

SERVED: June 20, 2011

NTSB Order No. EA-5588

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 17th day of June, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-18831
	v.)	
)	
ARTHUR ROY KOOISTRA,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed the oral initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., issued December 8, 2010, in this matter.¹ On March 23, 2010, the Administrator issued an order suspending respondent's airline

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

transport pilot certificate for a period of 60 days, based on alleged violations of 14 C.F.R. §§ 91.9(a),² 91.13(a),³ 91.117(a),⁴ 91.123(b),⁵ and 91.703(a)(3).⁶ Respondent appeals the law judge's decision with regard to the aforementioned violations, principally on the basis that his violations were excusable because he was fatigued during the flight at issue. We deny respondent's appeal.

The Administrator's order, which served as the complaint before the law judge, alleged that respondent acted as pilot-in-command (PIC) of a Polar Air Cargo flight in a Boeing 747-400F departing from Los Angeles, California, and arriving at Incheon

² Section 91.9(a) states that no person may operate a civil aircraft without complying with the operating limitations specified in the approved Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

³ Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ Section 91.117(a) prohibits operation of an aircraft below 10,000 feet mean sea level at an indicated airspeed of more than 250 knots.

⁵ Section 91.123(b) states that, "[e]xcept in an emergency, no person may operate an aircraft contrary to an [air traffic control (ATC)] instruction in an area in which air traffic control is exercised."

⁶ Section 91.703(a)(3) states that each person operating an aircraft of U.S. registry outside the United States must comply with part 91 to the extent that it is not inconsistent with the applicable regulations of the foreign country where the aircraft is operated, or with annex 2 of the Convention on International Civil Aviation.

International Airport in Seoul, South Korea, on June 29, 2009. The order stated the elevation of Incheon is 23 feet, and respondent violated the aforementioned regulations when he reset the Mode Control Panel to level the aircraft off at 100 feet above sea level, instead of 1,600 feet, which was the altitude at which the aircraft was allowed to intercept the glideslope. The complaint also stated that the aircraft's speed reached 275 knots at an altitude of 3,000 feet above sea level during the approach; that respondent deployed the speed brakes to 6.5 degrees when the aircraft's descent was more than one dot below the glide slope indication; that respondent deployed the speed brakes further to 43 degrees when the aircraft was at 1,900 feet above sea level and two dots below the glide slope indication; and that the aircraft began descending at a rate of 1,100 feet per minute after passing 1,000 feet above sea level. During the approach, the complaint alleged the aircraft's Electronic Ground Proximity Warning System (EGPWS) issued a sink rate warning. The complaint stated respondent initiated a manual missed approach, but did not retract the gear, flaps, and speed brakes until the aircraft reached 2,000 feet above sea level. Upon respondent initiating a go-around after the missed approach, the complaint alleged that air traffic control (ATC) instructed respondent to maintain the runway heading, but respondent deviated from the heading by more than 30 degrees.

As a result, the Administrator charged respondent with violating the aforementioned regulations.

In response to the Administrator's complaint, respondent's answer did not deny the factual allegations, but alleged several affirmative defenses. Respondent alleged his violations were justifiable based on the fact that he was suffering from fatigue, on the alleged existence of an emergency, on respondent's fellow crewmembers' errors, and on errors ATC committed. Respondent further contended he had filed a timely report under the Aviation Safety Reporting Program (ASRP).⁷ The Administrator does not contest respondent's eligibility for a sanction waiver under the ASRP.

