

SERVED : August 20, 1992

NTSB Order No. EA-3639

**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 6th day of August, 1992

THOMAS C. RICHARDS,
Administrator,
Federal Aviation Administration,

Complainant,

Docket SE-9850

v.

NORMAN SMITH,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on February 14, 1990, following an evidentiary hearing.¹ We deny the appeal.

The Administrator's order of suspension in this case alleged that respondent violated Federal Aviation Regulations

¹The initial decision, an excerpt from the hearing transcript, is attached.

§ § 91.75(b), 91.105(c), and 91.9 (14 C.F.R. Part 91),² and sought a 120-day suspension of respondent's private pilot certificate. The Administrator charged that respondent operated N2705W (a Mooney M20) under VFR³ and under the ceiling when the ceiling was less than 1,000 feet. Respondent was also charged with failure to follow an ATC instruction, and his actions were alleged to have been careless or reckless. The events that led to the order allegedly occurred November 29, 1987, in the Naples, FL airport control zone.

Certain facts are not disputed. Respondent first contacted the Naples tower when he was 7 miles east of the airport. Tower control advised that the airport was IFR,⁴ with a ceiling of 600 feet. When respondent asked for a special VFR clearance, he was told to "standby one I have to get one from approach." Exhibit

²§ 91.75(b) (now 91.123) provided:

(b) 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.

§ 91.105(c) (now, contrary to the Administrator's statement, codified at 91.155(c)) provided:

(c) Except as provided in § 91.107 [regarding special weather minimums inapplicable here], no person may operate an aircraft, under VFR, within a control zone beneath the ceiling when the ceiling is less than 1,000 feet.

§ 91.9 (now 91.13) provided:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³Visual flight rules.

⁴Instrument flight rules.

A-2 , at 2.⁵ Respondent stated that he interpreted this to mean he was to continue on until he received the clearance, and he did so. Tr. at 129, 159. The controller, on the other hand, testified that he assumed respondent knew that the statement meant to remain clear of the control zone until a clearance had been issued or the airport had gone to VFR. Tr. at 54.

Respondent next contacted the tower when he was in the control zone.⁶ The tower told him to "just remain clear of the control zone to the east." Id. According to respondent, he was headed north to depart the control zone when the tower next directed him to head 270° west, which took him back over the airport. The controller testified that he gave respondent that instruction to provide necessary separation. Allegedly, just after he had cleared another aircraft to take off, he heard and then saw a Mooney northwest of the airport, approximately 1/2 mile from the departure end of the runway. Only a few hundred feet allegedly separated it from the departing aircraft (which had taken off). The controller then confirmed with respondent

⁵Exhibit A-2 is the transcript of the tower tape.

⁶Respondent's testimony regarding his exact position at this time is unclear. He suggests (Tr. at 160) that he initially only nicked the control zone, and that the subsequent incursion was due to compliance with ATC'S various instructions. However, the transcript of the tower tape (Exhibit A-2 at 3) shows that he stated to the controller that he was 3 miles out, indicating he was considerably into the control zone. In either event, respondent was within that zone.

that respondent's was the aircraft the controller had seen. Tr. at 55-56, 101.⁷

The law judge found violations of § 91.105(c) and 91.9, not 91.75(b).⁸ He found that respondent entered the control zone without authorization but as a result of a misunderstanding, but that the misunderstanding did not excuse his action. He rejected respondent's suggestion that the fault in this case was not his, but was that of the controller, in failing to be more specific in his direction to stand by. The law judge reduced the sanction to a 60-day suspension.

On appeal, respondent continues to question the performance of the controller, claiming to be an 'inadvertent victim of the controllers [sic] instructions." Appeal at 5.⁹ We cannot agree that the cause of this incident lies elsewhere.

In dissecting the details of the event, respondent loses sight of the critical fact: he was, admittedly, in the control

⁷There is some confusion in the record on this point. The tower tape shows that respondent acknowledged to the controller that his was the aircraft in question, and respondent obeyed the controller's instructions. At the hearing, however, respondent contended that he misunderstood, and answered incorrectly. He stated that, the only time he saw the other aircraft, it was still on the runway, while he was at 1,000 feet, and there was no danger. As will be discussed, the position of the aircraft within the control zone and in relation to the departing plane does not affect our conclusion.

⁸The Administrator did not appeal either this finding or the reduced sanction, and we will not discuss the § 91.75(b) matter further.

⁹Although respondent had counsel at the hearing, on appeal he appears pro se.

zone flying VFR beneath the ceiling when, according to the official weather, the ceiling was below 1,000 feet. It was not until approximately 4 minutes after he landed that the ceiling exceeded 1,000 feet and the airport was returned to VFR status. Tr. at 86. Respondent's action thus violated § 91.105(c).¹⁰

Perhaps respondent assumed that he would receive a special VFR clearance before he reached the border of the control zone.¹¹ Any assumption would be made at his peril, however, when he knew that, without a clearance, he could not lawfully enter the control zone. Tr. at 165. Moreover, events subsequent to his doing so cannot excuse him. Thus, even if the controller later issued inappropriate instructions and/or mistook him for some other aircraft (issues we need not and do not decide), the initial violation remains.

We also affirm the law judge's finding that respondent acted carelessly, violating § 91.9. His action was inherently dangerous, and created the potential to endanger life and property. Haines v. Department of Transportation, 449 F.2d 1073

¹⁰The law judge apparently believed (and was not corrected at the time) that § 91.105(c) precluded WR Operations in a control zone unless flight visibility is at least 1 mile (Tr. at 207). This rule does not so provide, as it refers instead to weather ceilings (see footnote 2); § 91.107(c) speaks to visibility of 1 mile. This was harmless error. The un rebutted evidence shows that respondent was in the control zone when the official weather report reflected a ceiling of 600 feet. Exhibits A-2 and A-4. And, the law judge's comments remain equally valid -- the local controller's declaration of the weather, reflecting the official weather report at that location, was binding on respondent. Tr. at 213.

¹¹Or, perhaps, given his surprise to learn the airport was IFR (Exhibit A-2, at 2), he expected it would return to VFR before he reached the control zone.

(D.C. Cir. 1971). See also Administrator v. Norman, 5 NTSB 1637, 1638 (1986) (potential danger inherent in landing VFR without a special clearance when conditions are IFR).

The law judge also was correct in holding that the alleged omission on the part of the controller would not excuse the violation. Furthermore, we reject respondent's contention that the controller was at fault. Respondent admits that the information he received from the controller was sufficient to advise him that he needed a clearance. In fact, he asked for one. Nothing the controller said can reasonably be interpreted to excuse respondent. As the law judge said, "Standby" cannot reasonably be understood to mean "go ahead." Tr. at 212. Nor can the controller's failure to advise respondent that the special VFR clearance had been denied excuse respondent's incursion into the control zone. In the circumstances, no part of the blame can attach to the controller. See Administrator v. Toups, NTSB Order EA-3584 (1992), slip op. at 7 (ATC not "obliged to act to prevent pilots from FAR violations"). Compare Administrator v. Finley, 3 NTSB 2840 (1980) (where there are other contributing causes of an unauthorized crossing of a taxiway, including ATC'S extended tacit approval of respondent's procedure and lax traffic control, mitigation of sanction is an inadequate remedy; complaint dismissed).

Finally, respondent contends that suspending his pilot certificate is not an effective sanction, as sanctions that ground a pilot are not productive. We have held otherwise.

Administrator v. Mohamed, NTSB EA-2834 (1988), slip op. at 11 ("the Board believes there is deterrent value when sanctions are imposed even for unintentional violations"). Respondent offers no argument that the law judge's sanction (a 60-day suspension) is inconsistent with precedent, and the Administrator's citations indicate the contrary. See, e.g., Administrator v. Gaub, 5 NTSB 1653, 1658 (1986) (sanctions for VFR operations in IFR conditions range from 30 to 180 days).¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The 60-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.¹³

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹²In setting the sanction, the law judge inappropriately considered respondent's prior record. Administrator v. Thompson, NTSB Order EA-3247, fn. 9 (1991) (neither respondent's violation-free record or attitude justifies reduction of the sanction).

¹³For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).