

SERVED: December 11, 2014

NTSB Order No. EA-5732

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 December, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19526
v.)	
)	
ALBERT LEYNER,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued April 30, 2014, following a hearing.¹ In his decision, the law judge affirmed the Administrator’s order suspending respondent’s commercial pilot certificate and any other certificates respondent holds for a period of 60 days, determining respondent violated 14 C.F.R.

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

§§ 91.129(c)(1) and (i),² and 91.13(a),³ by failing to establish two-way radio communications and landing without receiving a clearance from air traffic control (ATC). We deny respondent's appeal.

A. The Administrator's Order

The Administrator's order, issued June 28, 2013, alleged respondent landed his Piper Aerostar 601P at Bozeman-Yellowstone International Airport in Montana without receiving the appropriate clearance from ATC on August 21, 2012. Bozeman is located in Class D airspace, and an ATC operating control tower facility maintains jurisdiction over the air space. The Administrator alleged respondent failed to establish two-way radio communications or visual contact with the ATC facility.

B. Facts

Respondent, who has been flying since 1957 and has several certificates and ratings, has owned his Piper Aerostar since 2001. In 2010, respondent began wearing hearing aids; at the hearing, he testified he owned two pairs. Respondent stated he recently purchased a second pair

² Section 91.129, titled "Operations in Class D airspace," provides, in part, as follows:

(c) Communications. Each person operating an aircraft in Class D airspace must meet the following two-way radio communications requirements:

(1) Arrival or through flight. Each person must establish two-way radio communications with the ATC facility (including foreign ATC in the case of foreign airspace designated in the United States) providing air traffic services prior to entering that airspace and thereafter maintain those communications while within that airspace.

* * * * *

(i) Takeoff, landing, taxi clearance. 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...

³ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

of hearing aids after completing extensive research in discerning the best type to wear while flying. Prior to the August 21, 2012 flight at issue, respondent had not used the new hearing aids in a radio or “controlled” environment.⁴

The day of the flight, air traffic controller Mitchell Robison, who was working in the tower local control position at the Bozeman tower, observed respondent’s aircraft on radar, approximately three miles from the airport. Mr. Robison then visually observed the aircraft through the windows of the tower when it was approximately one mile west of the tower.

Mr. Robison attempted to contact respondent several times, but received no response.⁵

Respondent’s aircraft was equipped with a transponder, which did not squawk an emergency code or a code indicating a radio problem; instead, the transponder only squawked the generic 1200 code.⁶

Mr. Robison advised an approaching Skywest aircraft that respondent’s aircraft was “NORDO,” meaning respondent was without a radio.⁷ Mr. Robison did not know whether respondent was simply passing through the airspace or whether he intended to land at Bozeman. Mr. Robison instructed the Skywest aircraft to complete two 360s to stay clear of respondent’s aircraft. Mr. Robison observed respondent on the left base but instead of turning left toward the runway, respondent made a right turn; this action surprised Mr. Robison because he expected

⁴ Tr. 85.

⁵ Exh. A-5 at 2 (transcript of communications, in which Mr. Robison asked, “november eight one x-ray, bozeman tower how do you hear”).

⁶ Under the National Beacon Code Allocation Plan, beacon code 1200 is described as “Visual Flight Rules (VFR) aircraft not in radio contact with an ATC Facility.” FAA Order JO 7110.66D, Appendix A.

⁷ Tr. 26.

respondent to land on runway 12.⁸ Mr. Robison believed respondent's right turn put his aircraft too close to the Skywest aircraft; as a result, he instructed the Skywest aircraft to complete a right 360. Mr. Robison testified he used the appropriate green light to point in the direction of the left runway, but respondent did not turn. Mr. Robison confirmed he had issued a landing clearance to respondent. However, he did not know whether respondent heard the clearance.

Mr. Robison advised respondent to call the tower after he landed, but respondent simply proceeded to the fixed based operator (FBO). Mr. Robison then approached respondent to ask him what happened. Mr. Robison recalled respondent experienced difficulty hearing Mr. Robison during the conversation. Respondent did not mention an emergency situation to Mr. Robison. Similarly, when operations inspector Paul Hurlbert, from the Helena Flight Standards District Office, contacted respondent in furtherance of his investigation into the pilot deviation report following the occurrence, respondent did not mention an emergency situation or a radio malfunction to Inspector Hurlbert.

At the hearing, FAA Regional Operations Specialist Roy Speeg also testified. Inspector Speeg opined the exception provided in 14 C.F.R. § 91.129(d) did not apply to

⁸ Tr. 27; see also Exh. A-5 at 2-3, in which respondent appeared to have heard portions of Mr. Robison's communication:

LC	november eight four x-ray bozeman tower how do you hear
N6081X	eight one x-ray
LC	november eight four x-ray
N6081X	okay okay I've got one eight
LC	november eight four x-ray runway one two cleared to land
* * * * *	
N6081X	eight one x-ray final runway one two bozeman
LC	november eight one x-ray you're still cleared to land runway one two
N6081X	uh I'm I'm about a one mile final
LC	eight one x-ray you're cleared to land

respondent's conduct on August 21, 2012, because no evidence showed respondent experienced a radio failure. Section 91.129(d)(2) states as follows:

(2) If the aircraft radio fails in flight under VFR, the pilot in command may operate that aircraft and land if--

- (i) Weather conditions are at or above basic VFR weather minimums;
- (ii) Visual contact with the tower is maintained; and
- (iii) A clearance to land is received.

