

SERVED: November 18, 2013

NTSB Order No. EA-5685

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 15th day of November, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-19441
)	
DONALD LUTHER FATOUT,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent, who proceeds *pro se*, appeals the oral initial decision Administrative Law Judge Stephen R. Woody issued on May 22, 2013.¹ By that decision, the law judge ordered suspension of respondent’s private pilot certificate, pending respondent’s successful completion

¹ A copy of the oral initial decision, an excerpt from the hearing transcript, is attached.

of a reexamination under 49 U.S.C. § 44709.² We deny respondent's appeal.

A. Facts

Respondent owns and operates a Maule, MXT-7-180A, which he utilizes for personal trips. On March 29, 2012, respondent traveled from Paoli Airport in Paoli, Indiana, to Greenwood Municipal Airport in Greenwood, Indiana. Upon approach into Greenwood, respondent twice contacted the Greenwood Municipal Airport manager, Ralph Hill, via radio, and asked which runway he should utilize.³ Mr. Hill responded twice to respondent, stating respondent could use his discretion to determine on which runway to land. Mr. Hill then left the main terminal building at the airport, and, wearing a reflective vest and holding marshaling wands, directed respondent to a parking space at the airport. According to Mr. Hill, respondent taxied past Mr. Hill, made a U-turn and parked his aircraft approximately six feet from the space at which Mr. Hill directed him to park. After respondent landed and came into the Greenwood terminal building, Mr. Hill observed respondent having difficulties trying to program his global positioning system (GPS) for his return flight to Paoli. Mr. Hill also knew restricted airspace existed between Greenwood and Paoli in the route respondent planned to fly. As a result, Mr. Hill contacted the Federal Aviation Administration (FAA) and the Greenwood police department. The FAA advised Mr. Hill if respondent had a valid medical certificate, Mr. Hill could not prevent him from leaving Greenwood. Likewise, police officers from the Greenwood police department questioned respondent briefly and looked inside his aircraft, but did not prevent him from departing.

² Title 49 U.S.C. § 44709(a) states, “[t]he Administrator of the Federal Aviation Administration may ... reexamine an airman holding a certificate issued under section 44703 of this title.”

³ Greenwood Municipal Airport does not have an air traffic control tower; therefore, pilots communicate their intention to arrive with the airport manager via UNICOM radio.

Respondent then departed from Greenwood, despite Mr. Hill's attempts to prevent him from leaving. En route to Paoli, FAA staff at the Indianapolis Terminal Radar Approach Control (TRACON) facility observed respondent enter restricted airspace over Camp Atterbury, a military training facility at which various training exercises involving "artillery, air to air, air to ground, those type operations with aircraft and with artillery" occur.⁴ Indianapolis TRACON staff contacted a sergeant at Camp Atterbury and quickly arranged for the temporary cessation of training exercises while respondent was in the airspace.

Consistent with standard procedure, TRACON staff completed a mandatory occurrence report concerning respondent's entry into the restricted airspace. Aviation Safety Inspector James Martin was assigned to investigate the occurrence. Inspector Martin contacted respondent and asked him questions derived from FAA practical test standards. Inspector Martin recalled respondent's answers were vague, and respondent did not remember commonly used terms regarding traffic patterns, such as "downwind" or "base leg."⁵ Based on these answers, combined with respondent's conduct at Greenwood and his entry into restricted airspace between Greenwood and Paoli, Inspector Martin requested respondent complete a reexamination to ensure his ability to operate an aircraft safely. As a result of respondent's refusal to complete this reexamination, by order dated February 6, 2013, the Administrator suspended respondent's private pilot certificate, pending successful completion of a reexamination.

At a hearing on May 22, 2013, Mr. Hill testified regarding his observations on March 29, 2012, when respondent arrived at the Greenwood airport. Thomas Jeffries, owner of Jeff Air Pilot Service in Greenwood, was also present at the Greenwood airport and described

⁴ Tr. 70 (testimony of Randy Hillenburg, FAA front-line manager who supervises staff at Indianapolis TRACON).

⁵ Tr. 98.

respondent's conduct at the airport that day. Mr. Jeffries recalled respondent had an unsteady gait as he walked to the terminal, was unable to program his GPS, and "seemed agitated and belligerent" when Mr. Hill offered to help him.⁶ Mr. Jefferies shared Mr. Hill's concern that respondent was heading straight for restricted airspace over Camp Atterbury. Mr. Hillenburg and Mr. Martin also testified concerning respondent's entry into the restricted airspace.

In response to the Administrator's case, respondent offered written statements from the manager of the Paoli airport, indicating the manager did not have concerns about respondent operating his aircraft. The law judge excluded these statements as hearsay. In addition, respondent attempted to admit into evidence a court record containing respondent's statements; the law judge also excluded this document, as respondent was present at the hearing and could provide his own live testimony. Respondent provided photographs of his aircraft and GPS, as well as a copy of a portion of the sectional chart showing respondent's route between Paoli and Greenwood, a police report documenting the Greenwood police department's response to Mr. Hill's call to them to prevent respondent from departing the Greenwood airport that day, and a copy of a report from the FAA communications center. The law judge admitted these items into evidence, and allowed respondent to testify on his own behalf. Respondent accused all the Administrator's witnesses of lying, and claimed Mr. Hill sought to "hijack" his aircraft and hold him at the airport, apparently until respondent paid Mr. Hill. In response to a question from the law judge, respondent stated he did not know if he had flown into restricted airspace on March 29, 2012, after his departure from Greenwood.

B. Law Judge's Oral Initial Decision

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he

⁶ Tr. 61.

found the Administrator had a reasonable basis to order reexamination of respondent's competency to operate an aircraft. As a result, under 49 U.S.C. § 44709, the law judge affirmed the Administrator's suspension of respondent's certificate pending his completion of such reexamination.

