

SERVED: June 30, 2006

NTSB Order No. EA-5235

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 June, 2006

<hr/>)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
	Complainant,)	
)	Docket SE-17398
	v.)	
)	
FRANK C. ALBERT,)	
	Respondent.)	
)	
<hr/>)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on August 16, 2005.¹ By that decision, the law judge upheld the Administrator's allegation that respondent violated sections 91.13(a), 91.103, 91.139(c), and 99.7 of the Federal Aviation

¹ The excerpt of the hearing transcript containing the law judge's decision is attached.

Regulations (FARs),² and affirmed the 30-day suspension of

² FAR sections 91.13(a), 91.103, 91.139(c), 14 C.F.R. Part 91, and FAR section 99.7, 14 C.F.R. Part 99, state, in relevant part:

Sec. 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.

* * * * *

Sec. 91.103 Preflight action.

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight....

* * * * *

Sec. 91.139 Emergency air traffic rules.

(a) This section prescribes a process for utilizing Notices to Airmen (NOTAMs) to advise of the issuance and operations under emergency air traffic rules and regulations and designates the official who is authorized to issue NOTAMs on behalf of the Administrator in certain matters under this section.

(b) Whenever the Administrator determines that an emergency condition exists, or will exist, relating to the FAA's ability to operate the air traffic control system and during which normal flight operations under this chapter cannot be conducted consistent with the required levels of safety and efficiency--

(1) The Administrator issues an immediately effective air traffic rule or regulation in response to that emergency condition; and

(2) The Administrator or the Associate Administrator for Air Traffic may utilize the NOTAM system to provide notification of the issuance of the rule or regulation. Those NOTAMs communicate information concerning the rules and regulations that govern flight operations, the use of navigation facilities, and designation of that airspace in which the rules and regulations apply.

respondent's private pilot certificate sought by the Administrator. We deny respondent's appeal.

The Administrator's July 29, 2005 Amended Order of Suspension (the "complaint") alleged:

1. At all times herein mentioned you were the holder of airman certificate number [redacted] with private pilot privileges.
2. On or about October 7, 2004, you acted as pilot in command of a Piper-PA-32, N3665W, a civil aircraft, the property of another, during a flight conducted in the vicinity of Stafford, Virginia.
3. A Notice to Airman FDC 3/2126 (hereinafter "the NOTAM") issued pursuant to 14 CFR §§ 99.7 and 91.139, became effective March 28, 2003 and was in effect on October 7, 2004.
4. The NOTAM, among other things, contained special security instructions issued by the Administrator of the FAA.
5. The NOTAM was [sic] covered the airspace in which you operated N3665W on October 7, 2004.
6. On the occasion referenced in paragraphs 2 through 5 herein, you operated N3665W within the airspace described in the NOTAM before becoming familiar with all available information concerning your flight,

(..continued)

(c) When a NOTAM has been issued under this section, no person may operate an aircraft, or other device governed by the regulation concerned, within the designated airspace except in accordance with the authorizations, terms, and conditions prescribed in the regulation covered by the NOTAM.

Sec. 99.7 Special security instructions.

Each person operating an aircraft in an ADIZ or Defense Area must, in addition to the applicable rules of this part, comply with special security instructions issued by the Administrator in the interest of national security, pursuant to agreement between the FAA and the Department of Defense, or between the FAA and a U.S. Federal security or intelligence agency.

specifically, familiarizing yourself with all requirements of the NOTAM.

7. Furthermore, on the flight referenced in paragraphs 2 through 5 herein, you operated N3665W within the airspace described in the NOTAM, but you failed to comply with all operating requirements and procedures specified in the NOTAM, including the special security instructions contained therein.
8. By entering the affected airspace without complying with the operating requirements, procedures and special security instructions specified in the NOTAM, you risked interception by military aircraft and the possible use of deadly force.
9. Your actions as described in paragraphs 2 through 8 inclusive were careless or reckless in that they endangered the lives and property of others.
10. By reason of the foregoing facts and circumstances, you violated [FAR sections 91.13(a), 91.103, 91.139(c), and 99.7].

An evidentiary hearing was conducted on August 16, 2005, during which the Administrator presented the testimony of persons from the U.S. Department of Homeland Security's Customs and Border Protection and the Federal Aviation Administration who were knowledgeable about respondent's incursion into the Washington, D.C. area Air Defense Identification Zone ("ADIZ") created by the NOTAM. These witnesses testified about the ADIZ, the radar tracking of respondent's aircraft, respondent's unauthorized entry into the ADIZ, and the identification of respondent as the pilot responsible. The Administrator also presented rebuttal testimony from a radar systems technician who testified that the radar that the Administrator used at the hearing to prove respondent penetrated the ADIZ airspace by 2 to 3 nautical miles had a measured maximum range error of

approximately 180 feet. The Administrator also introduced numerous exhibits, including the NOTAM, public aeronautical information and charts depicting the relevant airspace, radar plots of respondent's ADIZ incursion, a radar data-driven animation of respondent's ADIZ incursion, and the technical calibration data for the applicable radar facilities. Respondent testified on his own behalf, denying that he had penetrated the ADIZ, but did not present the testimony of any other witnesses.³

The law judge affirmed all factual allegations and FAR violations asserted in the Administrator's complaint, and, accordingly, upheld the 30-day suspension of respondent's pilot certificate.