Inspector Speeg stated respondent did not maintain visual contact with the tower and did not receive a clearance to land. Inspector Speeg testified *receiving* is an act that must be performed; Mr. Robison had *issued* a clearance for respondent to land, but respondent did not *receive* the clearance.⁹

Respondent recalled when he was traveling along the west side of the ridge near the airport, he attempted to contact Air Traffic Information Situation, but heard nothing.¹⁰ He also stated he saw no ground traffic or light signals. He felt he did not need to squawk code 7600 to indicate a communication problem because he did not believe he had such a problem. As he entered downwind from runway 12, he heard nothing.¹¹ Respondent proceeded northwest of the airport and contemplated what to do. He made two right 360s on the edge of the Class D airspace to attempt to get the tower's attention. He saw no traffic on the ground and no other aircraft for quite a distance, so he headed directly to the tower. He described Mr. Robison as agitated when the controller approached respondent at the FBO. Respondent informed Mr. Robison he believed his hearing aids, headset, and radios were incompatible, even though he was confident the hearing aids would work with the equipment when he purchased them. At the

⁹ Tr. 79.

¹⁰ Tr. 90-91.

¹¹ Tr. 95-96.

hearing, respondent mentioned he believed he was in an emergency situation because he was experiencing difficulty with his brakes.

C. Law Judge's Oral Initial Decision

At the conclusion of the hearing, the law judge determined the Administrator proved respondent violated § 91.129(c)(1) and (i), as well as § 91.13(a) when he failed to receive a clearance in Class D airspace from ATC to land. The law judge opined respondent's argument that an emergency excused his conduct was an affirmative defense, which respondent had the burden to prove.¹² The law judge rejected respondent's contention that his need to land at Bozeman instead of Livingston, because Bozeman has a longer runway, meant respondent's failure to receive a clearance was justified. The law judge concluded any existence of an emergency due to a communication failure was an emergency of respondent's own making, because respondent did not test his hearing aids in an ATC environment before flying with them. The law judge determined Mr. Robison's testimony was more credible than respondent's testimony. The law judge affirmed the Administrator's imposition of a 60-day suspension period.

D. Issues on Appeal

On appeal, respondent contends the law judge improperly prevented him from presenting his full affirmative defense of emergency. In addition, respondent argues the law judge deprived him of due process by precluding him from fully cross-examining the Administrator's witnesses.

¹² Initial Decision at 137 (citing Administrator v. Gibbs, NTSB Order No. EA-5291 (2007)).

Finally, respondent asserts the law judge erred in determining the Administrator's witnesses were credible.¹³

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.¹⁴

A. *Affirmative Defense of Emergency*

Respondent contends the law judge improperly refused to permit respondent to offer his "full" defense that an emergency existed to excuse his deviation; respondent asserts this preclusion prejudiced him. In addition, respondent contends the law judge erred in determining the emergency was one of respondent's own making.

If proven, an affirmative defense can excuse a respondent's admitted violation. In asserting such a defense, the burden shifts to the respondent to prove it by a preponderance of evidence.¹⁵ We have held a respondent must fulfill the burden of proving the factual basis for the affirmative defense, as well as the legal justification.¹⁶ One such affirmative defense is the existence of an emergency: 14 C.F.R. § 91.3(b) permits deviation from the regulations codified

¹³ Respondent has also requested oral argument before the Board, pursuant to 49 C.F.R. § 821.48(e). We find the parties have fully briefed the issues, and holding an oral argument is therefore unnecessary.

¹⁴ 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) (in making factual findings, the Board is not bound by the law judge's findings).

¹⁵ Administrator v. Hermance, NTSB Order No. EA-5706 (2014); Administrator v. Tsegave, NTSB Order No. EA-4205 at 5-6 (1994) (stating once the Administrator establishes a *prima facie* case, the burden shifts to the respondent, who has the opportunity to prove an affirmative defense excuses his conduct).

¹⁶ Administrator v. Donohue, et al., NTSB Order No. EA-5314 at 9 (2007).

in 14 C.F.R. part 91 only to the extent necessary to mitigate or circumvent the risk caused by the emergency.¹⁷

Respondent did not present evidence to prove his radios malfunctioned or were otherwise not operational at the time of the flight. He also admitted he did not test his hearing aids in the same type of environment in which he flew on August 21, 2012. His inability to hear ATC left him unable to obtain the clearance 14 C.F.R. § 91.129(d) requires. In this regard, respondent's failure to test his hearing aids in the radio environment in which he operated does not constitute an unanticipated emergency, which could function as an affirmative defense.

To the extent respondent argues he would not have flown to Bozeman but for the fact he was experiencing brake problems with the aircraft, we agree with the law judge that this argument cannot function as an affirmative defense. The proximate cause of respondent's deviation was his inability to hear ATC. His decision to land at Bozeman because of a purported problem with his brakes was not relevant to this failure to hear and receive the ATC clearance. Respondent would need to prove a radio malfunction or some other type of problem to explain how this excused his deviation; our jurisprudence would not support the conclusion his decision to land at Bozeman excuses his inability to hear the clearance.¹⁸ We do not believe the law judge erred in reaching this conclusion.

B. Cross-Examination of Witnesses

Respondent claims the law judge erred in preventing him from cross-examining Inspector Hurlbert regarding his investigation into respondent's flight and his opinion concerning the appropriate sanction. Our law judges have significant discretion in making evidentiary

¹⁷ Administrator v. Quinn, NTSB Order No. EA-4436 at 2 (1996).

¹⁸ Tsegave, supra note 13, at 2; see also Administrator v. Smith, NTSB Order No. EA-5147 at 2 (2005); Administrator v. Roetman, 3 NTSB 4023, 4024-25 (1981).

rulings. We review law judges' evidentiary rulings under an abuse of discretion standard, provided the respondent can also show he or she suffered prejudice as a result of the rulings at issue.¹⁹

Respondent contends the law judge's error regarding Inspector Hurlbert's testimony began with his granting of the Administrator's motion in limine to exclude the testimony of Charles Rogers. Under the law judge's pre-hearing order, respondent's identification of Mr. Rogers as an expert witness was untimely. As a result, the law judge granted the Administrator's motion to exclude his testimony. In respondent's response to the Administrator's motion, respondent asserted Inspector Hurlbert should be permitted to testify about his "use of the enforcement decision process tool based upon the facts of this case," as well as respondent's affirmative defenses.²⁰

Respondent asserts, in general terms, the law judge prohibited him from cross-examining Inspector Hurlbert regarding matters within his direct knowledge. Respondent contends the enforcement investigation report concluded taking administrative action against respondent, rather than suspending his certificates in an enforcement action, would be appropriate. In this regard, respondent contends the Administrator's choice of sanction was contrary to the Administrator's internal procedures.

