

SERVED: July 20, 2009

NTSB Order No. EA-5465

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

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket No. SE-18359
	v.)	
)	
MEHDI SAGHAFI,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty in this matter, issued following an evidentiary hearing held on December 5, 2008.¹ By that decision, the law judge affirmed the

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

Administrator's complaint and ordered a 160-day suspension² of respondent's commercial pilot certificate, based on violations of 14 C.F.R. §§ 91.123(b)³ and 91.13(a).⁴ We deny respondent's appeal.

The Administrator's August 21, 2008 order, which served as the complaint before the law judge,⁵ alleged that, on July 30, 2007, respondent operated as pilot-in-command of a Cessna T-210 aircraft on an instrument flight rules, passenger-carrying flight from Kansas City to Aspen, Colorado. The complaint stated that, while west of Denver at flight level (FL) 170, air traffic control (ATC) instructed respondent to "climb and maintain" FL 180. Compl. at ¶ 3. The complaint alleged that respondent operated contrary to this instruction when he first ascended to FL 180, but then descended to 17,500 feet, and that this descent caused a loss of separation between respondent's aircraft and another aircraft. The complaint stated that

² The law judge reduced the suspension period from 180 days to 160 days. The Administrator does not contest the law judge's reduction in sanction.

³ Section 91.123(b) provides as follows: "Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised."

⁴ Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another.

⁵ The Administrator amended the complaint to make minor alterations. Our references refer to the amended complaint.

respondent therefore violated § 91.123(b), and that his conduct was careless or reckless, in violation of § 91.13(a).

At the hearing, the Administrator called Richard Austin, who conducts evaluations and investigations of pilot deviations at the Quality Assurance office at the Denver ATC Center, to testify. Mr. Austin recorded the ATC communications in this case, and concluded that ATC instructed respondent to climb to FL 180 and maintain that altitude, and that respondent climbed to FL 180, but then deviated by descending below FL 180. Mr. Austin stated that respondent advised ATC that he was descending to "one seven thousand." Tr. at 18. Mr. Austin testified that ATC instructed respondent more than once to stay at FL 180, and that ATC notified respondent that they considered his conduct a deviation. Mr. Austin also described radar data depicting respondent's flight, and identified respondent's loss of separation with another aircraft, which resulted in a conflict alert. Mr. Austin stated that the data indicated that the most significant altitude deviation was 600 feet. He opined that respondent had deviated from an ATC instruction, and ATC did not contribute to or cause the deviation.

The Administrator also called Steven Begnaud, the air traffic controller who instructed respondent to climb to and maintain FL 180, to testify. Mr. Begnaud stated that, during the flight, respondent apparently made calls to Mr. Begnaud that

he did not hear. Mr. Begnaud further stated that he did not understand respondent's request, and that another pilot intervened in an attempt to relay the message. The other pilot told Mr. Begnaud that respondent asked "for 1,000 feet higher and a deviation right of course," to which respondent replied, "that is correct." Tr. at 49. Mr. Begnaud testified that he recognized respondent's voice, but that respondent did not use his call sign when he communicated with ATC. Mr. Begnaud recalled that he instructed respondent to fly to FL 180, and stated that respondent deviated from this instruction. Mr. Begnaud testified that he was "100 percent" sure that respondent had acknowledged his instruction. Tr. at 58. Mr. Begnaud stated that, had respondent stayed at FL 180 as instructed, the conflict alert would not have sounded.

The Administrator concluded the case-in-chief with the testimony of aviation safety inspector Gary Kopp, who investigated respondent's deviation. Inspector Kopp opined that respondent had deviated from the ATC instruction, which resulted in a loss of separation. The law judge held that Inspector Kopp was qualified to offer his opinion that respondent had acted in a careless or reckless manner. Tr. at 76. Inspector Kopp also described a prior violation, in which respondent deviated from an ATC instruction under circumstances similar to those in this case. Inspector Kopp also opined that respondent's deviation

was deliberate, in that he intentionally descended from FL 180, and that respondent should have repeated the instructions from ATC, which is normal protocol, rather than saying "thank you."

