

SERVED: January 7, 2009

NTSB Order No. EA-5426

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 5th day of January, 2009

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18417
v.)	
)	
PETER SERAFINO GIANNOLA,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Respondent has appealed the written decisional order of Administrative Law Judge Patrick G. Geraghty, issued on December 10, 2008.¹ The law judge denied respondent's appeal of the Administrator's emergency revocation order, which the

¹ A copy of the decisional order is attached.

Administrator based on violations of 14 C.F.R. §§ 61.89(a)(1)² and 91.13(a).³ We deny respondent's appeal.

On November 10, 2008, the Administrator issued an emergency order revoking respondent's combined third-class medical and student pilot certificate.⁴ In the order, the Administrator alleged that respondent acted as PIC of a Bellanca Viking on a passenger-carrying flight in Torrance, California, during which he did not have a private pilot certificate. The order also alleged that, based on respondent's deliberate operation of the aircraft as described, respondent acted in a careless or reckless manner. Based on these allegations, the Administrator alleged that respondent had violated the regulations described above, and ordered revocation of respondent's combined third-class medical and student pilot certificate. Respondent filed a timely answer to the order, in which he admitted that he acted as PIC of the Bellanca Viking on June 15, 2008, on a passenger-carrying flight while he did not have a private pilot

² Section 61.89(a)(1) prohibits a student pilot from acting as pilot-in-command (PIC) of an aircraft that is carrying a passenger.

³ Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52 - 821.57.

certificate. Respondent, however, denied that he acted in a careless or reckless manner, and denied that he violated §§ 61.89(a)(1) and 91.13(a). Respondent also presented three "affirmative defenses" in his answer.

Subsequent to the Administrator's issuance of the emergency revocation order, the Administrator filed a motion for summary judgment, in accordance with the Board's Rules of Practice. 49 C.F.R. § 821.17(d). In this motion, the Administrator asserted that no factual issues existed for resolution, because respondent admitted that he had operated the aircraft with a passenger when he did not have at least a private pilot certificate, as alleged. The Administrator disputed each of respondent's affirmative defenses, which consisted of arguments that: respondent had relied upon the statements of "those certified by the Administrator and by those employed by the Administrator who advised [r]espondent that no enforcement action would be taken against him"; mitigation of the sanction is appropriate because respondent reported his misconduct to the Administrator; and revocation is an inappropriate sanction because respondent was preparing to obtain his private pilot certificate. Respondent's Answer at 1-2. The Administrator attached to the motion a declaration of Aviation Safety Inspector Nathan Morrissey, who investigated respondent's alleged violation. In his declaration, Inspector Morrissey

stated that he believed respondent had shown a deliberate disregard for the regulatory requirements that establish minimum levels of safety, and that it was extremely dangerous for respondent to operate a Bellanca Viking, which is a complex aircraft, on a passenger-carrying flight with only a student pilot certificate. Respondent opposed the Administrator's motion.

The law judge granted the motion for summary judgment on the basis that respondent had admitted to the factual allegations in the complaint, and conceded that he had originally planned a solo flight, but took his fiancée as a passenger. The law judge also found that the evidence established that respondent knew that his decision to carry a passenger was in violation of § 61.89(a)(1). The law judge further concluded that a violation of § 61.89(a)(1) exhibited that respondent lacks the qualifications to hold a student pilot certificate, and that revocation was therefore the appropriate sanction. The law judge rejected respondent's affirmative defenses, finding that respondent's disclosure of his conduct to the Administrator was not truly voluntary, and that respondent had not obtained his private pilot certificate, so he was not entitled to a reduced sanction. The law judge determined that respondent's alleged reliance on FAA employees' representations that he could complete more training and not suffer a penalty

for his actions did not create a factual issue. Finally, the law judge rejected respondent's argument that his conduct did not amount to a violation of § 91.13(a). The law judge found that no factual issues existed to warrant a hearing, and granted the motion for summary judgment.

Respondent now appeals the law judge's decisional order in which the law judge granted summary judgment. Respondent argues that whether he lacks the qualifications to hold a student certificate is a disputed material fact, which is inappropriate for disposition via summary judgment. Respondent also contends that a factual dispute exists with regard to whether respondent deliberately violated § 61.89(a)(1), and whether he engaged in a scheme with his certified flight instructors to cover up his actions. Respondent also reiterates the arguments he presented in his answer as affirmative defenses, and argues that he did not violate § 91.13(a). Finally, respondent argues that the law judge was "predisposed" to granting the Administrator's motion for summary judgment, because the law judge did not set a hearing date, which indicates that he anticipated receiving and granting a motion for summary judgment. The Administrator opposes each of respondent's arguments, and urges us to uphold the law judge's decision.

Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis that the pleadings and

other supporting documents establish that no factual issues exist, 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).⁵ In submitting a motion for summary judgment, the burden rests on the moving party to establish that no factual issues exist. Moreover, courts will generally view a motion for summary judgment in a light most favorable to the nonmoving party when a genuine dispute regarding the facts exists. Fed. R. Civ. P. 56(c); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (stating that, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'"); see also Administrator v. Englestead, NTSB Order No. EA-4663 at 2

⁵ A *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the nonmoving 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.

(1998).

We first note that respondent has admitted that he conducted the flight at issue with a passenger, and that such conduct amounts to a violation of § 61.89(a)(1). The evidence in the record also establishes that respondent knew that he violated § 61.89(a)(1), as charged, as his October 17, 2008 letter to Inspector Morrissey states that he realized after agreeing to take his fiancée on the flight that, "[t]his act was a violation of Part 61.89(a)."

Respondent's assertions that he does not lack the qualifications to hold a student pilot certificate and his arguments concerning sanction are not persuasive. First, we note that we have previously held that, "[i]n 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."⁶ We do not believe that respondent's arguments concerning the appropriateness of the sanction are legitimate affirmative defenses, as they do not attempt to justify his conduct. With regard to respondent's contentions that he does not lack the qualifications to hold a

⁶ Administrator v. Nadal, NTSB Order No. EA-5308 at 10 (2007) (citing 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)).

student pilot certificate, we note that we have long held that the Administrator may show that a respondent lacks the qualifications necessary to hold a certificate in two ways: by establishing that a respondent has engaged in a continuing pattern of conduct showing disregard for regulations or lack of a disposition of compliance; or by showing that the respondent's conduct during one event is sufficiently egregious that it demonstrates that the respondent lacks the care and judgment to hold a certificate. Administrator v. Wingo, 4 NTSB 1304, 1305-1306 (1984); see also Administrator v. Frost, NTSB Order No. EA-3856 (1993). When we discuss the Administrator's allegations concerning a respondent's alleged lack of qualifications to hold a certificate, we generally do so in the context of a discussion concerning the appropriateness of a sanction. In this regard, we have also recognized that, "a disposition to flaunt important safety regulations" is a proper basis for certificate revocation. Administrator v. Oliveira and Morais, NTSB Order No. EA-4995 at 13 (2002). As such, respondent's assertion that he does not lack the qualifications to hold a certificate depends largely upon our resolution of his asserted defense that his conduct was justified because he relied on certified flight instructors who allegedly approved of his conduct.

To the extent that respondent asserts that the instructors condoned his conduct, and that he relied upon the fact that

these instructors did not call and inform the FAA of his conduct, such an argument does not excuse his actions. Respondent admitted that he knew he exercised poor judgment in allowing his fiancée to accompany him on the June 15, 2008 flight. The fact that respondent's instructors did not call the FAA concerning respondent's conduct does not preclude the Administrator from alleging that he violated a regulation and therefore lacks the qualifications necessary to hold a certificate. In this regard, we have previously held that an FAA office's position on a particular matter does not preclude the Administrator from disagreeing with the position and bringing an enforcement action based on conduct that the other office had previously approved. Administrator v. Darby Aviation, NTSB Order No. EA-5159 at 24-25 (2005) (stating that, "[i]n a large organization such as the FAA there will inevitably be differing views," and that, "[t]he Administrator can, and indeed should, overrule a FSDO's position if she believes it is incorrect or may be inconsistent with safety"). Here, respondent's argument concerns flight instructors who are not FAA employees.⁷ In light of our holding in Darby, we are not

⁷ Although respondent cites and attaches a deposition transcript from a Los Angeles Flight Standards District Office employee, and although elsewhere in his appeal brief respondent refers to the employee's determination not to pursue enforcement action, respondent does not specifically raise this issue in regard to his argument that he is qualified to hold a student pilot

inclined to find that flight instructors' ostensible approval of conduct by not reporting respondent's conduct will preclude the Administrator from bringing an enforcement action, especially when such instructors are not FAA employees.

