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NTSB Order No. EA-5322

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 3rd day of October, 2007

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-17459
	v.)	
)	
)	
ALVARO EDUARDO CORREDOR,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent, pro se,¹ has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on February 27, 2007, following a bifurcated evidentiary hearing held on November 28, 2006, and February 27, 2007.² The law judge affirmed the Administrator's July 8, 2005 order suspending

¹ Respondent had counsel before and during the hearing, and during motion practice following the hearing, but has submitted his brief to the Board pro se.

² A copy of the initial decision, an excerpt from the hearing transcript, is attached.

respondent's airline transport pilot (ATP) certificate, finding that respondent violated the Federal Aviation Regulations (FARs), 14 C.F.R. §§ 91.13(a), 91.103(a), 91.129(c)(1) and (2), and 91.129(i), but reduced the period of the suspension from 180 to 90 days.³ We deny respondent's appeal.

The Administrator's order functions as the complaint against respondent. It alleges that he operated a Cessna C-172 aircraft in the Class D airspace of Homestead Air Reserve Base without establishing two-way radio communication with the control tower, and that respondent landed and took off without a clearance. The Administrator also alleges that, before the flight, respondent failed to familiarize himself with all available information concerning the flight.

Respondent's Appeal

Neither party disputes that respondent operated the Cessna C-172 on December 28, 2004, and that respondent assumed control of the aircraft at some point after a pilot who had less experience than respondent surrendered control of the aircraft to

³ Section 91.13(a) prohibits careless or reckless operations that endanger another's life or property. Section 91.103(a) requires a pilot-in-command to become familiar with all available information regarding the flight before the flight. Section 91.129(c)(1) requires, before entering Class D airspace, the establishing, and while in the airspace the maintaining, of two-way radio contact with the ATC facility providing air traffic services; subsection (2) requires airmen to establish and maintain two-way radio communication with the primary airport control tower, when operating in Class D airspace. Section 91.129(i) prohibits, unless the operator has received an appropriate clearance from ATC, operation of an aircraft on a runway or taxiway, and departure or landing an aircraft at any airport with an operating control tower.

respondent. In addition, the parties seem to agree that respondent became the pilot-in-command (PIC) of the flight when he exercised decisional authority over the aircraft.⁴ Respondent argues that he did not know the aircraft was in Class D airspace when he assumed control, and that he therefore is not responsible for not complying with radio communication and other requirements applicable to Class D airspace. In addition, respondent argues that the law judge denied respondent due process when the law judge bifurcated the administrative hearing, in order to obtain testimony from Ms. Ada Hernandez-Rodriguez. Respondent also argues that the law judge's edits to his decision after issuing the decision require us to reverse the decision. We take each of respondent's arguments in turn.

The Flight

On December 28, 2004, respondent accepted an invitation from Ada Hernandez-Rodriguez (Ms. Hernandez) to fly with her in an aircraft she rented at Tamiami Airport, near Miami, Florida. Tr.

⁴ See Tr. at 327 ("She relinquished the aircraft to me...."); Tr. at 328 ("She just let go of the controls ... I grabbed the controls and ... the airplane ... is shaking violently in ... heavy turbulence. So ... she's panicked and I'm very concerned ... it was very hard to take care of the situation ... I started the approach for the runway that I was directed to ... And I presumed that's the runway where they wanted me to land. ... And the situation was fairly hard because I had to use full power to try to maintain altitude."); Tr. at 332 ("Based on the emergency of the helicopter and the military and the U.S. Government, I say I had operational control at that point because the other person was not responding"); Exh. A-4 at 2 ("Once the helicopter reached them ... and ordered them to land the plane, [respondent] said that [Ms. Hernandez] panicked and could not land the plane, so that was when he took over the controls.").

at 215-16, 316. Although Ms. Hernandez intended to fly to Homestead General Airport to practice touch-and-go landings, the aircraft entered the Class D airspace of Homestead Air Reserve Base, without first establishing two-way radio communication. They accomplished one touch-and-go before United States Customs Service personnel in a Blackhawk helicopter directed them to land.

