

SERVED: June 20, 2014

NTSB Order No. EA-5723

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 18th day of June, 2014

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket SE-19549
	)	
EITAN LEASCHAUER,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

Respondent, who proceeds *pro se*, appeals the written order of Administrative Law Judge William R. Mullins, issued on December 11, 2013.<sup>1</sup> In the order, the law judge granted the Administrator’s motion for summary judgment and denied respondent’s motion for summary

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

judgment, concluding the doctrine of *res judicata* precluded respondent's appeal.<sup>2</sup> The law judge also affirmed the 60-day suspension of respondent's airman certificate. On October 1, 2013, in a case arising out of the same incident and facts, the Board affirmed Administrative Law Judge Patrick Geraghty's findings granting an emergency order suspending respondent's airman certificate, pending a re-examination of his qualification to hold that certificate.<sup>3</sup> We deny respondent's appeal.

### 1. *Procedural Background*

On August 20, 2013, the Administrator issued a 120-day suspension order against respondent's private pilot certificate based upon violations of 14 C.F.R. §§ 91.123(b),<sup>4</sup> 91.129(i),<sup>5</sup> and 91.13(a).<sup>6</sup> Respondent appealed this order to the NTSB Office of Administrative Law Judges on August 26, 2013. The Administrator amended the complaint on October 24, 2013, adding a paragraph referencing the Administrator's indefinite suspension of respondent's private pilot's certificate for failure to submit to a reexamination under 49 U.S.C. § 44709.<sup>7</sup> The amended complaint also combined and eliminated some of the factual allegations, ultimately

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<sup>2</sup> *Res judicata*, a Latin phrase meaning, "a thing adjudicated," refers to an issue that has been definitively settled by judicial decision. Black's Law Dictionary at 1425 (9<sup>th</sup> ed. 2009).

<sup>3</sup> Administrator v. Leaschauer, NTSB Order No. EA-5680 (2013), pet for recon. denied, NTSB Order No. EA-5693 (2013).

<sup>4</sup> Section 91.123(b) states, "Except in an emergency, no person may operate an aircraft contrary to an ATC [air traffic control] instruction in an area in which air traffic control is exercised."

<sup>5</sup> Section 91.129(i) states, in relevant part, as follows: "No person may, at any airport with an operating tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC."

<sup>6</sup> Section 91.13(a) states, "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

<sup>7</sup> 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."

stating, “[p]rior to take off during the above-described flight, ATC instructed you to contact the ... Air Traffic Control Tower to receive a takeoff clearance. You failed to follow this ATC instruction and proceeded to takeoff ... without a clearance.”<sup>8</sup>

On November 5, 2013, the Administrator filed a motion for summary judgment, arguing the law judge should dismiss the case under the doctrine of *res judicata*. Respondent filed a cross-motion for summary judgment on November 12, 2013.

### 2. *Law Judge’s Written Order*

The law judge granted the Administrator’s motion for summary judgment and denied respondent’s cross-motion. In his order, the law judge noted the Administrator’s prior order requiring respondent’s reexamination “was based on the same incident and the same regulatory violation alleged here.”<sup>9</sup> The law judge noted “Judge Geraghty specifically found by a preponderance of the evidence that the ground controller, on the date of the incident, instructed [r]espondent to contact the tower, [r]espondent failed to follow this instruction and proceeded to take off without a clearance from the tower.”<sup>10</sup> The law judge also noted we had affirmed these findings. Ultimately, the law judge concluded the doctrine of *res judicata* precluded the case from proceeding further.

### 3. *Issues on Appeal*

Respondent appealed the law judge’s decision. Respondent claims the Board lacks jurisdiction under double jeopardy to grant the Administrator’s motion for summary judgment in this case. Respondent also asserts his appeal is not barred by the doctrine of *res judicata* and

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<sup>8</sup> See Complaint at ¶3.

<sup>9</sup> Order at 1.

<sup>10</sup> *Id.* at 2.

summary judgment was not appropriate.

## **2. Decision**

On appeal, we review the law judge's decision *de novo*, as our precedent requires.<sup>11</sup>

### *A. Jurisdiction to Review*

Respondent asserts the Board lacks jurisdiction to consider the Administrator's motion for summary judgment because the case is barred by "double jeopardy" and he has filed a petition for review of the Board's decision in EA-5680 (Docket SE-19548) in the United States Court of Appeals for the Ninth Circuit. We disagree.

