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NTSB Order No. EA-4892

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 1st day of May, 2001

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JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-15440
v.	)	
	)	
STEVEN J. HEWITT,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

Respondent, pro se, has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, rendered at the conclusion of an evidentiary hearing held on April 28, 1999.<sup>1</sup> There, the law judge found that respondent had violated sections 91.13(a), 91.307(b), 105.13, 105.14(a)(2), and 105.29(b) of the Federal Aviation Regulations (FAR), 14 C.F.R.

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<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

Parts 91 and 105, in connection with a flight operated for a parachute jump, as set forth in the Administrator's complaint.<sup>2</sup> He further determined that the Administrator did not prove by a preponderance that respondent violated FAR sections 91.213 and 91.215 and, therefore, reduced the sanction from a 180-day suspension of respondent's airline transport pilot (ATP) certificate to a 110-day suspension.<sup>3</sup> As discussed below, we

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<sup>2</sup>The pertinent sections of the FAR state:

**Section 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

**§ 105.13 General.**

No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft, if that jump creates a hazard to air traffic or to persons or property on the surface.

Under section 105.14(a)(2), the pilot-in-command (PIC) of a jump flight must advise air traffic control (ATC) that a jump activity has ended when the last jumper reaches the ground.

Section 105.29(b) requires that, at an altitude of more than 1,200 feet above the surface but less than 10,000 MSL (mean sea level), no PIC may allow a parachute jump to be made from the aircraft at a distance from clouds that is less than 2,000 feet horizontal.

Section 91.307(b) states that no PIC shall allow a jump to be made that is not in compliance with Part 105.

<sup>3</sup>Section 91.213(a) prohibits taking off in an aircraft with inoperative instruments unless several enumerated conditions have been met.

Section 215(b)(5)(i) prohibits the operation of an aircraft at or above 10,000 feet MSL without an operable coded radar transponder and automatic pressure altitude reporting equipment,

deny the appeal in all respects except sanction.<sup>4</sup> Regarding sanction, we will reduce the suspension period from 110 to 90 days.

The Administrator's suspension order, which serves as the complaint, alleges that on March 28, 1998, respondent was the pilot-in-command of a Cessna 182 operated in the vicinity of Sanderson Field Airport, Shelton, Washington, and allowed parachutists to jump from the aircraft when they could not maintain at least 2,000 feet horizontal distance from the clouds. The complaint also alleges that respondent failed to notify Air Traffic Control when "the parachute activities had ended upon the last jumper reaching the ground."

Two FAA Aviation Safety Inspectors who were at Sanderson Field and witnessed the jump testified at the hearing that they heard a piston-powered aircraft overhead, estimated that the aircraft was at about 10,000 feet, and that it was above the clouds, which were broken, at about 3,000 to 4,000 feet. They further testified that the jumpers descended through a small hole

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(..continued)  
as described in that section, unless authorized by ATC.

The Administrator argues in her reply brief that the Board should reinstate the 91.215(b)(5)(i) charge, which is connected to the assertion that respondent operated the subject aircraft above 10,000 feet MSL with an inoperable transponder. We have disregarded that argument, as it is not in the form of a proper appeal to the Board. The Administrator did not file an appeal of any aspect of the initial decision.

<sup>4</sup>Respondent filed an appeal brief and the Administrator filed a reply. Respondent then filed a "Reply to Complainant's Reply Brief" which the Administrator moves to strike as impermissible under our rules. We grant the motion.

in the clouds, that the jumpers were closer than 2,000 feet horizontally to the clouds, and that this created potential endangerment to the jumpers and to other aircraft. The Administrator introduced into evidence photographs taken by the inspectors of the jumpers as they descended and of the airport area about 15 minutes after the jumpers landed.<sup>5</sup> Respondent testified that the jumpers left the aircraft and passed through a hole in the clouds 6,000 to 7,000 feet in diameter. He entered into evidence depositions of eyewitnesses who stated that they did not see jumpers descending within 2,000 feet of clouds.

The law judge credited the testimony of the inspectors and found that the photographs depicted the jumpers closer than 2,000 feet to the clouds. We adopt the law judge's findings as our own, as he was in the position to hear the conflicting evidence, assess the demeanor of the witnesses, and make a credibility determination. We will not disturb a law judge's credibility finding unless it was made in an arbitrary or capricious manner. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). Respondent has not presented information or argument to justify a reversal of that finding.

