

SERVED: September 28, 2012

NTSB Order No. EA-5638

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 September, 2012

_____)	
MICHAEL P. HUERTA,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19059
v.)	
)	
ROBBIE LYNN GIBBS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral decisional order of Administrative Law Judge Patrick G. Geraghty, issued November 9, 2011.¹ By that order, the law judge granted the Administrator’s motion for summary judgment, finding respondent violated 14 C.F.R. §§ 91.405(a) and (b),² and

¹ A copy of the law judge’s decision order is attached.

² Subsections 91.405(a) and (b) provide:

91.13(a).³ Specifically, the law judge found respondent failed to have his landing gear inspected and his Cessna C560 aircraft returned to service after the landing gear failed to extend upon arrival at the Phoenix Sky Harbor International Airport (PHX) , in violation of § 91.405(a) and (b). Additionally, the law judge found respondent’s actions were careless and reckless because respondent subsequently operated the aircraft between PHX and the Mesa Citation Repair Station at the Williams Gateway Airport (IWA) without the aforementioned inspection and return to service and without retracting the landing gear during the flight, in violation of § 91.13(a). As a result, the law judge ordered a 50-day suspension of respondent’s airline transport pilot (ATP) certificate. We set aside the law judge’s order granting summary judgment in its entirety and remand this case for a full and complete hearing.

A. Procedural Background

The Administrator issued an order dated February 25, 2011, suspending respondent’s ATP certificate for a period of 60 days, based on the alleged violations described above. Respondent answered the complaint with admissions to some, but not all, of the allegations. He denied the landing gear failed to extend and contended he properly coordinated with maintenance personnel prior to his departure for the repair station at IWA. He also raised several

(.continued)

Each owner or operator of an aircraft:

(a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter;

(b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service.

³ Section 91.13(a) provides, “No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.”

affirmative defenses. The Administrator subsequently filed a motion for summary judgment, which respondent opposed.

B. Law Judge Oral Decisional Order

On November 9, 2011, the law judge ordered the parties to appear before him for the limited purpose of providing the parties with his oral decisional order on summary judgment. The law judge deemed all essential facts necessary for resolution of the case admitted and granted summary judgment in favor of the Administrator. He also rejected respondent's affirmative defenses, by which respondent asserted (1) respondent was entitled to waiver of sanction under the Aviation Safety Reporting Program (ASRP)⁴ and (2) respondent reasonably relied on maintenance personnel who informed him he did not need to obtain a ferry permit to transport the aircraft to a repair station.⁵ The law judge did not find merit in respondent's assertion that he was entitled to waiver of sanction due to the Administrator's failure to follow internal procedures by taking enforcement action, rather than administrative action, against his

⁴ Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where: (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action under 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past five years; and (4) the person completes and mails a written report of the incident to NASA within ten days of the violation.

⁵ A respondent may assert he or she reasonably relied upon the actions of another, and that such reliance excuses the alleged violation. In asserting this affirmative defense, the respondent must fulfill the following test:

If ... a particular task is the responsibility of another, if the pilot-in-command [PIC] has no independent obligation (e.g., based on the 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.

Administrator v. Fay & Takacs, NTSB Order No. EA-3501 at 4 (1992).

certificate.⁶ In reaching these conclusions, the law judge made credibility determinations unfavorable to respondent, even though respondent did not testify.⁷ The law judge considered mitigating circumstances, such as respondent's alleged reliance on maintenance personnel, and ordered a 50-day suspension of respondent's ATP certificate rather than the 60-day suspension the Administrator sought.

D. Issues on Appeal

Respondent appeals the law judge's order, raising three issues. First, he asserts the law judge erred in granting summary judgment because genuine issues of material fact exist. Respondent specifically contends the aircraft was airworthy on the flight between PHX and IWA and he did not need to obtain a ferry permit to conduct the flight. Additionally, he argues the law judge improperly concluded respondent admitted the landing gear did not extend upon landing at PHX. He also asserts the law judge needed to consider factual evidence concerning whether maintenance personnel informed respondent he could safely fly to the repair station. Second, respondent argues he committed no violation under the plain language of the regulation. In this regard, he contends the regulation requires known discrepancies on an aircraft be repaired

⁶ FAA Compliance and Enforcement Program, FAA Order 2150.3B (May 19, 2011); see also Administrator v. Moshea, NTSB Order No. EA-5523 at 8 (2010) (stating, in light of remand by the United States Court of Appeals for the District of Columbia Circuit, we will consider an affirmative defense when it amounts to an allegation that the Administrator failed to follow FAA procedures, regardless of whether such procedures are found in a rule, regulation, or statement of policy).

