Section 44709(d)(3) provides that the Board "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out ... unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." We agree with the law judge that the plain language of 49 C.F.R. § 141.77(c) does not support respondents' affirmative defense as § 141.77(c) clearly uses the phrase "receiving school" to indicate that the transfer of creditable training hours is between two different aviation schools rather than between different programs within the same school. Even if the language of the provision was not so clear, we do not believe the Administrator's interpretation of this provision is arbitrary, capricious, or not according to law. We therefore reject respondents' appeal on this issue.

Finally, we find the Administrator had a reasonable basis

for requesting reexamination of respondents' qualifications. We previously have acknowledged that the Administrator has significant discretion in determining whether such reexaminations are warranted.¹¹ We continue to analyze appeals concerning reexaminations under a standard of reasonableness. In this case, the law judge determined that respondents did not complete the 120 hours of flight training required by the FAR and SSAC's curriculum to hold commercial pilot certificates. Thus, the record clearly establishes the Administrator had a reasonable basis to order a reexamination of respondents' qualifications.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's emergency suspension of respondents' commercial pilot certificates, pending respondents' successful completion of a reexamination under 49 U.S.C. § 44709, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

¹¹ Administrator v. Occhione, NTSB Order No. EA-5537 at 13 (2010); Administrator v. Sanchez, NTSB Order No. EA-5326 at 4 (2007) (stating that, "[i]t is well-settled that the Board's inquiry into the reasonableness of a reexamination request is a narrow one," and quoting Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 at 4 (1994), for the standard that a "basis for questioning competence has been implicated, not that a lack of competence has been demonstrated"); see also Administrator v. Hutchins, NTSB Order No. EA-4899 (2001); Administrator v. Wang, 7 NTSB 752 (1991).

**EMERGENCY
SERVED JULY 29, 2010**

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

J. RANDOLPH BABBITT, ADMINISTRATOR Federal Aviation Administration Complainant	*	DOCKET NOS. SE-18900 SE-18901 SE-18902 SE-18903
v.	*	
EMMA WILKIE, PATRICK SELVA, JENNIFER HEATH, and XAVIER ROBERTS, Respondents.	*	JUDGE GERAGHTY

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DECISIONAL ORDER

This consolidated proceeding is before the Board upon the individual Appeals filed by the captioned Respondents from Emergency Order of Suspension issued to each individual Respondent.¹

Those Orders were issued by the Administrator, Federal Aviation Administration (FAA), Complainant in each, and those Orders serve as the Complaints herein.

As grounds for the Suspensions sought, it is alleged that the Respondents, holders of a Commercial Pilot Certificate, have failed to comply with FAA requests that

¹ Appended hereto as Attachment 1(a)-1(d) is a copy of each individual Order of Suspension: 1(a) Wilkie; 1(b)Selva; 1(c)Heath; 1(d)Roberts.

each submit to re-examination of their airman competence to hold Commercial Pilot Certification.

Respondents filed a consolidated Answer in which the allegations of Paragraphs 1 and 3 of the Complaint were admitted and, thus, are established. On consideration of the Answer response to Complaint, Paragraph 2, it is also deemed as established, as the additional verbage simply restates the contention of Affirmative Defense 1.

Respondents denied the allegations stated in the Complaint, Paragraphs 4 and 5.

Complainant has filed an Omnibus Motion, However, upon review of all pleadings, it is determined that it is appropriate to limit resolution to the section: Motion for Summary Judgment. Attached to and in support of that Motion are two documents: (1) Copy of Initial Decision by Judge W. Pope, SE-18685 (2009); (2) Sworn Affidavit by POI H. Porche.

Respondents filed a consolidated response to Motion in the instant proceeding against Respondents herein and in reply to a Motion made in a separate matter involving South Sky Aviation Corp.

Where a Motion for Summary Judgment is supported by admissible documents and affidavits, the responding party may not rely upon mere denials but must, by affidavit or otherwise, show that a genuine material issue exists as requires trial. The burden, however, of showing that no material fact is in genuine dispute rests upon the moving party and pleadings to be viewed in light favorable to the opposing party. Where, however, a reasonable Trier of Fact receiving the evidence/pleadings in such manner could not find in favor of the opposing party, entry of judgment is warranted.

As noted in their Answer, Respondents denied the allegations of the Complaint, Paragraphs 4 and 5. The notarized Affidavit of POI H. Porche attached to Complainant's Motion attests that none of the Respondents have responded to Complainant's letter for re-examination, nor have otherwise appeared for or scheduled the required re-examination.

Respondent's consolidated Response to Complainant's Motion does not address statements made by POI H. Porche in her Affidavit which supports allegations of

Paragraphs 4 and 5 of the Complaint. Upon consideration of the pleadings, it is concluded, and I hold that the allegations of Paragraphs 4 and 5, Complaint, are established.

Respondent's Consolidated Reply to Complainant's Motion is essentially an elaboration of the contention/argument stated in Respondent's Affirmative Defense. Basically, Respondents argue that there is no reasonable basis for FAA to require re-examination in that FARs Section 141.77(c) permits Respondents to credit excess training hours accumulated as students in other flight courses taken at South Sky Aviation Corp. toward the 120 hours mandated under the FAA-approved Commercial Pilot Training Syllabus for South Sky Aviation Corp. (SSAC). That same argument was made to Judge Pope in the earlier proceeding involving SSAC and rejected by him (Pope, Decision, pg. 6). In any event, the contention made in the Affirmative Defense is a question of law—legal interpretation which appropriately addressed this Judge herein. The language of Section 141.77(c), FARs, does not support Respondent's contention, rather, it is that for a student to receive credit for previous or excess training hours, such training/hours must have been accumulated at other than the "...receiving school...." In the context herein, it is plain that credit for previous hours can only be had for such training received at other than SSAC where the Respondents herein were continuously enrolled, i.e., they were not transfer students from another flight school. Respondent's Affirmative Defense is, therefore, rejected as contrary to the provision of FARs Section 141.77(c).

Board precedent in cases involving requests for re-examination is that the burden of showing good cause basis for the required re-examination rests with Complainant. Or, to state the precedent in context herein, the issue is not whether Respondents are operationally competent, rather, whether or not a reasonable ground/basis exists to support the re-examination request.

Herein, upon the pleadings, as it is shown that Respondents did not accomplish the 120 hours of training required in flight training curriculum of SSAC and that FARs Section 141.77(c) does not support SSAC's crediting of excess hours, it is concluded and held that Complainant has sustained his burden of showing that a reasonable basis exists as to require each individual Respondent to present for the required re-examination.

On precedent, the sanction of indefinite suspension until such time as the individual Respondent complies with the re-examination request and successfully completes such re-examination, the suspension of that Respondent's Commercial Pilot Certificate continues in effect.

In summary, therefore, I conclude that on this record there does not exist any genuine issue of a material fact in dispute and as precedent supports the sanction sought, trial is not necessary. I hold, therefore, that Complainant's Motion for Summary Judgment should be granted.

IT IS ORDERED:

1. Complainant's Motion for Summary Judgment is hereby granted.
2. Each individual Emergency Order of Suspension, Complaint, is hereby affirmed as issued.
3. The Commercial Pilot Certificate held by each Respondent is suspended pending that individual's compliance with Complainant's request for re-examination.
4. The Trial scheduled herein is hereby cancelled and this consolidated proceeding terminated.

SO ORDERED.

ENTERED this 29th day of July 2010, at Denver, CO.

PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE