

SERVED: November 18, 2009

NTSB Order No. EA-5489

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 18th day of November, 2009

<hr/>)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18458
v.)	
)	
MARK DAVID BAKHIT,)	
)	
Respondent.)	
)	
<hr/>)	

OPINION AND ORDER

Respondent, who proceeds pro se, appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., in this matter, issued following an evidentiary hearing held on June 23, 2009.¹ By that decision, the law judge affirmed the Administrator's complaint and ordered the suspension of

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

respondent's airline transport pilot (ATP) certificate with type ratings in Boeing 747-400 and BA-3100 aircraft, pending respondent's successful reexamination of his qualifications to hold an ATP certificate, under 49 U.S.C. § 44709.² Respondent appeals the law judge's order. We deny respondent's appeal.

The Administrator's emergency order³ against respondent, issued on December 15, 2008, alleged that respondent failed pilot proficiency checks conducted by Polar Air Cargo on or about September 17 and 28, 2008, and that respondent failed a pilot line check conducted by Polar Air Cargo on September 3, 2008. The order stated that, during the September 28 check, Aviation Safety Inspector David Lithgow observed respondent's performance, and determined that respondent: demonstrated marginal knowledge or understanding of numerous Boeing 747-400 systems, departed from an incorrect runway, failed to execute a go-around when he experienced a "full scale" glideslope indicator deflection, engaged in extensive maneuvering under

² Title 49 U.S.C. § 44709(a) provides that, "[t]he Administrator of the Federal Aviation Administration may ... reexamine an airman holding a certificate issued under section 44703 of this title."

³ Respondent subsequently waived the expedited procedures normally applicable to emergency proceedings. We also note that respondent seeks dismissal based on mistrial. We deny this motion as moot, because the motion contains arguments that respondent proffered in his appeal brief. We also find that the parties have fully briefed the issue central to this case, and that oral argument is not necessary. See 49 C.F.R. § 821.48.

instrument meteorological conditions without a clearance, and performed several other piloting errors. Order at ¶ 4. The Administrator's order further stated that, on September 30, 2008, the Administrator sent a letter to respondent requesting reexamination, pursuant to 49 U.S.C. § 44709, and that respondent did not submit to reexamination. As a result, the Administrator ordered suspension of respondent's ATP certificate until such time that respondent successfully completed a reexamination under § 44709. In response to the order, which became the complaint in this case, respondent presented two affirmative defenses: that the Administrator had no reasonable basis to reexamine his competency to hold an ATP certificate, and that no facts or circumstances indicated clear evidence of incompetence.

The case proceeded to hearing, at which the Administrator called Inspector Lithgow, who verified that he was present for respondent's September 28 proficiency check. Inspector Lithgow stated that the proficiency check occurred in a simulator, and that two captains from Polar Air were also present. Inspector Lithgow testified that he made a note of three mistakes that respondent made that caused him significant concern. In particular, Inspector Lithgow described that respondent took off on the wrong runway (25 left instead of 25 right), failed to execute a missed approach with a full scale glidescope indicator

deflection, and conducted extensive maneuvering in instrument meteorological conditions during a visual approach. Exh. A-8. Inspector Lithgow testified that he also noted seven minor errors, including respondent's lack of knowledge of system logic for the brake pressure accumulator, items that respondent missed when executing the preflight crew briefing, respondent's error in allowing the breakaway thrust setting to exceed 60 percent N1, respondent's oversight of the aileron position indicator malfunction during the taxi check, respondent's failure to follow the correct flight management system (FMS) procedure for executing a very high frequency omnidirectional range (commonly known as VOR) radial intercept, respondent's excess speed while in a holding pattern, and respondent's misunderstanding of the secondary flap position indicator display during a simulated leading edge flap malfunction. Exh. A-8 at 2. Inspector Lithgow testified that he informed respondent of his mistakes during his de-briefing with respondent, which immediately followed the proficiency check. Inspector Lithgow stated that he was concerned that respondent lacked situational awareness when executing the missed approach, and that he was especially concerned about respondent's aeronautical decision-making and judgment. Tr. at 34-35. Inspector Lithgow stated that the FAA does not order reexaminations lightly, and that he determined that reexamination of respondent's qualifications was

appropriate after reviewing respondent's records and noticing other previous failures of proficiency checks, and because respondent's mistakes on September 28 indicated deficiencies in the judgment and knowledge expected of someone who holds an ATP certificate.

