SERVED: January 18, 2008

NTSB Order No. EA-5354

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 16th day of January, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. DAVID LEE MOESLEIN, JR., Respondent.	Docket No. SE-17813

OPINION AND ORDER

Respondent has appealed from the oral initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., issued January 30, 2007.[1] The Administrator's order suspended respondent's airline transport pilot (ATP) certificate for 90

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

days, based on alleged violations of the Federal Aviation Regulations (FAR), 14 C.F.R. §§ 91.13(a), 91.139(c), 91.215(c), and 99.7.[2] The law judge concluded that the Administrator proved all allegations in the order of suspension, and that respondent violated each FAR section cited. We deny respondent's appeal.

The Administrator's August 31, 2006 order, which served as the complaint in this proceeding, alleged that on July 10, 2004, respondent was pilot-in-command (PIC) of a Piper PA-28R-201, number N27GS, on an instructional flight that departed from and then returned to Martin State Airport (MTN), Maryland. The Administrator alleged that respondent did not comply with the operating requirements of NOTAM 3-2126 (Exh. A-1), in effect for the airspace within the Washington, D.C. Air Defense Identification Zone (the ADIZ). The Administrator alleged that,

[2] Section 91.13(a) states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. Section 91.139(c) states that when a NOTAM (Notice to Airmen) has been issued under § 91.139, "Emergency Air Traffic Rules," no person may operate an aircraft within the designated airspace except in accordance with the conditions, authorizations, and terms prescribed in the regulation covered by the NOTAM. Section 91.215(c), "ATC Transponder and Altitude Reporting Equipment and Use," requires an aircraft in controlled airspace, if it has an operable ATC transponder, to operate the transponder, and to reply on the appropriate code or as assigned by ATC. Section 99.7 requires compliance with special security instructions, issued by the Administrator in the interest of national security by agreement with the Department of Defense or a Federal security or intelligence agency, in addition to other rules in Part 99, "Security Control of Air Traffic," when operating in an ADIZ (air defense identification zone).

by entering said airspace without complying with those requirements, respondent risked interception by military aircraft and the possible use of deadly force and, further, that such operation was careless or reckless so as to endanger the life or property of another.

At the hearing, the Administrator called four witnesses and presented 12 exhibits. The first witness, an FAA specialist in planning and architecture for air traffic operations airspace and aeronautical information management, George Bobik, testified that NOTAM 3-2126, identifying the airspace comprising the ADIZ, was in effect on July 10, 2004. Tr. at 46-48. A statement from a domestic events network (DEN) specialist working at the Potomac Terminal Radar Approach Control (hereafter PCT), confirms that N27GS departed MTN without transmitting its assigned discrete transponder code, as required by NOTAM 3-2126. As a result, the specialist produced two "Target of Interest Tracking Forms," at 1500 hours and 1642 hours on July 10, 2004, documenting the details of the outbound and inbound portions of respondent's flight. Exhs. A-7, A-8, A-9; Tr. at 83, 85, 92-94. The local air traffic controller at MTN provided a statement explaining how he became aware of the alleged initial ADIZ penetration, how he notified respondent via the radio that N27GS was not transmitting its assigned discrete transponder beacon code, and that "the pilot" acknowledged his failure to squawk

the required discrete beacon code, but said “now he was.” Exh. A-3; Tr. at 68, 81-82.

FAA Quality Assurance Specialist Dawn Ramirez identified a Preliminary Pilot Deviation Report, Form 8020-17, documenting the observation, identification, and tracking of respondent’s aircraft when it failed to transmit an assigned discrete code. This report contains a detailed description of the incident. Exh. A-5; Tr. at 57, 62. Ms. Ramirez also identified radar data and related radar plots showing the course flown by N27GS as it penetrated the ADIZ. Exh. A-6; Tr. at 64-72. She testified that the radar data and graphic plots of that data obtained from PCT and the National Capital Region Command Center show that N27GS departed MTN, situated within the geographical boundaries of the ADIZ, thereby entering the ADIZ without transmitting its assigned discrete beacon code. Tr. at 62, 66-67; Exh. A-6. Ms. Ramirez testified that N27GS flew south for 10 miles, exited the ADIZ, was out of the ADIZ for an hour and 40 minutes, and then re-entered without first establishing and maintaining two-way radio communication with PCT or squawking an assigned, discrete transponder code. Tr. at 62-63, 82, 85; Exh. A-5. She also testified that the local air traffic controller radioed N27GS upon its return to MTN, and advised “the pilot” to call PCT’s pilot deviation line. Tr. at 60. The transcript of the air traffic control (ATC) tape confirms that respondent called

the PCT ADIZ specialist, giving his name as "David Moeslein." Exhs. A-14 at 73-74, A-15.