At the hearing, the Administrator's several percipient witnesses testified concerning respondent's conduct on the flight. First Officer Brian Aitken, as well as the two pilots who were serving as relief pilots for respondent and First Officer Aitken, testified they were aware respondent was up and moving around the aircraft during his rest period. Contrary to respondent's testimony, the relief pilot who was acting as captain during respondent's rest period denied falling asleep in the cockpit, and stated respondent came to the cockpit to

⁷ 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).

relieve him approximately 30 minutes to 1 hour before scheduled, saying he could not sleep. One of the relief pilots, Tracy Knight, recalled respondent failed to set altitudes on the control panel, as required, and First Officer Aitken kept volunteering to do so. Mr. Knight observed First Officer Aitken set the altitude at 1,600 feet, which was the minimum level according to the applicable approach plate. All three of these witnesses also testified they did not set the Mode Control Panel to level the altitude off at 100 feet, and that they were scared during the missed approach, as the aircraft was sinking rapidly. Mr. Knight testified that he warned respondent the aircraft was too low several times. The witnesses also testified respondent appeared to not know what to do, as he did not select the altitude hold button, which would have halted the descent. Only after ATC gave warnings and repeatedly instructed respondent to stop the descent, and after the EGPWS informed respondent the aircraft was too close to terrain, did respondent select the altitude hold button. Because autopilot was still on, the aircraft continued to descend, but at a slower rate. Mr. Knight testified he unfastened his seat belt and was attempting to reach forward and take control, but respondent turned the autopilot off, added thrust, and pulled the stick back, which put Mr. Knight in his seat. Tr. at 63. Upon respondent's pulling the nose up and adding power, the aircraft began

climbing. Respondent then turned the aircraft away from the departure path, which was inconsistent with a go-around at Incheon. ATC inquired of respondent three times to state his intentions. Finally, at Mr. Knight's suggestion, respondent instructed First Officer Aitken to ask for another approach, to which ATC directed respondent to fly the present heading, and issued an altitude assignment. On the subsequent approach, respondent appropriately operated the aircraft, and landed without further incident.

Mr. Knight testified that respondent speculated after the flight that he believed "we" had misread the glidescope, and thought the aircraft was higher than it was. Tr. at 67-68. Respondent said he believed he needed to descend quickly for the approach. First Officer Aitken's testimony corroborated Mr. Knight's testimony, as First Officer Aitken stated that, after landing, respondent turned to the other pilots and said he was sorry "for endangering your lives and possibly your careers, but I misread the glidescope." Tr. at 141.

At the hearing, the Administrator also provided the testimony of the assistant chief pilot at Polar Air Cargo, Scott Welty, who stated he investigated the flight at issue, and respondent never claimed fatigue, emergency, or other crewmembers' errors may have caused his mistakes. With regard to Polar Air Cargo's policy concerning fatigue, Mr. Welty

testified the company treats fatigue as it does illness—if a pilot is too sick or too fatigued to fly as scheduled, they must inform the company, which would not take any consequent disciplinary action. Tr. at 180. Mr. Welty acknowledged the Polar manual current at the time of the flight at issue did not contain any detailed instructions to pilots concerning how they must handle fatigue.

In response to the Administrator's case, respondent testified he was suffering from fatigue during the missed approach at issue. He stated he had not flown in 60 days, and agreed prior to the flight to serve as PIC, as he needed the hours. The morning of the flight, respondent stated he woke up at his home and "la[id] around the house" all day. Tr. at 216. He testified he believed Eric Anderson, the relief pilot who would serve as captain while respondent was resting, would fly the first half of the trip, after take-off. However, Mr. Anderson told respondent he was tired, so respondent flew the first half while Mr. Anderson rested. Once it was time for respondent to rest, he testified that his body believed it was 5:00 am, so he was unable to rest, as 5:00 am was his usual wake-up time. One to two hours prior to the descent, respondent testified he entered the cockpit and saw Mr. Anderson sleeping, at which point respondent operated the aircraft in the left seat. Respondent testified it was his duty to complete the

approach, as it was a "Cat II," which required a pilot of his skill and experience. Contrary to other crewmembers' testimony, as well as Mr. Welty's, respondent opined that the other pilots on board could not have flown the aircraft for the Cat II approach. Respondent further opined that the glidescope did not reflect the altitude changes accurately when the aircraft was turning. Tr. at 223-24. Respondent also testified that he lost situational awareness after hearing the EGPWS alarm, and he is still not sure what happened on the flight. Respondent stated he was unable to take the data the aircraft gave him and put it to use, due to his fatigue. Respondent denied programming the altitude to 100 feet, as there was "no logical reason" for him to do so. Tr. at 225.

