

SERVED: November 21, 2007

NTSB Order No. EA-5339

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 19th day of November, 2007

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17808
v.)	
)	
BRET R. KIZER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent, proceeding pro se, appeals the written initial decision and order of Administrative Law Judge Patrick G. Geraghty in this matter, issued February 2, 2007.¹ By that decision, the law judge affirmed the Administrator's order of

¹ A copy of the decisional order is attached.

suspension for violations of 14 C.F.R. §§ 135.293(a)² and (b),³ 135.299(a),⁴ and 91.7(a),⁵ and imposed a 60-day suspension against respondent's commercial pilot certificate. We deny respondent's appeal.

² Section 135.293(a) states that, "[n]o certificate holder may use a pilot, nor may any person serve as a pilot, unless, since the beginning of the 12th calendar month before that service, that pilot has passed a written or oral test, given by the Administrator or an authorized check pilot," regarding the pilot's knowledge of several subjects, such as the type of aircraft, air traffic control procedures, meteorology, and the like.

³ The pertinent portion of section 135.293(b) provides as follows:

No certificate holder may use a pilot, nor may any person serve as a pilot, in any aircraft unless, since the beginning of the 12th calendar month before that service, that pilot has passed a competency check given by the Administrator or an authorized check pilot in that class of aircraft, if single-engine airplane other than turbojet, or that type of aircraft, if helicopter, multiengine airplane, or turbojet airplane, to determine the pilot's competence in practical skills and techniques in that aircraft or class of aircraft.

⁴ Section 135.299(a) states that, "[n]o certificate holder may use a pilot, nor may any person serve, as a pilot in command of a flight unless, since the beginning of the 12th calendar month before that service, that pilot has passed a flight check in one of the types of aircraft which that pilot is to fly." Section 135.299(a) specifies that an approved check pilot participate in the flight check, that the flight check consist of at least one flight over one route segment, and that the flight check include takeoffs and landings at one or more representative airports.

⁵ Section 91.7(a) restricts operation of a civil aircraft unless the aircraft "is in an airworthy condition."

The Administrator issued the suspension order, which became the complaint in this case, on August 21, 2006. The complaint alleged that respondent operated as pilot-in-command (PIC) of a Cessna 501 aircraft on at least 78 flights between February 23, 2004, and June 12, 2005, and that these flights carried passengers for compensation. The Administrator's complaint stated that respondent operated these flights without an air carrier operating certificate with the required operations specifications. The complaint also alleged that, at the time respondent acted as PIC for the aforementioned flights, respondent had not passed a written or oral test, as section 135.293(a) requires, and that respondent had not passed a competency check for the aircraft that respondent was operating within the preceding 12 calendar months. In addition, the Administrator's complaint alleged that the aircraft that respondent operated was 102.2 hours past the time of its required inspection, under the aircraft's continuous inspection program. As a result, the Administrator's complaint concluded that respondent operated the aircraft while it was in an unairworthy condition. Based on these allegations, the Administrator charged respondent with the regulatory violations listed above.

Respondent provided a timely answer to the Administrator's complaint (denying all alleged violations) via a letter dated

August 28, 2006. Subsequently, the Administrator served a discovery request on September 8, 2006, that included a request for admissions of the key allegations in the complaint.⁶ The Administrator's discovery request listed the response deadline as October 7, 2006. After not receiving a reply to this discovery request, the Administrator's counsel filed a motion on November 2, 2006, to deem the facts in the discovery request admitted. Respondent did not reply to the Administrator's motion, and the law judge issued an order granting the Administrator's motion on December 13, 2006. Shortly after the law judge issued the order deeming these allegations referenced in the Administrator's request for admissions as admitted, the Administrator filed a motion for summary judgment pursuant to 49 C.F.R. § 821.17(d). The law judge granted the Administrator's motion and terminated the case.

Respondent now appeals the law judge's order, principally based on constitutional arguments. In particular, respondent

⁶ The Administrator's request for admissions requested that respondent admit, among other allegations, the following: that respondent assumed that he could legally operate the flights at issue under Part 91 of the Federal Aviation Regulations (FAR); that respondent never inquired about whether the passengers present on the flights were being transported for compensation or hire in a manner that would require operation in accordance with Part 135 of the FAR; and that respondent never inquired about whether the aircraft at issue had undergone any maintenance or preventative maintenance prior to any of the flights.

asserts that he has a right to a speedy, fair trial and is "innocent until proven guilty." Respondent also states that he could not fully reply to the Administrator's discovery requests because the Administrator had not been responsive to his requests for information.⁷ The Administrator opposes respondent's contentions, and urges us to affirm the law judge's decision.

