

SERVED: October 23, 1998

NTSB Order No. EA-4713

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 23rd day of October, 1998

JANE F. GARVEY,)
Administrator,)
Federal Aviation Administration,)
)
 Complainant,)
) Docket SE-15361
v.)
)
RODGER M. ELLIS,)
)
 Respondent.)
)
)
)

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler rendered in this proceeding at the conclusion of an evidentiary hearing held on September 25 and 26, 1998.¹ By that decision, the law judge affirmed in its entirety an emergency order of the Administrator revoking respondent's airline transport pilot and certified flight instructor certificates for his alleged violations of

¹An excerpt from the hearing transcript containing the

sections 91.111(a), 91.123(b), 91.129(i), and 91.13(a) of the Federal Aviation Regulations, "FAR," 14 CFR Part 91.² For the reasons discussed below, the appeal will be denied and the initial decision will be affirmed.³

The Administrator's August 5, 1998 Emergency Order of Revocation alleged, among other things, the following facts and circumstances concerning the respondent:

1. You hold Airman Certificate No. 002154080 with airline transport pilot privileges, and Airman Certificate No. 002154080CFI with certified flight instructor

(..continued)

initial decision is attached.

²FAR sections 91.111(a), 91.123(b), 91.129(i), and 91.13(a) provide, in pertinent part, as follows:

§ 91.111 Operating near other aircraft.

- (a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

§ 91.123 Compliance with ATC clearances and instructions.

* * * *

- (b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

§ 91.129 Operations in Class D 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. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway, or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is clearance to cross all runways that intersect the taxi route to that point.

³The Administrator has filed a reply opposing the appeal.

privileges.

2. On June 3, 1998, you were pilot in command of a Cessna model 310 airplane, Civil Aircraft N310MH, the property of another, operating in air commerce on a flight into Alexandria International Airport (Alexandria), Alexandria, Louisiana.

3. During the flight described in paragraph two (2), you entered the Class D airspace surrounding Alexandria without establishing two-way radio communications prior to entering that airspace.

4. During the flight described in paragraph two (2), at the time you entered Alexandria's Class D airspace prior to establishing two-way radio communications with the Alexandria tower there were private and commercial passenger aircraft in the Alexandria traffic pattern.

5. During the flight described in paragraph two (2), after you had entered Alexandria's traffic pattern for landing, you were instructed by the Alexandria tower to continue downwind and to follow another airplane ahead of you. Furthermore, you were told by the Alexandria tower that that aircraft would be landing ahead of you.

6. When you could not locate[d] the aircraft ahead of you, you were instructed by the Alexandria tower to continue your downwind and that your turn to base leg would be called by Alexandria tower.

7. At a time when no emergency existed, and while operating in an area in which air traffic control (ATC) was exercised, you operated contrary to an ATC instruction, in that you turned base leg prior to being authorized to do so by the Alexandria tower.

8. Despite again being instructed by the Alexandria tower to continue downwind, you disregarded that instruction and continued on base leg for landing.

9. Your operation of N310MH was careless or reckless so as to endanger the life o[r] property of others, in that your operation of N310MH contrary to . . . ATC instructions placed your aircraft in the landing path of the aircraft that had previously been cleared to land.

10. As a result of your operation of N310MH contrary to an ATC instruction, Alexandria Tower was required to issue instructions to another aircraft to make a turn to avoid a conflict with your aircraft.

11. In spite of the fact that you were never issued a clearance to land at Alexandria you landed N310MH in front of an aircraft that had been cleared to land.

12. Finally, after landing at Alexandria without a clearance you requested permission to execute a 360-degree turn on the taxiway.

13. Despite the fact that your request to execute a 360-degree turn was denied by the Alexandria tower and you were instructed to taxi straight ahead, you disregarded those instructions and made a 360-degree turn on the taxiway.

The law judge concluded that the Administrator's evidence amply supported these allegations and, therefore, established the regulatory violations cited in the emergency order, which served as the complaint. Although some of respondent's numerous objections here reveal disagreement with the law judge's resolution of factual conflicts in the testimony of the parties' respective witnesses, he has not identified any valid reason for us to disturb the credibility assessments in favor of the Administrator's witnesses that the law judge's decision reflects.⁴ We will, accordingly, limit our consideration of respondent's appeal to those objections that essentially purport to excuse or justify his operation of N310MH in light of what he asserts demonstrates improper handling of his flight by ATC.⁵

⁴For example, respondent and an air traffic controller differed as to whether N310MH was within Class D airspace when it first made radio contact with the tower and when it later turned left base for Runway 14 at Alexandria. The law judge credited the controller's testimony that it was at both times.