Following the hearing the law judge issued an oral initial decision, in which he determined the Administrator fulfilled the burden of proving the alleged violations. The law judge acknowledged respondent's affirmative defense of fatigue, and summarized the testimony concerning the effects of fatigue on operation of an aircraft. The law judge stated, "[t]he aspect of fatigue ... cannot excuse an Airline Transport rated pilot who at all times must exercise the very highest standard of care, judgment and responsibility which the complete record shows that was not exercised by Respondent Kooistra during this approach and a missed approach." Initial Decision at 309-310. As a

result, the law judge affirmed the Administrator's order, after mentioning the record indicated respondent was eligible for a waiver of sanction under the ASRP. Id. at 306.

On appeal, respondent reiterates his affirmative defenses of fatigue, emergency, and crew error, and argues the law judge erred in not allowing an FAA Notice of Proposed Rulemaking (NPRM) into evidence. We do not find that any of respondent's affirmative defenses form a basis for excusing respondent's conduct on the flight at issue. With regard to fatigue, we are aware of the tremendous effects fatigue may have on virtually all major aspects of a pilot's behavior in the cockpit. Respondent correctly notes that pilot fatigue has consequently been a noteworthy aviation safety issue in the past year. However, respondent has provided no authority for his proposition that fatigue should serve as an affirmative defense to excuse a pilot of violating operational regulations. Instead, respondent relies upon the NPRM that he referred to at the hearing.⁸ The NPRM, however, does not help respondent's case. While it describes, at length, how fatigue can adversely affect several aspects of a pilot's conduct, it does not state

⁸ The Administrator contends respondent did not offer the NPRM into evidence, or make a proffer of it, as an exhibit at the hearing. Nevertheless, we review respondent's argument concerning the law judge's consideration of the subject NPRM as an evidentiary issue.

that the FAA's policy is to allow fatigue to serve as an affirmative defense, whereby it excuses regulatory violations.⁹ Moreover, the publication at issue is an NPRM, which is a *proposed* rule, not yet in effect.

In this regard, we do not believe the law judge erred in not formally allowing a copy of the NPRM into evidence or in failing to take judicial notice of the NPRM. We have long held that law judges have significant discretion in overseeing testimony and evidence at hearings, and we typically review our law judges' evidentiary rulings under an abuse of discretion standard, after a party can show such a ruling prejudiced him or her.¹⁰ In the case at issue, the law judge allowed respondent's attorney to reference the NPRM several times at the hearing. To the extent respondent argues the law judge excluded it, we do not believe such exclusion amounts to an abuse of discretion, as the NPRM consists of a collection of research concerning fatigue, and is not a final rule. Moreover, respondent cannot show that exclusion of the NPRM was prejudicial to him, as the

⁹ 75 Fed. Reg. 55852 (Sept. 14, 2010) (NPRM entitled "Flight Crewmember Duty and Rest Requirements").

¹⁰ 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).

NPRM does not state fatigue should serve as an affirmative defense in cases involving an aviation certificate action.

We also do not believe respondent's contention that an emergency existed excusing his violations. With regard to emergency defenses, § 91.3(b), entitled "responsibility and authority of the pilot in command," provides, "[i]n an in-flight emergency requiring immediate action, the pilot in command may deviate from any rule of this part to the extent required to meet that emergency." With regard to this defense, we are mindful of the fact that respondent did not declare an emergency to ATC or any crewmembers on board, and only raised it as a defense in his answer to the Administrator's complaint, and now on appeal. We also note we have long held "a deviation from, or disregard of, the regulations is not excused by an emergency which was either of the pilot's own making or which could have been avoided by the exercise of proper prudence before and during the flight."¹¹ The law judge determined, after assessing the evidence and witness testimony, that respondent had set the Mode Control Panel to 100 feet. The record indicates this setting served to commence the entire chain of events that resulted in the seriously mishandled approach at issue. We

¹¹ Administrator v. Katinszky, 3 NTSB 1595, 1597 (1979); see also, e.g., Administrator v. Futyma, NTSB Order No. EA-4141 at 8 (1994) (citing Administrator v. Worth, NTSB Order No. EA-3595 at 6-7 (1992)).

believe the law judge was correct in his assessment, and we do not find this affirmative defense excuses respondent's violations.