⁷ The law judge stated,

I attach more significance to the statements contained [in respondent's July 6, 2010 statement] than to the subsequent statement that he made and is attached to the response, that statement being made on October 31st of this year. The events are much clearer back in July of 2010 and the issue of self-serving [sic] does not arise as clearly with respect to the earlier statement.

between periodic inspections, and he made the necessary repairs to the loose wire harness in accordance with that requirement. Third, he states the law judge erred in resolving factual issues surrounding all three of his affirmative defenses without taking any evidence at a hearing. As to his assertion the Administrator failed to follow internal FAA procedures, respondent argues the law judge failed to consider the fact the Administrator's own Enforcement Decision Tool and Enforcement Decision Process, enumerated in FAA Order 2150.3B, indicated respondent's alleged misconduct should have been addressed administratively through remedial training, rather than through an enforcement action and certificate suspension. As a result of the Administrator's alleged failure to impose remedial training, respondent contends he was entitled to a waiver of sanction by the law judge. In conclusion, respondent requests the Board dismiss the complaint or, in the alternative, remand the case for a hearing.

2. Decision

We find the law judge erred in granting summary judgment in this case. Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis the pleadings and other supporting documents establish no genuine issue of material fact exists, and the moving party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d).⁸ In order to defeat a motion for summary judgment, the non-moving party must provide more than a general denial of the allegations.⁹ The law judge must view the evidence in the motion for

⁸ Administrator v. Wilkie, NTSB Order No. EA-5565 at 5 (2011); Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)); Administrator v. Giannola, NTSB Order No. EA-5426 (2009); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986) (a *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving party); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986) (an issue is *material* when it is relevant or necessary to the ultimate conclusion of the case).

⁹ Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, *supra* note 8, at 1296).

summary judgment in the light most favorable to the non-moving party.¹⁰

In responding to the Administrator's motion for summary judgment, respondent clearly raised issues of material fact, particularly with regard to his affirmative defenses. In the case of Singleton v. FAA, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Board's order, which affirmed the law judge's granting of summary judgment, based upon the need for a credibility hearing. The Circuit Court noted, "[i]n the past, the FAA and NTSB have suggested that credibility hearings are the norm in intentional falsification cases because factual determinations about knowledge do not readily lend themselves to adjudication on paper."¹¹ The case *sub judice* required resolution of credibility issues surrounding respondent's affirmative defenses. Rather than holding a hearing to accept evidence and testimony on these matters, the law judge improperly made credibility determinations adverse to respondent based solely on exhibits submitted as part of the motion for summary judgment.¹² As we indicated in Singleton, following the Circuit Court's remand, and expressly articulate here today—if resolution of an issue requires a law judge to make credibility findings, the law judge must do so by taking testimony and developing the record *at a hearing*. It is not appropriate to dispose of a case via summary judgment when a credibility determination is needed. We continue to view decisions granting summary judgment with disfavor when genuine issues of material fact, including credibility determinations, exist for resolution at

¹⁰ United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962).

¹¹ Singleton v. FAA, 588 F.3d 1078, 1083 (D.C. Cir. 2009).

¹² See generally, Administrator v. Singleton, NTSB Order No. EA-5529 at 7 (2010) (requiring law judges fully develop factual testimony and make credibility determinations on the record at a hearing).

hearing.¹³

The law judge also incorrectly disregarded respondent's assertion he was entitled to waiver of sanction due to the Administrator's failure to follow internal procedures by bringing an enforcement action against him, instead of an administrative action.¹⁴ In this regard, the law judge applied our 2007 decision in Moshea in reaching his decision to refuse to consider this affirmative defense. In his oral decisional order, the law judge stated,

The Board goes on to state, and this [sic] is statements included in the case of Administrator vs. Moshea, EA-5328, 2007 case, stating therein, "Jurisdiction concerning enforcement proceedings extends only to the question of whether safety and public interest require affirmation of the Administrator's order. We"—meaning the Board—"do not insert ourselves at the point where the Administrator has sole discretion to make decisions, and the Board's statutory charter prevents us from doing so. The discretion to pursue one remedy over another or to pursue an enforcement of [sic] action at all is solely within the Administrator's purview or description."