Following the conclusion of the Administrator's case, respondent testified on his own behalf. He acknowledged that he had a violation in 2003 for failure to follow an ATC instruction, and that, subsequent to that violation, he underwent extensive remedial training and regained his certificates. He testified that he takes long trips in his Turbo 210, and is a medical examiner who conducts examinations on behalf of the FAA. He stated that, during the flight at issue, he had two of his grandsons in the aircraft, and that one of them had motion sickness as a result of the turbulence. Respondent stated that, when he was in the Denver Approach area, he received an altitude of 17,000 feet after he requested it, and that, once he left Denver Approach and was handed to Mr. Begnaud at Denver ATC Center, he was already on "block clearance." Respondent testified that he tried to contact Denver Center several times and made a request for a deviation left and right, and up and down for 1,000 feet, but that he received no response. Respondent stated that another aircraft relayed the message for him, and that Mr. Begnaud then gave respondent a right heading. Respondent recalled he went to his assigned heading, maintaining FL 180, and that he heard

Mr. Begnaud say, "deviation approved." Tr. at 99. Respondent testified that, based on this, he believed ATC had granted his request for block clearance. Respondent stated that he encountered more turbulence and bad weather when he was at FL 180, and that he turned around to help his grandson, who had vomited. His other grandson, who was sitting beside him, then informed respondent, "you are down," and pointed to the altitude. Tr. at 100. Respondent stated that he told his grandson that his altitude was permissible, because he was on block clearance. Respondent testified that Mr. Begnaud then came on the radio and instructed him to return to FL 180. Respondent opined that he did not deviate from the ATC instruction because he believed he was on block clearance. He stated that he filed a report under the Aviation Safety Reporting Program (ASRP) after the flight.⁶

⁶ Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain other requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past 5 years; and (4) the person completes and mails a written report of the incident to NASA within 10 days of the violation.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he determined that respondent had deviated from the ATC instruction to maintain FL 180, and therefore violated 14 C.F.R. §§ 91.123(b) and 91.13(a), as charged. The law judge summarized the evidence and held that it showed that a deviation of 600 feet occurred during the flight, thus upholding the Administrator's charge of a deviation to at least 17,500 feet. He noted that Mr. Begnaud had testified that he believed his instruction to maintain FL 180 was clear. The law judge determined that ATC had never received respondent's request for a deviation, and that respondent's failure to use his aircraft identifier and repeat back the ATC instruction, as well as his propensity to say "thank you" several times, contributed to the communication problems. The law judge acknowledged that respondent had a prior violation, and that he had filed a report under the ASRP, but that he was not eligible for a waiver of sanction under the ASRP because of his prior violation. The law judge concluded that respondent had violated the regulations, as charged, but reduced the sanction from 180 days to 160 days, based on respondent's completion of additional training.

On appeal, respondent argues that the law judge erred in allowing Inspector Kopp's opinion that respondent had acted in a careless or reckless manner during the flight, and in ordering a

160-day suspension of his certificate. Specifically, respondent contends that whether he acted in a careless or reckless manner was a legal conclusion about which Inspector Kopp was not qualified to testify. Respondent argues that Inspector Kopp erred in testifying that respondent "deliberately" deviated from the ATC instruction because respondent did not hear the instruction. Respondent urges us to reverse the law judge's conclusion concerning the § 91.13(a) violation. With regard to sanction, respondent argues that a 160-day suspension is excessive, because it is based on a finding that he acted in a careless or reckless manner. He asserts that we should consider, as mitigating factors, that he had a sick passenger on board, that he incorrectly heard the ATC instruction, that he has had no additional violations, and that he has taken affirmative steps to prevent such miscommunication in the future. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.⁷

We find that respondent's arguments do not provide a basis for reversal of the law judge's decision. We have previously held that law judges have significant discretion in overseeing

⁷ We also note that, prior to filing his appeal brief, respondent filed a motion requesting oral argument. We find that the issues have been fully briefed by the parties and we conclude that oral argument is not necessary. See 49 C.F.R. § 821.48.

testimony and evidence at hearings,⁸ and respondent has not shown that the law judge erred by allowing Inspector Kopp to opine that respondent had acted in a careless or reckless manner. Moreover, respondent does not appear to dispute that he violated § 91.123(b) when he failed to maintain FL 180; this violation indicates that respondent also violated § 91.13(a).⁹ We further note that respondent's admitted act of turning around to assist his sick grandson while encountering turbulence amounts to a

⁸ See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, we will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001). Furthermore, the Board is aware of the wide latitude that the Administrative Procedure Act provides agencies with regard to the admissibility of evidence at administrative hearings. 5 U.S.C. § 556(d).

