

SERVED: June 3, 2010

NTSB Order No. EA-5522

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 2nd day of June, 2010

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18366
v.)	
)	
TIMOTHY M. HACKSHAW,)	
)	
Respondent.)	
)	
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ORDER DENYING RECONSIDERATION

The Administrator seeks reconsideration of our opinion and order in this case, NTSB Order No. EA-5501, served January 19, 2010. In that decision, we affirmed the law judge's order, in which he denied respondent's appeal, while reducing the sanction of a suspension period of respondent's airline transport pilot certificate from 180 to 100 days. The law judge determined that the Administrator proved that respondent violated 14 C.F.R. §§ 91.7(a) and (b), 91.13(a), and 91.703(a)(2) and (3), when respondent operated a Cessna 402B on a passenger-carrying flight while the aircraft was in an unairworthy condition. In particular, the law judge determined that the Administrator

proved that respondent operated the aircraft when the landing gear indicator light showed that the landing gear was malfunctioning, and that, thereafter, respondent took the aircraft to another airport with two homemade locks securing the landing gear, as well as with damage to the right propeller and potential damage to the right engine, as a result of the earlier landing. The law judge reduced the sanction from 180 to 100 days, based on the finding that respondent relied on his employer, Mr. Sylvanus Ernest, who held an airframe and powerplant rating, when Mr. Ernest informed him that the aircraft was fit to fly, notwithstanding the homemade locks and damage.

In the case below, both parties appealed; respondent appealed the law judge's determination that the Administrator proved the allegations in the complaint, and the Administrator appealed the law judge's reduction in sanction. We denied both appeals. With regard to the Administrator's appeal, we determined that the law judge's reduction in sanction was permissible, based on the circumstances of the case. Specifically, we stated:

We agree with the law judge's conclusion that Mr. Ernest's approval of the aircraft for a flight from Hewanorra to George Charles was a mitigating factor. In addition, respondent did not have passengers on the flight from Hewanorra to George Charles. While we do not condone respondent's operation of the aircraft on that flight, we agree with the law judge that a sanction of 100 days is appropriate under the circumstances of this case. The Administrator did not submit the Sanction Guidance Table into the record for this case, and did not explain the computation of and reasoning for the sanction until the Administrator filed the FAA appeal brief, which includes a brief footnote referencing the Sanction Guidance Table. Based on these circumstances, we do not believe absolute deference to the Administrator's choice of sanction is required.

NTSB Order No. EA-5501 at 23. Therefore, we denied the Administrator's appeal.

The Administrator has now petitioned for reconsideration of our affirmation of the law judge's sanction reduction. The Administrator cites portions of the record in which Albert Frank, an FAA principal operations inspector responsible for foreign air carriers that fly into the United States, testified

that he believed a suspension of 180 days was appropriate. The Administrator also cites Exhibit A-33 of the record, which is the Sanction Guidance Table. Respondent did not submit a response to the Administrator's petition.

The Administrator is correct that the Sanction Guidance Table was admitted in the record, and we hereby correct our previous opinion. We acknowledge again that Inspector Frank testified that he believed a sanction of 180 days was appropriate in this case. With regard to the deference that we afford the Administrator's choice of sanction, we have held that, concerning sanction issues in general, the FAA Civil Penalty Administrative Assessment Act (the Act)¹ states that the Board is bound by written agency guidance available to the public relating to sanctions to be imposed, unless the Board finds that any such interpretation or case sanction guidance is arbitrary, capricious, or otherwise not in accordance with law.² We have also stated that it is the Administrator's burden under the Act to articulate clearly the sanction sought, and to ask the Board to defer to that determination, supporting the request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or contrary to law.³ In Peacon, we stated as follows with regard to this deference:

[W]here the Administrator establishes before the law judge the existence of validly adopted written policy guidelines, the law judge must impose a sanction that falls within the range of sanctions suggested therein, unless he finds that application of the guidelines by the Administrator was arbitrary, capricious, or

¹ See 49 U.S.C. §§ 44709(d) and 46301(d)(5). Section 44709(d)(3) provides, "[w]hen conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law."

² Administrator v. Hewitt, NTSB Order No. EA-4892 at 2 (2001).

³ Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (Administrator introduced no evidence regarding applicable or relevant sanction guidance).

otherwise not in accordance with law. Further, where the Administrator argues that Board precedent supports her suggested sanction, the law judge may not ignore that precedent, unless he distinguishes it by explaining on the record why the requested sanction is not "according to law."