Ms. Hernandez, a citizen of Spain, came to the United States for 3 months, from November 2004 through January 2005, to accumulate flight time. Tr. at 204. She held a commercial pilot license in Spain, but did not have a certificate from the United States. Tr. at 202-03. She had 170 flying hours. Tr. at 204. Respondent had over 5,000 hours, and had an ATP certificate with a Boeing 737 type rating. Tr. at 311.

Ms. Hernandez met respondent at Tamiami Airport. He told Ms. Hernandez that he was doing some aviation consulting work, showed her his airline transport pilot certificate, indicated that he was a "real experienced pilot," and told her that he was a flight instructor. Tr. at 213-14, 315, 330. Ms. Hernandez asked respondent to fly with her during the flight at issue, in order to obtain instruction in landing the aircraft. The record indicates that Ms. Hernandez rented the aircraft in her name and did not list respondent as an occupant, either as a passenger or a pilot. Tr. at 51, 80-81, 217, 220, 257, 260-61; Initial Decision at 410. Before taking off, Ms. Hernandez programmed the Global Positioning System (GPS) for what she thought was

Homestead General Airport. Tr. at 218-19, 257, 261; Initial Decision at 409-10. Instead, the law judge determined that Ms. Hernandez mistakenly programmed the GPS for Homestead Air Reserve Base. Initial Decision at 410. After Ms. Hernandez and respondent arrived at what they thought was Homestead General, Ms. Hernandez performed a touch-and-go. Respondent then took the controls and stated that he was going to teach her how to land. Tr. at 223. While preparing to execute a second touch-and-go, the Customs personnel in the helicopter instructed them to land. Tr. at 223, 225-26.

In resolving the issue of which pilot was the PIC during the flight, the law judge found that Ms. Hernandez started the flight as the PIC. Initial Decision at 409-10, 413. The law judge also found that, upon respondent's act of taking over the controls and consequently accepting responsibility and control of the flight, he then became the PIC. Initial Decision at 409, 412, 413-15. The law judge further found that, at the point respondent assumed the status of PIC, "it was his duty to know where the aircraft was and to comply with all requirements applicable under the FARs to the conduct of the flight." Initial Decision at 414.

Respondent contends that he did not participate in the flight and was a passenger until Ms. Hernandez "let go of the controls after the Blackhawk helicopter arrived and forced them down." Respondent's Br. at 22. Further, respondent challenges the law judge's credibility determination that Ms. Hernandez was, across the board, a more credible witness than respondent. The

Administrator contests each of respondent's contentions, and urges us to affirm the law judge's decision.⁵

Credibility Determination/Pilot-in-Command

We have previously held that law judges are in the best position to evaluate witness credibility, and that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner."⁶ When parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous.⁷ Respondent has not made a showing that the law judge's credibility determinations were arbitrary or capricious, and we have carefully reviewed the record and agree

⁵ The Administrator does not contest the reduction in sanction. We note that respondent, after filing a timely notice of appeal on March 9, 2007, filed a second notice of appeal on April 9, 2007. Due to the filing of this extraneous second notice of appeal, the Administrator's counsel misconstrued respondent's filings; instead of filing a reply brief, the Administrator's counsel filed a motion to dismiss late-filed appeal. The Administrator's counsel subsequently filed a reply brief, along with a motion to accept a late-filed reply brief. Respondent opposes the motion. We grant the motion and consider both parties' briefs in this opinion, finding no prejudice to respondent, consistent with past treatment of late-filed reply briefs.

⁶ Administrator v. Hodges, NTSB Order No. EA-5303 at 5 (2007), citing Administrator v. Taylor, NTSB Order No. EA-4509 (1996) (the law judge sees and hears the witnesses, and is in the best position to evaluate their credibility), and Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also, Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983).