After a detailed discussion of his factual findings based upon a review of the evidence, the law judge made credibility determinations favorable to the Administrator's witnesses. The law judge described the Administrator's witnesses' testimonies as consistent, and found the Administrator's witnesses had no motive to testify dishonestly. The law judge stated, "[t]o find [the Administrator's witnesses' testimonies] other than credible, I would essentially have to determine that all of these witnesses had completely fabricated their stories, and I find no basis to do so."⁷ Based on these credibility determinations, the law judge found the Administrator had a reasonable basis on which to request reexamination of respondent's competency.

C. Respondent's Issues on Appeal

Respondent appealed the law judge's decision, and raises two main issues. Respondent argues the law judge erred in denying admission of the letters he offered into evidence from the airport manager at the Paoli airport. Respondent also challenges the law judge's credibility determinations, as he contends the evidence from the Administrator's records shows a time stamp that refutes the testimonies of the Administrator's witnesses concerning the sequence and timing of the events on March 29, 2012. As a result, respondent contends the Administrator does not have a reasonable basis to question his competency.

2. Decision

While we give deference to our law judge's rulings on certain issues, such as credibility

⁷ Initial Decision at 167.

determinations⁸ or evidentiary rulings,⁹ we review the case, as a whole, under *de novo* review.¹⁰

A. Evidentiary Rulings

We afford our law judges wide latitude in conducting hearings. In this regard, we will only overturn a law judge's evidentiary ruling when the appealing party can show the law judge's ruling amounted to an abuse of discretion, and resulted in prejudice to the party.¹¹ As the law judge correctly stated during the hearing in the case *sub judice*, NTSB administrative law judges must apply the Federal Rules of Evidence, which preclude the admission of hearsay testimony and evidence unless an exception applies.¹²

Respondent contends the law judge erred in not admitting into evidence letters he offered from John Deringer, who is the manager of the Paoli airport. We disagree with respondent's contention, as the letters respondent offered clearly fall within the definition of hearsay. Under Federal Rule of Evidence 801(c), hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The letters from Mr. Deringer state Mr. Deringer observed respondent on March 29,

⁸ See Administrator v. Porco, NTSB Order No. EA-5591 (2011), aff'd Porco v. FAA, 472 Fed. App'x 2 (D.C. Cir. 2012) (per curiam) (reviewing a law judge's credibility findings under an arbitrary and capricious standard of review).

⁹ See Administrator v. Ledwell, NTSB Order No. EA-5582 (2011) (reviewing a law judge's evidentiary rulings under an abuse of discretion standard of review).

¹⁰ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972).

¹¹ See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001); see also Lackey v. FAA, 386 Fed. App'x 689, 2010 WL 2781583 (9th Cir. 2010).

¹² Pub. L. No. 112-153, 126 Stat. 1159, § 2(a) (2012); see also 49 C.F.R. § 821.38.

2012, at the Paoli airport. One letter states respondent's conduct in landing his aircraft in Paoli was unremarkable, and a letter dated later than the first one states respondent's conduct in taking off from Paoli was unremarkable. Mr. Deringer did not testify at the hearing, and respondent sought to offer the letters into evidence to show he does not lack the competency or skill to operate his aircraft. Given the offering of the letters to prove the truth of the matter they assert, the letters constitute hearsay under the Federal Rules of Evidence, and respondent failed to show an exception to the hearsay rule applies to allow their admission.

Concerning Exhibit R-4, which is respondent's own written statement addressed to a "Magistrate Court," the law judge found the document, which respondent offered, was not subject to admission because respondent was present to testify at the hearing. We believe the law judge's exclusion of the document was within his discretion in balancing the probative value of the evidence against the degree to which it was unnecessary and cumulative.¹³ Respondent provided detailed testimony consisting of his recollection of the events of March 29, 2012. The narrative description contained in Exhibit R-4 is duplicative of respondent's live testimony, which was the best means by which the law judge could hear respondent's recollection, because the law judge could observe respondent during his description and question him as needed to provide clarity. Therefore, the law judge's exclusion of Exhibit R-4 was appropriate.

B. *Credibility Determinations*

We defer to the credibility findings of our law judges in the absence of a showing such findings are arbitrary and capricious.¹⁴ The law judge's resolution of the issue in this case—

¹³ See Fed. R. Evid. 403.

¹⁴ Administrator v. Porco, NTSB Order No. EA-5591 at 20 (2011), Porco v. FAA, 472 Fed. App'x 2 (D.C. Cir. 2012) (per curiam) (reviewing a law judge's credibility findings under an arbitrary and capricious standard of review); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

whether the Administrator had a reasonable basis to order reexamination of respondent's competency to hold a private pilot certificate—required him to assess the credibility of the witnesses. The law judge articulated credibility findings favorable to the Administrator's witnesses, and tied those credibility determinations to specific factual findings. Messrs. Hill and Jeffries provided consistent testimony, even though they did not hear one another's testimony because the law judge sequestered all witnesses, except Inspector Martin, during the hearing. They both indicated they were extremely concerned with respondent departing from Greenwood, as they did not feel he could safely operate his aircraft, and would pass through the restricted airspace between Greenwood and Paoli. Mr. Jeffries's recollection that Mr. Hill offered to take respondent in Mr. Hill's own aircraft back to Paoli, free of charge, and keep respondent's Maule in Greenwood temporarily corroborated Mr. Hill's summary of his conversation with respondent. These facts further show the law judge's favorable credibility assessments concerning the testimonies of Messrs. Hill and Jeffries were not arbitrary and capricious.