With regard to respondent's arguments concerning sanction, we find that respondent has not provided a sufficient reason for us to disagree with the Administrator's sanction of revocation. First, we will defer to the Administrator's choice of sanction when the Administrator has introduced the Sanction Guidance Table into the record. Garvey v. NTSB, 190 F.3d 571, 581 (D.C. Cir. 1999) (directing the Board to defer to the Administrator with regard to a respondent's sanction, when the Board had reduced the sanction on the basis that the pilot had acted "responsibly and prudently"); Administrator v. McCarthney, NTSB Order No. EA-5304 at 11-12 (2007); Administrator v. Law, NTSB Order No. EA-5221 at 4 (2006). Here, the Administrator requested judicial notice of the Sanction Guidance Table in his motion for summary judgment. Moreover, we have previously held

(..continued)

certificate. In his appeal brief, respondent also cited (and attached) a second deposition transcript from an FAA employee. The Administrator, in a footnote in his reply brief, "request[ed]" that the transcripts "be stricken and not considered." We caution the Administrator that such a request should be in the form of a written motion, and produced as a separate filing. Respondent treated the request exactly in that manner, and correspondingly filed an Opposition to Motion to Strike. We deny the Administrator's motion.

that revocation is appropriate when a student pilot transports a passenger. Administrator v. Marsalko, 1 NTSB 893, 894 (1970) (stating that, "[t]his Board, and the Civil Aeronautics Board before it, have traditionally viewed the action of a student pilot carrying a passenger as a serious offense which warrants revocation"). Furthermore, respondent does not provide any support for his arguments that the fact that he informed the FAA of his violation requires us to mitigate the sanction or the fact that he is working towards obtaining his private pilot certificate requires us to reduce his sanction. Respondent did not inform the FAA of his violation until over 2 months after the flight at issue, and did not file a report under the Aviation Safety Reporting Program. In addition, respondent's contentions concerning the fact that he expected to obtain his private pilot certificate within the year are merely based on conjecture and speculation.

Respondent's argument that the law judge erred in determining that respondent violated 14 C.F.R. § 91.13(a) also lacks support. The record establishes that respondent violated 14 C.F.R. § 61.89(a)(1). We have long held that the Administrator proves a violation of § 91.13(a) when he has proven an operational violation.⁸ Moreover, Inspector

⁸ See Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003); Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002);

Morrissey's declaration unequivocally supports the Administrator's contention that respondent acted in a careless or reckless manner. Overall, respondent's admitted operation of the Bellanca Viking with a passenger not only was a violation of § 61.89(a), but also violated § 91.13(a).

Finally, respondent's contention that the law judge was predisposed to granting summary judgment in favor of the Administrator lacks proof. Respondent has not shown that the law judge exhibited any conduct indicating that he was biased. Given that we have previously held that a party who asserts that a law judge is biased must present more than conjecture to support this contention, we do not credit respondent's assertion in this regard. See, e.g., Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008) (citing Administrator v. Nickl, NTSB Order No. EA-5287 at 7-8 (2007) and Administrator v. Wheeler, NTSB Order No. EA-5208 at 9 (2006)).

In conclusion, we find that respondent has not provided a basis upon which to find that a hearing is necessary because a genuine issue of material fact exists.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and

(..continued)
Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002).

3. The Administrator's emergency revocation of respondent's combined student pilot and third-class medical certificate is affirmed.

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

SERVED DEC. 10, 2008

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

ROBERT A. STURGELL, *
Acting Administrator *
Federal Aviation Administration, *
Complainant, *

v. *

PETER S. GIANNOLA, *
Respondent. *

Docket No.: SE-18417
JUDGE GERAGHTY

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DECISIONAL ORDER

This proceeding comes before the Board upon the Appeal of Peter S. Giannola, herein Respondent, upon his Appeal from an Emergency Order of Revocation, the Complaint, which Order revokes on an emergency basis Respondent's Combined Third Class Medical and Student Pilot Certificate.

That Complaint was issued on behalf of the Administrator, Federal Aviation Administration (FAA), herein the Complainant.¹

As grounds for the action taken against Respondent by Complainant, the Complaint alleges that:

1. You are now, and at all times mentioned herein, were the holder of Combined Third Class Medical and Student pilot Certificate issued on or

¹ Respondent filed a Petition Challenging the Administrator's Emergency Determination, which Petition was denied by the Chief Judge in his Order of November 19, 2008.

about May 25, 2007.