¹⁹ Administrator v. Walker, NTSB Order No. EA-5656 at 15n.39 (2013); see also Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). We will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

²⁰ Opposition of Resp. to the Administrator's Mot. in Limine to Exclude Testimony of Charles Rogers and Paul Hurlbert at 7.

Respondent attempts to analogize Administrator v. Ferguson²¹ to the facts of the case *sub judice*. Such an analogy fails for several reasons. First, the law judge's application of 49 C.F.R. § 9.7(b) was appropriate to Inspector Hurlbert's testimony,²² because § 9.7(b) clearly precluded Inspector Hurlbert from testifying concerning his personal opinion regarding the appropriate sanction. Unlike in Ferguson, the law judge permitted Inspector Hurlbert's testimony—both on direct and cross-examination—concerning a variety of facts, such as whether he researched hearing aids or asked respondent to test them, the scope of Inspector Hurlbert's conversations with respondent, whether respondent informed Inspector Hurlbert of a brake problem or radio malfunction, and whether respondent mentioned a headset problem to Inspector Hurlbert.²³ Respondent does not include any fact or citation to the transcript to indicate why he believes the scope of questions concerning Inspector Hurlbert's opinion on sanction would have been appropriate under 49 C.F.R. § 9.7(b). We find the law judge did not abuse his discretion.

²¹ 352 Fed.Appx. 192, 193 (9th Cir. 2009) (holding the law judge inappropriately curtailed the respondent's cross-examination of an FAA inspector).

²² Tr. 58-59, 61-62. Section 9.7(b) states:

An employee may testify for the United States both as to facts within the employee's personal knowledge and as an expert or opinion witness. ... [A]n employee may not testify as an expert or opinion witness, with regard to any matter arising out of the employee's official duties or the functions of the Department, for any party other than the United States in any legal proceeding in which the United States is a party. An employee who receives a demand to testify on behalf of a party other than the United States may testify as to facts within the employee's personal knowledge, provided that the testimony be subject to the prior approval of agency counsel and to the Federal Rules of Civil Procedure and any applicable claims of privilege.

²³ Tr. 54, 59-60, 65.

C. Law Judge's Credibility Determinations

In cases in which a party challenges a law judge's credibility finding, we defer to the credibility findings of our law judges in the absence of a showing such findings are arbitrary and capricious.²⁴ We find the law judge's determinations in this case were not arbitrary and capricious. The law judge articulated his basis for his credibility findings: he stated respondent offered two inconsistent reasons for why he needed to proceed to Bozeman, and testified he never saw any light signals and did not do any 360 turns. This testimony was contrary to Mr. Robison's recollection. In addition, the transcript of the ATC communications indicates respondent was trying to communicate with ATC "in the blind."²⁵ The law judge believed such attempted communication begs the question of why respondent did not mention his belief that he was experiencing communication problems.

We also find Mr. Robison's testimony was consistent. Respondent contends Mr. Robison testified he first saw respondent's aircraft when it was three miles away, but then stated he first saw it when it was one mile away. A review of the transcript of Mr. Robison's testimony is contrary to this assertion; Mr. Robison distinguished his recollection of having seen the aircraft first on radar, and then visually from the window.²⁶ Respondent's argument that Inspector Speeg's testimony was not credible also is inapposite; Inspector Speeg did not provide factual testimony, but only offered his opinion that respondent violated § 91.129(d). Overall, respondent has not provided a basis for his assertion that the law judge's credibility assessments were erroneous.

²⁴ Administrator v. Porco, NTSB Order No. EA-5591 at 13-20 (2011), aff'd, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

²⁵ Initial Decision at 136.

²⁶ Tr. 21, 38.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 60-day suspension of respondent's commercial pilot certificate, and all other certificates respondent holds, shall begin 30 days after the service date indicated on this opinion and order.²⁷

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

²⁷ For the purpose of this order, respondent must physically surrender his certificates to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

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.

ALBERT M. LEYNER,

Respondent.

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* Docket No.: SE-19526
* JUDGE GERAGHTY
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Lewis & Clark County District Court
228 Broadway Street
Helena, Montana 59601

Wednesday,
April 30, 2014

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

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

DAVID F. SHAYNE, Esq.
Federal Aviation Administration
Northwest Mountain Region
1601 Lind Avenue, S.W.
Renton, WA 98057
(425) 227-2165

On behalf of the Respondent:

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411 Aviation Way, Suite 245
Frederick, Maryland 21701
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ORAL INITIAL DECISION

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ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the appeal of Albert M. Leyner, hereinafter Respondent, from an Order of Suspension, which serves herein as the Complaint, which seeks to suspend his Commercial Pilot Certificate and any other airman pilot certificate for a period of 60 days. The Complaint was filed on behalf of the Administrator, Federal Aviation

1 Administration, herein the Complainant.

2 The matter has been heard before this Judge, and as
3 provided by the Board's Rules, I am issuing a bench decision in
4 the proceeding.

5 Pursuant to notice, this matter came on for trial on
6 April 30, 2014 in Helena, Montana. The Complainant was
7 represented by one of his Staff Counsel, David F. Shayne, Esquire,
8 of the Northwest Regional Office, Federal Aviation Administration.
9 The Respondent was present at all times and was represented by his
10 Counsel, Gregory J. Reigel, Esquire, of Frederick, Maryland.
11 Parties were afforded full opportunity to call, examine, and
12 cross-examine witnesses, and to make argument in respect to their
13 positions.