FAA Air Traffic Security Coordinator Carol Might testified that she coordinates security incidents in the national airspace system with other agencies, including the Department of Defense, the Department of Homeland Security, Customs, and other Federal, State, and local agencies, mostly over the DEN. Tr. at 110. She described a "target of interest" as one that is "not conforming to NOTAM 3-2126, meaning somebody who is not squawking a discrete code," and a "primary target" as one approaching the ADIZ or one that "pops up already in the ADIZ," and testified that, on July 10, 2004, N27GS was both. Tr. at 115. Ms. Might said that when everyone on the DEN agrees that a target has been identified, numerous agencies involved in monitoring the ADIZ consider many factors in a rapid, simultaneous, manner. Id. She said that such factors include the trajectory, altitude, and speed of the aircraft; the day's intelligence reports; and the current location of VIP "assets." Ms. Might testified that if fighter aircraft are launched into the airspace with civil aircraft, the impact on the airspace is significant, and that an aircraft's failure to comply with NOTAM 3-2126 by not transmitting a proper discrete code instigates numerous processes. Tr. at 117-22. Moreover, Ms. Might testified that these numerous processes were put into play

during the outbound leg of N27GS's flight on July 10, 2004, and that the return leg resulted in "almost the same thing." Tr. at 121, 123.

Aviation Safety Inspector John Cumberpatch opined that respondent was the PIC on this flight, and testified that respondent gave flight instruction during the flight, signed the student pilot's logbook as CFI (certified flight instructor), also listing his own ATP status, and noted the time was logged as dual PIC time. Mr. Cumberpatch suggested that this meant that the student logged PIC time, even though the instructor was the actual PIC. Tr. at 200-02; Exh. A-13 at 26.

Respondent did not appear at the hearing.[3] His counsel chose not to proceed at the conclusion of the Administrator's case and did not present witnesses. During cross-examination of Mr. Cumberpatch, respondent's counsel presented Exhibit R-1 (also admitted as Exh. A-14), the deposition of Dr. Gruen, the other pilot on the flight.[4] Tr. at 181-85. Respondent's counsel

[3] Respondent's counsel said respondent had been in a hospital for 2 months, following a cancer operation; the Administrator's counsel related that he was completely unaware of this. Tr. at 10. Respondent's counsel stated that respondent was "an elderly man," giving 73 as his age. Tr. at 11. The Administrator's counsel said that the record indicated that respondent was about 47 years old, "born in 1959." Tr. at 12. We discuss below whether the Administrator named the proper respondent.

[4] Dr. Gruen testified about his relationship with respondent and about the subject flight, starting from when he rented the aircraft from Phoenix Aviation. The purpose of the flight was

argued that Dr. Gruen rented the aircraft, operated it at all times, and "received a briefing from Flight Service and ... filed a flight plan in his name." Respondent's Appeal Br. at 10. At the conclusion of the Administrator's case, respondent's counsel offered Exhibit R-2, a filing pursuant to the Aviation Safety Reporting Program (ASRP).[5] Tr. at 203-04.

After considering the evidence, the law judge held that respondent violated the FARs as alleged. Initial Decision at 224. The law judge rejected respondent's affirmative defense that he was eligible for a waiver of sanction based on his filing of an ASRP report, finding that the violations were not inadvertent. Id. at 221.

Respondent presents a variety of arguments on appeal. He argues that the law judge erred by permitting the Administrator

(..continued)
for Dr. Gruen to practice for his commercial pilot certificate check ride. Exh. R-1 at 7. Dr. Gruen testified that he did receive instruction during the flight. Id. at 14-15.

