

SERVED: July 28, 2010

NTSB Order No. EA-5536

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 27th day of July, 2010

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-18777
	v.)	
)	
RHETT TOWNSEND HART,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., in this matter, issued following an evidentiary hearing held on March 23, 2010.¹ By that decision, the law judge affirmed the Administrator's complaint and ordered the 120-day suspension of respondent's

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

private pilot and airframe and powerplant (A&P) certificates. Respondent appeals the law judge's order with regard to the law judge's affirmation of the 120-day suspension period. We deny respondent's appeal.

The Administrator's order against respondent, issued on November 13, 2009,² alleged that respondent was convicted of "Possession of a Controlled Dangerous Substance-Not Marijuana" in Caroline County, Maryland, on October 18, 2006. The complaint stated that, as a result of the conviction, respondent violated 14 C.F.R. § 61.15(a)(2).³ Therefore, the Administrator's complaint ordered the 120-day suspension of respondent's certificates.

² The Administrator amended the order, which became the complaint in this case, on January 12, 2010, to correct a typographical error.

³ Section 61.15(a)(2) provides as follows:

(a) A conviction for the violation of any Federal or State statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marijuana, or depressant or stimulant drugs or substances is grounds for:

* * * * *

(2) Suspension or revocation of any certificate, rating, or authorization issued under this part.

The complaint also contained a reference to 14 C.F.R. § 65.12(a)(2), which provides that the penalty for such a conviction is suspension or revocation.

Respondent filed an amended answer⁴ to the complaint, in which he admitted to all of the complaint's allegations, and posed two affirmative defenses. Respondent alleged that the Board's stale complaint rule⁵ precluded the Administrator's pursuit of the case, and that, in the alternative, "the proposed suspension is unreasonably severe under all of the circumstances." Respondent's amended answer further stated that, "[u]nder all the applicable circumstances, a warning letter would be more appropriate."

In response to respondent's answer, the Administrator filed a motion for partial judgment on the pleadings and response to motion to dismiss complaint as stale, based on the Administrator's presumption that respondent's stale complaint argument in his answer amounted to a motion to dismiss. In the motion, the Administrator argued that good cause existed for the delay, because the Administrator did not learn of respondent's

⁴ Respondent amended his answer after the Administrator amended the complaint, as described above.

⁵ The Board's stale complaint rule requires that, in cases not alleging a lack of qualifications, a respondent can move to dismiss a complaint that states allegations of offenses that occurred more than 6 months prior to the Administrator's notification to the respondent of the reasons for the proposed action. 49 C.F.R. § 821.33. In the case at issue, both parties agree that the complaint does not allege a lack of qualifications, notwithstanding our case law that a drug conviction may, by its nature, indicate a lack of qualifications. See Administrator v. Robertson, NTSB Order No. EA-5315 at 6-7 (2007).

conviction until February 13, 2009,⁶ and, after learning of the conviction, immediately sent a letter informing respondent that an investigation into the matter was underway. On February 20, 2009, FAA Special Agent Steven Tochterman interviewed respondent about the alleged violation; Agent Tochterman's record of the interview indicates that respondent acknowledged the conviction and expressed "remorse and concern over the FAA investigation." Exh. 3 attached to Mot. At the conclusion of the interview, respondent requested an extension to reply to the Administrator's letter of investigation, which Agent Tochterman granted, thereby extending the deadline to March 20, 2009. Id. On March 12, 2009, respondent replied to the letter of investigation, and on March 31, 2009, the Administrator issued the notice of proposed certificate action (NOPCA). As a result, the Administrator argued in the motion that he "pursued the investigation with due diligence," and that the law judge should not dismiss the complaint as stale.

The law judge ordered a hearing in the case, which he commenced by stating that he did not find respondent's argument concerning the stale complaint rule persuasive, and that, given respondent's admissions to the allegations of the

⁶ The motion states that respondent had not completed an application for a medical certificate after his conviction, which explained why the Administrator was unaware of it. Mot. at 4 n.1.