2. On or about June 15, 2008, at approximately 1900 PDT, you acted as pilot in command of a Bellanca Viking, civil aircraft registration number N6556V, on a passenger carrying flight in the vicinity of Torrance Airport, Torrance, California.
3. During your operation of civil aircraft number N6556V as referenced in paragraph 2 above, you did not have at least a Private Pilot Certificate.
4. Your deliberate operation of N6556V, in the manner and under the circumstances described, was careless or reckless so as to endanger the life or property of another.

Upon those factual allegations, it is charged that Respondent, by acting as pilot in command on the passenger carrying flight of June 15, 2008, acted in regulatory violation of Sections 61.89(a) and 91.13(a), Federal Aviation Regulations (FARs).²

Respondent, by his Counsel, filed an Answer to the Complaint and therein admitted the validity of the allegations stated in Paragraphs 1 through 3 of the Complaint. Those factual allegations are therefore established.

Respondent's Answer denies the allegation of Paragraph 4 and, additionally, sets forth three (3) Affirmative Defenses which are addressed subsequently below.

Complainant filed a Motion for Summary Judgment and to Shorten Time for response thereto. As this is a proceeding subject to the expedited time requirements applicable to emergency proceedings, the Motion to Shorten time was granted by Order of November 26, 2008, which Order directed Respondent to submit any response by December 5, 2008.

² These Sections of the FARs, as pertinent herein, provide that:

Section 61.89(a), which states that a student pilot may not act as pilot in command of an aircraft: (I) that is carrying a passenger; and

Section 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent's Counsel has filed his Pleading in Opposition to Motion for Summary Judgment and therein elaborates on the Affirmative Defenses of his Answer and asserts additional disputes that he contends are material facts requiring trial to resolve and thus precluding a grant of Complainant's Motion.

The granting of a Motion for Summary Judgment is warranted wherein the pleadings, any supporting documentation and the entire record establishes that there does not exist any genuine dispute as to any material fact as would necessitate trial for resolution.

As noted above, Respondent, in his Answer, admitted the truth of allegations 1 through 3 of the Complaint. Upon those admissions, therefore, it is established that Respondent, in his flight operation of June 15, 2008, acted in violation of the provisions of Section 61.89(a), FARs, and I so hold.

Before turning to the Parties' respective arguments, a brief statement of the circumstances of Respondent's flight and of his subsequent actions is appropriate.

On the date charged, Respondent planned a solo flight; however, his then-fiancée came to the airport and wanted to accompany him on the flight. Respondent agreed and took her as passenger on the flight. After the flight, Respondent encountered his former Certificated Flight Instructor (CFI), M. Holten, who expressed dissatisfaction with Respondent's action.

At the time of the flight, Respondent was training with another CFI, K. Ness. A few weeks later, Respondent met with both CFI's and the group contrived a scheme not to report Respondent's activity of June 15, 2008, to the FAA, on Respondent's agreement to take further dual instruction. This scheme was agreed to by the three. As agreed, Respondent continued with CFI Ness, but later, CFI Holten apparently changed his mind and threatened to report Respondent's June 15 action to the FAA. Upon hearing of this from CFI Ness, Respondent then wrote to the FAA to bring the June 15, 2008 incident to the FAA's attention.³

³ Respondent's Brief, Exhibit 1.

As noted herein, supra, in his Brief, Respondent elaborates on his Answer's Affirmative Defenses and also asserts additional matter, all of which, it is contended, are disputes of material fact requiring trial to resolve and thus precluding a grant of Complainant's Motion. However, that there exist some matters and/or their significance or applicability for resolution of this proceeding that may be in dispute does not mean, ipso facto, that such disputed matters are disputed material facts.

Respondent argues that Complainant has not established facts which prove Respondent lacked care, judgment and responsibility at the time of his flight and that as lack of qualification is requisite for imposing revocation, since, it is argued, the record does not establish such that a dispute as to a material fact exists.

To the contrary, the record herein establishes prima facie evidence, unrebutted, that shows a lack of care, responsibility and judgment by Respondent in all his activities pertinent herein and thus a lack of qualification.