⁷ Id., citing Smith, supra at 1563.

with the law judge's assessments. Respondent's argument regarding the credibility of Ms. Hernandez's testimony is without merit.

We agree with the finding that respondent was the PIC after he accepted responsibility and control of the flight, because the PIC is the individual who has overall responsibility for and control of the flight.⁸ We also agree with the finding that respondent's status as PIC is a question of timing; when he assumed the status of PIC, it was respondent's duty to know where the aircraft was located, and to comply with all requirements applicable to the conduct of the flight.

Although Ms. Hernandez was the PIC for the commencement of the flight, respondent became the PIC when he exercised control over the flight. We have held that the PIC is not necessarily the pilot who operates the controls or directs the course of a flight.⁹ We have also held that, whether or not actually exercised, a pilot has ultimate decisional authority for control or direction of a flight if his responsibility includes the authority to give directions on how to fly the aircraft and to assert control of the aircraft.¹⁰ Here, respondent's assumption of control when he determined that such control was necessary leads us to conclude that respondent "possessed the ultimate

⁸ Administrator v. McCartney, 4 NTSB 925, 926 (1983).

⁹ Administrator v. Jeffreys, 4 NTSB 681, 682 (1982).

¹⁰ See id.

decisional prerogatives traditionally associated with service as pilot in command.”¹¹ As such, given our existing precedent on this issue, we find that the Administrator has established that respondent was the PIC during the period at issue.

We note that our conclusion would remain the same if we accepted respondent’s version of the incident. He testified that, after being intercepted by the helicopter, the airplane was “shaking and pitching,” he “saw panic” in Ms. Hernandez’s eyes, and she “started screaming about her Visa, they were going to throw her in jail.” Tr. at 326. Respondent said that Ms. Hernandez lost “spatial orientation,” and that she “just let go of the controls.” Tr. at 326, 328. As a result, respondent testified, he “grabbed the controls.” Tr. at 328. We find that, at that point, respondent assumed the status of PIC, with all of its incumbent duties and responsibilities.¹²

As stated above, respondent also claims that the law judge denied him due process when the law judge bifurcated the hearing to allow for the provision of Ms. Hernandez’s testimony. Respondent’s Br. at 14. We find this argument without merit. We have previously held that law judges have broad discretion in

¹¹ Id.

¹² We also acknowledge that the facts of this case are similar to those of Administrator v. Kimsey, NTSB Order No. EA-4537 at 1-2 (1997), in which we held that, where the respondent did not decline to take the controls of an aircraft, and did not know that the aircraft was in impermissible airspace, the respondent was the PIC, and had responsibility for the aircraft.

conducting hearings.¹³ Where the law judge has allowed the respondent the opportunity to present and cross-examine witnesses, we generally will not find a due process violation.¹⁴ Respondent had notice of the charges against him and of the dates and place of the hearing, and an attorney represented him.¹⁵ Moreover, respondent's attorney cross-examined Ms. Hernandez, and respondent's financial or logistical reasons for not providing certain witnesses on his own behalf will not result in our finding that the law judge erred. Overall, respondent has not established that the law judge abused his discretion in bifurcating the hearing; as such, we find no due process violation.

Respondent also argues that he was denied due process by the law judge's editing of his decision after issuing the decision.¹⁶ Respondent, however, has not established that the law judge's edits resulted in any prejudice to him. Respondent also notes another change, the insertion of the words "false" and "actual"

¹³ See Administrator v. Nickl, NTSB Order No. EA-5287 at n.4 (2007), citing, e.g., the Board's Rules of Practice, 49 C.F.R. § 821.35(b).

¹⁴ See Administrator v. Nowak, 4 NTSB 1716 (1984).

¹⁵ See Administrator v. Smith, 2 NTSB 2527, 2528 (1976). See also, Administrator v. Raab, NTSB Order No. EA-5300 at 3 (2007).