A party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no material issue of fact exists, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that Federal courts have granted summary judgment when no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).⁸ In the case at issue, given

⁷ Respondent does not identify any specific discovery requests that he submitted to the Administrator, and does not explain how the Administrator's alleged failure to respond to his requests prevented him from responding to the Administrator's request for admissions.

⁸ An issue is *genuine* if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving

respondent's lack of response to the Administrator's request for admissions, and the law judge's subsequent order deeming the essentially uncontested admissions to be admitted, no genuine issue of material fact exists. Therefore, the law judge properly granted summary judgment regarding the regulatory violations.

Moreover, we have long recognized that law judges, in general, have significant discretion in overseeing discovery. See 49 C.F.R. §§ 821.19(b), 821.35(b); see also Administrator v. Evans, NTSB Order No. EA-4298 at 2 (1994) (citing Administrator v. Wagner, NTSB Order No. EA-4081 (1994), and stating that, "[t]he sufficiency of discovery responses is a matter committed to the discretion of our law judges."). Where a party does not comply with discovery requests in accordance with 49 C.F.R. § 821.19, the law judge has the discretion to impose sanctions. See, e.g., Administrator v. Zink, NTSB Order Nos. EA-5249 at 4-5 (2006) and EA-5262 at 3 (2006); Administrator v. Moore, NTSB Order No. EA-4992 at 2 (2002); Administrator v. Bailey & Avila, NTSB Order No. EA-4294 at 3 (1994).

We have reviewed the record for this case and determined that the law judge did not err in granting the Administrator's

(..continued)

party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

motion for summary judgment. We note that respondent had at least two distinct opportunities after the Administrator filed the request for admissions to avoid the law judge's order that terminated this case. First, respondent could have responded to the Administrator's motion to deem the facts admitted by answering the request for admissions, or by opposing the motion in general. In addition, respondent could have responded to the Administrator's motion for summary judgment by answering the request for admissions or arguing that a factual issue existed. In lieu of arguing that any factual issues existed, respondent only requested a hearing in his response to the Administrator's motion, and argued that he was a taxpayer and an "upstanding citizen with a clean record." Respondent did not respond to the Administrator's discovery request, despite these opportunities to do so.⁹

We also find that respondent's constitutional arguments are unavailing. We have previously held that, where no genuine issue of material fact exists, a hearing would be meaningless. In Administrator v. Anderson, NTSB Order No. EA-3963 at 2 (1993), we stated that, "[i]t is manifest that respondent's

⁹ While we acknowledge that respondent is proceeding without counsel, we note that such a situation does not obviate a respondent's obligations with regard to discovery or responses in general in a pending enforcement action. See Administrator v. Casino Airlines, Inc., NTSB Order No. EA-5091 at 1 (2004), aff'd 439 F.3d 715, 718 (D.C. Cir. 2006).

right to contest the facts underlying the order of revocation at a hearing does not logically extend to facts which are not disputed." In Anderson, we also specifically recognized that section 609(c)(3) of the Federal Aviation Act¹⁰ does not require the Board to hold a hearing when no factual issue exists. In addition, in Administrator v. Palmersheim, NTSB Order No. EA-3370 at 5 (1991), we concluded that the statutory right to a hearing does not preclude the Board's law judges from limiting the scope of a hearing to the adjudication of those matters over which a genuine controversy continues to exist after the parties have filed their pleadings. Overall, the absence of any genuine issue of material fact in this record indicates that the law judge's granting of the Administrator's motion for summary judgment in this case was appropriate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 60-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated

¹⁰ Section 609(c)(3) states, in pertinent part: "[a]ny person whose certificate is revoked by the Administrator under this subsection may appeal the Administrator's order to the National Transportation Safety Board and the Board shall, after notice and a hearing on the record, affirm or reverse the Administrator's order."

on this opinion and order.¹¹

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

¹¹ 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).