As discussed in more detail below, we find the doctrine of *res judicata* applies to this case because this case involves the same facts and parties. The case the Board reviewed in Docket SE-19548 involved a reexamination. We have long held the Administrator has significant discretion in determining whether such reexaminations are warranted.<sup>12</sup> In this regard, the standard the Administrator must fulfill concerning a reexamination request under 49 U.S.C. § 44709 is minimal: the Administrator need only show he has a reasonable basis for requesting reexamination.

The case in Docket SE-19549 is a punitive certificate action, suspending respondent's airman certificate for operational regulatory violations. Docket SE-19548 took no action for the regulatory violations, but rather required respondent submit to a reexamination of his competency to continue to hold his airman certificate. We find each of these actions serves a

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<sup>11</sup> Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013) (citing Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, 7 NTSB 1323, 1325-26 (1991) (stating the law judge's findings could not be reconciled with the evidence in the record); and Administrator v. Schneider, 1 N.T.S.B. 1550, 1551 (1972) (in making factual findings, the Board is not bound by the law judge's findings)).

<sup>12</sup> Administrator v. Fatout, NTSB Order No. EA-5685 (2013); Administrator v. Occhione, NTSB Order No. EA-5537 (2010); Administrator v. Bakhit, NTSB Order No. EA-5489 (2009).

different purpose: the suspension is punitive in nature for the operational violations, while the reexamination is based on compliance and rehabilitation, seeking to ensure respondent holds the necessary qualifications and competency to conduct safe flights. Thus, the Board has jurisdiction to examine both cases.

### B. *Res Judicata and Summary Judgment*

Under the Board's Rules of Practice and Federal Rule of Civil Procedure 56, a party may file a motion for summary judgment on the basis the pleadings and other supporting documents establish no genuine issue of material fact exists, and the moving party is therefore entitled to judgment as a matter of law.<sup>13</sup> In order to defeat a motion for summary judgment, the non-moving party must provide more than a general denial of the allegations.<sup>14</sup> The law judge must view the evidence in the motion for summary judgment in the light most favorable to the non-moving party.<sup>15</sup>

Likewise, the Board has long applied the doctrine of *res judicata* in its jurisprudence.<sup>16</sup> This doctrine precludes a respondent from relitigating the same claim in a second legal proceeding where there was: (1) an earlier decision on the issue, (2) a final judgment on the

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<sup>13</sup> 49 C.F.R. § 821.17(d); Administrator v. Wilkie, NTSB Order No. EA-5565 at 5 (2011); Administrator v. Giannola, NTSB Order No. EA-5426 (2009); Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)); see also 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 non-moving 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).

<sup>14</sup> Administrator v. Hendrix, NTSB Order No. EA-5363 at 5 n.8 (2008) (citing Doll, *supra* note 14, at 1296).

<sup>15</sup> United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

<sup>16</sup> Administrator v. Culliton, NTSB Order No. EA-5178 at 3 (2005); Petition of Arrigoni, NTSB Order No. EA-4365 at 5 (1995) (citing Petition of Parker, NTSB Order No. EA-4233 (1994) and Petition of Weiss, NTSB Order No. EA-3678 (1992)).

merits, and (3) the involvement of the same parties or parties in privity with the original parties.<sup>17</sup> All these elements exist in this case. The law judge issued findings against respondent in the earlier reexamination case (Docket No. SE-19548) arising from the same factual situation.<sup>18</sup> The Board issued a final decision in the case.<sup>19</sup> The same parties were involved then and now—namely, respondent and the Administrator. Therefore, the law judge did not err in finding the doctrine of *res judicata* precluded respondent’s appeal and in granting the Administrator’s motion for summary judgment.

Finally, we note, under federal law, the pendency of an appeal does not suspend the finality of a judgment for *res judicata* purposes.<sup>20</sup> Therefore, the fact respondent has petitioned the United States Court of Appeals for the Ninth Circuit for review of our order in EA-5680 does not stop the finality of that decision for *res judicata* purposes in this case.

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<sup>17</sup> Culliton, *supra* note 16; Oriel v. Russell, 278 U.S. 358, 410 (1929). Petition of Parker, NTSB Order No. EA-4233 (1994) (doctrine of *res judicata* bars relitigation of issues concerning specifically disqualifying medical conditions that have been adjudicated in a prior case). Petition of Weiss, NTSB Order No. EA-3678 (1992) (unappealed initial decision is administratively final, and no longer subject to procedural challenge; petition to review subsequent denial barred by doctrine of *res judicata*). Petition of Forrette, NTSB Order No. EA-5524 (2010).