14 I have considered all the evidence, both oral and
15 documentary, and I simply summarize that which I rest upon for my
16 conclusions. The evidence I don't mention is viewed as not
17 materially affecting the outcome of this decision or as being
18 simply corroborative.

19 AGREEMENTS

20 By pleading, it was agreed there was no dispute as to
21 the following: Paragraph Numbers 1 and 2 of the Complaint were
22 admitted and therefore are taken as having been established for
23 this Decision. Also with respect to paragraph 4 -- so much of
24 paragraph 4 that alleges that during the flight admittedly engaged
25 in by the Respondent on August 21st, 2012, that he landed his

1 aircraft at the Bozeman Yellowstone International Airport. That
2 admission is also taken as having been established for purposes of
3 this decision.

4 DISCUSSION

5 As noted, the Complainant seeks to suspend Respondent's
6 pilot's certificate for a period of 60 days. That is based upon
7 the allegation that during the course of Respondent's flight of
8 August 21, 2012, when he undertook to land at Bozeman airport in
9 Bozeman, Montana, that he did so in a manner that resulted in
10 violation of the requirements of Sections 91.129(c)(1) and Section
11 91.129(i) of the Federal Aviation Regulations, and ultimately, as
12 a consequence thereof, that the Respondent was also in regulatory
13 violation at that time of the requirements of Section 91.13(a) of
14 the regulations. I'll refer to the specific requirements of those
15 Regulations as appropriate subsequently herein.

16 Turning to the testimony in the case, the Complainant's
17 case is made through several exhibits and the testimony offered
18 through three witnesses, the first of whom was Mr. Mitchell
19 Robison. He is a qualified tower controller, holds a Tower
20 Control Operator Certificate, and is, in fact, the air traffic
21 control, ATC, manager at the Bozeman tower. Prior to that he was
22 in the United States Air Force, operated there as a controller,
23 and has been with the Federal Aviation Administration in Bozeman
24 since about 2005.

25 On the date in question, he testified that the

1 Respondent's aircraft came into the Bozeman Class D airspace as a
2 NORDO aircraft, that is, no radio. Exhibit A-5 was a transcript
3 of the radio communications had between Mr. Robison who was then
4 working the local control position and the attempts to communicate
5 with Respondent in his aircraft, and also Mr. Robison's
6 communications with a SkyWest aircraft that was also at the same
7 time attempting landing at Bozeman airport.

8 Mr. Robison testified that Bozeman airport is controlled
9 airspace, Class D airspace from the surface to 2,500 feet AGL,
10 above ground level; 7,000 feet MSL, mean sea level, with a radius
11 of I believe he said 4.8 mile radius from the Bozeman airport.
12 Exhibit A-10 was received as a demonstrative and does show the
13 positions as testified to by Mr. Robison with respect to the
14 operation of the Respondent's aircraft into the Class airspace,
15 and also the SkyWest aircraft.

16 Mr. Robison reiterated that there was no radio
17 communications had between himself and Respondent in his aircraft,
18 which was an Aerostar aircraft. Mr. Robison testified that he
19 first identified the aircraft as squawking 1-2-0-0, the VFR
20 transponder code; did not have a visual at that time, but
21 subsequently did obtain visual contact using his eyes and
22 binoculars, and was able to observe Respondent's aircraft;
23 described the various maneuvers, including circling maneuver to
24 the north/northeast of Bozeman airport. The fact that Mr. Robison
25 -- it is uncontested that he, as a consequence of the operation of

1 the Respondent by his aircraft, had to give SkyWest two,
2 essentially, evasive 360 turns to achieve appropriate sequencing
3 once he had determined that the Respondent did in fact intend to
4 land at Bozeman, and had to assure that there was adequate
5 separation between the two aircraft.

6 Mr. Robison affirmatively testified that during the
7 course of the time that he did make attempts to communicate, and
8 Exhibit A-5 does show that Mr. Robison was attempting to
9 communicate with the Respondent's aircraft and getting no
10 response. There was indication that Respondent in fact was able
11 to transmit, essentially on his testimony, the Respondent's, in
12 the blind, since he did indicate that he was intending to land and
13 also made a communication once he was on the ground. But at no
14 time was there any communication from the Respondent advising the
15 tower of any predicament that the Respondent was experiencing in
16 the operation of his aircraft or any of the equipment in his
17 aircraft.

18 Mr. Robison also testified that he attempted to use
19 light signals with the Respondent; however, he got no indication
20 from the Respondent in his aircraft that any of the light signals
21 had been received. And Mr. Robison's testimony was to the effect
22 that the Respondent and his aircraft did not exercise any of the
23 suggestions contained in the Airman's Information Manual, which
24 can be used to indicate to a tower that an aircraft is
25 experiencing some type of an emergency situation, particularly

1 loss of radio communications, such as rocking the wings, raising
2 and lowering landing gear, flashing landing lights, circling the
3 airport repeatedly. The only indication of any circling maneuvers
4 was that of the testimony of Mr. Leyner that he testified he made
5 two circling maneuvers out near the eastern edge of the Class D
6 airspace along the western side of the ridge that runs north/south
7 to the east of Bozeman airport. That is not circling the tower
8 and giving any information that you're having an emergency.

9 Mr. Robison did confirm that subsequently that he left
10 the tower and did have a conversation with the Respondent at the
11 fix based operator after the Respondent had departed his aircraft.
12 At that time, according to Mr. Robison, when he talked with
13 Mr. Leyner, Mr. Leyner did not know what had occurred, that there
14 was any problem why the tower was somewhat concerned about the
15 operation.

16 He then indicates that Mr. Leyner expressed that he was
17 having difficulty with hearing him, and that Mr. Robison had to
18 speak louder so that he could make Mr. Leyner understand what was
19 going on in the conversation, and that Mr. Leyner then stated to
20 him that he had a problem with his brakes and that he needed to
21 get those checked.

