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NTSB Order No. EA-4804

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 22nd day of November, 1999

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15188
v.)	
)	
RONALD R. MACKO,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the written decisional order of Administrative Law Judge Patrick G. Geraghty issued on September 25, 1998, finding that respondent refused to allow an FAA inspector access to the cockpit of an aircraft and thus violated section 121.548 of the Federal Aviation Regulations (FARs), 49 C.F.R. Part 121.¹ The law judge reduced the sanction

¹The decisional order is attached. Respondent filed a brief (continued...)

imposed from a 30 to a 15-day suspension of respondent's airline transport pilot certificate.² Because respondent admitted to all the facts set forth in the Administrator's suspension order (complaint), the law judge determined that a hearing was unnecessary and the case could be decided on briefs alone. Based on the unique facts of this case, as discussed below, we grant the appeal.³

Respondent admitted that on June 16, 1996, he was the captain and pilot-in-command (PIC) of Delta Air Lines Flight 1471 from Atlanta to Savannah, GA. Before departure, FAA Inspector Steven Groover presented the appropriate credentials and paperwork (which included his FAA Form 110A) to Delta personnel and informed respondent that he intended to perform an en route inspection during the flight. Respondent denied Inspector

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on appeal and the Administrator has filed a reply.

Section 121.548 states as follows:

Aviation safety inspector's credentials: Admission to pilot's compartment.

Whenever, in performing the duties of conducting an inspection, an inspector of the Federal Aviation Administration presents form FAA 110A, "Aviation Safety Inspector's Credential," to the pilot in command of an aircraft operated by a certificate holder, the inspector must be given free and uninterrupted access to the pilot's compartment of that aircraft.

²The Administrator has not opposed the sanction reduction.

³Given our disposition of the case, we need not address respondent's argument that the law judge erred in deciding the case without a hearing.

Groover, who wore a beard, access to the jumpseat based on his understanding that the Delta Air Lines Flight Operations Manual (FOM) prohibited individuals with beards from riding in the cockpit. Before making this decision, respondent contacted the Delta Chief Pilot's office in Atlanta and was told by an Assistant Chief Pilot that his reading of the FOM was correct.⁴

Respondent contends that, despite his admission of the factual scenario set forth in the complaint, he should not be found to have violated FAR section 121.548 because he acted pursuant to the FOM (an FAA-approved document), and a "direct order" from his superior and that, further, allowing a bearded person to ride in the cockpit would not have been consistent with the highest level of safety, which, as PIC, he must always have as his paramount concern.⁵

⁴In a July 17, 1996 memorandum, Delta Assistant Chief Pilot C. L. Bartenfeld stated that he received a telephone call from respondent on June 16, 1996. Respondent called from the gate with a "question concerning a FAA jumpseat rider with a beard. I told him that according to our Flight Operations Manual, JSA's with a beard are not allowed in the cockpit and boarding should be denied." Respondent's Trial Brief, Exhibit (Ex.) D.

We cannot tell from this statement whether respondent informed Captain Bartenfeld that the FAA jumpseat rider was an inspector prepared to perform an en route inspection or whether that specific knowledge would have made a difference in the advice he gave to respondent.

⁵He cites Advisory Circular 120-43, dated 1/27/87, published by the FAA, entitled "The Influence of Beards on Oxygen Mask Efficiency." It states that:

Bearded crewmembers should be aware that oxygen mask efficiency is reduced by the presence of facial hair. Demand masks, such as those used in protective breathing equipment, many times cannot be donned (continued...)

The Administrator argues that the section of the FOM on which respondent relied had been rejected by the FAA Principal Operations Inspector (POI) for Delta before the date of this flight, and therefore was not a legitimate basis for denying an FAA inspector free and uninterrupted access to the cockpit of an aircraft.⁶ To support this argument, she relies on the affidavit of William Dubis, the POI for Delta. Administrator's Trial Brief, Ex. 1. He states that the page of the FOM on which respondent claims he relied was dated August 31, 1995. Under the heading "Dress Code," in the section entitled "Jump Seat," it stated, "Note: For safety reasons, beards are not acceptable in the cockpit."⁷ Mr. Dubis affirmed that on or about August 31, he

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rapidly nor seal effectively when used by bearded individuals. This can adversely affect the performance of the mask and reduce crewmember awareness, capability, and performance.

Id. at 3, Respondent's Trial Brief, Ex. C.