⁹ In Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003), we stated as follows:

The Administrator consistently includes a "careless or reckless" charge (*i.e.*, a § 91.13(a) charge) in her complaints charging violation of operational regulations ... Under the Administrator's interpretation of her regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven. The cases that have established this policy are too numerous to list, some of the most recent being Administrator v. Nix, NTSB Order No. EA-5000 (2002) at 3; and Administrator v. Pierce, NTSB Order No. EA-4965 (2002) at n.2.

We note that Seyb also involved a respondent's deviation from an ATC instruction.

violation of § 91.13(a). As such, Inspector Kopp's testimony that he believed respondent had acted in a careless or reckless manner was not dispositive.

Regarding respondent's arguments concerning the sanction that the law judge imposed, we find that the law judge adequately considered the potentially mitigating factors that respondent listed in his appeal brief, and the law judge's reduction in the suspension period is indicative of such consideration. The Administrator's Sanction Guidance Table provides for a suspension of 30 to 90 days for a violation of § 91.123(b), but states that the suspension period may be increased when an airman has committed prior violations. In general, we defer to the Administrator's choice of sanction.¹⁰ Moreover, we have also previously held that failure to adhere to ATC instructions is a serious violation,¹¹ and recognize that respondent's conduct on the flight at issue could have led to a sobering outcome. We find that a suspension of respondent's commercial pilot certificate for 160 days is appropriate under the circumstances of this case.

¹⁰ Garvey v. NTSB, 190 F.3d 571, 581 (D.C. Cir. 1999); Administrator v. Law, NTSB Order No. EA-5221 at 4 (2006); see also Go Leasing v. NTSB, 800 F.2d 1514, 1518 (9th Cir. 1986).

¹¹ See, e.g., Administrator v. McCarthney, NTSB Order No. EA-5304 at 8-9 (2007) (citing several cases and stating that, "[w]e have adhered to [a] standard of stringent compliance with ATC instructions in a number of cases").

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision, including the reduction in sanction from 180 to 160 days, is affirmed; and
3. The 160-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹²

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

¹² 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: *

ROBERT A. STURGELL, *
ACTING ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-18359

JUDGE GERAGHTY

MEDHI SAGHAFI, *

Respondent. *

* * * * *

Byron G. Rogers U.S. Courthouse
1929 Stout Street
Courtroom C-502
Denver, Colorado 80294

Friday,
December 5, 2008

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

SCOTT R. MORRIS, ESQ.
Federal Aviation Administration
Northwest Mountain Region
Office of the Regional Counsel
1601 Lind Avenue SW
Renton, Washington 98055-4099
(425) 227-1417
(425) 227-1007 -- fax
scott.morris@faa.gov

On behalf of the Respondent:

NICHOLAS E. PHILLIPS, ESQ.
Phillips, Mille & Costabile, Co., L.P.A.
7530 Lucerne Drive, Suite 200
Middleburg Heights, Ohio 44130
(440) 243-2800
(440) 243-2852
nphillips@pmlawyers.com

1 ORAL INITIAL DECISION

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a
3 proceeding before the National Transportation Safety Board on the
4 appeal of Dr. Mehdi Saghafi, herein Respondent, from an Order of
5 Suspension which purposes to suspend his Commercial Pilot's
6 Certificate for a period of 180 days.

7 The Order of Suspension serves herein as the Complaint.
8 It was filed on behalf of the Administrator, Federal Aviation
9 Administration, herein the Complainant.

10 The matter has been heard before this Law Judge, and as
11 provided by the Board's rules, I'm issuing a bench decision in the
12 proceeding.

13 Pursuant to this Notice, this matter came on for trial
14 on December 5, 2008 in Denver, Colorado. The Complainant was
15 represented by one of his Staff Counsel, Scott R. Morris, Esq. of
16 the FAA's Northwest Mountain Region. The Respondent was present
17 at all times and was represented by his Counsel,
18 Nicholas E. Phillips, Esq., of Middleburg Heights, Ohio.

19 The Parties have been afforded full opportunity to offer
20 evidence, to call, examine and cross-examine witnesses, and to
21 make argument in support of their respective positions.

22 I have considered all of the evidence, both oral and
23 documentary. And in reviewing the case, I will only highlight
24 that which leads to the conclusion I have reached herein. The
25 evidence that I don't specifically mention is viewed by me as

1 essentially being corroborative or as not materially affecting the
2 outcome of the decision.