On cross-examination, Inspector Lithgow acknowledged that he does not have specific familiarity with Polar Air's training program, that he did not request a print-out of the proficiency check from the simulator, and that he did not hear Captain Branstetter, who was present for the September 28 proficiency check, commend respondent for respondent's performance. Inspector Lithgow also acknowledged that respondent had received satisfactory evaluations in other proficiency checks. Tr. at 77-78; Exh. A-5 (indicating that respondent exercised satisfactory judgment during the September 3, 2008 check).

In response to the Administrator's case, respondent called William Hampton, who administered a proficiency check for respondent on August 8, 2008, in which respondent successfully passed all criteria. Tr. at 100-101; Exh. R-2. Captain Hampton stated that he is still a captain at Polar Air, but that he ceased to be a check airman after August 2008. Captain Hampton acknowledged that he told some people at Polar Air that he believed his act of passing respondent in the August 8 proficiency check was the reason that he is no longer a check

airman. On cross-examination, however, Captain Hampton testified that respondent was "hot or cold," and generally unpredictable when operating an aircraft. Tr. at 106. Captain Hampton also stated that respondent was known as "one you didn't want to leave in the cockpit alone," and that he had observed respondent not paying attention and making mistakes on certain other flights. Tr. at 108. Captain Hampton also described how he had to "write up" respondent on one occasion for mistakes respondent made. Tr. at 108-110.

Respondent also called Lawrence Branstetter, who was the check airman for respondent on September 28, 2008, to testify. Captain Branstetter testified that respondent failed the pre-flight inspection when he failed to identify certain incorrect items in photographs, such as the landing gear safety pin. Captain Branstetter further testified he had given respondent unsatisfactory ratings in FMS procedures and in judgment, because respondent did not change the FMS to reflect the new runway for which respondent had received clearance, and that respondent loaded the FMS incorrectly. Captain Branstetter described respondent's performance on September 28 as not good, and stated that he would not be comfortable if he were in the back seat of a small aircraft that respondent was operating. Captain Branstetter's testimony corroborated Captain Hampton's testimony, with regard to the perception that respondent lacks

consistency in operating aircraft. Captain Branstetter also opined that respondent is unable to "multitask." Tr. at 124.

Finally, respondent testified on his own behalf. Respondent stated that he was injured in June 2006 and was on medical leave until June 2008, and that, when he returned to work, Polar Air was searching for a reason to fire him; respondent described Polar Air's actions in this regard as a "witch hunt." Tr. at 133. Respondent stated that the 3-hour oral examination that he underwent on September 3 was not required, because it was a line check, and that he did not know why he needed to complete so many checks when the FAA-approved Flight Operations Training Manual for Polar Air does not require them. Tr. at 134-35; Exh. R-6. Respondent testified that, at the conclusion of the September 28 proficiency check, Captain Branstetter told him that he had done a good job, and that Captain Nardiello, who was the support pilot during the September 28 check, made several attempts to sabotage respondent's performance during the check. Respondent stated that he and Captain Nardiello had a strained relationship, and that Captain Nardiello is known as the person at Polar Air who sabotages proficiency checks to orchestrate the removal of certain pilots. Respondent cited examples of what he perceived as actions that Captain Nardiello took in attempting to thwart respondent's performance during the proficiency check; in

particular, respondent stated that Captain Nardiello instructed him to stop the aircraft several times as he was taxiing (Tr. at 148), that Captain Nardiello programmed the FMS box incorrectly, and that Captain Nardiello directed respondent to execute an approach when respondent did not want to do so. Respondent also stated that, in response to his request for a runway clearance, he was told to use the "same clearance as yesterday," which is why he proceeded to 25 left. Tr. at 147. Regarding the approach, respondent stated that he was operating under visual flight rules during the visual approach, not instrument flight rules, and that he received a two-engine approach.

Respondent acknowledged that he did not answer each question perfectly during the oral examination, but stated that he did not believe he had failed. Respondent also conceded that he missed the pin in the landing gear when he evaluated the photograph during the preflight. Respondent testified that he did not recall his error concerning the breakaway thrust setting because Captain Nardiello stopped him so many times, and that he has "never" used 60 percent N1 for his breakaway thrust. Tr. at 159. Respondent conceded that he missed the aileron position indicator malfunction during the taxi check. Respondent opined that he was correct in slowing to 210 knots while in the holding pattern, and stated that he did not recall anything about the

secondary flap position indicator display showing a leading edge flap malfunction.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he concluded that the Administrator had a reasonable basis for requesting a reexamination of respondent's qualifications. The law judge recited Inspector Lithgow's testimony concerning the numerous aspects of the September 28 check ride, and reiterated that Captains Branstetter and Hampton both described respondent as inconsistent, and stated they would be uncomfortable in a small aircraft if respondent was operating it.