⁶A qualified inspector may only be denied access in the interest of safety. 49 C.F.R. § 121.547(a). An inspector is qualified if he or she possesses the appropriate credentials, as specified in FAR section 121.548. As such, respondent's argument (made without substantiation) that Inspector Groover was a general aviation airworthiness inspector and, therefore, not qualified to inspect an aircraft in Part 121 operation is unpersuasive and irrelevant to the issues in this case.

Similarly, respondent's claim (or, rather, counsel's argument) that the inspector's wife was a paying passenger on the same flight was unsubstantiated by evidence and was not considered in our decision.

⁷The entire section, dated "31 Aug. 95," read:

Dress Code

(continued...)

contacted Shand Gause of Delta Flight Operations and advised him that the note should be changed because a violation of the FARs would occur "if the FAA, NTSB, or Secret Service was denied access to the jump seat." Id. at 2. He further states that on April 30, 1996, a month and a half before the subject flight, Delta issued a Flight Operations Bulletin with "a subtle but important change to their Jump Seat Dress Code paragraph." Id. The phrase "for safety reasons" had been removed and, thus, the directive read simply "Beards are not acceptable in the cockpit."⁸ Mr. Dubis concluded that "[t]his change made this

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Male pilots traveling in civilian clothes must wear dress suits or coordinated pants and a sports coat with a shirt and tie.

Female pilots traveling in civilian clothes must wear a dress, a suit, a dress pantsuit, a coordinated blouse/skirt, or a sweater/skirt combination.

Jump seat riders who are not Delta employees are expected to comply with the dress and grooming standards described above.

Note: For safety reasons, beards are not acceptable in the cockpit.

Respondent's Trial Brief, Ex. B.

⁸The revised section read:

Dress Code

Flight Uniform, or

- Males - Dress suits or coordinated pants and sport coat with a shirt and tie.

- Females - Dress, suit, dress pant-suit, coordinated blouse/skirt, or a sweater/skirt combination.

(continued...)

note a Dress Code requirement as opposed to a safety requirement, and therefore, would not be applicable to an Aviation Safety Inspector, who could only be removed for safety reasons." Id. He approved of the change.

In her trial brief, the Administrator cites Administrator v. Flowers, NTSB Order No. EA-3842 (1993), to support her argument that, even if the FOM appeared to contradict the FAR, the regulations must always take precedence.⁹ We find that Flowers may be distinguished from the instant case. There, an FAA inspector had made arrangements with the airline several days in advance to conduct an en route inspection of a particular flight. When he arrived, he was told by the ticket agent that his presence on the flight had been noted in the computer. He was escorted to the aircraft where he presented his credentials and the appropriate form to the first officer and began the inspection. Yet, when the inspector later presented his credentials to the respondent (PIC), the respondent was rude and confrontational to him. He told the inspector that he did not have the appropriate paperwork, and told him he would not be flying with him without that paperwork. The respondent later claimed that an internal airline pass was necessary for the

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Note: Beards are not acceptable in the cockpit.
Administrator's Trial Brief, Ex. 1, Attachment 3.

⁹It should be noted that, with regard to regulations vs. the manual, Flowers cited Administrator v. Chiplock, NTSB Order No. EA-3556 at 5 (1992), where the manual at issue was one that was *unapproved* by the FAA.

computation of weight and balance; however, the co-pilot stated that he had told the respondent that he had already informed the operations department, for the purpose of weight and balance, that a jumpseat rider would be present. We found that the respondent was "acting out of pique," not concern for company procedures (as set forth in the manual), and that his claimed concern for safety was belied by the co-pilot's testimony. Id. at 9. A safety issue did not exist, since the presence of a jumpseat rider had already been reported for weight and balance purposes.¹⁰

In the instant case, respondent knew that, upon display of appropriate credentials, an FAA inspector is entitled to uninterrupted access to the cockpit, and may only be denied access in the interest of safety. He excluded Inspector Groover in reliance on a provision of the Delta FOM, which he asserts he believed was based on a safety concern. To confirm his reading of the manual provision, respondent checked with a Delta Assistant Chief Pilot who told him that boarding should be denied

¹⁰Similarly, in Administrator v. Thorn, 6 NTSB 1274 (1989), we found unconvincing a respondent's argument that he had a genuine concern for safety when he excluded an inspector from the cockpit based on the personal animus that existed between the two and because he feared a "vendetta-type" checkride. Thorn may also be distinguished from the instant case because there, while the respondent consulted with his company vice president before refusing access to the FAA inspector, he received only support for what was ultimately his decision, not advice that amounted to a directive from his superior to refuse access. In Thorn, "[t]he issue of cockpit access remained at all times under the purview of the PIC." Id. at 1276.

to a jumpseat rider with a beard.