C. *Reexamination Request*

Finally, we affirm the law judge's finding that the Administrator had a reasonable basis for requesting reexamination of respondent's qualifications. We previously have acknowledged that the Administrator has significant discretion in determining whether such reexaminations are warranted.¹⁵ In this regard, the standard the Administrator must fulfill concerning a

¹⁵ Administrator v. Sanchez, NTSB Order No. EA-5326 (2007) at 4 (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, NTSB Order No. EA-3264 (1991). We recently have affirmed this reasonableness standard, notwithstanding arguments that the respondent has been subject to sabotage by employers who allegedly attempt to orchestrate failure of proficiency

reexamination request under 49 U.S.C. § 44709 is minimal: the Administrator need only show he has a reasonable basis for requesting reexamination.

In the case at issue, the Administrator provided testimony on a number of concerns the Administrator had regarding respondent's conduct on March 29, 2012. As Inspector Martin summarized, respondent's conduct at Greenwood was troubling; in response to a question from the law judge regarding what concerns Inspector Martin had based on his investigation of respondent's conduct before he left Greenwood, Inspector Martin stated,

Partially, the hearing and vision problems. The parking problems at Greenwood gave me cause to be concerned because marshaling is a fairly common procedure that pilots adhere to. And even not being able to manipulate his handheld GPS. It's our opinion that if you're going to rely upon that for navigation, you should be able to use it correctly.¹⁶

Even excluding the events at Greenwood from consideration, we find it concerning that the evidence shows respondent entered into restricted airspace, in violation of a Notice to Airmen (NOTAM), yet did not know he did so.¹⁷ In his testimony about this at the hearing, respondent stated, “[w]ell, on the way, on my GPS, these restricted areas, they came up on my GPS. So I knew I was approaching them. But I gave way to the right to get out of it, if I was in it, and got

(.continued)

checks. Administrator v. Occhione, NTSB Order No. EA-5537 (2010); Administrator v. Bakhit, NTSB Order No. EA-5489 (2009).

¹⁶ Tr. 108. With regard to Inspector Martin's reference to respondent's alleged “hearing and vision problems,” we note respondent mentioned, at the hearing, his recent failure to obtain a renewal of his medical certificate. As the law judge correctly stated at the outset of the hearing, the case at issue does not involve respondent's medical certificate, but only concerns the Administrator's order that respondent complete a reexamination under 49 U.S.C. § 44709.

¹⁷ Inspector Martin defined NOTAMs as “information put out to the pilot community for various things: runway closures, restricted airspace, presidential movements, varying things.” Tr. 99. He described the NOTAM applicable to the airspace over Camp Atterbury as two separate sections. Both sections of the restricted airspace are published “on a chart, hot from a certain altitude to a certain altitude, a certain time to a certain time, any given day.” Id. Descriptions of the restricted zones are also published in NOTAMs. Id.

my way back to Paoli. I landed.”¹⁸ Following respondent’s testimony, the law judge inquired further about respondent’s knowledge of the restricted airspace. The transcript contains the following dialogue between the law judge and respondent:

Law Judge: Sir, I have a question for you. Did you or did you not -- you said you knew you were approaching the restricted airspace. Did you fly into the restricted airspace or didn’t you?

Respondent: I don’t know, sir.

Law Judge: Okay.

Respondent: My GPS showed that the restricted airspace, I was approaching restricted airspace.

Law Judge: Okay.

Respondent: It showed on my GPS. I made away to the right to get out of it, if I was in there. It showed it was coming up. I don’t know if I was in it or not.

Law Judge: Okay. Did your GPS indicate that you were in it or indicate you were approaching it?

Respondent: It indicated I was approaching it.

Law Judge: Okay. Never indicated you were in it?

Respondent: Huh?

Law Judge: Never indicated you were actually in it?

Respondent: I don’t think so, sir. I could have been actually in it. If I was in it, I might have been blown in it by the wind. I don’t know. Maybe by the wind, but if I was in it, I didn’t do it deliberately. I didn’t fly in it on purpose.¹⁹

The evidence adduced at the hearing shows respondent did not merely fly near the restricted airspace or slightly penetrate the area; instead, Mr. Hillenburg testified respondent diagonally transversed one of the restricted sections of airspace, and slightly penetrated the other restricted section.²⁰ Later, when Inspector Martin discussed the restricted airspace and NOTAM with respondent, Inspector Martin opined respondent did not have an appropriate understanding

¹⁸ Tr. 140.

¹⁹ Tr. 141.

²⁰ Tr. 76.

of the restricted areas. Respondent's failure to adhere to the restrictions published in the NOTAM and his lack of understanding concerning the restricted airspace constitute a reasonable basis for ordering reexamination of respondent's competency.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's oral initial decision is affirmed; and
3. The Administrator's suspension of respondent's private pilot certificate, pending respondent's 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.

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

* * * * *

In the matter of: *

MICHAEL P. HUERTA, *
ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. * Docket No.: SE-19441

JUDGE WOODY

DONALD LUTHER FATOUT, *

Respondent. *

* * * * *

U.S. Tax Court
Federal Building & Courthouse
Courtroom 288
46 East Ohio Street
Indianapolis, Indiana

Wednesday
May 22, 2013

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:00 a.m.

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent

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3085 E. County Road 910 S.
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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE WOODY: All right. This has been a proceeding under the provisions of 49 United States Code Section 44709, and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board, Federal Rules of Evidence, Federal Rules of Procedure, as practicable.

This matter has been heard before this Administrative Law Judge and as provided by the Board's rules, I've elected to issue an oral initial decision in this matter.