Administrator's complaint, the hearing would only address the topic of the appropriate sanction. The law judge indicated that his ruling concerning the stale complaint rule was based on the Administrator's evidence that the Administrator acted with dispatch after learning of the conviction. Tr. at 18. At the hearing, the Administrator did not provide any witness testimony, but submitted the conviction file from Caroline County, Maryland, and relevant excerpts from the Sanction Guidance Table into evidence. Exhs. A-1 and A-2. The Administrator's counsel requested deference to the Sanction Guidance Table, and directed the law judge's attention to the portion of the Table that provide a range of 45 to 120 days suspension for a "[s]ingle conviction for simple possession." Exh. A-2. For multiple convictions for "simple possession" of drugs, the Table provides a range of 120 days of suspension to revocation. Id.

The Administrator's counsel argued that the Administrator considered two circumstances as aggravating factors, both of which the Administrator submitted into evidence via the conviction file. Specifically, the Administrator's counsel contended that respondent's conduct amounted to more than one drug violation, and that respondent provided false statements to police when he was arrested. These aggravating factors, the Administrator's counsel argued, sufficed to increase the

sanction to the top of the range for respondent's drug conviction.

Respondent's counsel objected to the admission of the entire conviction file, on the basis that only the single page of the conviction record itself was relevant to whether respondent violated §§ 61.15(a)(2) and 65.12(a)(2). The Administrator's counsel conversely argued that the entire file was relevant, because the circumstances of a conviction are relevant to the Administrator's determination of the appropriate sanction. Despite respondent's counsel's objection, the law judge admitted the exhibit.

Respondent also testified on his own behalf, in which he asserted that, although he had a brief drug problem following a divorce, he had undergone extensive rehabilitation and had overcome his drug addiction. Respondent stated that he was unaware that he needed to report his conviction to the Administrator, and urged the law judge to consider his rehabilitation as mitigating. Tr. at 39.

At the conclusion of the hearing, the law judge issued an oral decision, in which he determined that the suspension period of 120 days was appropriate. Specifically, the law judge found that the Administrator took all mitigating factors into consideration in determining that 120 days was an appropriate sanction, given the circumstances. The law judge also again

rejected respondent's argument that the stale complaint rule applied.

On appeal, respondent contends that the law judge erred in determining that the stale complaint rule was inapplicable, in admitting the entire conviction file into the record, and in affirming the 120-day suspension. Specifically, respondent argues that the Administrator provided no evidence indicating that the delay prior to issuing the NOPCA was justified. With regard to the law judge's evidentiary ruling concerning the conviction file, respondent argues that "background materials" in the file, such as the statement of the charges and of probable cause, were irrelevant. Respondent further asserts that the Administrator provided no evidence concerning how the Administrator calculated the appropriate sanction, or the reasons for the sanction. The Administrator disputes each of respondent's arguments, and urges us to affirm the law judge's decision.

We agree with the law judge that respondent's argument concerning the stale complaint rule is unpersuasive. While respondent's conviction occurred in October 2006, and the Administrator issued the NOPCA in March 2009, the evidence establishes that the Administrator pursued the case with due diligence after discovering the conviction. To the extent that respondent argues that the Administrator produced no evidence

that the FAA acted with reasonable dispatch after learning of the conviction, we reject this argument, as the documents attached to the Administrator's pretrial pleading in response to respondent's stale complaint argument unequivocally show that the Administrator commenced an investigation and sent a letter to respondent on the same day that the FAA learned of the conviction. In evaluating cases in light of the due diligence standard and the stale complaint rule, we note that, in Administrator v. Ramaprakash, NTSB Order No. EA-5076 (2004), the Board's decision on remand from the Court's ruling in Ramaprakash v. Federal Aviation Administration, 346 F.3d 1121 (D.C. Cir. 2003), we stated that we would consider whether the Administrator exercised due diligence at the time the Administrator receives information indicating a violation of 14 C.F.R. § 61.15.⁷ In the case at hand, the evidence cited above establishes that the Administrator exercised due diligence after learning of respondent's conviction. Therefore, we do not believe the law judge erred in his resolution of this issue.