This case is more akin to Administrator v. Kellogg, 1 NTSB 1254 (1971), which we distinguished from the facts in Flowers. In Kellogg, we did not find a violation where a respondent refused to allow an FAA inspector to occupy the center observer seat. The facts indicated that he acted in good faith and was motivated by a reasonable interpretation of the company flight manual (which required the second officer to occupy that seat) and safety concerns (specifically, that during an emergency, the second officer's duties can only be performed from the center seat since it contained a microphone outlet in the oxygen mask).¹¹

In the instant case, respondent was faced with a decision which, no matter which way he chose, potentially could have had negative consequences. On the one hand, upon display by an FAA inspector of the necessary credentials, a pilot must provide the inspector uninterrupted access to the cockpit and, on the other,

¹¹But see Administrator v. Schmid, 1 NTSB 1645 (1972), another case where the PIC denied an FAA inspector who was present to conduct an en route inspection access to the center observer's seat. The PIC claimed that he needed the second officer to occupy the center seat for the performance of assigned checklist duties. We found, however, that the operations manual directed the first, not second, officer to read the checklists, and that, coupled with the inspector's broad authority, outweighed the fact that the respondent was not officially notified of the FAA policy regarding the center seat. Id. at 1646. We also noted that the decision of whether an inspection could be conducted just as well from the left or center observer's seat was the Administrator's to make, as set forth in FAR section 121.581(a). See also Administrator v. Farrell, 2 NTSB 1480 (1975).

Delta's FAA-approved FOM (confirmed by an Assistant Chief Pilot) admonished that beards are not acceptable in the cockpit. If, as the Administrator contends, the FOM restriction on bearded individuals in the cockpit cannot be applied to FAA inspectors, then the manual should be clarified to so indicate. It is apparent that respondent was aware of the reasons for prohibiting beards in the cockpit which, as the Administrator acknowledges, could result in the user being deprived of sufficient oxygen.¹² No evidence was submitted, however, to indicate that respondent knew or should have known that the restriction on bearded individuals riding in the cockpit did not apply to FAA inspectors.¹³ Simply removing the phrase "for safety reasons" from the statement that "beards are not acceptable in the cockpit" does not change the fact that a beard can affect the seal of the mask around the wearer's face, which would appear to be a safety issue, or make it clear that the potential for an FAA inspector riding jumpseat to be deprived of sufficient oxygen to allow him to remain coherent and conscious during an emergency is

¹²Since beards interfere with the mask's ability to completely seal, "a bearded pilot faces the unacceptable risk for inadequate delivery of oxygen after decompression. This could jeopardize the pilot's ability to perform his assigned tasks required for operation of the aircraft." Administrator's Trial Brief, Ex. 2 at 2, affidavit of Research Physiologist Robert P. Garner. See also FAA Advisory Circular 120-43, dated 1/27/87, Respondent's Trial Brief, Exhibit C.

¹³The Administrator does not dispute that the prohibition against beards worn by the flight crew is a safety issue. This undermines her argument, however, that without the qualifying "for safety reasons," the no beards policy was simply a dress code requirement.

not considered by the Administrator to be a safety-related matter.¹⁴

In these circumstances, respondent could reasonably believe that allowing anyone with a beard to ride jumpseat would be contrary both to a specific provision in the FAA-approved FOM and to the interest of safety in the cockpit, a belief his supervisor confirmed. We decline to conclude in this setting that respondent's actions constituted a violation of FAR section 121.548.¹⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The initial decision is reversed; and
3. The Administrator's suspension order is dismissed.

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

¹⁴The possibility that during an emergency the crew might be distracted from operating the aircraft by a jumpseat rider who was not receiving an adequate supply of oxygen to remain coherent and conscious seems to be a justifiable safety concern.

¹⁵This decision, however, should not be read as a retreat from the Board's position that we in no way condone "unjustified or insubstantial challenges to an FAA inspector's authority [to exercise inspection responsibilities]...", as we have recently said. Administrator v. Werth, NTSB Order No. EA-4766 at 4 (1999).