22 Mr. Paul Hurlbert is also an employee with the Federal
23 Aviation Administration. He's with the Flight Standards District
24 Office, the FSDO, here in Helena, Montana. He holds an Airline
25 Transport Pilot Certificate rating, CFII Flight Instructor, and

1 testified as to his activities in the investigation.

2 He testified that he had sent at least two letters of
3 investigation to the Respondent to which the Respondent never
4 replied, and, of course, it is no requirement legally on any
5 airman to respond to a letter of investigation. However, of
6 interest here is that subsequently the Respondent acknowledged
7 that he received the LOIs but said he never got around to
8 apparently making a response until subsequently when he sent
9 letters which were received both in November and October by the
10 FAA.

11 The Respondent apparently did state to the FAA that he
12 had sent a third letter, but that letter was not acknowledged as
13 having been received till, as I understand, several months later
14 someone in the FAA saw it. But that is not really definitely
15 established to my satisfaction.

16 Mr. Hurlbert did indicate that he spoke with the
17 Respondent by phone, apparently, and that at that time the
18 Respondent did acknowledge that he in fact had been operating as
19 the pilot in command of the aircraft at the time, and expressed
20 through Mr. Hurlbert that he, the Respondent, had experienced a
21 loss of communication situation. However, at that time, according
22 to Mr. Hurlbert, the Respondent made no mention of any problem
23 concerning brakes on the aircraft. He stated that he, as I
24 indicated, had received the LOIs but had apparently chosen not to
25 make any response.

1 Mr. Ray Speeg was the final witness for the Complainant.
2 He's the Regional Operation Specialist. He's with the Federal
3 Aviation Administration. A-1 is his curriculum vitae, and it was
4 received. And in reviewing that document, it is clear that he was
5 qualified to testify as an expert in this situation and express an
6 opinion as to any violations of the Federal Aviation Regulations.

7 As to those opinions, Mr. Speeg testified that based
8 upon his review of the enforcement package, listening to the
9 testimony, attending the informal conference, reading the
10 depositions, that he had formed an opinion as to any prospective
11 violations of the FARs as alleged in the complaint. That opinion
12 as expressed by him in his testimony was that upon all of the
13 evidence, that the Respondent had failed to adequately conform
14 with the suggestions in the Airman's Information Manual and in
15 fact had operated in regulatory violation of the provisions of
16 91.129(c) of the Regulations.

17 That Paragraph of part 91.129 covers communications and
18 provides what is required for arrival or a flight through
19 controlled airspace, in this case, the Class D airspace at
20 Bozeman. It requires that each person operating through that type
21 of airspace must establish two-way radio communications. It's, in
22 his opinion that the Respondent failed to establish any two-way
23 radio communications.

24 Lastly, with respect to FAR 91.129(a), he was of the
25 opinion that the Respondent operated in regulatory violation of

1 that provision, and that at the time that the Respondent landed at
2 Bozeman, he in fact had not received a clearance to land his
3 aircraft at the airport. And that's -- ultimately, therefore,
4 that's a residual offense. There was a violation of 91.13(a),
5 which prohibits either a careless or reckless operation of an
6 aircraft so as to endanger the life or property of others.

7 The Respondent testified on his own behalf. He's been
8 flying since about 1957. He holds a Commercial, Instrument,
9 multi-engine rating, qualified in helicopters, has operated in
10 Part 135. He is the owner and operator of the Aerostar. He uses
11 it for personal, business, and for recreational purposes.

12 With respect to his hearing aids, Respondent testified
13 that prior to this incident he had had his hearing checked and
14 had, as a result of that, received a diagnosis of loss of hearing
15 range in the middle range; and that in any event, that he had,
16 sometime around the year 2010, obtained his first set of hearing
17 aids.

18 With respect to his operation of his aircraft at the
19 time he was using his first set of hearing aids, he testified that
20 he had never used his aircraft with the radios at the same time
21 that he was using his first set of hearing aids, so there was no
22 interaction between himself, the operations of the radio equipment
23 in his aircraft, and his first set of hearing aids.

24 He obtained a second set of hearing aids in about the
25 year 2012, which was prior to this incident in August of that

1 year. According to his own testimony, he was concerned because of
2 the diagnosis and the fact that he was going to use these hearing
3 aids and, I guess, anticipated flying, that he wanted, in his
4 words, to make sure that the interaction between the hearing aids
5 and his equipment in the aircraft would be acceptable. And that
6 he talked to, I guess, the distributors or the salesmen or whoever
7 were the purveyors of this set of hearing aids, getting their
8 assurance, according to the Respondent, that everything would be
9 A-okay as far as interaction between this set of hearing aids, the
10 second set, and operation of equipment in his aircraft.

11 As through operation of his aircraft with respect to the
12 second set of hearing aids, he states he flew maybe three or four
13 times, but not in any radio environment, apparently in
14 uncontrolled airspace. No requirement for any type of radio
15 communication. I assume he was operating out of Livingston,
16 that's an uncontrolled airport. So while it would be preferable
17 to at least use intercom -- or Unicom, rather, to broadcast your
18 intentions for takeoff or landing, operation in a traffic pattern,
19 apparently he did not do that since he says he never used the
20 radios.

21 Turning, then, to the date in question. The Respondent
22 departed from Livingston apparently with the primary intention of
23 coming over to Bozeman for purposes of having a compression check
24 done on one of the cylinders in his aircraft. That was the reason
25 that he was flying to Bozeman, okay?

1 He indicates also that he -- and there was testimony
2 that -- and he brought up that he experienced what he thought was
3 a brake problem or a brake failure on his departure from
4 Livingston; and that, therefore, that he decided to go to Bozeman
5 to utilize the fact that Bozeman has a much longer runway, I think
6 somewhere in excess of 8,000 feet. Livingston is, I think, less
7 than 5,000, and that's why he went to Bozeman.

8 But that's contradictory since on one hand he's
9 testified that on the departure from Livingston, the whole reason
10 that he was going to fly to Bozeman was for the check of his
11 cylinder, and that it was on his departure from Livingston that he
12 experienced something with the brakes that caused him to believe
13 that he experienced -- or possibly experiencing a brake failure,
14 and that's why he was going to Bozeman. So we have two different
15 explanations of why the Respondent was going to Bozeman.