Respondent's argument that the law judge erred in admitting the conviction file into evidence is equally unavailing. We

⁷ In Ramaprakash, the Administrator charged the respondent with a violation of § 61.15(e), which requires a certificate holder to report motor vehicle actions to the Administrator. Since our Ramaprakash decision following remand, we have applied this due diligence standard in other cases. Administrator v. Shrader, NTSB Order No. EA-5100 (2004).

have long held that law judges have significant discretion in overseeing testimony and evidence at hearings.⁸ With regard to the conviction file, we agree with the Administrator that the records in the file are relevant to the Administrator's choice of sanction. Respondent appears to argue that the circumstances of the offense for which he was convicted are irrelevant; however, such an argument is contrary to the notion that the Board may consider aggravating and mitigating factors in determining whether the Administrator has imposed a sanction that is arbitrary, capricious, or contrary to law.⁹ We agree

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)). 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). Cf. Administrator v. Ferguson, 352 Fed. Appx. 192 (9th Cir. 2009) (holding that law judge erred in curtailing the cross-examination of FAA witness, because the witness was central to the Administrator's case and the ruling was therefore prejudicial); but see Lackey v. FAA, Nos. 08-72357, 08-73188, 08-74804, 09-70233 (9th Cir. July 8, 2010) (rejecting the respondent's argument that the Board erred in affirming certain evidentiary rulings).

⁹ See 49 U.S.C. § 44709(d)(3), which provides as follows:

[T]he 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.

that the conviction file is relevant to respondent's conduct, which led to his conviction and gave rise to the Administrator's choice of sanction. For example, the file shows that respondent had more than one type of drug in his car, and that he falsely told a police officer that the woman with him was his wife, in an attempt to assist her in evading arrest. Such circumstances are relevant in considering whether they amount to aggravating factors for purposes of the Administrator's choice of sanction. Overall, we do not believe the law judge abused his discretion in permitting the admission of the file into evidence.

Finally, given the aggravating circumstances surrounding respondent's conduct that led to his conviction, for which respondent served an 11-month incarceration term, we do not find that the Administrator's choice of sanction was arbitrary, capricious, or contrary to law. We have long held that the FAA Civil Penalty Administrative Assessment Act (the Act)¹⁰ states

(..continued)

We have previously reviewed the Administrator's choices of sanction in light of aggravating or mitigating circumstances. Administrator v. Scuderi, NTSB Order No. EA-5321 (2007) (sanction reduction in light of mitigating circumstances), accord Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010); see also Administrator v. Poland, NTSB Order No. EA-5449 at 8-10 (2009) (sanction increased from that which the law judge imposed, in light of aggravating circumstances), accord Administrator v. Riggs, NTSB Order No. EA-5436 at 16-18 (2009), pet. for rev. denied, No. 09-71516 (9th Cir. filed June 17, 2010).

¹⁰ 49 U.S.C. §§ 44709(d) and 46301(d).

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 sanction guidance is arbitrary, capricious, or otherwise not in accordance with law.¹¹ 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 in a manner contrary to law.¹² The Administrator's counsel fulfilled this standard with the evidence he presented at the hearing, which included relevant excerpts from the Sanction Guidance Table and the conviction file, and by clearly stating the Administrator's reasons for the choice of sanction. Moreover, we do not find respondent's argument that his rehabilitation should lead us to reduce the sanction persuasive. In this regard, we agree with the Administrator's and the law judge's determination that a violation-free history following one's conviction is the status quo, rather than a mitigating circumstance.

¹¹ Administrator v. Hewitt, NTSB Order No. EA-4892 at 2 (2001).

¹² 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).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 120-day suspension of respondent's private pilot and A&P certificates shall begin 30 days after the service date indicated on this opinion and order.¹³

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

¹³ 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).

APPEARANCES:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Rhett Townsend Hart from an Order of Suspension dated November 12, 2009, issued by the Regional Counsel, Southern Region of the Federal Aviation Administration.

Said Order of Suspension seeks to suspend the mechanic certificate and the private pilot certificate of Respondent Hart. The Administrator's Order of Suspension, which has been duly promulgated pursuant to the National Transportation Safety Board's Rules of Practice in Air Safety Proceedings, was issued by the Southern Region of the Regional Counsel's Office of the Southern Region of the Federal Aviation Administration.

This matter has been heard before this United States Administrative Law Judge, and as is provided by the National Transportation Safety Board's Rules of Practice, specifically Section 821.42 of those Rules, as the Judge in this proceeding I am given the option to either subsequently issue a written decision or to forthwith, as I'm going to do at this time, to

1 issue an oral initial decision on the record.