Decisional Order at 49-50. In 2009, however, the District of Columbia Circuit Court found we erred in Moshea and remanded the case to us to consider whether the FAA improperly sought sanction against the respondent. Subsequent to the Circuit Court's remand, we issued a decision reversing the 2007 Opinion and Order. Under our current jurisprudence, law judges must take evidence and consider these procedural issues when respondents contend they are entitled to an alternative type of sanction.¹⁵

Therefore, we instruct the law judge to hold a hearing in this case. Respondent, as discussed above, raised numerous factual questions which can only be resolved through the

¹³ See, e.g., Administrator v. Carr, NTSB Order No. EA-5635 (2012); Administrator v. Hollabaugh, NTSB Order No. EA-5609 (2011); Administrator v. Manin, NTSB Order No. EA-5586.

¹⁴ See Administrator v. Moshea, NTSB Order No. EA-5523 at 8 (2010), following remand from District of Columbia Circuit Court, 570 F.3d 349 (D.C. Cir. 2009).

¹⁵ See footnote 13, supra.

taking of testimony and evidence at a hearing. Likewise, the law judge improperly made credibility findings unfavorable to respondent without the benefit of a hearing. Additionally, the law judge applied an overturned holding from the Moshea case when he refused to take evidence and consider respondent's affirmative defense that the FAA failed to follow its internal procedures in bringing an enforcement action against him. Although we note the existence of these specific factual issues, this list is not exhaustive. It merely explains our general conclusion as to why summary judgment was the inappropriate disposition. At the hearing, the law judge should not limit the acceptance of evidence to the issues described above. The Administrator has the burden of fully proving the allegations set forth in the complaint.¹⁶ Following the Administrator's case-in-chief, respondent may put on his case-in-chief. Respondent also has the burden of proving any affirmative defenses he raises.¹⁷ Finally, the Administrator should have an opportunity to rebut the respondent's case-in-chief and affirmative defenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's request for a remand is granted;
2. The law judge's oral decisional order granting summary judgment is set aside; and
3. This case is remanded for a full and complete hearing.

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

¹⁶ Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (stating the Board's role is to determine, after reviewing evidence the Administrator presents, whether the Administrator fulfilled the burden of proof); see also, e.g., Administrator v. Opat, NTSB Order No. EA-5290 at 2 (2007); Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005).

¹⁷ Administrator v. Kalberg, NTSB Order No. EA-5240 at 7 (2006) (citing Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

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. *
ROBBIE LYNN GIBBS, *
*
Respondent. *
* * * * *

Docket No.: SE-19059
JUDGE GERAGHTY

U.S. Tax Court, Courtroom 406
Sandra Day O'Connor U.S.
Courthouse
401 West Washington Street
Phoenix, Arizona 85003

Wednesday,
November 9, 2011

The above-entitled matter came on for hearing,
pursuant to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

ADAM RUNKEL, Esq.
Office of the Regional Counsel
Federal Aviation Administration
Western Pacific Region
15000 Aviation Boulevard
Lawndale, CA 90261
adam.runkel@faa.gov
310-725-7142

On behalf of the Respondent:

MICHAEL PEARSON, Esq.
Curry, Pearson, and Wooten, PLC
814 West Roosevelt Street
Phoenix, AZ 85007
602-258-1000

1

2

3

4

5

6

7

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

8

ADMINISTRATIVE LAW JUDGE GERAGHTY: The matter is before the Board on the appeal of the Respondent, Mr. Gibbs, from an Order of Suspension which seeks to suspend his airline transport pilot's certificate for a period of 60 days. The Order of Suspension was filed as provided by Board rule as the complaint herein; therefore, I use those terms interchangeably. The Order of Suspension is the complaint and vice versa. The complaint was filed on behalf of the Administrator of the Federal Aviation Administration and he is nominated the Complainant herein.

18

The allegations supporting the proposed enforcement action against the Respondent are set forth in 11 numbered paragraphs of the complaint and subsequently in this order I will address each of those factual allegations and the response made by the Respondent to the assertions by the Complainant in his motion, that in light of the Respondent's answer filed to the Complainant there is no material fact remaining in dispute. I will address those seriatim

25

1 subsequently herein.

2 Before proceeding to that, however, I believe it
3 would be helpful and, in fact, it is necessary to discuss some
4 ancillary matters that have arisen as a result of the various
5 arguments and assertions in the pleadings and also to discuss
6 the Federal Aviation Regulations, which have arisen in the
7 course of this proceeding.