Finally, we find unpersuasive respondent's argument that other crewmembers' errors caused the mishandled approach. The law judge weighed the evidence and evaluated the testimony on this issue in a manner unfavorable to this defense, and we do not believe the law judge's conclusion was erroneous.

Respondent contends a crewmember on the flight deck dialed the altitude down to 100 feet, and argues the crewmembers failed to inform respondent of this error. However, this argument is contrary to the testimony in the record, in which both Messrs. Knight and Anderson testified they informed respondent the aircraft was too low, and "still sinking." Tr. 59 (Mr. Knight's testimony), 99-100 (Mr. Anderson's testimony). In addition, First Officer Aitken testified he did not set the altitude at 100 feet.

Moreover, we note that, as PIC, respondent's duty on the flight was to monitor the altitude,¹² along with other critical aspects of the flight, and correct as necessary. The regulations clearly state PICs have the ultimate responsibility

¹² The record establishes respondent had the following tools available to him for monitoring the altitude: the glideslope indicator, the altimeter, the vertical speed indicator, verbal cues from other crewmembers, and repeated comments from ATC.

for the operation of a flight.¹³ To the extent respondent may be basing this defense upon an argument that he reasonably relied upon the other crewmembers' actions, we note this argument is not persuasive according to our narrow doctrine of reasonable reliance.¹⁴ Therefore, we do not accept respondent's defense concerning other crewmembers' alleged errors.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's initial decision is affirmed.

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

¹³ 14 C.F.R. § 91.3(a).

¹⁴ In the controlling case concerning reasonable reliance, Administrator v. Fay & Takacs, NTSB Order No. EA-3501 (1992), we held, "[i]f ... a particular task is the responsibility of another, if the [pilot-in-command] has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found." Id. at 10 (emphasis in original). We further noted the doctrine may apply to cases "involving specialized, technical expertise where a flight crew member could not be expected to have the necessary knowledge." Id. at 9. We have also recently stated the doctrine of reasonable reliance is generally one of narrow applicability. Administrator v. Angstadt, NTSB Order No. EA-5421 at 18-19 (2008), *pet. for review denied*, Angstadt v. FAA, No. 09-1005, 348 Fed.Appx. 589 (D.C. Cir. Sept. 24, 2009) (per curiam).

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ORAL INITIAL DECISION AND ORDER

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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 Arthur Roy Kooistra from an Amended Order of Suspension dated March 23, 2010 which seeks to suspend Respondent Kooistra's Airline Transport Pilot Certificate for a period of 60 days. As the record indicates this is the second session that we've had in this proceeding and at the first session it came out abundantly clear that a successful NASA report had been filed by the Respondent so that if any violations were found no sanction would be imposed.

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The Administrator's Order of Suspension as duly promulgated pursuant to the National Transportation Safety Board's Rules of Practice was issued by the Regional Council of the Eastern Region of the Federal Aviation Administration. This matter has been heard before this United States Administrative Law Judge and as is set forth in the Rules of Practice of the Board it is not mandatory that I issue an Oral Initial Decision but I'm going to do so at this time.

23

Following notice to the parties this matter came on for trial. The first session was September 22nd in New York City of

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1 this year, 2010. The second session, is today, December 8th, 2010
2 here in Washington, D.C. In both of these sessions Respondent
3 Kooistra was present at all times and was very ably represented by
4 Joseph Lamonaca, Esquire. The Administrator's counsel was, also,
5 very ably represented by Robert Spitzer, Esquire of the Regional
6 Counsel's Office, Eastern Region of FAA. Both parties have been
7 afforded the opportunity to offer evidence, to call, examine and
8 cross-examine witnesses. In addition, the parties were afforded
9 the opportunity to make argument in support of their respective
10 positions.