3 AGREEMENTS

4 By pleading, it was agreed there was no dispute as to
5 the allegations contained in Paragraphs one and two of the
6 Complaint. And accordingly, those matters are taken as having
7 been established for purposes of the Decision.

8 DISCUSSION

9 As noted above, the Complainant seeks a suspension of
10 180 days predicated upon the Respondent's admitted operation on
11 July 30, 2007 when he was pilot in command of a Cessna Turbo 210
12 on an IRF passenger carrying flight from Kansas City to Aspen,
13 Colorado.

14 It is alleged that in the course of the flight, that he
15 received an instruction from air traffic control, ATC, and that he
16 failed to comply with that instruction and deviated there from and
17 that deviation precipitated a loss of separation with another
18 aircraft that was then also being handled by the particular sector
19 of air traffic control.

20 As a consequence of those actions, it is alleged that
21 the Respondent acted in regulatory violation of Section 91.123(b)
22 which provision as appropriate here, prohibits operation of
23 aircraft contrary to an ATC instruction in an area in which air
24 traffic control is exercised.

25 And as an aside here, clearly, there's no dispute that

1 at the time ATC was exercising control in the area and over
2 Respondent's aircraft.

3 It is also charged that the Respondent as a consequence
4 of his actions acted in regulatory violation of Section 91.13(a)
5 which prohibits operation of an aircraft in a careless or reckless
6 manner so as to endanger the life or property of others. The
7 Complainant makes his case through numerous Exhibits and the
8 testimony of three witnesses.

9 First of the witnesses was a Mr. Richard Austin who is a
10 quality assurance specialist and he's in the quality assurance
11 department with the air traffic control center in Longmont,
12 Colorado. He had 20 years with the Federal Aviation
13 Administration. He holds a controller's certificate, private
14 pilot's license, and at 20 some years in the United States Army as
15 a crewman on helicopters.

16 The witness sponsored several Exhibits, of which
17 primarily C-1 and C-2 are of significance herein, and also C-6.
18 And taking those: C-2 is a transcript of the voice communications
19 between Sector six of air traffic control, which was the sector in
20 which the Respondent was operating at the time, and the
21 controller.

22 C-1 is the CD of the voice communications themselves.
23 There was also a video presentation, I guess would be the way to
24 say that, in which there was a coordination between the radar, the
25 data, and the voice communications showing the actual interaction

1 between the various aircraft that were transiting that Sector six
2 at the time of the alleged incident.

3 Suffice to say that, based upon what Mr. Austin
4 testified, that showed on the end tab and the various plots, that
5 there was a deviation of 600 feet, and then shown on also C-7,
6 which is a preliminary deviation report.

7 Ultimately, it was Mr. Austin's opinion that the pilot,
8 in fact, had deviated from an ATC instruction, which instruction
9 was to maintain flight level one eight zero. And further, that
10 having listened to the tapes and reviewed the material which he
11 sponsored in evidence, it was also his opinion, which was part of
12 the duties that he has in the quality assurance department, that
13 there was no contribution by the controller to the incident
14 itself, that is, the incident did not involve any untoward actions
15 on the part of the controller.

16 On cross-examination, Mr. Austin conceded he had never
17 spoken with the Respondent himself. And listening to materials,
18 he was of the opinion that there was, between the conflict report,
19 only a couple seconds between the advice to the Respondent on
20 possible conflict and when it appeared on the controller's screen.

21 Mr. Steven Begnaud was the controller operating Sector
22 six at the time that this occurred. He's been with the Denver
23 Center 18 years, a full journeyman air traffic controller. He
24 testified that the pilot checked in from apparently Denver
25 Approach Control, and that the Respondent was, in fact, as

1 indicated, operating towards Aspen through Sector six, which also
2 apparently controls westbound departures out of DEN, Denver
3 International Airport.

4 According to the controller, the Respondent made several
5 calls which the controller indicated that he either didn't hear or
6 were unintelligible to him, and that also there were instances, no
7 call sign given by the pilot communicating. However, that on his
8 testimony, by listening to the voice and sequence, that he was
9 sure that he was, in fact, communicating with the Respondent.

10 The controller also pointed out that his instruction
11 was, in fact, quite clear to maintain flight level one eight zero.
12 In his opinion, the pilot -- the Respondent deviated from the
13 specific instruction that the controller had given to him, that
14 is, to maintain the assigned altitude.