2 DISCUSSION

3 Following notice to the parties, this matter came on for
4 trial on March 23, 2010 in Atlanta, Georgia. The Respondent was
5 present at all times and was very ably represented by David
6 McDonald, Esq. The Complainant in this proceeding was very ably
7 represented by Christopher Stevenson, Esq. of the Regional
8 Counsel's Office, Southern Region of the Federal Aviation
9 Administration.

10 Both parties have been afforded the opportunity to offer
11 evidence, to call, examine and cross-examine witnesses on behalf
12 of their case. In addition, the parties were afforded the
13 opportunity to make final argument in support of their respective
14 positions.

15 I have reviewed the testimony and evidence in this
16 proceeding, which consisted of two documentary exhibits on behalf
17 of the Administrator and no testimony. In view of the fact that
18 the Respondent has admitted everything as set forth in the five
19 paragraphs of the Administrator's Order of Suspension of November
20 12, 2009, which really constitutes the Administrator's case, and
21 leaves the sole issue to be decided here as that of sanction.
22 It's been a while since I've had a case like this where virtually
23 every allegation, every charge set forth in the Administrator's
24 Order of Suspension has been admitted.

1 I have looked at the documentary exhibits and the
2 testimony of the sole witness in this case, Respondent Hart. The
3 possession of cocaine is what we're involved with here. The cases
4 are legion that the National Transportation Safety Board and its
5 judges must give due deference to the sanctions sought by the
6 Administrator.

7 I have listened carefully to both counsel and their
8 arguments. And I think it is very compelling, logical and
9 persuasive, as the Administrator's counsel has stated, that any
10 and all mitigating factors where Respondent Hart is concerned have
11 been taken into consideration. While this case and the offense
12 that caused this case to be brought to the Administrator's
13 attention is old, the Administrator acted as soon as he had
14 knowledge of the case, which was some years after the occurrence,
15 the conviction of October 18, 2006, of the Respondent. So I
16 cannot countenance or grant the validity of a stale complaint
17 basis to dismiss the Administrator's Order of Suspension.

18 We're here to decide the validity of the sanction sought
19 by the Administrator. The sanction by the guidance table
20 promulgated by the Federal Aviation Administration is from 45 to
21 120 days. The 120 days sought by the Administrator is the top
22 period of suspension.

23 I cannot be unmindful of the facts and the evidence, as
24 stated and set forth by the Administrator when he said that

1 everything mitigating had been taken into account where Respondent
2 Hart is concerned, but for the fact that this was a simple
3 possession case and not a multiple violation. The evidence is
4 compelling and persuasive that the Administrator didn't bring an
5 Order of Revocation. Taking into account the totality of the facts
6 and circumstances, Administrator did seek a sanction at the top of
7 the sanction range, which is 120 days, which is what we have here.

8 As the Judge in this proceeding, and as the Board has
9 said on many occasions on other cases, we, the Board and the
10 Judges, are bound to give deference to the sanctions sought by the
11 Administrator. I feel in that regard, in a manner of speaking,
12 that my hands are tied.

13 Certainly, the Respondent is to be commended for having
14 thoroughly rehabilitated himself and has changed his life and his
15 lifestyle since the period of his incarceration ended. He is
16 certainly to be commended for that. However, reviewing all the
17 facts, evidence, and the Administrator's and the Respondent's
18 exhibits as this hearing record is presently constituted, I have
19 to make the following specific findings of fact and conclusions of
20 law:

21 The Respondent has admitted paragraphs 1, 2, 3, 4 and 5
22 of the Administrator's Order of Suspension. I'm incorporating
23 what those paragraphs spell out; I'll incorporate them by
24 reference.

1 Paragraph number 6 is as follows:

2 This Judge finds that safety in air commerce or air
3 transportation and the public interest does require the
4 affirmation of the Administrator's Order of Suspension dated
5 November 13, 2009, in view of the violation of Federal Aviation
6 Regulation by the Respondent under Part 65 and Part 61 of the
7 Federal Aviation Regulations, and that the suspension of the
8 mechanic certificate and the pilot certificate for a period of 120
9 days under the totality of the circumstances and facts here is
10 reasonable.

11 ORDER

12 IT IS ORDERED and adjudged that the Administrator's
13 Order of Suspension dated November 13, 2009, be and the same, is
14 hereby affirmed.

15

16

17 EDITED ON

18 April 13, 2010

WILLIAM E. FOWLER, JR.

Chief Administrative Law Judge