11 DISCUSSION

12 I have reviewed the testimony and evidence adduced
13 during the course of the two sessions that we've had here. We've
14 had a total of six witnesses on behalf of the Administrator and
15 eight exhibits adduced on behalf of the Federal Aviation
16 Administrator. The Respondent had four exhibits and one witness,
17 the Respondent himself.

18 After reviewing the testimony and evidence adduced
19 during the course of this proceeding I have determined and
20 concluded that the Administrator was definitely validly premised
21 in bringing this action as set forth in the Administrator's
22 Amended Order of Suspension of March 23rd, 2010 concerning, as you
23 recall, Polar Air Flight on June 29th, 2009 where the Respondent,
24 Arthur Roy Kooistra acted as the pilot-in-command. This flight

1 being from Los Angeles International Airport to Incheon
2 International Airport, Seoul, South Korea.

3 The Administrator's case is very compelling, persuasive
4 and logical and it is my finding, holding, determination and
5 conclusion that the Administrator has successfully proven, by a
6 fair and reasonable preponderance, of relevant, substantial and
7 probative evidence the great majority of the 26 numbered
8 paragraphs which constitutes the Administrator's Amended Order of
9 Suspension.

10 There was no inconsistent testimony during the course of
11 the Administrator's case. This case, it has been brought out
12 during the course of the testimony, apparently has caused the FAA,
13 and we have some testimony in this regard, that a new emphasis is
14 being placed on the aspect of fatigue on airline pilots, all
15 pilots I should say. As you well know, the National
16 Transportation Safety Board has gotten into this subject a while
17 back so you might say it's a joint effort.

18 This to me is a case of first impression because as
19 Respondent's counsel ably summed up, what you have here is, as he
20 put it, a series of -- well, the case itself was an aberration, he
21 said, but a series of aberrant happenings and occurrences. The
22 overall picture, is that unfortunately Respondent Kooistra showed
23 an almost total lack of judgment, in that mistakes that he made on
24 his approach into the Incheon, Seoul Korea Airport, misplacing the

1 location of the localizer and the glidescope, to mention a few of
2 these. When he initiated a missed approach he did not retract the
3 gear flaps and speed breaks until the airplane reached 2,000 feet
4 above sea level. The most fortunate thing about this entire case
5 is that there was no crash although, as we all know, the flight
6 came within 200 feet of terrain. Captain Kooistra was at the
7 controls of the flight at the time.

8 The Respondent's case is heavily predicated on the
9 aspect of fatigue, that Respondent's rest was broken, he had not
10 had the proper amount of rest and sleep he should have before the
11 flight left Los Angeles. There was testimony brought out, Captain
12 Kooistra took over the flight early claiming that he couldn't
13 sleep. The weather was bad. It was late at night and the CAT II
14 approach was called for and he was the only one, as captain,
15 qualified to make this approach. That's when all these mistakes
16 occurred. As I said, fortunately, even though there was -- you
17 could call it, to use a colloquialism, a close call when you come
18 within 100 feet of terrain. We are lucky that there was not a
19 crash or incident, any injuries or anything of that type which so
20 often happens with this type of flight.

21 The aspect of fatigue is certainly a big factor in this
22 proceeding, but it cannot excuse an airline transport rated pilot
23 who at all times must exercise the very highest standard of care,
24 judgment and responsibility which the complete record shows that

1 was not exercised by Respondent Kooistra during this approach and
2 a missed approach.

3 You may recall that Inspector David Lithgow, who on the
4 record was designated as an expert in 747 aircraft, while he said
5 that fatigue could have been and was a factor in this proceeding
6 the mistakes made by the Respondent here were very serious, of
7 great significance to the FAA and, thus, this Order of Suspension
8 being brought and that the approach by Respondent Kooistra to
9 quote Inspector Lithgow, "was a badly mismanaged approach."