16 As to his arrival in Bozeman, listening to his testimony
17 and comparing it to the testimony of Mr. Robison and the diagrams
18 as the two witnesses illustrated them on Exhibit A-10, I don't
19 find anything in the way of a significant discrepancy in the
20 testimony of Mr. Robison as to what he observed of the
21 Respondent's aircraft or the Respondent's testimony as to how he
22 proceeded into the Bozeman area up along the side of the
23 north/south ridge.

24 He testified he made two circling maneuvers out on the
25 edge of the Class D airspace, maybe protruding a little bit into

1 it, but there's no testimony that he ever attempted to go closer
2 in above, say, the traffic pattern altitude and circle the tower
3 and make any of the recommended activities as stated in the
4 Airman's Information Manual to advise the tower that he was having
5 some kind of problem and couldn't receive radio communications.
6 He has -- on the testimony in front of me, there was no indication
7 of why the Respondent could assume -- and that was all it could be
8 is an assumption, because he couldn't have known that the tower
9 knew anything of his predicament, and so he's never really made a
10 communication.

11 On the Respondent's testimony, he never observed any
12 light signals. This, of course, is contradicted by Mr. Robison
13 who indicates that he was in fact using a light gun, and attempted
14 to communicate with an aircraft that he knew was NORDO.

15 Respondent also testified that he observed no traffic in
16 the area, although it is uncontradicted and it does show on
17 Exhibit A-5 in communications that there was, in fact, a SkyWest
18 aircraft attempting to land at Bozeman at the same time and that
19 that aircraft, the SkyWest, had to be given two diverting circling
20 maneuvers to obtain sequencing between Respondent and the SkyWest
21 aircraft.

22 Mr. Leyner also testified to contradict Mr. Robison that
23 he didn't do any 360 turns north of Bozeman airport as testified
24 to by Mr. Robison because at that time he had his gear and flaps
25 down. Yes, I would agree if you're attempting to do 45- or

1 60-degree bank turns, you're going to increase the stall factor,
2 but that doesn't mean you can't do 15-degree or 30-bank turns in
3 that aircraft configurations. And so whether or not those turns
4 can be completed, it would depend on whether you're going to do
5 steep turns or gentle turns, and there's no description of what
6 kind of turns were made. So we have the conflict in the
7 testimony, but I don't find that it is impossible to do 360 turns
8 at 500 feet, depending on your angle of bank and your airspeed.

9 Respondent concedes that he did speak with Mr. Robison
10 after he was on the ground. His description of the conversation
11 is diametrically opposed to that of Mr. Robison. According to
12 Mr. Leyner, Mr. Robison was upset, didn't understand anything
13 about emergency procedures; that he tried to explain to
14 Mr. Robison there was a brake problem and that he in fact could
15 hear the tower after he -- the Respondent got his engines back
16 into the idle configuration, but prior to that apparently was not
17 able to communicate.

18 And, of course, there was no testimony that in -- at any
19 time that he -- that the Respondent either attempted to signal by
20 means of transponder communication using 7600, though the
21 Respondent concedes that he knows that that can be put into a
22 transponder specifically to advise. The fact that it's going to
23 set off an alarm, if you have an emergency -- I wouldn't think
24 worrying about an alarm is high on your priority list. Nor was
25 there any indication that he attempted to transmit in the blind

1 that he was having an emergency.

2 I agree Board decision clearly states, and I think I've
3 already cited the case, you don't have to -- it's not a
4 prerequisite to declare an emergency, but there is indication in
5 the transcript that the Respondent did attempt to communicate in
6 the blind. And it would stand to reason that if he were making
7 communications in the blind, it raises a question why you wouldn't
8 at least mention "I think I'm having a communications problem; I
9 think I'm having a brake problem," mention what your emergencies
10 are. If one of your reasons for going to Bozeman is that it is a
11 long runway and that there are emergency services there, I think
12 you would want to alert the tower personnel that there is a
13 situation in which you might need to avail yourself of those
14 facilities. That is a consideration which I take into account
15 here.

16 On cross-examination, the Respondent did concede that at
17 no time prior to his flight of August 21st, 2012 that he made any
18 type of test flight to test whether or not in fact his second set
19 of hearing aids were in fact compatible with the radio equipment
20 in his aircraft. He stated he did not do that.

21 That to me is the testimony in the case. The burden of
22 proof in this case, of course, rests with the Complainant at all
23 times, and must carry that with a preponderance of the reliable
24 and probative evidence.

25 With respect to affirmative defenses, and particularly

1 with the defense of emergency exception under Section 91.3(b) of
2 the regulations, the burden of proof rests with the Respondent in
3 a particular case. As the Board stated in Administrator v. Gibbs,
4 which is Board Decision EA-5291 (2007), the Respondent has the
5 burden of proof regarding the defense of an emergency that
6 justifies his actions and deviating from other requirements of
7 Part 91 Regulations.

8 And it is also pointed out in the Gibbs case that it is
9 a burden upon the Respondent to establish a causal connection
10 between the emergency situation that is allegedly being
11 experienced and a departure from the regulatory requirement,
12 whatever the particular one is of Part 91 so that it would be
13 excused. That that is -- there must be a nexus between them. The
14 Board clearly holds -- held that in Gibbs, and see that at -- and
15 also the citation to prior decision, Administrator vs. Smith,
16 EA-5147, a 2005 case.

17 And the Board also has pointed out in subsequent cases
18 that the burden is upon the Respondent in a case where he asserts
19 an emergency defense justifying a deviation from a regulation in
20 Part 91 that the emergency that he or she perceives directly
21 caused the deviation and cites supporting cases therein.
22 And further, that an emergency situation caused by the pilot in
23 command's own actions does not excuse or justify a departure from
24 the regulations.