Pursuant to notice, this matter came on for trial on May 22nd, 2013, in Indianapolis, Indiana. The Administrator was represented by one of its staff counsel, Mr. Chris Zurales, of the Great Lakes Regional Counsel of the Federal Aviation Administration. Respondent chose to represent himself in these proceedings.

The parties were afforded a full opportunity to offer evidence, to call and examine and cross-examine witnesses and to make arguments in support of their respective positions.

I will not discuss all the evidence in detail. I have, however, considered all of the evidence, both oral and documentary. That which I do not specifically mention is either viewed by me as being corroborative or as not materially affecting

1 the outcome of this decision.

2 The Respondent, Mr. Donald Fatout, has appealed the
3 Administrator's Order of Suspension dated February 26th, 2013, and
4 pursuant to the Board's rules, the Administrator filed a copy of
5 that order on February 26th, 2013, which serves as the complaint
6 in this case.

7 The action taken by the Administrator here is based upon
8 the charge that, by virtue of information that's enumerated in
9 paragraphs 2 through 6 of the complaint, a reasonable basis exists
10 for a request for reexamination of Respondent's airman competency
11 pursuant to 49 United States Code Section 44709(a). Further, that
12 by reason of Respondent's failure to comply with a request by the
13 Administrator to submit to a reexamination to establish whether or
14 not he is competent, the Respondent is in violation of that
15 statutory provision.

16 In his answer to the Administrator's complaint,
17 Respondent admitted paragraph 1 of the complaint. And as that has
18 been admitted by the Respondent, that allegation is deemed as
19 established for purposes of this decision. The Respondent denied
20 the remaining paragraphs, paragraphs 2 through 8, of the
21 complaint.

22 The Administrator moved for admission of Exhibits A-1
23 through A-3, which were admitted into evidence over objection of
24 the Respondent. Respondent moved for admission of Exhibits R-1
25 through R-9. Exhibits R-1, R-5 through R-7, and R-9 were admitted

1 into evidence. Exhibits R-2 through R-4 and R-8 were not admitted
2 into evidence. I also admitted Exhibit ALJ-1.

3 The standard in this type of case has been addressed by
4 the Board repeatedly. The Administrator need only show that a
5 reasonable basis exists for the reexamination request made by the
6 Administrator to the particular airman. For example, in the case
7 of Administrator vs. Hutchins, which is a Board case EA-4899
8 (2001), and as noted by the Board in Hutchins, the review of the
9 reasonableness of the reexamination request is exceptionally
10 narrow. The Board does not attempt to second-guess the
11 Administrator as to the actual necessity for another check of the
12 certificate holder's competence. Rather, in a typical case, the
13 Board looks only to see whether the certificate holder has been
14 involved in a matter in which a lack of competence could have been
15 a factor, and if he has, the Board upholds the reexamination
16 request as reasonable without regard to the likelihood that a lack
17 of competence actually played a role in the event.

18 And in the Hutchins case, a number of other cases were
19 cited. For example, Administrator vs. Wang. That's NTSB Order
20 EA-3264 from 1991; Administrator vs. Santos and Rodriguez, EA-4266
21 (1994); Administrator vs. Maitland, NTSB EA-4878 from 2001. In
22 sum, the Administrator in such cases need only convince the Board
23 that a basis for questioning competence has been implicated, not
24 that a lack of competence has been demonstrated.

25 The Administrator presented the testimony of four

1 witnesses: Mr. Ralph Hill, Mr. Thomas Jeffries, Mr. Randy
2 Hillenburg and Mr. James Martin.

3 Mr. Hill testified he is the airport manager of the
4 Greenwood Municipal Airport. He was working at the airport on
5 March 29th, 2012, and encountered the Respondent there. He first
6 encountered Mr. Fatout via the UNICOM radio. Mr. Fatout called
7 over the radio, "What runway are you guys using today?" To which
8 Mr. Hill responded, "Winds 130 at 3. Pilot's discretion."
9 Mr. Fatout then repeated the same radio call, and Mr. Hill
10 repeated his radio call. Mr. Hill then observed Mr. Fatout on
11 final approach and on landing, seeing nothing abnormal on the
12 approach or the landing.

13 Mr. Hill then donned his reflective vest and gathered
14 his marshalling wands and assumed a position in front of the
15 parking space closest to the terminal in Mr. Fatout's direct line
16 of sight. Mr. Fatout initially taxied past where he should have
17 turned, then made a U-turn and came back toward the parking space.
18 Mr. Hill attempted to marshal Mr. Fatout into the parking space,
19 which was marked with typical markings. Mr. Fatout stopped his
20 aircraft 6 feet off the center marking, which is unusual; normally
21 you would expect an aircraft to be within 1 foot of the center
22 mark. When Mr. Fatout deplaned, he indicated he needed to get
23 going quickly because he does not fly much anymore and does not
24 see well up there. Mr. Fatout also had obvious difficulty
25 hearing.

1 Mr. Hill discussed his concerns about Mr. Fatout's
2 hearing and seeing difficulties and the operation of his aircraft,
3 discussed those difficulties with others. He asked Mr. Fatout's
4 sister if he could speak with Mr. Fatout. After doing so, he
5 called Mr. Fatout into his office and told him of his concerns
6 with his sight and his hearing and observations of his aircraft
7 operation. He offered to fly Mr. Fatout to Paoli in his aircraft,
8 to hangar Mr. Fatout's aircraft overnight, and to make
9 arrangements to return it the next day, all at no cost to
10 Mr. Fatout. Mr. Hill also observed that Mr. Fatout had been
11 working on his GPS unit and heard him comment that he couldn't get
12 the thing to pull up the Paoli airport. He was still working with
13 the GPS when he left the building.