8 There has been argument made on the part of the
9 Respondent that a special flight permit, also called a ferry
10 permit, is -- and it's stated on page 6 of the Respondent's
11 response to the motion, where it is asserted that according to
12 the FAA the Respondent's transgression was not in obtaining a
13 ferry permit so that he could fly the aircraft to the
14 manufacturer's facility, which I believe was in Williams,
15 apparently not obtaining a ferry permit despite determining --
16 that is, the Respondent determining, the aircraft was
17 airworthy and soliciting advice from the manufacturer.

18 It goes on, on page 7, to assert that as was stated
19 in deposition that the special flight permit is really just a
20 ministerial action or requirement, or here, the word
21 ministerial exercise in obtaining the permit, and that it was
22 really enhancing form over substance. I disagree. And
23 Mr. [sic] Dufriend in his deposition, which is Exhibit C to
24 the Respondent's response, clearly states the grounds for that
25 assertion.

1 A special flight permit is obtainable in accordance
2 with provisions of Section 21.197 of the FARs. That is not a
3 regulation contrary to what appears to be the assertion here
4 that can be charged as a violation on the part of an owner or
5 an operator of an aircraft. It does not include any
6 prohibitory language; it's a procedural regulation. It sets
7 forth when a ferry permit is required and how to go about it.
8 But that is not simply formality, because the purpose is there
9 is an event that puts into question the standard airworthiness
10 that the particular aircraft possesses, and therefore to fly
11 it, you might be flying the aircraft when it is in an
12 unairworthy condition. Usually, you're flying it from point A
13 to point B for purposes of obtaining some sort of specialized
14 maintenance.

15 However, as a condition to the obtaining of a
16 special flight permit, or ferry permit, it is required that
17 that particular aircraft be inspected, as Mr. Dufriend
18 correctly stated in his deposition. The regulation itself
19 specifically requires that the aircraft be submitted to a
20 certificated mechanic, A&P, and have that mechanic inspect the
21 particular aircraft and make a determination, which he must
22 certify back to the FAA on the form applying for the ferry
23 permit that the aircraft is in safe condition for flight. Not
24 that it's airworthy, just that despite whatever the
25 discrepancy may be with a particular aircraft, that it still

1 can be operated safely; that is, that there will not be any
2 detriment to the public interest and aviation safety, which is
3 the bottom line for the FAA and the Board.

4 However, the issue of whether or not a flight permit
5 is obtained or should have been obtained is not an issue in
6 this case. That is not the transgression that is charged in
7 the Administrator's complaint. I will discuss the actual
8 regulatory charge in the complaint subsequently, but it has
9 nothing to do with the issuance or nonissuance of the ferry
10 permit.

11 I'm willing to accept on the evidence that the
12 Respondent did make an inquiry with, I believe it was
13 Mr. Robinson, as to whether or not he needed a ferry permit;
14 and on the statement of the Respondent himself, and I didn't
15 find anything else, he was told he didn't need one. That was
16 not the person to ask about whether he needed a ferry permit.
17 You should have called the FSDO, the Flight Standards District
18 Office, and spoken to one of the aviation safety inspectors
19 whose specialty is maintenance or maybe even operations
20 inspector, and say, here is what's happening; do I need one?

21 The advice he received, if he did receive that
22 advice, was erroneous, and it's Respondent's obligation to act
23 correctly. The fact that he relied upon erroneous advice does
24 not excuse anything. But in any event, that is not the basis
25 of the charge in this action which is pending before me, and

1 it is not a predicate to the regulatory charge set forth in
2 the complaint.

3 There is also allegations and assertions made as to
4 the failure of the Administrator to charge a violation of
5 section 91.7 of the Federal Aviation Regulations. Again, a
6 charge of 91.7, for whatever reason, the FAA decided not to
7 bring that regulatory charge in this case. Therefore, I do
8 not have to address whether or not the facts in this case
9 would have supported a charge of regulatory violation of that
10 particular FAR.

11 However, I do note and so hold that a charge and a
12 finding of violation of 91.7 FAR is not a predicate to the
13 charge of regulatory violation -- of the regulation violation
14 charged herein. And the regulation at issue herein is whether
15 or not as a consequence of the flight operations conducted by
16 the Respondent, which commenced on May 23, 2010, and carried
17 over into the following day, May 24th, 2010, that such caused
18 the Respondent to operate in regulatory violation of the
19 provisions of Section 91.405(a)(b) of the FARs. And I will
20 discuss the specific provision of that regulation below.