Peacon at 4 (footnote and citations omitted). In Peacon, we determined that the law judge's decision did not include the necessary analysis concerning why the sanction was "not according to law." Therefore, we granted the Administrator's appeal with regard to sanction.

Unlike Peacon, in the case at hand, the law judge specifically stated his reasons for reducing the sanction. First, the law judge noted that a suspension period of 180 days was at "the high end of the range of sanctions provided in the Administrator's Sanction Guidance Table," and stated that, "further Board precedent record[s] a number of cases in which lesser periods of suspension for not dissimilar violations have been approved." Initial Decision at 346. Perhaps more importantly, however, the law judge stated that he considered the fact that respondent relied on Mr. Ernest's assessment that the aircraft was airworthy to be a mitigating factor. Id. at 347. Earlier in his decision, the law judge provided a lengthy discussion of Board case law concerning airworthiness. Id. at 318-23 (summarizing cases such as Administrator v. Thibert, NTSB Order No. EA-5306 at 5-7 (2007), Administrator v. Yialamas, NTSB Order No. EA-5111 (2004), and Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994), in which we stated that we will consider whether a respondent knew or should have known that an aircraft was in an unairworthy condition before operating it). The law judge also referenced Administrator v. Scuderi, NTSB Order No. EA-5321 (2007), in which we affirmed the law judge's reduction in sanction from 180 to 100 days for violations of 14 C.F.R. §§ 91.7(a) and 91.13(a) and (b), among other regulations.

We have carefully considered the Administrator's arguments on the issue of sanction. In the petition, the Administrator states, "deference to the ... sanction guidance table would be appropriate in this matter." Pet. at 4. In the original case, the law judge found, and we affirmed, that respondent violated 14 C.F.R. §§ 91.7(a) and (b), 91.13(a), and 91.703(a)(2) and (3). The Sanction Guidance Table provides for a suspension of 30 to 180 days for "[o]peration of unairworthy aircraft." Exh. A-33 at 16, item 20. The law judge's imposition of a 100-day suspension, therefore, is not outside the bounds of the Sanction Guidance Table. We also note that, in previous cases

involving a violation of § 91.7(a) and (b), we have typically imposed a sanction of 90 to 160 days, lowering the Administrator's choice of sanction in some cases.⁴ Moreover, we do not believe the Administrator has provided a compelling rationale for departing from a suspension period within our customary range on this sanction; while the Administrator contends that aggravating factors existed in respondent's violations in this case, the Administrator does not dispute the mitigating factors that the law judge listed, such as the fact that respondent relied upon Mr. Ernest. In brief, we are careful to refrain from deviating from our past precedent, absent a clear rationale for doing so. Therefore, based on the facts that the 100-day sanction falls within the Sanction Guidance Table for the stated violations, that the law judge determined that mitigating factors were present in this case, and that the 100-day sanction is comparable to the sanction we have imposed in other cases involving airworthiness violations, we deny the Administrator's petition.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration is denied.

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

⁴ See, e.g., Scuderi, supra; Administrator v. Zink, NTSB Order No. EA-5262 (2006) (140-day suspension for violation of 14 C.F.R. §§ 91.7(a) and (b), 91.13(a), 91.213(a)(4), and 121.563, after the respondent operated an Airbus A-319 for Frontier Airlines after he was aware that the number 2 engine thrust reverser did not deploy on the preceding flight); Administrator v. Hatch, NTSB Order No. EA-5230 (2006) (150-day suspension—reduced from the original 180-day suspension—imposed for the respondent's violation of 14 C.F.R. §§ 91.7(a), 91.407(a), 91.405(b), and 91.13(a), when the respondent operated two separate flights after becoming aware of some loss of engine power); Administrator v. Yarmey, NTSB Order No. EA-5036 (2003) (90-day suspension for violation of 14 C.F.R. §§ 91.7(a), 91.9(a), 91.13(a), when the respondent put gasoline intended for an automobile, rather than the avgas required by the aircraft's type certificate, into the aircraft); Administrator v. Pierce, NTSB Order No. EA-4965 (2002) (120-day suspension—reduced from the original 180-day suspension—imposed for violation of 14 C.F.R. §§ 91.7(a) and 91.13(a), when the respondent departed with malfunctioning mixture control cable).