14 Mr. Hill discussed his concerns with others there and
15 called the FAA. He was connected with a physician who advised
16 that if Mr. Fatout had a current medical certificate, then he
17 would have to let him go. He then told Mr. Fatout that if he
18 could produce a valid medical certificate, he would no longer
19 interfere with his departure.

20 After Mr. Fatout got into his aircraft, Mr. Hill went
21 inside. He did not observe his departure because he was
22 documenting their conversation and called the Indianapolis air
23 traffic control facility. He advised the Indianapolis ATC of his
24 concerns and that if Mr. Fatout flew directly to Paoli, then he
25 would probably violate Camp Atterbury's restricted airspace.

1 He completed the memorandum that is Exhibit A-1 because
2 the events that day were so outside the ordinary. He made the
3 notations on March 29th. He added the address block addressed to
4 Mr. Henderson after being advised where to send the information.
5 He had not met Mr. Fatout prior to March 29th, 2011. Although
6 Mr. Fatout may have flown into Greenwood three times prior,
7 Mr. Hill had not seen or met him.

8 Mr. Jeffries then testified, and he testified that he
9 owns and operates Jeff Air Pilot Services at the Greenwood
10 Airport. He is the chief pilot. The company provides flight
11 instruction and aircraft rental at the Greenwood Airport. He
12 holds an ATP certificate, multi-engine, as well as commercial
13 single engine, certified flight instructor, multi-engine and
14 single engine, with instrument rating. He is a retired
15 Continental Airlines pilot, and he retired in 2009 [sic] after
16 serving 20 years in that capacity. Mr. Jeffries was at the
17 Greenwood Airport on March 29th, 2012, and observed Mr. Fatout,
18 both through radio calls and personally.

19 He heard Mr. Fatout's radio calls on the UNICOM asking,
20 "Where is the traffic," and "I can't see him." He sounded
21 somewhat panicked, as if he had lost situational awareness. He
22 did not personally observe Mr. Fatout until after he had parked on
23 the ramp. He saw Mr. Fatout briefly talk with Mr. Hill and then
24 walk into the terminal with an unsteady gait. He overheard him
25 say several times that he was unable to program his GPS.

1 Mr. Fatout seemed agitated and belligerent at the help
2 that was being offered by Mr. Hill. From his radio calls, it did
3 not appear that Mr. Fatout knew where the traffic was and was
4 having trouble seeing and did not appear to know what he was
5 doing. He did not talk directly with Mr. Fatout. He saw him once
6 he was airborne and heading south.

7 Mr. Jeffries asked Mr. Hill if he had the number for
8 Camp Atterbury because Mr. Jeffries was concerned Mr. Fatout would
9 fly through the restricted airspace based on his heading. Camp
10 Atterbury conducts live fire exercises in the area. That
11 restricted area has been in place a long time. He found out later
12 that Mr. Hill had called the Indianapolis approach control. He
13 was also concerned based on the way Mr. Fatout was conducting
14 himself in the terminal.

15 Next, Mr. Hillenburg testified that he's a front-line
16 manager for the Indianapolis Terminal Radar Approach Control
17 facility, or TRACON, and tower. TRACON oversees the airspace in
18 restricted areas R3401 A and B, as well as Racer A, B and C MOAs,
19 or Military Operating Areas. Those are associated with Camp
20 Atterbury. The FAA does not own the airspace. It is owned by the
21 military.

22 On March 29th, 2012, Mr. Hillenburg talked with Mr. Hill
23 several times. He first talked with him about Mr. Hill's concern
24 that a pilot may depart and possibly pass through the restricted
25 airspace. Restricted area R3401 A was hot at 25,000 feet and

1 below, and R3401 B was hot 14,000 feet and below.

2 Mr. Hill called back when the pilot had departed.

3 Mr. Hillenburg then tagged Mr. Fatout's aircraft and tracked his
4 path. He contacted Atterbury tower to advise them that the
5 aircraft may violate the restricted airspace. He also talked to
6 range control, Sergeant Hart. He called Atterbury back when
7 Mr. Fatout was getting close to violating the restricted area. He
8 was advised at that time that Camp Atterbury had closed the range
9 on which artillery and air-to-ground operations had been ongoing
10 to allow safe passage of the aircraft.

11 He observed Mr. Fatout's aircraft on radar as it
12 slightly penetrated area A and as it passed diagonally through
13 restricted area B. Mr. Hillenburg then contacted Atterbury once
14 Mr. Fatout had passed through the restricted area, and Exhibit A-2
15 is a mandatory occurrence report, or MOR, that was filed on March
16 29th, 2012 regarding the restricted airspace in question. It is a
17 report that is required by the FAA for such incidents, and the
18 flight standards district office, or FSDO, also gets a copy. It
19 is marked as not significant because there was no loss of
20 separation, and Atterbury was able to cease operations before
21 Mr. Fatout passed through the restricted area. The notation on
22 the report that Mr. Fatout was flying IFR is an error. The
23 reference to Mr. Fatout's daughter is another error. He believes
24 that was intended to refer to Mr. Fatout's sister.

25 Mr. Fatout was not in the restricted airspace very long,

1 and Mr. Hillenburg does not know why he violated the airspace or
2 if it was deliberate. The radar used to track Mr. Fatout is very
3 precise and is the same radar used to control airspace and
4 maintain aircraft separation.

5 Mr. Martin testified that he is the safety inspector for
6 operations for the Indianapolis FSDO. He holds an ATP flight
7 instructor and ground instructor certificates. Mr. Henderson, his
8 supervisor at the FSDO, assigned Mr. Martin to investigate the
9 mandatory occurrence report that is Exhibit A-2. He began his
10 investigation on March 30th, 2012. He reviewed both the mandatory
11 occurrence report and Mr. Hill's memorandum, which is Exhibit A-1,
12 before completing the investigation. Initially he contacted
13 Mr. Fatout's sister to get good contact information for
14 Mr. Fatout. He also looked Mr. Fatout up in the FAA database and
15 determined that he had both current medical and private pilot
16 certificates. Also discovered that he owned a Maule aircraft.