10 Further it was stressed during the course of this record
11 the duty of an ATP-rated pilot is to see that his flight is safe
12 at all times not only when he is at the controls but when the
13 flight is going on and another individual, is in control as we've
14 had three other assistants here, first officers and whatnot who
15 were handling the flight, to see that everything was done in
16 accordance with the Federal Aviation Regulations. It is
17 unfortunate, in a manner of speaking, the Respondent has a clear,
18 spotless and unblemished record that what occurred here could be
19 deemed a series of aberrant events but this does not excuse an
20 ATP-rated pilot, as I mentioned a moment ago, from exercising at
21 all times the highest standard of care when he is pilot-in-command
22 as Respondent Kooistra was during this flight of June 29th, 2009.

23 So that, ladies and gentlemen, I'm sure you get the
24 ultimate drift of my determination in this proceeding, I will now

1 proceed to make the following specific findings of fact and
2 conclusions of law for the 26 numbered paragraphs in the
3 Administrator's Amended Order of Suspension which sets forth the
4 charges against Captain Kooistra.

5 Respondent through counsel admitted paragraphs 1, 2 and
6 3 of the Amended Order of Suspension. My findings of facts and
7 conclusions of law which has been proven by an almost overwhelming
8 amount of evidence, very well presented and very, consistent,
9 which not only enhanced the Administrator's case, in my opinion,
10 but successfully rebutted the affirmative defenses that the
11 Respondent adduced during the course of the presentation of the
12 Respondent's case as well as the early pleadings and motions that
13 were filed in this proceeding.

14 On finding 4, based on the evidence and testimony
15 adduced before me during the course of this proceeding I have
16 found that the elevation for Incheon International Airport is 23
17 feet.

18 5, I find that the approach phase of the flight into the
19 Incheon Airport described above that the Respondent was a pilot in
20 command flying the airplane.

21 6, it is found that during the approach described above
22 Air Traffic Control cleared respondent, Captain Kooistra, for a
23 CAT II approach to runway 15L.

24 7, it is found that during the approach described above

1 Respondent Kooistra deployed the speed brakes to 6.5 degrees when
2 the aircraft descent was more than one dot below the glidescope
3 indication.

4 8, it is found that during the approach described above
5 Respondent deployed the speed brakes further to 43 degrees when
6 the aircraft was at 1,900 feet above sea level and two dots below
7 the glidescope indication.

8 9, it is found that during the approach above when the
9 aircraft was 1,900 feet above sea level, Respondent reset the mode
10 control panel to level the airplane off at 100 feet above sea
11 level instead of 1,600 feet, the altitude at which the airplane is
12 to intercept the final approach fix. In that finding while the
13 evidence in the Administrator's case is not everything that it
14 should be as to who set the dial to 150 feet in a manner of
15 deduction and logic I have arrived at that conclusion that the
16 level of the airplane was set at 100 feet above sea level instead
17 of 600 -- I'm sorry, instead of 1,600 feet, the altitude at which
18 the airplane had been assigned.

19 10, it is found during the approach described above the
20 aircraft was descending at a rate of 1,100 feet per minute after
21 passing 1,000 feet above sea level.

22 11, it is found that during the approach described above
23 the electronic ground proximity warning system issued a sync rate
24 warning at 600 feet above sea level and terrain and pull up

1 warnings at 390 feet above sea level.

2 12, it is found that Respondent Kooistra initiated a
3 manual missed approach but did not retract the gear flaps and
4 speed brakes until the airplane reached two feet above sea level.

5 13, it is found that as Respondent initiated the go
6 around, air traffic control instructed the Respondent to maintain
7 the runway heading.

8 14, it is found that it executed the missed approach.
9 Respondent deviated from the runway heading by more than 30
10 degrees.

11 15, it is found that Section 91.123(b) of the Federal
12 Aviation Regulations states that no person except in an emergency
13 may operate an aircraft contrary to ATC instruction in an area
14 which Air Traffic Control is exercised.