15 And C-8 was the controller's written statement which he
16 indicates he prepared somewhere within two hours of the incident
17 itself. And I have reviewed that statement, which is consistent
18 with his testimony and the voice communications as they appear in
19 Exhibit C-2.

20 On cross-examination, there was discussion as to
21 responses that were received and I'll discuss that in some detail.
22 There's a use of "thank you, sir," which occurs in the voice
23 transcript at time 1750:34, and also another one that appears at
24 1750:41 as to his interpretation of that, which the controller
25 maintained on cross he understood as coming from the Respondent

1 and that he was, in fact, 100 percent sure of that.

2 The final witness was Mr. Gary Kopp. He is an Aviation
3 Safety Inspector. He's been with the FAA in that capacity for
4 about two and a half years. However, he has an extensive aviation
5 background. He was with Eastern Airlines for 17 years, apparently
6 until they went out of business. Then he was a pilot with United
7 Airlines, retired as a Captain from United Airlines, and was also
8 in the United States Air Force as a C-130 pilot. He has an
9 Airline Transport Pilot Certificate, a string of type ratings, and
10 also Flight Engineer 20,000 plus hours, so he was certainly in a
11 position to be able to offer an opinion in this case.

12 In his opinion, having discussed this investigation,
13 which he took over from another investigator who had been on the
14 case but assigned to go to training. In any event, Mr. Kopp
15 testified that in his opinion, the Respondent had deviated from an
16 assigned altitude, maintain flight level. He therefore created a
17 conflict between his aircraft, 314 Delta, and another one which I
18 believe is 800 Echo Charlie.

19 The witness was also of the opinion that the action
20 taken by the Respondent was, in fact, a reckless operation and
21 that it had to be intentional, that is, the aircraft didn't do it
22 by itself and that the Respondent left the altitude in which he
23 had been assigned and therefore, at least there was a potential of
24 a midair collision, which he viewed being intentional, that is,
25 deliberate as opposed to careless, which is something that you do

1 by misadventure possibly.

2 Respondent also has a prior violation history, as
3 pointed out by this witness, and it appears in Exhibit C-12. And
4 I do note that there was an action taken in 2004 for an event that
5 occurred earlier, I believe in 2003. And that as a result, the
6 Respondent voluntarily surrendered his certificate.

7 The fact that he voluntarily surrendered his certificate
8 does not affect the fact that there was in this instance a showing
9 of a prior violation. So there is on the evidence in front of me
10 a bonafide violation history on the part of the Respondent.

11 It was acknowledged also by the witness that the
12 Respondent had filed a safety reporting program report with NASA
13 -- NASA, all caps -- but that as the witness pointed out, under
14 the Advisory Circular Paragraph nine, that immunity cannot be
15 granted where the particular individual has a prior violation
16 history, that is, a regulatory violation that had occurred within
17 five years of the present violation.

18 And, of course, here we have the violation history of
19 the action in 2004 and this incident which takes place in 2007.
20 And so therefore, clearly within the five years, so the NASA
21 report would not have any force and effect on sanction in this
22 case.

23 The witness also sponsored C-16, which were the weather
24 reports. And on his testimony, they clearly showed that any pilot
25 flying the route that the Respondent was taking on that July

1 flight would have expected to find a line of thunderstorms along
2 the Front Range and thunderstorms in the mountains.

3 The Respondent is placed at the time of the deviation
4 at about Georgetown area and that there was a radial and distance
5 given also in the quality assurance report.

6 But, in any event, Georgetown is well within the
7 mountains and would not be unusual in the late afternoon to find
8 buildups. And in this case, in fact, thunderstorms were reported,
9 and, of course, you would have cumulonimbus and related
10 turbulence. That should not have been unexpected.

11 On cross-examination, as I've indicated, there was a
12 question and answer about recklessness and how it was defined by
13 this witness. And the witness again reiterated that it was his
14 opinion that it was a reckless operation since it was
15 intentionally done, that is, Respondent intentionally departed
16 from his assigned altitude of flight level one eight zero and
17 commenced a descent without obtaining amended clearance.

18 Respondent testified on his own behalf. He has a long
19 history as a Designated Aviation Medical Examiner and I took note
20 of Respondent's Exhibits R-3 and R-4, which are certificates from
21 the FAA commending the Respondent for his activities as an
22 Aviation Medical Examiner.

23 Unfortunately, in my view, while that is certainly
24 commendable, it really doesn't have much bearing on flight
25 operations.