⁵Respondent also complains that the hearing in this matter

That review convinces us that respondent's brief is little more than an attempt to escape accountability for his intentional disregard of ATC instructions, and the adverse impact on air safety it produced, by contending that he was subjected to improper ATC practices and procedures at the Alexandria airport that, in some unexplained way, legitimate his actions.⁶ In our

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was held two days beyond the 25-day deadline in Section 821.56 and that some of the Administrator's witnesses did not comply with the law judge's sequestration order. Neither point merits extended comment. The specification of a 25-day deadline for setting the hearing date in an emergency case reflects an effort to ensure that enough time will remain after the hearing for the Board to dispose of any appeal from the law judge's decision within the 60-day statutory mandate. See Administrator v. Player, 3 NTSB 3498 (1981). It was not intended to give the parties to an emergency proceeding any additional substantive or procedural rights. As to the sequestration issue, apart from the fact that respondent's appeal gives no indication as to which witnesses may have been discussing the case outside the hearing room, what they may have talked about, or whether any of them had yet testified, a challenge such as this one, involving potential factual disputes that were neither presented to nor resolved by the law judge, can not be entertained on direct appeal from the law judge's initial decision. Such an objection would have to be raised pursuant to Section 821.57(d).

⁶For instance, respondent argues that the controller, in denying respondent's request to make a 360 degree turn after landing, incorrectly used the term "negative" instead of "unable." Although respondent does not say so directly, he appears to believe that this asserted error in phraseology (that is, this departure from the terminology specified in FAA Order 7110.65L, "Air Traffic Control," para. 2-1-18) entitled him to disregard the denial and execute the maneuver with impunity. Like the law judge, we see the matter differently. We think, in the circumstances of this case, that so long as the meaning of the controller's instruction was clear, and there is no doubt here that respondent understood that ATC had not approved a turn, neither the correctness of the controller's language, nor the reasons for his decision are relevant to a determination as to whether respondent operated his aircraft contrary to an air traffic control instruction.

judgment, respondent's contentions in this respect are without merit.

As we read respondent's brief, it is his position that ATC, by directing him to continue his downwind leg when the respondent could not locate the aircraft that had been cleared to land ahead of him and by, in view of that circumstance, indicating, in effect, that it would advise him when it was safe to turn base,⁷ engaged in the improper provision of separation services that should not have been extended to a visual flight rules (VFR) flight such as he was conducting. Although it is doubtful that ATC's efforts to sequence respondent's aircraft into the flow of traffic landing at the Alexandria airport actually constituted a separation service, as that term is normally understood, we think it unnecessary to a decision in this case to characterize the nature of its contacts with N310MH.

Respondent does not argue that ATC was not authorized to determine the order in which aircraft, VFR or otherwise, approaching the airport would be cleared for landing, and, notwithstanding his opinion that ATC could have done a better job helping him locate the aircraft he was to follow, none of its transmissions to him was, in our judgment, inconsistent with the proper exercise of that authority in the context of his inability to spot that aircraft. Thus, even if it were true that ATC would

⁷Respondent took offense at ATC's offer to call his left base for him, replying, when observed by ATC turning left before being told to do so, and ahead of the aircraft respondent was to follow: "Hey you're not determining when I can turn base son I

ordinarily not issue VFR traffic specific instructions as to how to fly the airport pattern, such instructions here, clearly intended to reduce the collision potential that a premature turn to base by respondent's aircraft could (and ultimately did) create, were, at the very least, appropriate. To the extent that respondent found ATC's assistance in this connection unwelcome, he could have radioed his intent to exit the pattern, for re-entry when he had all traffic converging on the airport in sight, or he could have sought permission to land ahead of the aircraft that had already been cleared to land, an option that would have possibly prompted ATC to re-evaluate the relative positions of all aircraft within the airport environment and issue appropriate changes, if it believed them warranted.

What the respondent was not free to do was ignore or defy ATC's instructions in favor of his own assessment that his aircraft should be accorded landing priority over one he could not find, but whose safety he should have appreciated could be seriously compromised if he did not allow ATC, which had both aircraft in sight, to manage the situation in accordance with its informed appraisal of how best to ensure safe operations within the controlled airspace it is charged with regulating. Respondent's decision to land contrary to instruction and ahead of an aircraft he did not yet see was both reckless and demonstrative of a noncompliant attitude inimical to air safety.

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do that, now wheres the traffic?" Adm. Exh. A-2, page 3.

Finally, respondent contends that he should be given a waiver of penalty because he filed an Aviation Safety Reporting Program report of the incident. We disagree. An ASRP waiver is not available for deliberate, willful FAR violations, and respondent's conduct was anything but inadvertent. More to the point, we share the Administrator's view that respondent should lose his airman privileges, for his repeated defiance of ATC's appropriate and lawful authority shows that he does not possess the care, judgment and responsibility required of a certificate holder. Respondent proved himself to be an unpredictable, lawless element in an airspace system critically dependent for its safety on both the reliability of its individual users and their willingness to relinquish when necessary their operational autonomy.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The initial decision and the Emergency Order of Revocation are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.