¹⁶ In his decision issued at the conclusion of the evidentiary hearing, the law judge mistakenly stated that respondent and Ms. Hernandez completed two touch-and-go landings at Homestead Air Reserve Base before the arrival of the Blackhawk helicopter. During his routine proofreading of his initial decision, the law judge edited his decision to reflect the fact that only one touch-and-go was completed. Initial Decision at 412-13.

when referring to his Social Security numbers. Respondent's Br. at 16. Respondent raises this issue also in the context of credibility determinations and, in three motions before the Board, seeks to have the Social Security numbers redacted from these proceedings. We dispose of these issues together. First, we find that there is no due process violation, for the reasons we set forth above. Nor has respondent shown that he was prejudiced in the context of this enforcement action in any way, either by the inclusion of Social Security numbers in the record of the proceedings or by the insertion of the words "false" and "actual" in reference to the numbers. In addition, we note that we have extensively reviewed the record and arguments regarding the law judge's reference to the issue of whether respondent's Social Security number was false. We find that, while the law judge acknowledged this issue, in the context of a credibility determination in an order responding to a motion to redact the numbers, the record indicates that whether respondent produced a false Social Security number during the investigation into the events at issue is not critical to the outcome of this case. Indeed, whether respondent produced a false Social Security number played no part in the law judge's credibility assessment as to whether respondent was the PIC of the flight at issue. As such, whether the law judge erred in acknowledging the Social Security number issue in the context of a credibility assessment does not function as an appropriate basis for appeal in this

case.¹⁷

Emergency

Respondent challenges the law judge's conclusion that an emergency did not exist when respondent and Ms. Hernandez landed at Homestead Air Reserve Base. Respondent's Br. at 31-32. Respondent asserts that the lights in the aircraft "went out," and that other evidence indicates such. Id. at 31. The law judge discredited both respondent's and Ms. Hernandez's testimony on this issue. Respondent has not established that the law judge erred in determining that an emergency situation did not exist at the time of the events at issue. Overall, and based on the foregoing, we find that the law judge did not deny respondent due process of law.

We conclude that the Administrator met his burden with regard to violations of 14 C.F.R. §§ 91.13(a), 91.103(a), 91.129(c)(1), 91.129(c)(2), and 91.129(i). As such, the law

¹⁷ We acknowledge that respondent has submitted motions to the Board's Office of General Counsel, some requesting that the Board amend its records to ensure that any Social Security numbers are not published or available to the public as a result of this case and the underlying proceedings. We note that the Board has taken steps to ensure that respondent's Social Security numbers will not appear on any records that are publicly available, and deny respondent's pending motions, accordingly, as moot. We also acknowledge that respondent submitted a motion to recuse the Board's general counsel based on respondent's belief that the general counsel had formed an opinion as to respondent's credibility as a result of interaction between respondent and staff personnel in the Office of General Counsel initiated by respondent. We conclude that any interaction with the Office of General Counsel is not relevant to the law judge's factual determination on the issue of whether respondent was the PIC and whether he had the responsibilities of a PIC at the critical point during the subject flight. That motion also is denied.

judge did not err in imposing a suspension of respondent's certificate for a period of 90 days. The law judge explained his reduction in the sanction, finding that the Administrator's sanction was "excessive under the circumstances." Initial Decision at 415. The law judge said there is no evidence that respondent "was responsible directly for the mistake in navigation committed by Ms. Hernandez." Id. The law judge found that, based "on the shared responsibility for the actions ... a substantial reduction of the length of the suspension is warranted." Initial Decision at 416.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision, including the reduction in sanction from 180 to 90 days, is affirmed; and
3. The 90-day suspension of any and all certificates held by respondent, including his ATP certificate, shall begin 30 days after the service date indicated on this opinion and order.¹⁸

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

¹⁸ For purposes 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).