17 When Mr. Martin called initially, Mr. Fatout thought he
18 was calling about his medical certificate. Mr. Martin had to
19 advise that he was calling about the pilot deviation. He asked
20 Mr. Fatout if he realized he had penetrated Camp Atterbury
21 restricted airspace. Mr. Fatout said he did not realize it. He
22 then asked Mr. Fatout questions regarding general aviation matters
23 taken from the private pilot qualification exam. Specifically, he
24 asked about traffic patterns for uncontrolled airports and radio
25 calls. Mr. Fatout's answers were vague and unsure, forgetting

1 common fundamental terms. He did not -- he, being Mr. Fatout --
2 did not provide answers that would be expected from a qualified
3 pilot. Mr. Fatout was still not aware that he had penetrated
4 restricted airspace, and Mr. Martin had to explain the proactive
5 steps that had to be taken to shut down the range in order to
6 allow his safe passage.

7 The restricted areas are on the sectional charts and are
8 also covered by separate Notices to Airmen, or NOTAMs. Mr. Martin
9 asked Mr. Fatout if he was aware of the hot areas published on the
10 charts and the NOTAMs. Mr. Fatout did not have an appropriate
11 understanding of the restricted areas and the proper procedure for
12 transiting the areas.

13 Mr. Martin then discussed his findings and observations
14 with his supervisor, Mr. Henderson, and both agreed that a request
15 for reexamination was appropriate. There were a number of
16 competencies that were a concern, primarily the penetration of the
17 restricted airspace, but also the demonstrated hearing and vision
18 problems, the parking problem, the radio call, the difficulties or
19 lack of familiarity with the common terminology, and difficulties
20 with the GPS. In this case, he indicated if Mr. Fatout was to
21 rely on the GPS for navigation, then he should know how to use it.

22 He did not discuss the hearing or vision issues with
23 Mr. Fatout, but he did discuss the parking and GPS concerns.
24 Mr. Martin advised Mr. Fatout that he would be sending a letter,
25 which he confirmed was received by Mr. Fatout both through

1 certified mail receipt and follow-up telephone conversation.
2 Mr. Martin does not recall Mr. Fatout reporting a near collision.

3 Next Mr. Fatout testified on his own behalf. He
4 testified that he was coming into Greenwood Airport, that when he
5 was coming into Greenwood Airport, he was on a collision course
6 with another aircraft and had to lower his nose and take other
7 evasive action to avoid collision. After he landed, he saw the
8 parking attendant, who was not Mr. Ralph Hill, and informed him of
9 the near collision. The attendant said he had not heard anything
10 about it.

11 When he first entered the terminal, his sister was not
12 there, so he went back to his airplane and retrieved the GPS. He
13 then met with his sister. Mr. Hill then informed him that he was
14 not going to let him leave the airport. Mr. Hill also demanded to
15 see his medical certificate. Mr. Fatout did not respond but got
16 up and left. Mr. Hill threatened that if he left, he would be in
17 trouble with the FAA. He also blocked his path to the aircraft.
18 It was at that point that he was told the FAA was on the phone in
19 the office, and they walked to the office. That was the first and
20 only time that they were in Mr. Hill's office. Mr. Hill informed
21 him that if he showed him his medical certificate, then he would
22 let him go. Mr. Fatout then showed his medical certificate.

23 Mr. Fatout was removing the chocks and preparing to
24 depart when two police who had been called earlier, at his
25 request, showed up, a male officer inspecting the interior of his

1 airplane and a female officer spoke to Mr. Fatout. They did not
2 prevent him from departing. After he was in his plane, Mr. Hill
3 yelled at him, "You are not a safe pilot."

4 Mr. Fatout took off en route to Paoli. The restricted
5 area came up on his GPS. He knew he was approaching the
6 restricted area. He's not sure if he penetrated the restricted
7 airspace. He could have been in it, but if so, it was not
8 deliberate. He had no problem landing at Paoli.

9 DISCUSSION

10 Now, having discussed the testimony and other evidence,
11 I'll now discuss that evidence as it applies to my findings in
12 this case.

13 Now, as I noted earlier, the standard here is a very
14 light one. The standard is whether there's a reasonable basis to
15 request reexamination. It is not an issue of whether Respondent
16 is competent or not competent because the FAA cannot make that
17 determination at this point. That's why they made their request.

18 With respect to the issue of the reasonableness of the
19 request, the FAA presented the testimony, as I indicated, of
20 Mr. Hill, Mr. Jeffries, Mr. Hillenburg and Mr. Martin. Both
21 Mr. Hill and Mr. Jeffries expressed concerns, consistent concerns,
22 about the radio calls, about the nonstandard nature of the radio
23 calls. Mr. Jeffries made observations that Mr. Fatout seemed to
24 be somewhat panicky and lacked some situational awareness.

25 After Mr. Fatout had landed, Mr. Hill observed him

1 taxiing and parking and observed him doing so in a manner that was
2 not as precise or as skillful as one would expect from a qualified
3 pilot. Mr. Hill was concerned enough that he offered to store
4 Mr. Fatout's aircraft and arrange alternate transportation, and
5 even Mr. Fatout confirmed he offered to store his aircraft at no
6 expense.

7 Mr. Hill also contacted the FAA to determine steps that
8 he might take because of the concerns with his initial
9 observations. Both Mr. Hill and Mr. Jeffries observed Mr. Fatout
10 having significant difficulty with programming the GPS that he
11 relied on for navigation; and again, Mr. Fatout, in his testimony,
12 confirmed some difficulty with programming that GPS.