[5] Under the ASRP, sanction may be waived, despite the finding of a regulatory violation, if certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c. This program involves filing a report with the National Aeronautics and Space Administration (NASA) concerning a FAR violation. Such filing will obviate imposition of sanction if: (1) the violation was inadvertent and not deliberate; (2) it did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in an enforcement action to have committed a regulatory violation in the past 5 years; and (4) the person mails a report of the incident to NASA within 10 days.

to amend the complaint at the hearing, and by finding that respondent was the PIC. He also argues that the law judge erred when he found that there were two unauthorized penetrations into the ADIZ and when he found that respondent's actions were not inadvertent for purposes of the ASRP. Finally, he argues that the law judge erred by affirming a suspension for a person who "flies for a living," in violation of the Equal Protection Clause of the United States Constitution,[6] and by finding that safety in air commerce or air transportation and the public interest required affirmation of the suspension. In turn, the Administrator opposes each of these arguments, and urges us to affirm the law judge's decision.

Respondent challenges the law judge's actions in suggesting and then allowing the Administrator to amend the complaint by adding the suffix "Jr." to respondent's name and by correcting the certificate number from 2695586 to 2694486. Respondent's Appeal Br. at 9-10; Tr. at 14-17. With regard to amending pleadings, the Board's Rules of Practice, at 49 C.F.R. § 821.12(a), state that amendment of a pleading within 15 days before the hearing "shall be allowed only at the discretion of the law judge." Before that time, a party may amend by filing

[6] U.S. Const. amend. XIV, § 1 (stating, "[N]or shall any State ... deny to any person within its jurisdiction the equal protection of the laws.").

the amended pleading with the Board and serving copies on all parties. See 49 C.F.R. § 821.12(a). The rule also provides that, in the case of an answerable pleading, the law judge shall allow any adverse party a reasonable time to object or answer. Finally, the rule requires amendments to complaints to be "consistent with the requirements of 49 U.S.C. § 44709(c) and 44710(c)."[7]

Respondent argues that this amendment "chang[ed] the individual being charged in the Order of Suspension to another individual," and denied him due process of law. Respondent's Appeal Br. at 9. Respondent's counsel raised this issue at the hearing, but was at first unclear, stating, "I would rather not commit myself, Your Honor, until the Government puts their case on." Tr. at 12 (referring to discussion of the issue of whether the Administrator named the appropriate respondent). Answering the law judge's inquiry into why counsel did not notify the Administrator regarding the status of his client, respondent's counsel stated that he had two clients, who were father and son.

[7] Before issuing an order taking action against an airman's certificate after conducting a reinspection, reexamination, or other investigation, § 44709(c) requires the Administrator to advise the certificate holder of the reasons on which the Administrator relies and to provide the holder an opportunity to answer the charges and be heard why the action should not be taken. This procedure was followed in this case. See footnote 8 infra. Likewise, § 44710(c) provides the same protection for revocation of airman certificates for controlled substance violations.

He said that David Lee Moeslein "is the father," and "[m]y defense is they've named the wrong party. The party they're claiming is David Lee Moeslein, Jr." Tr. at 14. The Administrator disputes this defense, pointing out that the elder Moeslein is not a certificate holder and that respondent was the only certificated pilot, holding certificate number 2694486, living at his address of record in Maryland when the Notice of Proposed Certificate Action (NOPCA) was mailed there on December 17, 2004 (the correct certificate number was used in the NOPCA). Administrator's Reply Br. at 11; Tr. at 31, 145-49, 178; Exh. A-14. The Administrator also points out that, although the certificate number was subsequently incorrect (2695586) on the order of suspension and the complaint, respondent was also the only certificated Moeslein at his new address of record in Ohio when the Administrator mailed the documents to him. Administrator's Reply Br. at 12.

We have held that minor corrections to a complaint that cause no surprise and do not prejudice a respondent do not constitute error.[8] Here, respondent has not provided any

[8] See Administrator v. Rogers, 2 NTSB 428, 428-29 (1973) (no abuse of discretion when the Administrator amended complaint at start of hearing; amendment was correction of date: "correct date was within the knowledge of respondent; therefore, the ... amendment could not have been a surprise and could in no way have prejudiced respondent") (internal citation omitted); and Administrator v. Baer, NTSB Order No. EA-4619 at n.5 (1998) (the Administrator changed "bulletin" to "manual"; Board said that

evidence of prejudice, nor have we found any. He received notice of certificate action and had an opportunity to prepare a defense and present arguments on the matter.[9] There is no question that David Lee Moeslein, Jr. received notice of the certificate action against him and that he was the correct party to receive it.[10] The record indicates that respondent had notice of the charges against him and of the dates and place of the hearing, that an attorney represented him, and that he had the opportunity to present evidence and cross-examine witnesses, yet

(..continued)
even if the ruling was in error, "there is no evidence of prejudice to respondent").