On appeal, respondent contends that the June 23, 2009 hearing was a mistrial because his attorney "grossly misrepresented" his defense. Respondent argues that, at the hearing, his attorney did not submit any of the documentation that respondent collected during discovery, did not call witnesses who had traveled to testify at the hearing, and did not argue the central issues of the case, which he contends are fraud, coercion, and conspiracy between Inspector Lithgow and Polar Air. In support of his theory that the FAA and Polar Air were engaged in a conspiracy, respondent submitted on appeal a recording that the law judge did not allow into evidence at the hearing. Respondent also contends that FAA Order 2150.3B requires that the Administrator customize the letter requesting

reexamination such that it specifically identifies the deficient areas that the Administrator alleges that respondent exhibited. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.⁴

We first note that respondent appears to argue that his counsel ineffectively represented him. In general, we have previously declined to consider arguments concerning ineffective assistance of counsel, as the right to counsel does not extend to cases subject to our review.⁵ Moreover, we note that respondent's argument concerning his counsel's representation is nevertheless unpersuasive, as respondent's counsel explored the issue at the hearing of whether the Administrator conspired with Polar Air to ensure that respondent failed the September 28 proficiency check. In particular, respondent's counsel inquired of Inspector Lithgow concerning whether Polar Air had requested that Inspector Lithgow observe respondent. Tr. at 61-64. At the hearing, respondent's counsel also inquired of Captains

⁴ The Administrator's counsel also submitted an objection to respondent's request for a mistrial, in which he argues that our Rules of Practice do not allow for a motion for mistrial on appeal.

⁵ See, e.g., Administrator v. Wells, NTSB Order No. EA-4275 at 3 (1994) (Order Denying Reconsideration) (citing Administrator v. Jones, 3 NTSB 3649, 3650 (1981), Administrator v. Jansen, 3 NTSB 2601 (1980), and Administrator v. Jaax, 5 NTSB 1624, 1625 (1977), and stating that, "these are civil proceedings, and the right to counsel does not reach the same constitutional level as it would in a criminal case").

Hampton and Branstetter concerning whether Polar Air was engaged in a plan with the FAA to fail respondent on his proficiency check. Furthermore, as stated above, respondent's testimony at the hearing described at length his belief that Polar Air sought to terminate his employment by orchestrating his failure of the September 28 proficiency check. Overall, respondent's argument that his counsel ineffectively represented him is neither persuasive nor subject to our review.

With regard to the central issue of respondent's appeal, we agree with the law judge that the Administrator had a reasonable basis for requesting reexamination of respondent's qualifications.⁶ We note that we have previously acknowledged that the Administrator has significant discretion in determining whether such reexaminations are warranted.⁷ Moreover, respondent's contention that his mistakes during the proficiency check were the result of Captain Nardiello distracting him is

⁶ To the extent that respondent argues coercion, fraud, and perjury, we note that these contentions are framed in the context of respondent's overall argument that the Administrator did not have a reasonable basis to request reexamination.

⁷ Administrator v. Sanchez, NTSB Order No. EA-5326 (2007) at 4 (stating that, "[i]t is well-settled that the Board's inquiry into the reasonableness of a reexamination request is a narrow one," and quoting Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 at 4 (1994), for the standard that a "basis for questioning competence has been implicated, not that a lack of competence has been demonstrated"); see also Administrator v. Hutchins, NTSB Order No. EA-4899 (2001); Administrator v. Wang, NTSB Order No. EA-3264 (1991).

not persuasive, as pilots are expected to operate aircraft in situations in which distractions arise. Respondent's failure to proceed to the correct runway and his instrument flight rules operation of the aircraft when cleared for visual flight rules operation, among respondent's other mistakes, are serious errors. If these mistakes were excusable because they were the result of intentional, unreasonable distractions, then a reexamination could serve to resolve any doubt about respondent's proficiency. As such, we reject respondent's argument that the Administrator's request for reexamination under 49 U.S.C. § 44709 was unreasonable.