13 After his initial contact with the FAA, Mr. Hill again
14 contacted the FAA air traffic control facility because of concerns
15 with Mr. Jeffries [sic] possibly violating the restricted area at
16 Camp Atterbury and the potential danger to himself and others.

17 Mr. Hillenburg then, based on that contact, tagged and
18 tracked Mr. Fatout and contacted Camp Atterbury. Because of the
19 probable penetration, Camp Atterbury as a result had to shut down
20 the range, the active range. The radar that Mr. Hillenburg
21 observed confirmed penetration of both restricted areas A and B,
22 one somewhat more so than the other.

23 And finally, Mr. Martin conducted his investigation
24 based on the reports that he received, and he too made
25 observations that are consistent with those of the other

1 witnesses: Mr. Fatout was unable to articulate traffic pattern
2 nomenclature, to include common fundamental terms; Mr. Fatout was
3 not able to clearly articulate restricted airspace procedures.
4 Mr. Martin also considered the other reports of demonstrated
5 difficulties with radio calls, with parking and taxiing, and with
6 the use of the handheld GPS.

7 I found the testimony of these witnesses to be quite
8 credible. Mr. Hill and Mr. Martin [sic] made observations that
9 were consistent with one another with regard to Mr. Fatout's
10 conduct and his operation of the radios. Neither of these
11 individuals knew Mr. Fatout or had any apparent reason to
12 fabricate their observations. They had not met him prior to March
13 29th, 2012, had no dealings with him prior to that time.

14 Their observations and concerns with respect to his
15 heading and possible penetration of the restricted airspace at
16 Camp Atterbury were then confirmed by Mr. Hillenburg who tracked
17 Mr. Fatout's course and took steps to coordinate safe passage
18 through their restricted airspace. Mr. Martin's subsequent
19 investigation resulted in similar observations and concerns.

20 Thus, I find their testimony to be very consistent in
21 many respects. To have made independent yet consistent
22 observations about Mr. Fatout's conduct, to find their testimony
23 other than credible, I would essentially have to determine that
24 all of these witnesses had completely fabricated their stories,
25 and I find no basis to do so.

1 Allegation Number 1 was admitted by the Respondent. He
2 holds and at all times relevant hereto held private pilot's
3 Certificate Number 310282802.

4 2. On March 29th, 2012, he acted as pilot in command of
5 a Maule MXT-7-180-Alpha, civil aircraft, registered as tail number
6 N9KV, on two flights in the vicinity of the Greenwood Airport,
7 Greenwood, Indiana.

8 3. At the end of the first flight, he entered the
9 traffic pattern and landed at Greenwood Airport.

10 4. Upon entering the pattern at Greenwood, he used
11 nonstandard radio calls and appeared unable to establish
12 situational awareness in the pattern.

13 5. After landing on the first flight, he was unable to
14 see the marshaller until he was very close, and then unable to
15 precisely taxi the aircraft while parking.

16 6. After departing Greenwood on the second flight, he
17 entered without permission or approval and without contacting
18 airline traffic control restricted areas R3401 A and 3401 B.
19 Although I do not find that they were active at the time, they had
20 been active just prior to his entering that restricted area. But
21 through coordination with the air traffic control center and Camp
22 Atterbury, the range was not hot at that time.

23 7. On April 5th, 2012, as a result of a review of the
24 events of March 29th, 2012, a representative of the Administrator
25 requested by letter that Respondent appear for a reexamination of

1 his competency. Such reexamination was to include appropriate
2 portions of the private pilot certificate and practical test
3 standards as set forth in greater detail in the letter.

4 8. Although he received the April 5th, 2012 letter,
5 he's failed as of the date of this order and as of this date to
6 appear for and participate in a reexamination of his
7 qualifications.

8 I find and conclude, therefore, that based upon the
9 weight of the evidence that there be a reasonable basis to request
10 a reexamination of the Respondent, that the Order of Suspension,
11 the complaint herein, be, and the same hereby is, affirmed as
12 issued.

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ORDER

IT IS THEREFORE ORDERED that:

1. The Order of Suspension, the complaint herein, be, and the same hereby is, affirmed as issued;
2. That all pilot certificates held by the Respondent, including private pilot's Certificate Number 310282802, are hereby suspended immediately; and
3. That a period of suspension shall continue in effect until the Respondent appears for a reexamination of his qualifications to hold a private pilot's certificate.

This order is entered this 22nd day of May 2013 at Indianapolis, Indiana.

STEPHEN R. WOODY
Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE WOODY: All right. Now, Mr. Fatout, what I have here is a written statement of your appeal rights. I've issued my decision, but you have an opportunity, if you so desire, to appeal, to request an appeal to the full Board of my decision. So I want to provide you with a copy of your written appeal rights so you have something to refer to. And if you'd like, I'll hand the copy of that to you. You can come

1 forward and retrieve that.

2 Mr. Zurales, I have a copy for you, too, as well, and
3 I'll hand a copy of this to the court reporter and ask her to make
4 that the next ALJ exhibit and include that with the record.

5 (Whereupon, the document referred to
6 as ALJ Exhibit 2 was marked for
7 identification and received into
8 evidence.)

9 ADMINISTRATIVE LAW JUDGE WOODY: Sir, since you're not
10 represented, I'll go over these with you. If you have any
11 questions, you can ask me.

12 What's primarily important regarding this is that if you
13 want to file an appeal, there is a timeline that you have to --
14 there are timelines that you have to meet, and those are important
15 because if you don't file a timely appeal, then that appeal likely
16 won't be accepted by the Board, and you will have lost your
17 opportunity to appeal my decision.