[9] Our review of the case file reveals that, on September 23, 2004, respondent received a letter of investigation (Exh. A-12 at 46); that the order of suspension and the complaint were sent to his correct addresses of record; and that he filed a notice of appeal, an answer to the complaint, and a request for discovery on September 6, 2006, and filed an amended answer on September 25, 2006. On November 21, 2006, respondent requested a continuance of the hearing from December 12, 2006. The file also reveals that on December 13, 2006, he requested issuance of subpoenas and amended that request on December 29, and that, on or about December 14, 2006, he submitted a response to discovery.

[10] Respondent's counsel also states that the "failure to provide proper safeguards to an individual is a violation of due process and equal protection of the law." Respondent's Appeal Br. at 10. We have previously held that, where a respondent has had the opportunity to present and cross-examine witnesses at the administrative hearing, he has not been denied due process of law, as established by the Fifth Amendment. See Administrator v. Nowak, 4 NTSB 1716 (1984); Administrator v. Logan, 3 NTSB 767, 768 (1977); Administrator v. Smith, 2 NTSB 2527, 2528 (1976).

chose not to mount a meaningful defense at the hearing. We note, however, that respondent's counsel cross-examined the hearing witnesses and attended Dr. Gruen's deposition.[11]

Respondent also argues that the law judge erred by finding that respondent was PIC, given the evidence that Dr. Gruen operated the aircraft. In his deposition, Dr. Gruen said, "If a violation was committed then, yes, I committed it ... I was flying the plane and I was in control of the airplane." Respondent's Appeal Br. at 10. In a reverse factual situation, we granted a student pilot's appeal in Administrator v. Rajaratnam, NTSB Order No. EA-3497 (1992), based on the other pilot's statement that, as the senior pilot, he would have taken over command in an emergency situation, holding that:

> [W]hile respondent may have been the pilot in charge of the physical management of the aircraft, [the other pilot] was the pilot who possessed the ultimate responsibility for the safety of the operation. ... [That] made him the PIC, as that term is defined in the FAR.

Id. at 9. In the instant case, respondent concedes that, after the flight, he contacted ATC "on behalf of Dr. Gruen," but argues that "does not make a person [PIC]." Respondent's Appeal Br. at 10. Dr. Gruen testified that he did not make the phone call because respondent "didn't tell me to do it." Exhs. R-1, A-14 at 74; Tr. at 190. When respondent called the FAA pilot

[11] See Administrator v. Raab, NTSB Order No. EA-5300 at 3 (2007).

deviation line, he identified himself as the pilot, and did not mention a second pilot. Exhs. A-15, A-16; Initial Decision at 222; Tr. at 162. Although not answering the question of who physically flew the airplane, it indicates that respondent had "final authority and responsibility for the flight."[12] Furthermore, we have long held that an instructor is always the PIC on an instructional flight,[13] and that the PIC is not necessarily the pilot who operates the controls or directs the course of a flight.[14] We have also held that the PIC is the individual who has overall responsibility for and control of the flight.[15]

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[12] Title 14 C.F.R. § 1.1 defines "pilot in command," stating it means the person who:

> (1) Has final authority and responsibility for the operation and safety of the flight;
>
> (2) Has been designated as pilot in command before or during the flight; and
>
> (3) Holds the appropriate category, class, and type rating, if appropriate, for the conduct of the flight.

[13] See Administrator v. Hamre, 3 NTSB 28, 31 (1977) ("Regardless of who is manipulating the controls of the aircraft during an instructional flight, or what degree of proficiency the student has attained, the flight instructor is always deemed to be the pilot-in-command."); see also Administrator v. Strobel, NTSB Order No. EA-4384 (1995).

[14] Administrator v. Jeffreys, 4 NTSB 681, 682 (1982); see also Administrator v. Funk, NTSB Order No. EA-2915 (1989).

[15] Administrator v. McCartney, 4 NTSB 925, 926 (1983).

Dr. Gruen held a private pilot certificate, had 500 flying hours, and was working toward a commercial pilot certificate; respondent had over 7,000 hours and was an ATP and a CFI. Tr. at 157, 181; Exh. A-12 at 11. We have held that an ATP is "held to the highest degree of care," and must accept responsibility for the events of the flight.[16] Here, respondent and Dr. Gruen had a well-established instructor/student relationship. Dr. Gruen received many hours of flight training from respondent. Tr. at 181; Exhs. A-14 at 16-22, A-13 at 15, 17, 20-21, 26-41.