As for the charge that respondent did not notify ATC when the jumpers were on the ground, the law judge found (and respondent essentially admitted) that he did not do so.

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<sup>5</sup>The law judge also found that the ASOS (Automated Surface Observing System) reports, although from an uncertified station, were consistent with the weather described by the inspectors and depicted in the photographs. (Transcript (Tr.) at 149.)

Respondent argues that it is not a common practice for any jump plane to call "all jumpers on the ground," that controllers are too busy to entertain such calls and, further, that the controller implied he did not want respondent to call in by stating "just report [altitude] a minute prior to jump."

(Exhibit C-2.) The law judge found this insufficient to be considered an authorization to deviate from the regulation and that the evidence did not support the argument that there was a controller policy of waiving the regulation. We have not been convinced otherwise.<sup>6</sup>

Respondent also argues on appeal that sanction should be waived because he filed a report with NASA under the Aviation Safety Reporting Program (ASRP). As the Administrator notes, this argument is untimely. It should have been made before the record closed in this case. Respondent offers neither a reason why he did not present this information before or during the hearing, nor a good cause for us to entertain it now. In any event, it would appear, as the Administrator argues, respondent's actions were not inadvertent and, as such, he would not qualify for the sanction waiver.

Finally, respondent argues that the period of suspension is excessive. The Administrator did not enter the Sanction Guidance Table, FAA Order 2150.3A, Compliance and Enforcement Program,

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<sup>6</sup>Respondent also maintains that some of the charges are redundant. The choice of charges, however, is a matter left to the discretion of the Administrator. They are supported by a preponderance of the evidence and thus are sustained.

Appendix 4, into evidence at the hearing and did not address this issue in her reply.<sup>7</sup> Her counsel spoke to sanction briefly in closing argument, justifying the period of suspension sought by citing the "combination of regulations" charged and the small opening in the clouds where the jumpers descended relative to the opening that was required under the regulations. (Tr. at 131-32.)

Under the FAA Civil Penalty Administrative Assessment Act, 49 U.S.C. §§ 44709(d) and 46301(d), the Board is "bound by...written agency guidance available to the public relating to sanctions to be imposed...unless the Board finds that any such interpretation [or in this case sanction guidance] is arbitrary, capricious, or otherwise not in accordance with law." However, as we stated in Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997), "it is the Administrator's burden under the Act to clearly articulate the sanction she wishes, and to specifically ask the Board to defer to that determination, supporting her request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law."

We find that the Administrator did not adequately support the sanction imposed.<sup>8</sup> While the law judge reduced the sanction

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<sup>7</sup>If the Administrator wants the Board to defer to her validly adopted written sanction policy, she must explicitly and timely raise the deference argument. See Hinson v. NTSB and Richard A. Rolund, 57 F.3d 1144 (D.C. Cir. 1995). See also Administrator v. Kimsey, NTSB Order No. EA-4537 at 5 (1997).

<sup>8</sup>In closing, the Administrator's counsel referenced the Foss case, see discussion *infra*, and Administrator v. Smith, NTSB Order No. EA-4622 (1998) (section 105.29(a) violation, sanction

from a 180 to a 110-day suspension, precedent, although limited, supports a further reduction. See, e.g., Administrator v. Hulihan, NTSB Order No. EA-4845 (2000) (violations of sections 91.13(a), 105.13, and 105.29(a) and (b), 60-day suspension, ATP certificate; pilot permitted jump over victor airway, into or through clouds); Administrator v. Woermann, NTSB Order No. EA-4644 (1998) (section 105.13, 15 days, ATP certificate; pilot allowed jump into path of another aircraft and did not make announcements over UNICOM); Administrator v. Foss, NTSB Order No. EA-4631 (1998) (section 105.29(a) violation, 45-day suspension of respondent's airman certificate; pilot allowed jump in area where parachutists could not maintain required cloud clearance).

We have reviewed the small number of precedential cases and, considered with the number and type of violations, have determined that a further reduction to a 90-day suspension period is warranted in this instance.

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waived under the ASRP).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted as to the reduction in sanction from 110 to 90 days and denied in all other respects;
2. Except as to the reduction in sanction, the initial decision is affirmed; and
3. The 90-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>9</sup>

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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<sup>9</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).