Lastly, respondent's argument that the Administrator's letter requesting reexamination does not fulfill the criteria of the Administrator's own guidance, published in FAA Order 2150.3B,⁸ and his argument that the Administrator's emergency order is inconsistent with the paperwork from the September 28 proficiency check, are also not persuasive. To the extent that respondent seeks to contend that the Administrator is inconsistently complying with the requirement to adhere to the standards of FAA Order 2150.3B, we note that we have previously held that inconsistent enforcement of FAA guidance or regulations is not subject to our review, but is instead an

⁸ FAA Compliance and Enforcement Program, Order 2150.3B at 5-5 - 5-8 (Oct. 1, 2007).

argument within the purview of the Administrative Procedure Act (APA).⁹ Moreover, we reject respondent's argument that the paperwork from the September 28 proficiency check contradicts the Administrator's emergency order, as Exhibit A-8 specifically lists the errors that respondent made during the check, and the Administrator's order accurately includes the errors at issue. Furthermore, even if the order included some inaccuracies, we note that respondent has admitted that he has not completed a reexamination in response to the Administrator's request, and has not established that the Administrator's request was unreasonable.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's emergency suspension of respondent's ATP certificate, pending respondent's successful completion of a reexamination under 49 U.S.C. § 44709, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

⁹ See Administrator v. Jablon, NTSB Order No. EA-5460 at 12 n.5 (2009) (stating that, "[a]nyone who seeks to challenge an agency's enforcement of its own regulation may do so in limited circumstances under the APA," and citing 5 U.S.C. § 702).

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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-18458

MARK DAVID BAKHIT, * JUDGE FOWLER

Respondent. *

* * * * *

General Services Administration
26 Federal Plaza
Courtroom 238
New York, New York 10278

Tuesday,
June 23, 2009

The above-entitled matters came on for hearing, pursuant to
notice, at 10:00 a.m.

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

APPEARANCES:

On behalf of the Administrator:

ROBERT SPITZER, ESQUIRE
Federal Aviation Administration
One Aviation Plaza
Jamaica, New York 11434

On behalf of the Respondent:

MICHAEL L. DWORKIN, ESQUIRE
Michael L. Dworkin & Associates
465 California Street, Suite 210
San Francisco, California 94104
(415) 421-2500

1 Spitzer, Esquire, of the Regional Counsel's Office, Eastern Region
2 of the Federal Aviation Administration.

3 Both parties have been afforded the opportunity to offer
4 evidence, to call, examine, and cross-examine witnesses. In
5 addition, the parties, through counsel, have been afforded the
6 opportunity to make final argument in support of their respective
7 positions.

8 I reviewed the testimony and evidence in this
9 proceeding, which consists of one witness on behalf of the
10 Administrator, Inspector David Lithgow, and three witnesses on
11 behalf of the Respondent, including the Respondent himself,
12 Captain Robert Hampton, Captain Lawrence Branstetter and, as I
13 said, the Respondent himself.

14 The paramount, central, and overriding issue to be
15 decided in this proceeding, and the reason why we're all here
16 today is, was there a reasonable basis for the re-examination
17 request made of Respondent Bakhit. Another way to look at it, is
18 the Respondent an Airman that needs to be re-examined. Upon my
19 review of the totality of the evidence, coupled with the
20 documented exhibits, I would have to answer both of those
21 questions in the affirmative.

22 What we have here, and I'm trying to be as succinct and
23 concise as possible, reviewing all of the evidence that we've had
24 adduced before today, on his own behalf, in Respondent Bakhit we
25 have an experienced Airman who has, I believe I'm correct in

1 saying, a minimum of 19 years experience as an airman. As they
2 would say out in the street, in a colloquial sense, we have a
3 mixed bag here, where this airman is concerned.

4 Perhaps Captain Branstetter said it all when he stated
5 that the Respondent is a "hot and cold pilot." Inspector Lithgow
6 reviewed the totality of the records, the airman's records, and
7 the history of Respondent Bakhit. He saw that he had passed
8 numerable tests through the years; and he has failed numerable
9 tests through the years.

10 To answer counsel for the Respondent's statement, yes,
11 he could fly an aircraft, he can fly a B-747-400, but can he fly
12 it with the proficiency and competency that the Federal Aviation
13 Administration requires?

14 Respondent passed the pilot proficiency test in August
15 of 2008. He failed a proficiency test in September and a line
16 check test in September 2008. So, you can see what I'm saying
17 here. We have an experienced pilot, as I said, but a "hot and
18 cold pilot" based on the analysis of all of the evidence and
19 testimony here. A pilot that unfortunately for him two of the
20 Respondent's witnesses Captain Branstetter and Captain Hampton
21 said they were uncomfortable flying with him.

22 He would not be, in the final analysis, and I'm
23 paraphrasing now, they would not be comfortable with him flying as
24 pilot in command of a 747-400 aircraft. Facing a quick review of
25 some of the pertinent and relevant testimony that we had,

1 Inspector David Lithgow was designated as an expert in aviation,
2 his testimony on his review of the September 28th, 2008
3 proficiency check here where the Respondent is concerned,
4 Inspector Lithgow's testimony was devastating.