Although testifying that respondent never touched the controls, when Dr. Gruen described practicing emergency procedures, he said that, while instructing him, respondent "would pull the throttle" to initiate the emergency procedure. Exhs. R-1 at 34, A-13 at 26. That there was no designation of PIC by agreement between the flight participants only exacerbates respondent's position. As an ATP and CFI, respondent has the responsibility to make sure that he and the participants in the flight agree on such a designation of PIC. This, along with our holding that the instructor is always the PIC, promotes safety by avoiding confusion in the cockpit.[17]

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[16] Administrator v. Kimsey, NTSB Order No. EA-4537 at 3 (1997).

[17] See Administrator v. Walkup, 6 NTSB 36, 37 (1988).

Although the law judge did not "fully explain his rationale for determining that respondent was pilot-in-command,"[18] given our existing precedent on this issue, we find that the Administrator has established that respondent was the PIC during the flight. We also comment on respondent's duty to exercise the highest standard of care as an ATP, and that his acquiescence, or even worse his obliviousness, to such violations was inexcusable.[19] The Administrator properly pursued this action against respondent.

Respondent next argues that the law judge erred in finding there were unauthorized ADIZ penetrations on the flight at issue. Respondent's Appeal Br. at 11. Given the lengthy testimony and evidence that the Administrator presented at the hearing, we find this argument without merit. See Tr. at 57-108, 115-136, 140-202; Exhs. A-1, A-3, A-5, A-6, A-7, A-8, A-9, A-12, A-14, A-15, A-16. Further discussion regarding this argument is unnecessary.

Respondent also argues that the law judge erred when he did not "accept" respondent's filing of a report under the ASRP. Specifically, respondent argues that the FAR violations he committed were inadvertent. Respondent's Appeal Br. at 11. We

[18] See id. at 39.

[19] See Administrator v. Peacon, NTSB Order No. EA-4607 at 15 (1999).

have long treated a respondent's assertion that he is eligible for a waiver of sanction under the ASRP as an affirmative defense.[20] Moreover, in asserting an affirmative defense, the respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification.[21] Therefore, based on this standard, respondent must fulfill his burden of establishing that he has met all criteria of the ASRP, and is therefore eligible for a waiver of sanction. Here, respondent has not met this burden; respondent did not present evidence to prove that he fulfilled all four criteria,[22] and instead argues only that his violation was inadvertent. Respondent also has not produced sufficient evidence to dispute the law judge's assessment that the violations were not inadvertent. As such, we do not find that respondent is eligible for a waiver of sanction under the ASRP.

In addition to the due process argument addressed above, respondent presents a further Constitutional argument, stating that a 90-day suspension for a "person that flies for a living ... would cause a great hardship" and that the imposition of

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[20] Administrator v. Smith, 5 NTSB 1560, 1564 (1986).

[21] See Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994).

[22] Supra at n.5.

such a sanction would constitute a violation of the Equal Protection Clause. Respondent's Appeal Br. at 12. We have repeatedly expressed the view that, "such considerations are not a proper basis for modifying an otherwise legitimate sanction."[23] Furthermore, respondent makes "no showing that the sanction amount is inconsistent with precedent."[24]

Finally, respondent argues that the law judge erred "in finding that safety in air commerce or air transportation and the public interest requires the affirmation of the Administrator's Order of Suspension." Respondent's Appeal Br. at 13. Respondent reasons that the Administrator's policy regarding air defense identification zones deals with security, and not safety. Id. A challenge as to whether a particular FAR violation amounted to an unsafe action was raised in the case of Administrator v. Good, NTSB Order No. EA-5026 at 3-4 (2003), where we said:

> The difficulty with respondent's arguments is that we are not here to make abstract determinations about whether we think a particular action is "safe," or if one action is safer than another. Our role here is to promote air safety by adjudicating alleged violations of the FARs, and we do so by reviewing the elements of the cited rule and the facts that are established on the record. As a matter of law, except perhaps in a

[23] Administrator v. Basco and Koch, NTSB Order No. EA-4788 at 2 (1999), citing Administrator v. Van Ovost, NTSB Order No. EA-4681, n.9 (1998).