As Respondent concedes that he carried his passenger "...against his better judgment...",⁴ the inference, which I made from that statement, is that he knew that his decision to carry a passenger was contrary to the provision of Section 61.89(a), FARs, and thus his action was a deliberate choice to act in violation of that FAR. Subsequently, Respondent participated in a scheme to prevent his deliberate violation coming to the attention of the FAA.⁵ In addition, Complainant's position is supported by the Board's historical determination that a violation of Section 61.89(a) FAR, is a serious offense warranting revocation⁶ and, therefore, one that establishes lack of qualification. On Board precedent and the uncontested evidence of record, I hold that the totality of Respondent's actions demonstrate a lack of judgment, care, and responsibility and, therefore, a lack of qualification to hold an Airman Certificate.

⁴ Id. Complainant's Brief, Exhibit 1.

⁵ Id.

⁶ Administrator v. Marsalko, 1 NTSB, 893, 894 (1970), and cases cited, n.4.

Respondent asserts that Complainant is required to prove that Respondent conducted, i.e., operated, the aircraft in flight in a manner showing lack of qualification. It is also argued that based upon the Affidavit of CFI K. Ness⁷, that Respondent must be presumed to have flown the aircraft in a competent manner.

Respondent's arguments are unavailing in that in this proceeding there is no burden upon Complainant to prove how Respondent conducted, that is, flew the aircraft. That Respondent presumably completed his flight without incident has no bearing upon the issue of lack of qualification. The question of lack of qualification is, rather, based upon, as discussed herein, supra, his decision to undertake the flight in deliberate violation of the FARs and his subsequent actions related thereto.

As to the Affidavit of CFI Ness, I simply observe that I would not assign weight or credibility to his statements. On this record, it is shown that Mr. Ness, although a CFI was, nevertheless, willing to conspire with Respondent and CFI Holton, to engage in a scheme to avoid Respondent's violation coming to the FAA's attention.⁸

Respondent asserts that Respondent's actions subsequent to the flight of June 15th did not evince a lack of qualification and that Complainant has not proven otherwise.

The evidence contradicts Respondent's argument. As previously discussed, following that flight, Respondent (more on this point infra) proceeded to conspire with his two CFI's in devising a scheme which was intended to preclude the FAA from becoming aware of the violation Respondent had committed. As discussed, supra, such subsequent activity warranted the conclusion that Respondent acted with a lack of judgment and responsibility.

⁷ Respondent's Brief, Exhibit 2.

⁸ The actions of CFI's Holton and Ness, in this Judge's view, show a lack of the degree of judgment and responsibility expected of a CFI.

Respondent contends that a material fact exists as to the issue of appropriate sanction on the argument that Respondent is entitled to mitigation of sanction as he voluntarily disclosed his violation to the FAA.

On the evidence herein, the Board's Opinion and Order in Administrator v. Fallon, EA-2675 (1988, is inapposite. Thus, Respondent's reliance thereon fails.

As previously discussed, Respondent, subsequent to the June 15, 2008 flight, willingly engaged in a scheme with his two (2) CFI's, the purpose of which was to preclude FAA's becoming aware of Respondent's violation. It was not until later, after the scheme had been underway that, when Respondent was made aware that CFI Holton had become dissatisfied and threatened to inform the FAA, that Respondent wrote to the FAA advising of his violation.⁹ The reasonable inference is that if CFI Holton had not become dissatisfied and threatened to report to the FAA, Respondent would not have written his letter to the FAA. Action taken under duress, to preclude CFI Holton's threatened action, is not a voluntary disclosure.

Respondent states that a dispute exists as to whether revocation is the appropriate sanction and, therefore, summary judgment should not be. The cases cited by Respondent do show that Board precedent holds that mitigation of revocation sanction for a Section 61.89(a) FARs violation, to that of a six (6) month suspension, is justified by the obtaining of a higher degree of certification than Student Pilot, e.g., Private Pilot, mitigates the prior violation. Respondent argues that as he has substantially completed Private Pilot requirements and shows his continuing interest in aviation, he is entitled to mitigation, and that this issue presents a material dispute. The facts are, however, that Respondent has not achieved, that is, obtained, a higher level of Airman Certificate, nor has Respondent cited a Board Decision, nor is this Judge aware of any such Opinion and Order, wherein the Board held mitigation of sanction was warranted solely upon continued training and interest in aviation. The Board cases cited by Respondent do not support his position and do not establish existence of a disputed material fact.