18 So the first and most important one is that you have to
19 file that appeal, and it needs to be filed in writing, just a
20 notice of appeal that you would like to appeal my decision. And
21 that has to be done within 10 days of the date of my decision. So
22 within 10 days of today, that would have to be filed, all right?
23 And this tells you how to do that, an original and three copies
24 sent to, you know, our office, and there's an address here. So I
25 won't cover that with you.

1 And in order -- but once you have filed your notice that
2 you are going to appeal, within 50 days of my decision today, you
3 have to file a copy of your written brief in support of your
4 appeal. So -- and again, that is laid out here. And it provides
5 the address, the Office of the General Counsel, to which you need
6 to send that if you do appeal in order to perfect your appeal.

7 Those timelines are very important, so it's important
8 that you keep track of those if you decide that you would like to
9 appeal my decision, all right?

10 Now, you also have to provide copies of your notice of
11 appeal and any brief, written brief that you submit, to
12 Mr. Zurales, the opposing counsel. He'll have an opportunity to
13 reply to your brief, and he'll provide you with a copy of that as
14 well. And he has timelines he needs to meet as well. But I'm
15 most concerned you understand what your timelines are if you
16 desire to appeal my decision.

17 MR. FATOUT: Well, I understand that. But I heard you
18 talking. You didn't -- you didn't favor anything that I said at
19 all. It was all -- you agreed with everything he said.

20 ADMINISTRATIVE LAW JUDGE WOODY: Well, sir, certainly
21 people -- others who review this may disagree with my decision.

22 MR. FATOUT: Right.

23 ADMINISTRATIVE LAW JUDGE WOODY: And that's why you have
24 an appeal right, and that's why it goes to the full Board. And
25 they will review my decision and determine whether they agree with

1 me or whether they do not agree with me. So you certainly have
2 that option if that's what you'd like to do. And certainly I'm
3 not infallible. We all make mistakes. If the Board disagrees
4 with me, then the Board disagrees with me.

5 So certainly consider your -- whether or not you'd like
6 to file an appeal. And just importantly, if you decide you would
7 like to, please make sure that you meet those timelines, because
8 if you don't --

9 MR. FATOUT: Well, I'm going to appeal, yes, sir.

10 ADMINISTRATIVE LAW JUDGE WOODY: Okay.

11 MR. FATOUT: Because --

12 ADMINISTRATIVE LAW JUDGE WOODY: But understand that you
13 have to do that in writing. You telling me that you're appealing
14 does not constitute a notice of appeal. So you have to do that in
15 writing.

16 MR. FATOUT: Well, I'm going to do it in writing --

17 ADMINISTRATIVE LAW JUDGE WOODY: Okay.

18 MR. FATOUT: -- because I don't think you considered
19 anything that I said, the same way as Chris Zurales. And the time
20 that he said I was in the air, I was on the ground. That is an
21 important thing. I mean, you know, he's not accurate. But I
22 respect your decision. I'm not arguing.

23 ADMINISTRATIVE LAW JUDGE WOODY: And I understand your
24 position. And certainly that's why you have that appeal right,
25 so --

1 MR. FATOUT: So where do I appear, back in here or what?

2 ADMINISTRATIVE LAW JUDGE WOODY: No, sir. It will be to
3 the full Board. The Board is in Washington, D.C. It typically is
4 done by paper. So in other words, you would submit your appeal,
5 and you wouldn't necessarily appear before them to have another
6 hearing. It will be a decision made on the record that we've
7 created here. That's why we have the record that we've created.

8 MR. FATOUT: Well, I have another question. I can't
9 think of it. Oh, yes, I do. The transcripts, when will I see
10 them? Because that --

11 ADMINISTRATIVE LAW JUDGE WOODY: I wish I could give you
12 a good answer. I think the timeline for preparing a transcript is
13 within 14 days.

14 COURT REPORTER: Yes.

15 MR. FATOUT: Well, I won't be able to see your reasons.

16 ADMINISTRATIVE LAW JUDGE WOODY: Well, you can file the
17 -- the notice of the appeal and the brief in support of the appeal
18 are two different things. The notice of appeal, if you want to
19 appeal, you provide that notice within 10 days.

20 MR. FATOUT: Right.

21 ADMINISTRATIVE LAW JUDGE WOODY: And then you'll have an
22 opportunity to review the record, the transcripts, and once you've
23 reviewed those, you can then submit your brief in support of your
24 appeal. That's that 50 days from today.

25 MR. FATOUT: Oh, okay.

1 ADMINISTRATIVE LAW JUDGE WOODY: So you do have some
2 additional time. It's just you have to provide the formal notice
3 that you plan to appeal within 10 days. And then you have the --

4 MR. FATOUT: So this appeal, I'll have to send
5 Mr. Zurales my appeal too?

6 ADMINISTRATIVE LAW JUDGE WOODY: Well, you just send a
7 copy to his office so that they know that you appealed it.

8 MR. FATOUT: Okay.

9 ADMINISTRATIVE LAW JUDGE WOODY: Okay.

10 MR. FATOUT: All right.

11 ADMINISTRATIVE LAW JUDGE WOODY: All right, sir. Thank
12 you.

13 MR. FATOUT: No problem.

14 ADMINISTRATIVE LAW JUDGE WOODY: With that, the hearing
15 is terminated. Thank you for your time this afternoon.

16 (Whereupon, at 4:33 p.m., the hearing in the above-
17 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Donald Luther Fatout

DOCKET NUMBER: SE-19441

PLACE: Indianapolis, IN

DATE: May 22, 2013

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Marlana M. Haig
Official Reporter