[24] Id.

> most unusual circumstance not present here, a violation of the FARs involving operational requirements is, by definition, an unsafe aviation practice.

Overall, we find that safety in air commerce or air transportation and the public interest require us to affirm the order of suspension and the decision of the law judge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed; and

3. The 90-day suspension of respondent's airline transport pilot certificate, and any other pilot certificate now held by respondent, shall begin 30 days after the service date indicated on this opinion and order.[25]

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

[25] 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).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
MARION C. BLAKEY,	*	
ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-17813
	*	JUDGE FOWLER
DAVID LEE MOESLEIN, JR.,	*	
	*	
Respondent.	*	

Garmatz Federal Courthouse
Courtroom 9D
101 West Lombard St.
Baltimore, MD 21201

Tuesday,
January 30, 2007

The above-entitled matter came on for hearing, pursuant to notice, at 10:19 a.m.

BEFORE: WILLIAM E. FOWLER, JR.
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958 as that Act was subsequently amended on the appeal of David Lee Moeslein, Jr., from an Order of Suspension dated August 31, 2006, issued by the Enforcement Division of Chief Counsel's Office of the Federal Aviation Administration. Said Order of Suspension seeks to suspend the Respondent Moeslein's Airline Transport Pilot Certificate Number 2694486 for a period of 90 days.

The Administrator's Order of Suspension pursuant to the National Transportation Safety Board's Rules of Practice serves as the complaint in this proceeding, and this matter has been heard before this United States Administrative Law Judge, as is provided by the Rules of Practice, specifically Section 821.42 of those Rules, the Judge is given the option either to subsequently issue a written decision in a proceeding of this type or, to as I'm going to do forthwith at this time, following the conclusion of the proceeding, issue an oral initial decision ordinarily referred to as a Bench Decision.

Following notice to the parties, this matter came on for trial in Baltimore, Maryland, on January 30, 2007. The Respondent was not present, but was very ably represented by Jay Cohen, Esquire. The Complainant in this proceeding, the

Federal Aviation Administrator, was likewise very ably represented by Stephen Dunn, Esquire, of the Regional Counsel's Office, Federal Aviation Administration. Both parties through counsel have been afforded the opportunity to offer evidence, to call, examine and cross-examine witnesses in behalf of their cases. In addition, the parties were accorded the opportunity to make argument in support of their respective positions.

I have reviewed the testimony and documentary exhibits during the course of this proceeding here today. The Administrator has had four witnesses; Respondent did not choose to proceed. Respondent did not appear. The Respondent chose not to put on any evidence at all. Many technical motions, by Respondent the majority of which I denied. I allowed the Administrator to amend his complaint as to the full name of the Respondent David Lee Moeslein, Jr., and as to whether or not there was proper service upon the Respondent pertaining to this proceeding and case.

We’re dealing here with an unauthorized ADIZ penetration of an ADIZ zone that substantially encompasses the Washington area, in this 3-126. Here we have two unauthorized penetrations by the flight of the Respondent on July 10, 2004 on his departure and subsequent return to the Martin State Airport in Maryland on July 10, 2004. And the Administrator has charged improper use of the Respondent's transponder, failing to utilize his transponder and have the requisite

transponder beacon code which made the Respondent's flight on both of these penetrations to become a primary target.

After reviewing all of the testimony and evidence, I would have to find and conclude that the Administrator's case is sound, it's validly premised and the Administrator has proven all of the allegations that she has set forth in her Order of Suspension of August 31, 2006, where Respondent David Lee Moeslein, Jr., is concerned. There is no question that you have an unauthorized entrance into a restricted area and particularly in this NOTAM territorially speaking that deals with the Washington and Camp David area, very vital and important area where the President, Vice President, and other important officials are concerned. It is of the utmost priority if a primary target is sighted as the Respondent was here on these incursions, that this be rectified. I have heard a number of cases like this, and not with two incursions, usually it was one, of the ADIZ, and the sanction has been substantially less than the 90-day period of suspension sought here by the Administrator. However, as I stated a moment ago, the testimony and the documentary exhibits, and the radar plots were all devastating to any valid defense I feel that the Respondent had come up with. Inspector John Alan Cumberpatch's testimony was particularly pertinent, germane and apropos where the Administrator's Letter of Suspension was concerned, because with the Respondent, David Lee Moeslein, Jr., we are dealing