1 I've also taken into account Exhibits R-5 and R-6, what
2 are affidavits from the two passengers in the aircraft, which were
3 the grandsons of the Respondent, Matthew and James Rhodes. And as
4 it turns out, on the argument at least, these are the same
5 passengers that were in the aircraft at the time of the prior
6 violation.

7 Respondent conceded his prior violation history,
8 occurring with the same aircraft, however, that one occurring
9 essentially on the East Coast, whereas this one has been the Rocky
10 Mountain area.

11 Respondent gave somewhat of a rambling testimony as to
12 the occurrence, but it's clear from listening to him and parceling
13 the voice communications that the Respondent, in his mind at
14 least, was requesting a deviation either from turbulence or for
15 buildups and that what he thought would be a deviation to the
16 right and possibly a block altitude and that apparently, he
17 undertook to control his aircraft in accordance with what he had
18 requested from ATC.

19 Unfortunately, ATC never received that. The controller
20 that was actually controlling that flight said what the Respondent
21 requested was not what he acknowledged and was required to comply
22 with. The final instruction from a controller who was actively
23 controlling a particular flight is the governing clearance.

24 The controller in another sector or departure control
25 gives you an instruction, climb and maintain 6,000 and they hand

1 you off and the next controller tells you to, you know, climb and
2 maintain one two thousand, that's what you're supposed to do once
3 you accept it. That's the one that controls.

4 As to the evidence, in my view then the only thing I
5 wish to discuss in some detail is just the voice communications.

6 Looking at Exhibit C-2, it is clear that the controller
7 was not able to understand the initial call-up from the Respondent
8 in 41 Delta, shown as unintelligible on the typed transcript of
9 the voice recordings. And the controller clearly comes back and
10 tells them aircraft calling and apparently didn't even get the
11 call sign and was unintelligible. And he says try it again.

12 Fourteen Delta comes back again and asks -- requests a
13 deviation to the right, 1,000 feet up and down. And then in
14 parenthesis, get out of weather here. So that wasn't really clear
15 on the transcript.

16 Controller comes back and says still unreadable, cannot
17 recognize anything but the call sign, 14 Delta and gives the
18 altimeter setting.

19 And then there's a Good Samaritan pilot somewhere who
20 relays, he's requesting a deviation to the right and 1,000 feet
21 higher. Can't blame the controller. That is all he's getting.

22 It's not unusual to have a relay from another pilot in
23 the area and have this with a downed aircraft with an ELT.
24 Somebody over flying it will call in and say I've got an ELT
25 signal. Or even on a cross country, you might be in a dead space

1 area and another aircraft will hear it or say he's requesting, you
2 know, whatever. And so it's not uncommon or unusual for that to
3 occur.

4 In any event, there is then a response because the
5 Respondent clearly heard what this unknown pilot was relaying
6 because the Respondent comes back at 1750:34 and says, "That's
7 right, sir." And then the controller comes back and tells him,
8 and this is clearly the instruction from the controller, aircraft
9 designation, "Maintain flight level one eight zero deviation to
10 the right of course approved."

11 Immediately after that, 1750:41, so within five -- no,
12 point 05 seconds, 14 Delta says, "Thank you." Now, there was
13 conversation in the examinations as to why the controller felt
14 that the Respondent was acknowledging this clearance.

15 In my view, listening to the sequence and reviewing the
16 sequence, the sequence makes clear that the only conclusion to be
17 reached is that the Respondent is the individual responding with
18 thank you. That's the acknowledgement of receipt and compliance
19 with the instruction. And I would point out if one goes through
20 the rest of C-2, you find that the Respondent uses that expression
21 "thank you" repeatedly.

22 At 1756:39, it's unintelligible, but then you hear
23 "thank you."

24 At 1808:07, Respondent acknowledges a "descend and
25 maintains sixteen thousand, thank you," and I'm quoting.

1 And then again, towards the end of the transcript, you
2 again find "thank you" being used twice and then yes, sir, "thank
3 you."

4 And then there was another unknown, friendly pilot who
5 chimed in and said don't forget to file a NASA report. So they
6 were looking out for each other.

7 But, it's clear that the Respondent has a propensity not
8 to use his identifier -- the aircraft number -- merely to say
9 "thank you."