15 16, it is found that Section 91.123(b), as stated above,
16 is not inconsistent with applicable regulations of the foreign
17 country, South Korea, where the aircraft was being operated on
18 Annex 2 of the Convention on International Civil Aviation.

19 17, it is found that during the missed approach the
20 aircraft speed reached 275 knots at an altitude of 3,000 feet
21 above sea level.

22 18, it is found that Section 91.117(a) and Part 91 of
23 the Federal Aviation Regulations states that unless authorized by
24 the Administrator no person may operate an aircraft below 10,000

1 feet MSL at an indicated airspeed of more than 250 knots. The
2 evidence here was the airspeed was 288 miles per hour.

3 19, it is found that Section 91.117(a), as stated above,
4 is not inconsistent with applicable regulations of the foreign
5 country South Korea where the aircraft was being operated or Annex
6 2 of the Convention on International Civil Aviation.

7 Paragraph 20 was withdrawn by the Administrator at the
8 beginning of this proceeding.

9 Paragraph 21, it is found that during the approach
10 described above the Respondent did not establish and maintain a
11 stabilized approach and descended below the minimum stabilized
12 approach height.

13 Paragraph 22 was withdrawn at the outset of this
14 proceeding so it's not applicable at this time.

15 Paragraph 23, it is found that Section 91.9(a) is not
16 inconsistent with applicable regulations of the foreign country of
17 South Korea where the aircraft was being operated or Annex 2 of
18 the Convention on International Civil Aviation.

19 24, it is found that by virtue of the foregoing
20 Respondent Kooistra operated an aircraft in a careless manner so
21 as to potentially endanger the life or property of another.

22 25, it is found that Section 91.13(a) of Part 91 of the
23 Federal Aviation Regulations states that no person may operate an
24 aircraft in a careless or reckless manner so as to endanger the

1 life or property of another.

2 26, it is found that as a derivative violation 91.13(a)
3 as stated above is not inconsistent with the applicable
4 regulations of the foreign country of South Korea where the
5 aircraft was being operated or Annex 2 of the Convention on
6 International Civil Aviation.

7 27, it is found, based on the evidence and testimony
8 adduced during the course of this proceeding, a violation of
9 Section 91.117(a) and I am incorporating my reference what that
10 paragraph labeled (a) says also Section 91.123(b) which I
11 incorporate by reference that is as that paragraph is set out
12 under paragraph (b) of finding twenty-seven and (c) the derivative
13 violation 91.13(a) which states that no person may operate an
14 aircraft in a careless or reckless manner so as to endanger the
15 life or property of another and (d) found that violation it's
16 being satisfied by the Administrator's A-2 which is the approach
17 plate which the Administrator adduced during the course of this
18 proceeding and which was duly admitted in evidence.

19 Those are the violations that I have found. As I stated
20 earlier, the testimony and evidence of the Administrator is very
21 strong, logical, compelling and persuasive in proving the
22 violations of the aforesaid sections which I just referred to of
23 the Federal Aviation Regulations.

24 My final finding is that this Judge finds that safety in

1 air commerce or air transportation and the public interest does
2 require the affirmation of the Administrator's Amended Order of
3 Suspension dated March 23, 2010 in view of the aforesaid
4 violations set forth earlier in this decision.

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ORDER

8 IT IS ORDERED AND DECREED that the Administrator's Order
9 of Suspension of March 23, 2010 be, and the same is hereby,
10 affirmed.

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

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15 EDITED ON

WILLIAM E. FOWLER, JR.

16 12/29/10

Chief Administrative Law Judge

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APPEAL

19 JUDGE FOWLER: Under the heading of appeal if either
20 party wishes to appeal the judge's Oral Initial Decision which was
21 just issued, the Appellant shall file his Notice of Appeal within
22 ten days following the Judge's Oral Initial Decision which -- has
23 been issued, on today's date of December 8th, 2010. In order to
24 perfect the appeal the Appellant must file a brief within 50 days

1 of the date of today's decision setting forth his objections to
2 the Judge's Oral Initial Decision. The Notice of Appeal and the
3 Brief shall be filed with the National Transportation Safety
4 Board, Office of Judges, 490 L'Enfant Plaza East S.W., Washington,
5 D.C. 20594. If no appeal to the Board from either party is
6 received or if the Board of its own volition does not file a
7 motion to review the Judge's Oral Initial Decision within the time
8 allowed then the Judge's decision shall become final. Timely
9 filing of such an appeal, however, shall stay the order as set
10 forth in the Judge's decision. Off the record.

11 (Off the record.)

12 (On the record.)

13 JUDGE FOWLER: All right. On the record.

14 Let the record indicate that in my decision I misspoke
15 about the amount of sleep that the Respondent had prior to the
16 flight leaving Los Angeles. He apparently appeared to have a
17 sufficient amount of sleep to participate in the flight but as the
18 evidence bore out and due to the fact it was beyond his control,
19 it obviously was very indicative that fatigue became a very cogent
20 factor where the Respondent was concerned and made him make the
21 mistakes and some of the erroneous decisions that he made. I have
22 stated earlier the Administrator -- too, the plate was a modicum
23 of evidence establishing the international connection of the
24 flight in question and the regulations between the FAA and those

1 of Seoul, Korea but I deem that plate to be sufficient for the
2 Administrator to have met his burden of proof in that regard.

3 The ground proximity warning I may have misspoke myself.
4 I'm not certain based on the large amount of evidence, highly
5 technical evidence that we've had during the two sessions of this
6 proceeding but, certainly, counsel for the Respondent's statements
7 may be entirely, entirely correct.

8 Is there's anything further gentlemen that you feel I
9 may have overlooked or omitted in my decision? Mr. Lamonaca do
10 you -- I'm sorry. Go ahead Mr. Spitzer.

11 MR. SPITZER: Your Honor, I'd also note that the motion
12 for summary judgment which the Administrator filed contains copies
13 of the Korean Aviation Regulations and also a brief description of
14 how the FAA Regulations are not inconsistent with those.

15 JUDGE FOWLER: Yes, and that can be deemed, and I'm glad
16 you raised that Mr. Spitzer, that can be deemed compatible to the
17 finding -- between the FAA regs and the regs of Seoul, Korea. A
18 bit of additional evidence in addition to the plaque that the
19 Administrator adduced.

20 Does either side, either counsel able to state at this
21 time with a reasonable degree of certainty as to whether or not
22 they contemplate filing a Notice of Appeal from the Judge's
23 decision?

24 MR. LAMONACA: Yes, Your Honor, we do contemplate filing

1 an appeal.

2 JUDGE FOWLER: You will be?

3 MR. LAMONACA: Yes.

4 JUDGE FOWLER: All right. Will the Administrator be
5 filing a notice of appeal?

6 MR. SPITZER: No, Your Honor.

7 JUDGE FOWLER: All right. Let the record indicate
8 counsel for the Respondent, as he stated, he will be filing a
9 notice of appeal from the Judge's Oral Initial Decision just
10 issued.

11 Gentlemen, if there's nothing further at this time I
12 would declare the hearing closed but before we go off the record I
13 would like to thank both counsel for their very outstanding,
14 industrious and diligent efforts on behalf of their respective
15 clients and I have no witnesses here to thank except to Captain
16 Kooistra who was the only witness on behalf of the Respondent.
17 The witnesses on behalf of the Administrator let us say I will
18 thank them in absentia for their help, assistance, cooperation
19 during the course of this proceeding. Thank you all very much.
20 We stand adjourned.

21 (Whereupon, at 1:15 p.m., the hearing in the above-
22 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Arthur Roy Kooistra

DOCKET NUMBER: SE-18831

PLACE: Washington, D.C.

DATE: December 8, 2010

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Beverly A. Lano
Transcriber