with a very experienced airline transport pilot as well as being a flight instructor, and where we have a situation that an alleged NASA report was filed on behalf of the Respondent, it would not be apropos, and I have not accepted it because I don't' believe these violations were inadvertent, which most ADIZ violations are, at least most of the ones I've had the privilege and pleasure of hearing. For an experienced pilot like Mr. Moeslein to engage in this is hard to understand. Apparently this is his first violation of any infraction of the FAA regulations. The Board gives little credence to this. I usually do, but I don't deem this to be a mitigating factor that I can give credence to at this time. This is a very novel case from my perspective in that the Respondent has chosen not to go forward. He has come forth with some ostensibly novel defenses, most of which, based on the totality of the evidence, I have not accepted and given much weight to. So that as I mentioned, it is my determination here that despite the developments of surprise raised by the Respondent, as stated by the Administrator's counsel of some thing that he was unaware of, that is counsel for the Administrator, I still feel that this has not impaired the Administrator's case. Being in an ADIZ without permission without the proper transponder beacon code means that the Respondent's aircraft constitutes a hazard. There's ample testimony that there was other air traffic in the area at this time. The Administrator's evidence mainly

through Inspector John Alan Cumberpatch has shown that the Respondent was in fact the pilot-in-command of this flight, that he made the telephone call pursuant to the telephonic requests by the FAA to so report, and that the Administrator, as I have mentioned, is validly premised in bringing this action.

So that ladies and gentlemen, I will now proceed to make the following specific findings of fact and conclusions of law accordingly:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) It is found that the Respondent, David Lee Moeslein, Jr., was and is the holder of Airline Pilot Certificate Number 2694486.

(2) It is found that on or about July 10, 2004, the Respondent acted as pilot-in-command of a Piper PA-284-201, the aircraft in question, Identification Number N27GS, operated on a flight in the vicinity of Martin State Airport, Maryland.

(3) It is found at all relevant times the aircraft was owned by Robert B. Hollen.

(4) It is found that at the time of the flight a Notice to Airman, commonly referred to as a NOTAM, was in effect effecting the airspace in which the Respondent was operating.

(5) It is found that the NOTAM prohibited operations of an aircraft within the Washington, D.C. area described in

the aforesaid NOTAM except in accordance with the operating requirements and procedures specified in the NOTAM.

(6) It is found the NOTAM was issued pursuant to 14 C.F.R. 99.7 and 99.139, Federal Aviation Regulations.

(7) It is found that prior to the flight, in the conduct of this flight it is obvious that Respondent failed to become familiar with all available information concerning that flight; namely the NOTAMs concerning flight restrictions, emergency traffic rules pertinent to the Respondent's flight.

(8) It is found that during the Respondent, David Lee Moeslein, Jr., operated the aircraft within the area described in the NOTAM.

(9) It is found that during the flight the Respondent did not comply with the operating requirements and procedures specified in the NOTAM.

(10) It is found that by entering the effected airspace without complying with the operating requirements and procedures specified in the NOTAM, Respondent risked interception by military aircraft and the possible use of deadly force.

(11) It is found by entering the effected airspace without complying with the operating requirements and procedures specified in the aforesaid NOTAM, the Respondent risked interception by military aircraft and the possible use of deadly force.

(12) It is found that Respondent thereby operated his aircraft in a careless manner so as to potentially endanger the lives and property of another.

(13) It is found that by reason of the foregoing, the Respondent violated the following sections of the Federal Aviation Regulations as set forth in Paragraph 14 of the Administrator's Order of Suspension. I will incorporate by reference what each one of these sections says without spelling it out individually. Violation of (a) Section 91.13(a); (b) Section 91.39(c); (c) Section 91.25(c); and (d) Section 99.7. All of these regulations being in violation as I have just alluded to and incorporated the meaning of them by reference of the Federal Aviation Regulations.

(14) This Judge finds that safety in air commerce or air transportation and the pubic interest does require the affirmation of the Administrator's Order of Suspension, dated August 31, 2006, in view of the Respondent's aforesaid violations.

ORDER

IT IS ORDERED, ISSUED, AND DECREED that the Administrator's Order of Suspension, dated August 31, 2006, be and the same is hereby affirmed.

DATED & EDITED ON
FEBRUARY 21, 2007

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WILLIAM E. FOWLER, JR.
Administrative Law Judge