SERVED: July 20, 2009

NTSB Order No. EA-5464

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 July, 2009

J. RANDOLPH BABBITT, Administrator, Federal Aviation Administration, Complainant, v. GERALD HANRAHAN, Respondent.	Docket SE-18329

OPINION AND ORDER

Respondent, pro se, appeals the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued in this proceeding on January 21, 2009.[1] By that decision, the law judge denied respondent's appeal of the Administrator's order

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

suspending his private pilot certificate. We deny respondent's appeal.

The Administrator's suspension order, dated July 31, 2008, and filed as the complaint in this case, alleged that respondent violated 14 C.F.R. § 91.130(c) when he entered the Burbank (California) Airport Class C airspace on January 15, 2008, without first establishing two-way radio communication with the air traffic control (ATC) facility having jurisdiction over that airspace and thereafter maintaining those communications,[2] and that, as a result of the violation and its ensuing situation, he also violated § 91.13(a), which prohibits any person from operating an aircraft in a careless or reckless manner so as to endanger the life or property of another.

At the hearing, the Administrator proved that respondent failed to establish two-way radio communication with Southern California Terminal Radar Approach Control (SCT) before entering the Class C airspace, and failed to maintain communication with that facility while within that airspace. As a result of his entry into that airspace and failure to establish and maintain the required two-way radio communications, a Southwest Airlines

[2] Section 91.130(c) requires a person operating an aircraft in Class C airspace, prior to entering that airspace, to establish two-way radio communications with the ATC facility providing air traffic services, and thereafter to maintain said communications while within that airspace.

flight on course to arrive at Burbank Airport was turned to avoid respondent's aircraft. At the hearing, respondent's own testimony was the only evidence he presented; he very succinctly stated that he did not believe he was careless and reckless and that, on every other occasion when he departed Van Nuys Airport, the "tower issued a limit to altitude of 2,500 feet or below," but that, on this day, no restriction had been given. He further stated that he was "on a VFR [flight]," that it "was a clear day," and that he "avoided the aircraft that was approaching." During his closing argument, respondent admitted that he did not have "proper communication with [the ATC facility controlling] the Class C airspace."

At the conclusion of the hearing, the law judge issued an oral initial decision, finding that the Administrator proved the alleged violations by a preponderance of reliable, probative and substantial evidence. The law judge reduced the suspension from 45 days to 40 days, "tak[ing] into account" that respondent, "apparently as a result of the testimony in session today, came to the realization that he had acted in regulatory violation of Section 91.130(c)," and "because of the attitude exhibited by the Respondent in Court today."[3]

On appeal, respondent states that the "argument for this

[3] The Administrator does not appeal the reduction in sanction.

appeal is prosecutorial misconduct." As the Administrator points out in the reply brief, respondent's appeal does not articulate specific objections to the law judge's order, but contends that the Administrator's counsel was evasive or delayed providing the names and addresses of FAA witnesses that respondent intended to call to testify, and, additionally, that an exhibit, a written statement from an FAA air safety investigator, did not reflect that respondent and the investigator had an agreement that the violation would result in remedial training only. The Administrator's reply brief frames the issues as: whether the law judge's determination that respondent violated the alleged provisions is supported by a preponderance of the reliable, probative and substantial evidence of record and whether the law judge's conclusions were in accordance with law and precedent; and whether prejudicial error occurred.

After carefully reviewing the record and the pleadings, and although we commend the Administrator for attempting to formulate respondent's brief in proper legal format, we disagree with the Administrator's framing of the issues presented by respondent. In point of fact, we believe that respondent's appeal fails to identify any issue warranting our consideration. Section 821.49 of the Board's Rules of Practice states that the Board will consider only these issues: are the findings of fact

each supported by a preponderance of reliable, probative and substantial evidence; are conclusions made in accordance with law, precedent and policy; are the questions on appeal substantial; and, have any prejudicial errors occurred? Respondent has not identified any specific finding or conclusion of the law judge that he believes is either contrary to the evidence in the record or not adequately supported by it, nor has he undertaken to demonstrate error in the law judge's disposition of the matter in terms of its merits or the propriety of the sanction.[4] Having said that, we note that we have held that law judges have wide latitude in overseeing hearings.[5] We have also held that we will not overturn a law judge's evidentiary ruling absent a showing that the ruling was an abuse of discretion.[6]

The Administrator proved, and respondent admitted, that there was a violation of § 91.130(c). We have long held that violations of § 91.13(a) may be residual and derivative in nature and are proven when an operational violation is

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[4] We note that respondent's appeal brief states that he spoke to the Administrator's counsel following the hearing and indicated that he "would go ahead and start the suspension if she could give me until February 13, 2009," inferring that was the reason he appealed to this Board.

[5] See Administrator v. Kachalsky, NTSB Order No. EA-4847 (2000).

[6] See Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

established.[7] We find ample evidence that respondent violated these two regulatory provisions.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's decision, including the reduction in sanction from 45 to 40 days, is affirmed; and

3. The 40-day suspension of respondent's private pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[8]

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

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[7] See, e.g., Administrator v. Giannola, NTSB Order No. EA-5426 (2009); Administrator v. Seyb, NTSB Order No. EA-5024 (2003); Administrator v. Nix, NTSB Order No. EA-5000 (2002).

[8] 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

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In the matter of:                 *
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ROBERT A. STURGELL,               *
Acting Administrator              *
Federal Aviation Administration,  *
                                  *
         Complainant,             *
v.                                *    Docket No.:  SE-18329
                                  *    JUDGE GERAGHTY
GERALD HANRAHAN,                  *
                                  *
         Respondent.              *
* * * * * * * * * * * * * * * * * *
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NTSB Courtroom
1515 West 190th Street
Suite 555
Gardena, California

Wednesday,
January 21, 2009

The above-entitled matter came on for hearing, pursuant to Notice, at 9:22 a.m.

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Complainant:

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Federal Aviation Administration
Western Pacific Region
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310-725-7110

On behalf of the Respondent:

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707-328-6005

ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board on the appeal of Gerald Hanrahan, herein Respondent, from an Order of Suspension, which seeks to

suspend his Private Pilot Certificate for a period of 45 days. The Order of Suspension as provided by the Board's rules serves herein as the Complaint and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant.

The matter has been heard before this Judge and, as provided by the Board's Rules of Practice, I am issuing a bench decision in the proceeding.

Pursuant to notice, the matter came on for trial on January 21, 2009 in Gardena, California. The Complainant is represented by one of his Staff Counsel, Ms. Lisa Toscano, Esquire, of the Western Pacific Regional Counsel Office. Respondent was present at all times and elected to represent himself pro se.

The parties have been afforded the opportunity to offer evidence, to call and examine and cross-examine witnesses, and to offer evidence in support of their respective positions. I have considered all of the evidence, both oral and documentary, and that evidence that I do not specifically mention is viewed by me as being essentially corroborative or not affecting the outcome of the decision.

AGREEMENTS

By prior pleading, it was agreed there was no dispute as to the allegations contained in Paragraphs 1, 2, 4, and 5 of the Order of Suspension, the Complaint. Therefore, those

matters are taken as having been established for purposes of the decision.

DISCUSSION

As indicated, the Complainant seeks the suspension of 45 days, and that is predicated upon the allegation that as a result of the Respondent's admitted operation from Van Nuys Airport on or about January 15th, 2008, when he acted as pilot in command, that he so operated the aircraft as to be in regulatory violation of Section 91.130(c) of the Federal Aviation Regulations, which essentially requires for operation in Class C airspace the obtaining and maintaining of two-way radio communication between the controlling ATC and the pilot.

It is also alleged that by reason of failure to maintain the two-way communications and a result of a potential conflict with a Southwest Airlines aircraft that was approaching into Burbank, that the Respondent overall acted in regulatory violation of Section 91.13(a) of the Federal Aviation Regulations. That Regulation states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

In closing argument, the Respondent stated in open session that he was accepting that the evidence offered by the Complainant during the proceeding will establish that he had, in fact, operated in regulatory violation of Section 91.130(c) of the Regulations. Upon that statement by the Respondent, the

discussion of the evidence pertaining to that regulatory charge is unnecessary. I simply observe, however, that if I were to discuss all of the evidence, my conclusion would necessarily have to be that the evidence by a clear preponderance does establish that the Respondent did depart from Van Nuys Airport, did penetrate into the overlying Class C airspace. And therefore, since he did not obtain and maintain two-way radio communications with the controlling air traffic control facility, which was the Southern California TRACON, that he did operate in the violation of the Section of the Federal Aviation Regulations, which I've referenced.

I simply observe here that just because on prior departures you obtained from Van Nuys a clearance to climb to 2,500 or below, that should have alerted you that there was some reason that they were holding you at 2,500. And if you had looked at the pertinent terminal chart, which you are required under the Regulations to have the charts available to you for your operations or at least have reviewed them, you would've realized that they were holding you below 2,500 to avoid the overlying floor.

In any event, on your admission, it is established and I do find that you did operate in regulatory violation of Section 91.130(c) of the Regulations.

With respect to the charge violation of Section 91.13(a) of the regulations, it has been historically held by

the Board and affirmed by various United States Courts of Appeal that potential endangerment is sufficient. It is not necessary for a violation under this section of Regulations to wait for some catastrophic incident to occur. As long as there is a reasonable nexus between the actions of the particular individual and the potential for endangerment or hazard to persons or property, that is sufficient to establish the violation.

Herein, the plots as established in the testimony of Mr. Whitaker and the exhibits do show that the two aircraft, the Respondent's and the Southwest, were on paths, which if deviation had not been issued by the controller, that there was a potential for the two aircraft to come within conflict as they were headed for each other. There was no communication with the Respondent. The controller gave an alert to the Southwest Airline’s aircraft.

It took place in Class E airspace, see and avoid, VFR, yes. However, the Southwest is operating in IFR and is being controlled. It doesn't make any difference if it's in Class E airspace, even though it's see and avoid. The deviation given to Southwest was the requirement because of Respondent's operation of his aircraft. That is at least a potential endangerment to the life and property of Southwest Airlines and the people aboard that particular aircraft and anyone else who would be on the ground in the unfortunate event

if, in fact, something occurred like a midair collision.

I find therefore that upon Board precedent and the facts as established, that it is showing that the Respondent did operate in a careless manner so as to endanger potentially the life and property of others. And, therefore, he did act in regulatory violation of Section 91.13(a) of the Regulations, and I so find.

Turning to the issue of sanction, sanction is simply not for the particular Respondent in the case. He is also to act as a deterrence to others who might be so similarly disposed or to possibly educate them as not to act in a similar manner. Deference is to be shown to the Administrator's choice of sanction as required by Statute, absent a showing that it's either arbitrary or capricious or not in accord with Board precedent. The sanction shows that it is in accord with precedent and is not arbitrary or capricious. However, I am going to take into account that the Respondent, apparently as a result of the testimony in session today, came to the realization that he had acted in regulatory violation of Section 91.130(c) of the regulations. And therefore, I will reduce the sanction sought because of the attitude exhibited by the Respondent in Court today.

The violations are still serious, and therefore it is a minimal reduction, but still reduction. I therefore will modify the suspension from that of 45 days to a period of 40

days. And with that modification, I will affirm the Order of Suspension, Complaint, herein.

ORDER

IT IS THEREFORE ADJUDGED AND ORDERED THAT:

1. The Order of Suspension, the Complaint herein, be and the same hereby is modified to provide for a period of suspension of 40 days instead of 45 days.

2. The Order of Suspension, the Complaint herein, as modified, be and the same hereby is affirmed.

3. The Respondent's private pilot certificate be and the same hereby is suspended for a period of 40 days.

Entered this 21st day of January 2009, at Gardena, California.

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EDITED
FEBRUARY 13, 2009

Patrick G. Geraghty
Administrative Law Judge