⁹ Respondent's Brief, Exhibit 1, pg. 2. Affidavit K. Ness, Exhibit 2, pg. 2. Items 9, 10, Respondent's Brief.

Respondent further contends that a reviewable dispute exists as to appropriate sanction in that Respondent, to his detriment, relied upon representations made to him by an authorized representative of the FAA Administrator.

Respondent argues first that he has relied to his detriment on the terms of the "training plan" scheme entered into between Respondent and the two CFI's. The Respondent and the two CFI's agreed that if Respondent accomplished an additional 15 hours of dual instruction that such would serve as punitive remedy for his operational violation and that no further action would be necessary, that is, no report by either Respondent or by the two CFI's would be made of the violation to the FAA.

This argument fails as there is no showing that either CFI Holton or CFI Ness held any authorization to make such representations on behalf of the Administrator FAA. Nor, particularly, does it appear that the CFI's held any delegated authority to make binding determination for the Administrator FAA as to appropriate punitive action. Simply put, Respondent agreed to this scheme at his peril.

Respondent also argues that he relied, to his detriment, on representations made to him by a Mr. E. Wood, an Aviation Safety Inspector (ASI), who, having received the report/letter Respondent sent to the FAA, determined that the "counseling" from Respondent's CFI's and the "training plan" was adequate remedial action. The ASI took no further action concerning Respondent's violation. Respondent contends that he acted to his detriment by incurring expenses of time and money for additional flight training upon ASI Wood's representation of no further FAA action.

Respondent's understanding vis-à-vis ASI Wood does not present a disputed material fact. Any statements made by ASI Wood cannot, as a matter of law, act to preclude the Administrator from taking the instant enforcement action. Respondent's argument is that ASI Wood's representation estopped the Administrator; however, the defense of estoppel is not available against the Federal Government, herein the Federal

Agency, FAA.¹⁰ The Board, in its Opinion and Order in Administrator v. Darby Aviation d/b/a/ Alphajet International, Inc., EA-5159 (2005) at 25, expressed the same conclusion holding that the Administrator can overrule a decision/position of a subordinate that the Administrator finds is incorrect or inconsistent with safety.¹¹

Lastly, Respondent argues against a finding of a violation of Section 91.13(a) FARs, as a residual offense. Respondent misstates Complainant's burden of proof, that is, Complainant, in order to sustain this charge, is not obligated to offer evidence as to how Respondent conducted the actual flight, that is, Respondent's piloting skills. Board precedent holds that wherein an operational violation is proven, as it is herein, a finding of a residual violation of Section 91.13(a) FARs is warranted. Accordingly, Complainant's charge of a violation of Section 91.13(a) FARs is in accord with precedent and not arbitrary or capricious. Thus, this issue is not a disputed material fact.

Moreover, on the proven circumstances of Respondent's decision to carry a passenger in violation of Section 61.89(a) FARs, I conclude that the charged violation of Section 91.13(a) FARs is not simply a residual violation. Rather, the record shows that Respondent acted deliberately and the violation was, therefore, reckless and potentially endangered the life and property of another: his passenger.

In summation, therefore, I find and conclude that on the evidence of record, evaluating such in a manner favorable to Respondent that, nonetheless, it must be held that there does not exist any triable issues of material fact. Further, on historic Board precedent, and for the deference required to be given Complainant's choice of sanction, the sanction of revocation must be affirmed and, therefore, Complainant's Motion for Summary Judgment granted.

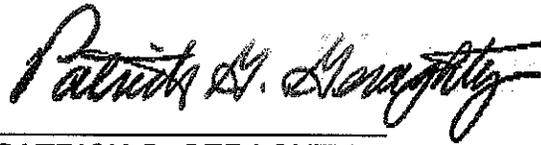
¹⁰ United States v. Ware, 473 F.2d 530 (9th Cir. 1973).

¹¹ The failure of action by ASI Wood appears as not in accord with internal FAA procedures. Complainant's Brief, Declaration of N. Morrissy, Paragraphs 6, 10.

IT IS ORDERED THAT:

1. Complainant's Motion for Summary Judgment be and hereby is granted.
2. The Emergency Order of Revocation, the Complaint, is affirmed as issued.

ENTERED this 10th day of December 2008 at Denver, CO.



**PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE**