

SERVED: September 9, 2011

NTSB Order No. EA-5597

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 9th day of September, 2011

_____)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19128
v.)	
)	
GREGORY ERNEST GREEN,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Respondent, who proceeds pro se, appeals the oral initial decision of Administrative Law Judge Alfonso J. Montañó, issued August 9, 2011.¹ By that decision, the law judge affirmed the Administrator’s complaint and ordered the suspension of

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

respondent's private pilot certificate, pending respondent's successful reexamination of his qualifications to hold the certificate under 49 U.S.C. § 44709.² We deny respondent's appeal.

The Administrator issued the emergency revocation order,³ which became the complaint in this case, on July 7, 2011. The complaint alleged, on or about December 6, 2010, respondent acted as pilot-in-command of a Cessna C-177B on a passenger-carrying flight from a private airstrip. The complaint stated respondent failed to maintain directional control and establish a climb sufficient to refrain from striking a fence; and this conduct resulted in substantial damage to the aircraft. After the incident, the Administrator sent two letters to respondent on January 4, 2011 and February 10, 2011, requesting respondent appear for a reexamination of his competency to hold his certificate. The complaint alleged respondent received the February 10, 2011 letter, but failed to appear for a reexamination.

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

³ This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52-821.57.

The law judge held a hearing for the case, at which aviation safety inspector (ASI) William Evanoff from the Indianapolis Flight Standards District Office (FSDO) testified. Inspector Evanoff identified several photos showing significant damage to respondent's aircraft after the December 6, 2010 incident. Exh. A-4. Inspector Evanoff recalled having a telephone conversation with respondent following the incident, in which respondent told him he "may have encountered a tensile wire fence" on the side of the airstrip, because he hit a cross-wind. Tr. at 24. Inspector Evanoff spoke with other ASIs about the incident, and concluded a reexamination request under 49 U.S.C. § 44709(a) was appropriate. Inspector Evanoff acknowledged respondent claimed to have completed a flight review with someone named "L. Bothe," a certified flight inspector. Tr. at 39. Inspector Evanoff explained, however, a reexamination pursuant to § 44709(a) must occur with an ASI from an FAA FSDO, and Mr. Bothe was not an ASI, but instead was a designated pilot examiner (DPE). Tr. at 49.

In rebuttal of the Administrator's case, respondent briefly testified. He stated he did not know how the December 6, 2010 incident occurred. Respondent also asserted his recently completed biennial flight review sufficed to meet the requirements of 49 U.S.C. § 44709(a). On cross-examination,

respondent admitted he had not submitted to a reexamination as requested by the FAA.

The law judge issued an oral initial decision at the conclusion of the hearing, in which he determined the evidence established the Administrator had a reasonable basis for requesting respondent complete a reexamination under 49 U.S.C. § 44709(a). The law judge found the evidence concerning the December 6, 2010 incident indicated the Administrator had reason to question respondent's competence. The law judge also stated respondent provided no evidence concerning the alleged flight review conducted by the DPE, Mr. Bothe. Initial Decision at 73.

On appeal, respondent argues the Administrator cannot prove he lost directional control of the aircraft on the flight in question. Respondent further contends the Administrator's request for a reexamination states he should complete a "soft field takeoff," but the airfield at issue was frozen. Lastly, respondent asserts he completed a satisfactory flight review with "an FAA examiner" following the incident, and subsequently has conducted flights without incident. The Administrator opposes respondent's arguments, and urges us to affirm the law judge's decision.

We agree with the law judge's finding that the Administrator had a reasonable basis for requesting reexamination of respondent's qualifications. We previously

have acknowledged the Administrator has significant discretion in determining whether such reexaminations are warranted.⁴ The evidence the Administrator presented, showing the damage to respondent's aircraft after the incident, indicates respondent encountered an obstacle on takeoff. Respondent does not dispute this incident occurred. Tr. at 57 (stating he "[did not] know how this accident happened"). Given these facts, we find the Administrator had a reasonable basis to request respondent complete a reexamination.

In addition, the scope of our review of reexamination requests is very narrow and limited to the reasonableness of the request.⁵ The fact the December 6 incident took place on frozen ground, yet the Administrator requested respondent complete a soft-field takeoff, is outside the scope of our limited inquiry concerning whether the request for reconsideration under 49 U.S.C. § 44709(a) was reasonable.

⁴ Administrator v. Occhione, NTSB Order No. EA-5537 at 13 (2010); Administrator v. Sanchez, NTSB Order No. EA-5326 at 4 (2007); Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 at 4 (1994)(the standard for a reexamination request by the Administrator is 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).

⁵ Administrator v. Wilkie, et. al., NTSB Order No. EA-5565 at 7 (2011); Administrator v. Sanchez, NTSB Order No. EA-5326 at 4 (2007) (stating, "[i]t is well-settled that the Board's inquiry into the reasonableness of a reexamination request is a narrow one"); Administrator v. Wang, 7 NTSB 752 (1991).

Finally, to the extent respondent contends his biennial flight review sufficed to fulfill the requirement of 49 U.S.C. § 44709(a), we reject this argument. Pilots must complete biennial flight reviews under 14 C.F.R. § 61.56. These flight reviews have requirements different from those of a reexamination under 49 U.S.C. § 44709(a). The Administrator will request a reexamination after realizing a reasonable basis exists to question a pilot's competency, judgment, or other necessary attribute. Therefore, reexaminations occur upon request, rather than on a periodic basis. Respondent provides no authority for his belief, nor do we find any exists, that a biennial flight review can be substituted for a reexamination under 49 U.S.C. § 44709(a).

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 private pilot certificate, pending respondent's successful completion of a reexamination under 49 U.S.C. § 44709, is affirmed.

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

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. *

GREGORY E. GREEN, *

Respondent. *

* * * * *

Docket No.: SE-19128
JUDGE MONTAÑO

City-County Building
Room 501
220 East Washington Street
Indianapolis, Indiana

Tuesday,
August 9, 2011

The above-entitled matter came on for hearing, pursuant
to Notice, at 8:30 a.m.

BEFORE: ALFONSO J. MONTAÑO
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

CHRIS G. ZURALES, ESQ.
Senior Attorney
Office of the Regional Counsel
Federal Aviation Administration
Great Lakes Region
2300 East Devon Avenue
Des Plaines, IL 60018
(847) 294-7313
(847) 294-7498 (Fax)

On behalf of the Respondent

GREGORY E. GREEN, Pro Se
325 North County Road 750 West
North Vernon, IN 47265

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE MONTAÑO: This is a proceeding under the provisions of 49 USC 44709, formerly Section 809 of the Federal Aviation Act, and the provisions and Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board and the sections pertaining to emergency proceedings instituted by the Administrator, Federal Aviation Administration. This matter has been heard by me as an administrative law judge. As provided by the Board's Rules, I've elected, as required, to issue an oral initial decision in this case.

Pursuant to notice, this matter came on for trial on August 9th in Indianapolis, Indiana. The Administrator was represented by one of its senior staff counsel, Chris G. Zurales, Esquire, of the Great Lakes Region, Federal Aviation Administration. Mr. Green chose to represent himself in these proceedings.

The parties were afforded full opportunity to offer evidence, to call, examine and cross-examine witnesses, and to make arguments in support of their respective positions.

1 Mr. Green has been in the courtroom throughout these entire
2 proceedings.

3 I will not discuss all of the evidence in detail. I
4 have, however, considered all of the evidence, both oral and
5 documentary, that is before me. That evidence which I do not
6 specifically mention is viewed by me as being either corroborative
7 or not materially effecting the outcome of this decision.

8 DISCUSSION

9 Mr. Gregory Ernest Green, Respondent, has appealed the
10 Administrator's Emergency Order of Suspension, dated July 7, 2011,
11 pursuant to 821.31(a) of the Board's Rules of Practice. The
12 Administrator filed a copy of the emergency order on July 15,
13 2011, to serve as the complaint in this case.

14 The Administrator ordered the emergency suspension of
15 Respondent's private pilot certificate based on Respondent's
16 failure to submit to and/or satisfactorily complete reexamination
17 that was requested by letters dated January 4, 2011 and February
18 10, 2011. The two letters informed the Respondent that the
19 reexamination would consist of an appropriate private pilot
20 practical test standards with emphasis on soft-field takeoff and
21 climb, soft-field approach and landing, and positive aircraft
22 control and aeronautical decision making.

23 The Order of Suspension, or complaint, specifically
24 states that as of the date of the Emergency Order of Suspension,
25 Respondent had failed to appear or to participate in the

1 reexamination to determine his qualifications.

2 As to the agreements in this case, and in response to
3 the Administrator's Emergency Order of Suspension, the Respondent
4 admitted paragraphs 1, 2 and 4. As Respondent has admitted those
5 allegations, they are deemed to have been established for the
6 purpose of this decision.

7 Respondent has denied paragraphs 3 and 5. Respondent
8 denies paragraph 3 in that he asserts that he did maintain
9 directional control. In his statement he indicates he does not
10 know how he got into the fence, could have been ice, snow,
11 crosswind, or deer could have knocked the fence down and it came
12 into the runway. He also asserts that he performed every aspect
13 of the 709 request letter with an FAA examiner and maintains that
14 that should be satisfactory to prove his competence as a private
15 pilot.

16 As far as the exhibits are concerned, the Administrator
17 moved for the admission of Exhibits A-1 through A-4. They were
18 admitted without objection. Respondent moved for the admission of
19 Exhibit R-1, which I requested him to do.

20 As far as the testimony is concerned in this case, the
21 Administrator presented the testimony of Mr. William A. Evanoff,
22 who is a safety inspector, Indianapolis Flight Standards District
23 Office. We went through Mr. Evanoff's background, substantial
24 flight background. Mr. Evanoff testified that he investigated the
25 events that occurred on December 6, 2010, which he learned of

1 through an anonymous phone call. The events of December 6, 2010,
2 involve Respondent's aircraft, N888VM, when Respondent is alleged
3 to be unable to maintain directional control of his aircraft from
4 a private grass strip and came in contact with a fence.

5 Inspector Evanoff conducted an examination, examined the
6 damage to the aircraft and obtained photos which have been
7 admitted into evidence as Exhibit A-4. He also took another
8 inspector with him who was involved or who has an expertise in the
9 area of airworthiness. They determined that the damage to the
10 aircraft was significant and -- or more precisely, substantial
11 damage to the aircraft, and an accident report was filed with the
12 National Transportation Safety Board.

13 He testified that he spoke to the Respondent by
14 telephone. He testified the Respondent told him that he owned the
15 aircraft and he owned the grass landing strip and that he had been
16 involved in the accident that occurred on December 6, 2011.
17 According to Inspector Evanoff, Mr. Green told him that he had
18 taken off in a 10-knot crosswind on frozen field and Respondent
19 told Inspector Evanoff that, in quotes, "he may have struck the
20 fence."

21 Based on his review of the evidence he had accumulated,
22 Inspector Evanoff believed that -- or caused him to question
23 Respondent, whether Respondent possessed the qualifications
24 necessary to hold a private pilot certificate because of
25 Respondent's performance on December 6. He felt that it indicated

1 that the Respondent did not meet the standards contained in the
2 Practical Test Standards for private pilot certificate. He
3 testified he decided to request that the Respondent appear for
4 reexamination.

5 He prepared a letter to the Respondent dated January 24,
6 2011, which went unclaimed. He spoke to the Respondent by phone,
7 who had asked him to send him the letter by First Class mail,
8 which Inspector Evanoff did send by First Class mail. The
9 Respondent has indicated he did receive that letter.

10 Subsequently he did not hear from Mr. Green, but I
11 believe he indicated that he found out that Mr. Green had made
12 contact with the Louisville FSDO to set up a reexamination, which
13 is an option that a pilot that's been requested to conduct a
14 reexamination can exercise. At that time Mr. Green indicated to
15 that aviation inspector that the repairs on the aircraft would
16 take some time and it would take some time for him to schedule a
17 reexamination flight. Inspector Evanoff had checked with the
18 Louisville FSDO a number of times and it was determined that the
19 reexamination flight never took place and was never completed.

20 Inspector Evanoff indicated that Mr. Green spoke to his
21 supervisor, Mr. Chambers, and had signed a written statement
22 indicating that he was willing to take the reexamination flight.
23 Before the letter of suspension was sent out, Mr. Chambers,
24 according to Mr. Evanoff, had spoken to Mr. Green one last time
25 and Mr. Green had indicated that he did not intend to take the

1 reexamination flight. He testified that as of today, that
2 Respondent has not appeared for reexamination.

3 On cross-examination Mr. Green asked Inspector Evanoff
4 if he knew what happened, what exactly were the circumstances. Of
5 course, Mr. Evanoff testified that he did not know the
6 circumstances, he was not there. But he also pointed out that
7 that's not what the FAA has to prove. Mr. Evanoff was also
8 accused of perjury, which I think has been explained in this
9 situation.

10 I found the testimony of Mr. Evanoff to be credible.
11 There's really no question as to his creditability based on cross-
12 examination.

13 In response to my question, Mr. Evanoff stated that the
14 only person that can conduct a reexamination 709 flight would be
15 an aviation inspector, that it cannot be done by anyone else; no
16 one else has the authority to do that, including an examiner which
17 has been FAA approved. The only person or persons that can
18 conduct a 709 reexamination are the aviation flight inspectors.

19 Mr. Green testified on his own behalf. He testified he
20 did not know how he got into the fence, as I indicated. He did
21 not know if deer had knocked down the fence. He did not know
22 exactly how it happened. He testified that he did not lose
23 directional control of the aircraft. He also testified that the
24 field was frozen on that day and the accident therefore was not
25 soft-field.

1 He testified that he performed a flight review with an
2 FAA-approved flight examiner by the name of Larry Bothe and that
3 they had gone over the practical test standards set out in the
4 letters that were sent from Inspector Evanoff. He testified that
5 he satisfactorily conducted that flight review and that Mr. Bothe
6 had signed off as a successful completion of that flight review.
7 Mr. Green argues that that proves that he is a competent pilot,
8 that he passed the flight review and that therefore the
9 Administrator's request for reexamination is unreasonable.

10 FINDINGS OF FACT AND CONCLUSIONS OF LAW

11 Now, what I'll do at this point is discuss the evidence
12 as I've heard it and apply it to the law because, as I indicated
13 at the beginning, and again to reiterate, my role is to apply the
14 facts to the law, to be fair to both parties. And I am, of
15 course, bound by the law and the case law that's been decided by
16 the National Transportation Safety Board and any other higher
17 court decision, federal court decisions.

18 As I stated at the beginning of this hearing, the
19 Administrator has a broad discretion under the Federal Aviation
20 Act to order reexamination of airmen. It is well settled at the
21 NTSB that an inquiry into the reasonableness of a reexamination
22 request is a narrow one, namely, whether a request objectively
23 viewed is reasonable.

24 In the cases cited by the Administrator, Administrator
25 v. Sanchez, NTSB Order Number EA-5326, and also in the case of

1 Administrator v. Santos and Rodriguez, the Board stated that, in
2 sum, the Administrator in such cases need only convince us that
3 the basis for questioning competence has been implicated, not that
4 the lack of competence has been demonstrated.

5 In the case of Administrator v. Ringer, the Board
6 specifically stated that the law judge or the Board may not
7 invalidate a reexamination request simply because some other
8 factor or factors other than pilot competence may have been
9 responsible for the accident, for the accident in whole or in
10 part. It means only that the Administrator to have the request
11 upheld must demonstrate a reasonable basis for believing that the
12 pilot's competence could have been a factor. Thus, the
13 Administrator does not have to prove that Respondent's
14 incompetence caused him to either hit the fence or come in contact
15 with the fence and damage his aircraft. The Administrator need
16 only show that the Respondent's competence could have been a
17 factor or his competence is implicated in the accident.

18 As Inspector Evanoff testified, he's not sure and he
19 could not testify under oath what caused the accident, if it was a
20 crosswind, if it was some other matter that caused the accident,
21 but as indicated and as required by the case law, the
22 Administrator doesn't have to prove that. All they have to prove
23 is that the pilot's competence could have been a factor in the
24 accident. Credible testimony of the Administrator's witness and
25 the evidence demonstrates that the Respondent's competence in this

1 case could have been a factor in the accident, and the
2 Administrator's testimony in evidence demonstrates the
3 Respondent's competence is implicated in the accident.

4 As to Respondent's defense that he completed a check
5 ride with Mr. Larry Bothe, an FAA approved flight examiner, I
6 don't have any evidence to demonstrate that Mr. Bothe had the
7 authority to conduct a 709 reexamination, and there has been
8 testimony from Mr. Evanoff that he, Mr. Bothe, does not have the
9 authority to conduct a 709 reexamination flight. I have no
10 evidence that Mr. Bothe claimed to Mr. Green that he could conduct
11 the 709 reexamination or that Mr. Bothe knew that. I don't have
12 those facts in front of me. The Administrator maintains, through
13 its witness, that Mr. Bothe was not, again, authorized to conduct
14 a 709 examination, only FAA safety inspector or aviation
15 inspectors can conduct a 709 reexamination.

16 Based on my view of the credible witness presented by
17 the Administrator and the evidence in its entirety, I must find
18 that based on the factual situation as the evidence presents, the
19 Administrator has made a showing by a preponderance of
20 substantial, reliable and probative evidence that there is a
21 reasonable basis to request a reexamination of the Respondent.
22 The case law clearly established that the Administrator need not
23 prove Mr. Green's competence as a pilot caused the accident or how
24 the accident was caused. The Administrator need only prove that
25 the incident implicated Mr. Green's competence, whether

1 Mr. Green's competence may have been a factor in the accident.

2 As counsel for the FAA testified in his opening
3 statement, he argued I have no choice but to find for the
4 Administrator based on the case law and based on the facts of this
5 case. That is a correct statement. I have to find in favor of
6 the Administrator based on the evidence before me.

7 I find that the Administrator has acted reasonably in
8 ordering the reexamination of Respondent airman's competency. I
9 further find that the evidence and the precedent does indicate
10 that safety in air commerce and air transportation and the public
11 interest do require affirmation of the Administrator's order as
12 issued.

13 ORDER

14 IT IS THEREFORE ADJUDGED AND ORDERED that the
15 Administrator's Order of Suspension be, and the same hereby is,
16 affirmed.

17 The Administrator's Order of Suspension shall continue
18 in effect until such time as the Respondent presents himself and
19 successfully accomplishes the reexamination as requested in the
20 Order of Suspension.

21

22

23 EDITED ON
24 AUGUST 12, 2011

ALFONSO J. MONTAÑO
Administrative Law Judge

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEAL

ADMINISTRATIVE LAW JUDGE MONTAÑO: As to your appeal rights, Mr. Green, since this is an emergency case, you have a right to appeal to the full Board. There's five Board members that, if you appeal the decision, it will go before them. They won't have another hearing. What happens is that they review briefs that are submitted by the FAA and by you, and decide whether or not my decision is not supported by the evidence or my decision is arbitrary and capricious or my findings are arbitrary and capricious.

There's a strict time limit and I'm going to give you a sheet which talks about that time limit, but you'll have 2 days in which to file a notice of appeal. And that's going to be with an original and three copies of the notice of appeal, basically just saying I appeal the decision of Administrative Law Judge Montaño, issued on the 9th of August. And you would mail that to the National Transportation Safety Board, Office of Administrative Law Judges, Room 4704, 490 L'Enfant Plaza, S.W., Washington, D.C. 20594.

After that, to perfect the appeal, you have to file a brief in support of your appeal within 5 days after the date on which the notice of appeal is filed. Briefs shall be served by either overnight mail or fax and confirmed by First Class mail directly with the same address -- no, this is to a different address. The National Transportation Safety Board, Office of

1 General Counsel, Room 6401, 490 L'Enfant Plaza East, S.W.,
2 Washington, D.C.

3 As I said, I will hand you a copy of the appeal
4 procedures. And I would like to remind you there's a 2-day --
5 again, the time limits are very strict. So if you decide to
6 appeal, please pay particular attention to the time frame that you
7 have to appeal it.

8 That completes my decision in this case. Is there
9 anything for the record before I go off the record? Since the
10 Administrator has the burden, I'll let them go first and then I'll
11 come back to you, Mr. Green. Go ahead.

12 MR. ZURALES: No, sir.

13 ADMINISTRATIVE LAW JUDGE MONTAÑO: Mr. Green?

14 MR. GREEN: The 2-day -- I mean, I don't know if 2 days
15 is enough time to make my decision. Can I file the appeal and
16 then cancel it or if I file it I have to follow through?

17 ADMINISTRATIVE LAW JUDGE MONTAÑO: That happens. At
18 times people -- you know, respondents may file an appeal and then
19 think about it and decide they -- then they'll file a notice
20 withdrawing the appeal.

21 MR. GREEN: But if I don't do this in 2 days, then
22 there's no questions asked?

23 ADMINISTRATIVE LAW JUDGE MONTAÑO: Right. Yes, my
24 decision will be the final decision. So if you want to appeal,
25 you can appeal within the 2 days. If you decide on day 4, "I

1 really don't want to do this," then you can withdraw it. But if
2 you want to pursue it, then you've preserved your right to appeal.

3 MR. GREEN: Okay.

4 ADMINISTRATIVE LAW JUDGE MONTAÑO: Okay. So let me hand
5 you this, Mr. Green. Thank you.

6 Anything else, Mr. Green, at this point?

7 MR. GREEN: Not that I know of.

8 ADMINISTRATIVE LAW JUDGE MONTAÑO: All right. I would
9 like to thank everyone for their participation. That's the
10 evidence I had to weigh and the decision I had to render. I
11 appreciate the respect that you've shown to this forum. Thank you
12 all very much, and we'll go off the record. Thank you.

13 (Whereupon, at 11:55 a.m., the hearing in the above-
14 entitled matter was closed.)

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Gregory E. Green

DOCKET NUMBER: SE-19128

PLACE: Indianapolis, IN

DATE: August 9, 2011

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.

Valerie Fillenwarth
Official Reporter