<sup>18</sup> In SE-19548, the law judge specifically found “the evidence shows by a preponderance of the evidence that [r]espondent taxied to the runway 3-1 right, went onto the runway and executed a takeoff without receiving a clearance from the local controller. So there is no doubt on this evidence that [r]espondent took off without appropriate ATC clearance for that maneuver. I find therefore that the allegation in paragraph 5 is clearly established. . . [a]nd also further. . . the allegations in paragraph 6 are established.” Initial Decision at 147 (Attached to NTSB Order No. EA-5680 (2013)).

<sup>19</sup> NTSB Order No. EA-5680.

<sup>20</sup> Eichman v. Fotomat Corp., 759 F.2d 1434, 1439 (9<sup>th</sup> Cir. 1985).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The law judge's order is affirmed.

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

SERVED: December 11, 2013

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

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

Complainant, \*

v. \* Docket SE-19549

EITAN LEASCHAUER, \*

Respondent. \*

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**ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

The Administrator of the Federal Aviation Administration (Complainant), through Counsel, has moved for Summary Judgment in these proceedings, alleging that there are no triable issues of fact, and that Complainant is entitled to judgment as a matter of law. The Complainant argues that the issues involved in this case were litigated before Judge Geraghty on September 17, 2013 (SE-19548) in an emergency hearing, and Judge Geraghty's findings were affirmed by the National Transportation Safety Board (Board) by NTSB Order No. EA-5680 on October 1, 2013.

In the emergency case, the Administrator was seeking an Emergency Order of Suspension of this Respondent's airmen certificate, pending re-examination of his qualification to hold that certificate. That request to re-examine was based on the same incident and the same regulatory violation alleged here, FAR 91.123(b) and FAR 91.129(i). FAR 91.123(b) provides that, except in

an emergency, no person may operate an aircraft contrary to an ATC instruction on an area in which air traffic control is exercised. FAR 91.123(i) provides that no person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft unless an appropriate clearance is received from ATC. A third violation, FAR 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another was alleged as a residual violation based on a finding of either of the previous FARs cited.

Although the hearing in the emergency case was held to determine if the Complainant's request to re-examine was reasonable, Judge Geraghty specifically found by a preponderance of the evidence that the ground controller, on the date of the incident, instructed Respondent to contact the tower, Respondent failed to follow this instruction and proceeded to take off without a clearance from the tower. As stated, these findings were subsequently affirmed by the Board. (NTSB Order No. EA-5680, October 1, 2013).

Respondent has not responded to Complainant's Motion for Summary Judgment, but instead has filed his own Motion for Summary Judgment, seeking to re-litigate the same issues determined by Judge Geraghty and affirmed by the Board. Because the Board has affirmed Judge Geraghty's findings, Respondent's Motion for Summary Judgment is without merit.

The Board's Rules of Practice provide that Summary Judgment is appropriate when the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved, and a party is entitled to judgment as a matter of law and further based on the doctrine of *res judicata*.

Here, the specific findings of Judge Geraghty, as to the violations of FAR 91.123(b) and FAR 91.129(i) and the Board's Order affirming those findings leave no material issues of fact to be determined at trial. Therefore, the Motion for Summary Judgment affirming the regulatory violation of FAR 123(b) and FAR 129(i), with the further findings of FAR 91.13(a) as a residual violation of the first two, is **AFFIRMED**. The Administrator is seeking a 60-day suspension of Respondent's Airman's Certificate, which does fall in the mid-range (30-90 days) for either of the operational violations alleged. The Complaint herein was amended, reducing the sanction sought in the original complaint from 120 days to 60 days. Respondent has not filed a response or objection to this sanction, and, therefore, the 60 days suspension also **AFFIRMED**.

Therefore, the Administrator's Motion for Summary Judgment affirming the Order of Suspension as issued is **AFFIRMED**, Respondent's Motion for Summary Judgment is **DENIED**, *and the hearing scheduled for December 17, 2013, is cancelled.*

SO ORDERED.

ENTERED this 11<sup>th</sup> day of December, at Washington, D.C.

A handwritten signature in black ink, appearing to read 'W R Mullins', is written above a horizontal line.

WILLIAM R. MULLINS  
JUDGE

## **APPEAL (DISPOSITIONAL ORDER)**

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board  
Office of Administrative Law Judges  
490 L'Enfant Plaza East, S.W.  
Washington D.C. 20594  
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board  
Office of General Counsel  
Room 6401  
490 L'Enfant Plaza East, S.W.  
Washington, D.C. 20594  
Telephone: (202) 314-6080  
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

**NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.**

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

**ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.**