On appeal, respondent raises numerous arguments but, for the reasons set forth in the Administrator's reply brief, none of them are persuasive. Instead, we find it most significant that during the hearing respondent did not testify in any detail about an awareness of the ADIZ and, most importantly, he provided no testimony about the measures he actively took to ensure his aircraft would avoid the ADIZ. Respondent's testimony, as well as his arguments now on appeal, appears to be little more than post hoc rationalization for poor airmanship and an unwillingness to take responsibility for failing to fulfill the responsibilities imposed upon all pilots. For

³ Respondent introduced only one exhibit, a one-page excerpt from the Aeronautical Information Manual.

example, notwithstanding respondent's argument that he was not put on adequate notice that the 30-mile arc specified in the ADIZ area he violated was to be measured in nautical, as opposed to statute miles, the record in this case makes it clear that a reasonable and prudent pilot would not believe the arc was measured in anything other than nautical miles, or, if there was any reasonable doubt, would have taken steps to verify the proper unit of measurement. Similarly, respondent's unscientific assumptions and inferences about the design and operation of the radar systems that recorded his incursion fall short of countermanding the thorough and knowledgeable testimony to the contrary by the Administrator's witnesses.⁴

Respondent's other arguments are even less persuasive. For example, respondent now claims for the first time in his appeal that if he is found to have violated the ADIZ, his penetration of the airspace was only because of an emergency created by his need to avoid another aircraft. This argument, is, of course, improperly raised at this stage of the proceedings. See 49 C.F.R. 821.40. This argument also somewhat contradicts his

⁴ The Administrator has filed a Motion to Strike documents attached to respondent's appeal brief. The documents were apparently prepared by respondent and referred to by respondent repeatedly during his testimony, but respondent's counsel did not proffer them as exhibits. In opposing the Administrator's motion, respondent claims these documents are merely "chalks" provided "to assist in collating the myriad of details summarized by [respondent] in his testimony." Respondent's Response and Opposition to the Administrator's Motion to Strike at 4. We view the attachments to respondent's brief, which are discussed and referenced throughout his presentation of his defense, to be permissible argument and not improper new evidence. The Administrator's Motion to Strike is denied.

claim to have been aware of the ADIZ airspace, for there is no ATC transcript or testimonial evidence that respondent knew and attempted to notify ATC of his alleged predicament. Most importantly, however, the radar data introduced by the Administrator indicates that the closest proximity between respondent's aircraft and the aircraft respondent now claims he tried to avoid occurred only after respondent had violated the ADIZ airspace and had reversed course and was proceeding to exit the ADIZ airspace. Respondent also argues that the law judge erred in not accepting his detailed written proposed findings of fact. However, nothing in rule 821.39 requires that a party be permitted to submit written submissions, nor has respondent even claimed that he was unable to provide this information during his closing argument. See Administrator v. McElroy, 2 NTSB 444, 445 (1973) (where we rejected an identical argument in the context of a former version of our rule and stated, "it has been the consistent practice of the law judges, prior to the oral issuance of a decision, to allow oral argument, which in effect provides the parties with the opportunity to submit orally their proposed findings, conclusions, and supporting reasons"). Finally, respondent also argues that he was prevented from presenting a full defense because allegedly responsive information about radar locations or tolerances was not provided during discovery for reasons of national security; respondent makes no legitimate showing that he was prevented from defending his case, nor does he demonstrate, in any fashion, that he or

his counsel diligently pursued redress before the law judge for what he perceived to be the Administrator's deficient discovery responses.

Respondent demonstrates no errors, nor do we discern any, in the law judge's decision.⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's airman certificate shall begin 30 days after the service date indicated on this opinion and order.⁶

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

⁵ The Aircraft Owners and Pilots Association (AOPA) has asked for leave to file an amicus curiae brief in this case pursuant to 49 C.F.R. § 821.9(b). The Administrator does not oppose the amicus brief, and, because in our judgment the amicus brief does not unduly broaden the matters at issue or prejudice either party, it is accepted. AOPA argues that this case raises issues about "inconsistencies in depictions of the restricted airspace, the lack of precise language in the NOTAMS, and the potential for misidentification of aircraft that have allegedly violated the ADIZ, any combination of which can result in a pilot being charged by the FAA without justification." AOPA brief at 2-3. We trust the Administrator will consider the views expressed by AOPA, but, in the context of the record evidence of this case, AOPA's arguments do not sway our decision on respondent's appeal.

⁶ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).