25 Turning, then, to this question of brake failure and

1 going to Bozeman. As I've indicated, that is really not a
2 relevant question in this case. Why the Respondent was going to
3 Bozeman is not relevant to the charges in the complaint, and as I
4 already observed, there's a discrepancy in the Respondent's own
5 testimony about why he was going to Bozeman. Was it to check out
6 the cylinders or because he experienced some type of brake problem
7 as he was departing Livingston? Why he went to Bozeman, it could
8 have been to go get a hamburger. It's what he did when he got to
9 Bozeman that is relevant. I only take into account that there is
10 a discrepancy, to my view, in the Respondent's testimony as to why
11 he in fact was going to Bozeman. It goes to his credibility in
12 this case.

13 I've also observed closely the demeanor of both
14 Mr. Robison and the Respondent in their testimony. Mr. Robison's
15 testimony as to the Respondent's maneuvers into the Class D
16 airspace and what he as the controller was able to observe, and
17 the fact that he did not receive any communications in the blind
18 as to any emergency, which is admitted; or that he, as controller,
19 did attempt to communicate with light guns and had to give
20 separation instructions to SkyWest. And the Respondent, of
21 course, testified that he observed no traffic in the Bozeman area,
22 so it doesn't contradict anything with respect to the SkyWest.

23 Based upon that, I would find the testimony of
24 Mr. Robison to be the more credible as to what actions actually
25 occurred with the Respondent and his aircraft and his attempt and

1 subsequent landing at Bozeman aircraft [sic]. And particularly
2 that no mention was made to Mr. Robison at the time as to radio
3 communication failures, and what was going on and what was
4 happening with the Respondent in his aircraft or any question as
5 to why from Mr. Leyner to Mr. Robison, "Why didn't you give me any
6 light signals?"

7 If Mr. Leyner on his testimony was looking for light
8 signals and didn't see any, I think he would have asked, "Hey, I
9 was circling; how come you didn't give me any light signals?" if
10 you knew that light signals were still in use and that the
11 Airman's Information Manual specifically recommends that.
12 In any event, I resolve the credibility issue in favor of the
13 testimony of Mr. Robison.

14 With respect to the emergency of loss of radio
15 communication as alleged by the Respondent, the burden of proof,
16 as I've indicated, rests with the Respondent to establish that by
17 a preponderance of the evidence. Here on his own testimony he
18 knew he had experienced a loss of hearing. He got his second set
19 of hearing aids, and on his own testimony, went through some
20 effort to make a determination, at least by talking to the
21 purveyors of the instruments, that those hearing aids would be
22 compatible with his operation of his radios in his aircraft. But
23 the Respondent testified that at no time subsequent to obtaining
24 that set of hearing aids, that he made any effort to make a
25 definitive determination that those hearing aids were in fact

1 compatible with the radio equipment in his aircraft. The first
2 time, apparently, he used the radio with these hearing aids is the
3 flight to Bozeman. So the only thing he had to go on was some
4 salesman's representation everything's okay.

5 In my view, whether the Respondent knew that he needed
6 hearing aids, had experienced middle range hearing loss, had new
7 hearing aids and he was concerned about the interaction between
8 the aids and the radio equipment, that a reasonable and prudent
9 pilot would have made some effort to assure himself that in fact
10 those hearing aids, as represented to him by the purveyors, were
11 in fact compatible with his radios. He didn't do that.

12 So if, in fact, he experienced a radio communication
13 failure for receiving -- because apparently he could transmit
14 since at least there is some transmission reflected in the
15 communication tapes -- to my view, it is an emergency of his own
16 making. It could have been avoided by the simple expedience of
17 making a flight test and communicating with Unicom at Livingston
18 or with another aircraft, you know, and make some effort to assure
19 himself that when he did go flying and he needed to go into
20 controlled airspace, that his hearing aids and the radios were
21 compatible. He didn't do that here.

22 So in my view, with respect to brake failure and as an
23 emergency for flying into Bozeman, the fact that it's
24 contradictory, there is no causal connection established on a
25 preponderance of the evidence between brake failure and failure to

1 communicate. That is a charge failure to get a clearance into the
2 Class D airspace and failure to get a clearance to land.

3 So there's no causal connection between an alleged brake failure
4 even if you assume arguendo there was one and the charges in this
5 Complaint. So that is not a valid FAR 91.3 emergency.

6 And in my view, as I've already stated, on the evidence
7 in front of me, I do not find that the Respondent has sustained by
8 a preponderance of the evidence that he experienced an emergency
9 with respect to interaction between his hearing aids and his
10 radios that was not of his own making or that could have been
11 avoided by the simple expedience of making a test of that
12 equipment prior to this flight to Bozeman. So I therefore reject
13 the affirmative defense raised by the Respondent.

14 Turning, then, to the Regulation itself. FAR
15 91.129(e)(1), as I've already indicated, requires that two-way
16 radio communications must be established prior to entering the
17 Class D airspace. On the evidence in front of me, it is clearly
18 shown that two-way radio communication was in fact not established
19 and there was no emergency on this evidence in front of me that
20 would excuse failure of the Respondent to comply with that portion
21 of the regulations.

22 Subsequently it is also charged that the Respondent
23 failed to comply with the requirements of FAR 91.129(i), which
24 requires that when an aircraft experienced a radio failure in
25 flight under VFR, which this flight was, that there are several

1 things that a pilot in command may do to operate his aircraft and
2 land if he wants -- the weather conditions are VFR. So that's
3 satisfied here, that visual contact with the tower is maintained.
4 Respondent maintains that he had visual contact with the tower,
5 but observed no radio -- or no light signals in the absence of his
6 radio communications.

7 On the contrary, I find on the credible evidence that
8 the tower did in fact attempt to communicate with light gun
9 signals, and that the letters submitted by the Respondent do not
10 really lend any support to his claims of not being given any
11 signals from the tower via light signals.