5 There is no way that I would reject the testimony of
6 Inspector Lithgow as an aviation expert. He testified
7 voluminously and in depth as to every aspect of this last
8 proficiency check, September 28th, 2008.

9 His testimony touched on the thing that Respondent
10 demonstrated, marginal knowledge, or incorrect understanding of
11 numerous B747-400 systems. That Respondent departed from the
12 incorrect runway. That he failed to execute a go-around, and he
13 experienced a full-scale glide scope indicator deflection and that
14 he engaged in extensive maneuvering under instrument
15 meteorological conditions without clearance.

16 Respondent performed numerous other pilot errors, so
17 that ladies and gentlemen, I feel I have no choice in this matter,
18 the Administrator was validly well premised in supplying the
19 meaningful answer here, which is the central issue in this
20 proceeding.

21 Respondent Mark Bakhit is an airman that needs to be re-
22 examined, and until he does that, until he is re-examined and does
23 so successfully and establishes that his qualifications are
24 apropos to be the holder of an airline transport pilot
25 certificate, I have to uphold the Administrator's Emergency Order

1 of Suspension dated December 15th, 2008.

2 The Administrator had a very reasonable basis to seek a
3 re-examination. You may recall, witnesses on both sides, for the
4 Administrator and the Respondent expressed concern about the
5 abilities and competency of the Respondent.

6 So as I said earlier, in response to counsel for the
7 Respondent's sterling final argument, as everyone of us in this
8 courtroom knows, the Federal Aviation Administrator, at any time
9 in his discretion, can check and seek to re-examine any Airman
10 that he has certificated.

11 Of that there is absolutely no doubt. So without
12 further belaboring the facts in this proceeding I will now proceed
13 to make the following specific Findings of Fact and Conclusions of
14 Law:

15 One, the Respondent, Mark David Bakhit, admits and it is
16 found that he is the holder of Airline Transport Pilot's
17 Certificate number (omitted) with typerating of the Boeing 747-400
18 and the BA-3100 aircraft.

19 Two, it is found Respondent failed pilot proficiency
20 checks conducted by Polar Air Cargo on or about September 17th,
21 2008, September 28th, 2008 and that pilot line check conducted by
22 Polar Air Cargo on or about September 3rd, 2008.

23 Three, Respondent admits, and it is found, that during a
24 proficiency check conducted by Polar Air Cargo on or about
25 September 18th, 2008 Aviation Safety Inspector David Lithgow of

1 the Federal Aviation Administration observed the Respondent's
2 performance.

3 Four, it is found that, during September 28th, 2008,
4 Check Airman Safety Inspector David Lithgow observed that
5 Respondent demonstrated marginal knowledge or understanding of
6 numerous Boeing 747-400 systems, that Respondent departed from an
7 incorrect runway. The Respondent failed to execute go-around when
8 Respondent experienced a full-scale glide scope indicator
9 deflection, and that Respondent engaged in extensive maneuvering
10 under instrument meteorological conditions without a clearance,
11 and Respondent performed several other pilot errors.

12 Five, it is found that for reasons of the above the
13 Administrator determines that it was necessary and correct to re-
14 examine Respondent's competency to hold an Airline Transport Pilot
15 Certificate.

16 Six, the Respondent has admitted, and it is found, based
17 on the evidence adduced here, that by letter dated September 30th,
18 2008 the Acting Administrator, by an Aviation Safety Inspector of
19 the New York Federal Aviation Flight and its District Office
20 requested that pursuant to 49 USC 44709 Respondent submit to a re-
21 examination of Respondent's competency to hold an Airline
22 Transport Pilot Certificate based on the above described
23 circumstances.

24 Seven, the Respondent admits and it is found that as of
25 this date Respondent has failed to submit or satisfactorily

1 complete this re-examination.

2 Eight, it is found by this Judge that safety in air
3 commerce or air transportation and the public interest does
4 require the affirmation of the Administrator's Emergency Order of
5 Suspension, dated December 15th, 2008; in view of the Respondent's
6 failure, as of this date, to take a re-examination to demonstrate
7 his competency to be an Airline Transport Pilot Certificate
8 qualified to fly a B747-400 aircraft.

9

10

ORDER

11

12

13

IT IS ORDERED THAT the Administrator's Emergency Order
of Suspension, dated December 15th, 2008 be and the same is hereby
affirmed.

14

15

This order is issued by William E. Fowler, Jr. a United
States Administrative Law Judge.

16

17

18

19

20

21

22

23

24

25

William E. Fowler, Jr.

Chief Administrative Law Judge