10 The Board has clearly opined several times that it's
11 incumbent upon pilots to closely listen to ATC instructions
12 because you don't always get from ATC what you're expecting. You
13 might ask for an altitude, and for whatever reason, ATC can't
14 comply and they will give you something else. Or you ask for a
15 heading change and they can't give it to you immediately.

16 And then an even worse scenario, you get your clearance
17 and you're expecting cleared as filed and you've got a whole new
18 route. And there you are flight planning your route while you're
19 sitting in the cockpit.

20 But, it's incumbent upon the pilot communicating with
21 ATC to be alert to what's being communicated. Just because you
22 think that you have requested, up and down or block altitude, if
23 ATC can't comply with that request, they're not going to give it
24 to you and they may change it.

25 In this case, the controller simply knew from what had

1 been relayed, there was a request for a deviation to the right and
2 higher is 1,000 feet, and he cleared the Respondent to maintain
3 flight level one eight zero. The Respondent acknowledged that
4 with a "thank you." And I specifically hold that that is his
5 acknowledgement, and therefore, he was bound to comply with that.

6 I simply observed that the Board has held and it is
7 good voice communication technique to identify who you are when
8 you're communicating with ATC as the Board has indicated.

9 And it is also the recommended practice to give a full
10 read back, that way if there is any confusion, the pilot reads
11 back to the controller something different than what the
12 controller had transmitted, the controller knows there's confusion
13 and the two of them can work it out. None of that was done here.
14 And that's to the Respondent's charge, not the Controller's.

15 Burden of proof in the case rests with the Complainant
16 as to the charges and it must be sustained by a clear
17 preponderance of the reliable and probative evidence.

18 On my review of the evidence, it is clear that the
19 Respondent was, in fact, given a specific instruction by ATC in an
20 area in which ATC was exercising control, that is, maintain flight
21 level one eight zero, who is also accepted by the Respondent with
22 a "thank you." Not the best voice communication technique, but
23 that was his acceptance.

24 And the controller then was going to handle the rest of
25 the aircraft in his sector predicated upon the compliance by the

1 Respondent. In fact, the Respondent on the evidence in front of
2 me deviated by descending without obtaining an amended clearance.
3 He may have had it in his head, but that's not what ATC had
4 authorized him to do.

5 The evidence also is not disputed that there was a loss
6 separation vertical between the two aircraft, which was Echo
7 Charlie, which had to be 1,000 feet and five miles. There was no
8 lateral compromise, but a vertical. And so there was a 600 foot
9 deviation.

10 In my view, the evidence clearly establishes that the
11 Respondent failed to comply with an acknowledged ATC clearance and
12 deviated there from by descending from his assigned altitude
13 without obtaining an amended clearance.

14 Also, I find on the evidence that there was, in fact, a
15 loss of separation between the Respondent's aircraft and the
16 following aircraft, which was 800 Echo Charlie, and I so hold.

17 Upon those conclusions, I find therefore that the
18 Respondent did operate in regulatory violation of Section
19 91.123(b) in that he operated contrary to an ATC instruction in
20 the area in which ATC was exercising control.

21 An operational violation sustains a finding of violation
22 of Section 91.13(a), and that I find this was a reckless operation
23 which was a deliberate departure from his clearance and at least
24 potentially endangered the life and property of others.

25 Turning to the issue of sanction, the Administrator

1 seeks suspension of 180 days. I have taken into account that
2 there's a prior violation history which, in my view, would add at
3 least 60 days to an individual violation such as we have here in
4 the absence of that history.

5 But, I also take into account that the Respondent has
6 undertaken additional training. He went back and started over
7 again, apparently, from what I can glean from his airman records.

8 And although, maybe it wasn't the best of performance,
9 he did accomplish it and I think he should get some benefit for
10 that because it shows to me at least an attempt to gain additional
11 instruction, knowledge and shows compliance disposition.

12 By saying that, I will therefore reduce the period of
13 suspension from 180 days to 160 days. And with that modification,
14 I will affirm the Order of Suspension.

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ORDER

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IT IS THEREFORE ADJUDGED AND ORDERED THAT:

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1. The Order of Suspension, the Complaint herein, is
hereby modified to provide for a suspension of 160 days instead of
180 days.

2. That the Order of Suspension, the Complaint herein
as amended for sanction hereby is affirmed.

1 Entered this 5th day of December, 2008, at Denver,
2 Colorado.

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7 EDITED & DATED ON

PATRICK G. GERAGHTY

8 JANUARY 15, 2009

Administrative Law Judge