12 And lastly, the most important one is that a clearance
13 to land is received. The operative word is "received." You can't
14 receive something unless you are a recipient. You don't get
15 something because I tell you I've given you a gift if you never
16 receive the gift. You haven't received a gift until you have it
17 in your hand. You don't have a clearance until you get it.
18 On the Respondent's own testimony, he never heard any clearance to
19 land and he never saw any light signals, so he never received any
20 clearance.

21 On one testimony there were no light signals given, so
22 there was no clearance. On the other one, if there was a -- the
23 clearance to land was broadcast in the blind, but he testified
24 that he never heard it. So if he never heard it, he never
25 received it. You can't receive something that you never get.

1 As the Board has held in prior cases, it is important
2 with ATC communications that you acknowledge the receipt, and that
3 is a requirement. Every time ATC tells you to do something --
4 "you're clear to land," you need to respond "2-X-ray, clear to
5 land"; "2-X-ray, clear to take off," "2-X-ray, taxi into position
6 and hold," which is now changed into "line up and wait" or "clear
7 downwind" -- they expect you to read back. It's the only way ATC
8 knows that you've received it and that you're going to comply.
9 The Board has stressed that in prior cases, the necessity of
10 acknowledgment between ATC and a particular aircraft. The only
11 way the system can work.

12 In this case, in any event, on the evidence in front of
13 me, there's no indication that the Respondent ever received a
14 clearance to land, and therefore, when he in fact landed his
15 aircraft at Bozeman airport, he did so without having received a
16 clearance to land, and therefore, was in regulatory violation of
17 the provisions of the cited section of the FARs.

18 As the Board has clearly held that where operational
19 violations have been established, as they are here with respect to
20 Sections 91.129(c)(1) and (i) of those Regulations, a residual
21 violation of Section 91.13(a) is to be found, in that the
22 Respondent did act in at least a careless manner which potentially
23 endangered the life and property of others. Actual endangerment
24 is not a requisite. Potential hazard is enough.

25 On the testimony here, uncontradicted, SkyWest was given

1 two 360 circling maneuvers as a consequence of Respondent's
2 operation into Bozeman. That is sufficient, and therefore I do
3 find a regulatory violation of Section 91.13(a).

4 And lastly, then, turning to the affirmative defenses,
5 I've already ruled on Affirmative Defense 1. The burden of proof
6 on all these rests with the Respondent.

7 There was a statement that the Administrator's
8 interpretation of the FARs is arbitrary and capricious and
9 contrary to law. There was no evidence offered to substantiate
10 that, and I, upon the evidence in front of me, and my
11 interpretation of regulations do not find that that affirmative
12 defense has been established by the preponderance of proof.

13 I also reject the Affirmative Defense 3, in that the
14 Respondent's conduct was not excused under Part 91.3 of the
15 Regulations and that, therefore, his operation was not in
16 accordance with the requirements of Section 91.129.

17 Paragraph 4 is rejected for the reasons I've already
18 stated. I do not find that there was a valid emergency as to
19 excuse Respondent's operation into Bozeman airport.

20 And I reject the allegation and Affirmative Defense 5
21 that the prosecution is arbitrary and capricious and contrary to
22 internal guidance and recommendations as there has been no
23 evidence in front of me to support that by a preponderance.

24 And lastly, then, that the sanction is arbitrary and
25 capricious and that it's contrary to internal guidance and

1 recommendations, that I at least give some cognizance to. There
2 was no request by the Complainant to exercise deference to the
3 Administrator's choice of sanction or to the Sanctions Guidance
4 Table in that case. I can simply go back to older NTSB cases for
5 at least some suggestion as how the Board viewed excursions into
6 traffic, old traffic control areas. Those violations were
7 generally in the 60- to 90-day area.

8 Here, in looking at the sanction of 60 days, I look at
9 the fact that the Respondent failed to -- on the evidence in front
10 of me, to avail himself of attempts to validly communicate with
11 the Bozeman tower, made no effort to determine whether or not the
12 equipment he was using was compatible. He gave various
13 explanations of why he was going to Bozeman.

14 The fact that SkyWest uncontradictedly had to be given
15 two deviation maneuvers, which was, at least, therefore,
16 potentially hazardous to endanger the life and property of others,
17 and that a sanction of 60 days appears in the overall as
18 essentially a minimal sanction and, therefore, I will affirm the
19 Administrator's Order of Suspension, the Complaint herein, as
20 issued.

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ORDER

IT IS THEREFORE ORDERED that the Complainant's Order of Suspension, the Complaint herein, be, and the same hereby is, affirmed as issued.

The Respondent's Commercial Pilot's Certificate and any other airman pilot certificate held by him is hereby suspended for a period of 60 days.

Entered this 30th day of April 2014 at Helena, Montana.

EDITED ON

MAY 30, 2014

PATRICK G. GERAGHTY

Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE GERAGHTY: Record will reflect that at this time -- Mr. Shayne, will you come up, please?

MR. SHAYNE: Yes, Your Honor.

ADMINISTRATIVE LAW JUDGE GERAGHTY: I am giving to Mr. Shayne two copies of appeal provisions setting out the provisions for appeal from an Oral Initial Decision. One for you, Mr. Shayne; and would you please give one --

MR. SHAYNE: Certainly.

ADMINISTRATIVE LAW JUDGE GERAGHTY: -- copy to Mr. Reigel. And the record will reflect that Mr. Shayne has complied with my request.

1 Is there anything further for the record, gentlemen?

2 MR. SHAYNE: Nothing from the Government, Your Honor.

3 MR. REIGEL: Nothing.

4 ADMINISTRATIVE LAW JUDGE GERAGHTY: Hearing nothing, the
5 proceedings are closed.

6 (Whereupon, at 1:16 p.m., the hearing in the above-
7 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: Albert M. Leyner

DOCKET NUMBER: SE-19526

PLACE: Helena, Montana

DATE: April 30, 2014

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.

Mary R. Sullivan
Official Reporter