21 It is instructive to look at the requirement of 91.7
22 for several reasons herein. Section 91.7 applies to civil
23 aircraft airworthiness and consists of two subparagraphs:
24 subparagraph (a), subparagraph (b). Subparagraph (a) is
25 prohibitory. It says no person may operate a civil aircraft

1 unless it's in an airworthy condition. Straightforward, the
2 aircraft's not airworthy, you can't operate it. That falls
3 over into, I have a malfunction or discrepancy with my
4 particular aircraft; it may be unairworthy or the mechanic has
5 told me it's unairworthy, but it's in a condition for safe
6 flight, so I can get a ferry permit. That's the only way to
7 get around 91.7(a) other than not flying the airplane.

8 Subparagraph (b) needs to be discussed in this case.
9 There was a report made by Aviation Safety Inspector James
10 Kerr, K-E-R-R, and that report is attached to the Respondent's
11 response as Exhibit B. Before going into the details of his
12 report, it should be noted that Inspector Kerr's involvement
13 in this event was not in the enforcement action which is
14 before me. Rather, he was assigned to conduct a possible re-
15 examination of the qualifications, that is, the competency, of
16 the Respondent. The issue for re-examination is whether or
17 not there is a reasonable basis to request the re-examination.
18 For example, the person trying to land the aircraft runs off
19 the runway; that's probably a basis to ask for a re-
20 examination, unless there was a mechanical problem, and have
21 the person demonstrate that he can land an aircraft and stay
22 on the runway.

23 In this case, Mr. Kerr conducted a re-examination
24 interview with the Respondent. Whatever Mr. Kerr determined
25 in the course of the re-examination is not relevant to

1 resolution of the issues in the enforcement proceeding which
2 is pending before me. They are two separate and distinct
3 actions that the FAA can bring. They, in fact, can bring both
4 actions against an individual as a result of a single
5 occurrence. That is, an occurrence may result in a finding or
6 an allegation that there was a violation of a particular
7 operational FAR and also be grounds to question the competency
8 of the pilot or his knowledge. Or there could be an event
9 where there is no charge of regulatory violation, but there is
10 a question as to the competency of the pilot, such as a pilot
11 possibly flying an ILS. Maybe not committing any regulatory
12 violation, not following ATC instructions, but so messed up
13 the ILS approach, missed the approach and go around and miss
14 it again, that there's a question as to whether or not he's
15 competent to hold a instrument rating, and so there's a
16 re-examination. It has nothing to do with the violation.

17 Mr. Kerr, based upon discussion that he had with the
18 Respondent in the course of this, determined that it was
19 unnecessary to do a complete re-examination, but that
20 counseling was sufficient. That finding, again, is not
21 relevant to any determination in this case.

22 Also, in his report, Mr. Kerr lastly indicates that
23 he understands the rule. I would assume that he's talking
24 about 91.405 and possibly also 91.7 in saying that an
25 experienced pilot can make a determination of aircraft

1 airworthiness, and pilots do this on a day-to-day basis.
2 And, of course, there is also the assertions that, you know,
3 the aircraft and the facts do show that on May 24th, it was
4 flown with the gear down from Phoenix Sky Harbor to Williams
5 Gateway Airport and it arrived there without further incident.
6 The fact that it arrived there without further incident as far
7 as I'm concerned is fortuitous, because at that time there was
8 an unknown discrepancy; the cause was unknown. The impact of
9 a second landing at Williams could, just within the realm of
10 reasonable probability, cause a failure of the gear system
11 entirely and its collapse. There could have been a crack in
12 some of the mechanism and another impact, even with a smooth
13 landing, could have caused a total failure. So the fact that
14 it arrives at another destination safely, again, is not
15 determinative of the issues herein.

16 But I specifically do take issue with the statement
17 that pilots make airworthiness determinations on a daily
18 basis. And I believe he's referring to a pilot's obligation
19 to do a preflight check, a walk around, inspect the aircraft,
20 ensure that the required entries are in the logbook, that it's
21 within times for inspection, et cetera; but that's not an
22 airworthiness determination.

23 91.7, in subparagraph (b) says what the pilot in
24 command is responsible to determine, and I quote, "The pilot
25 in command of a civil aircraft is responsible for determining

1 whether that aircraft is in a condition for safe flight."
2 That is not an airworthiness determination.

3 Airworthiness consists of two things: whether the
4 aircraft meets its type design certificate and it's in a
5 condition for safe flight. We've already gone through that
6 with a special flight permit. If it doesn't meet its type
7 design certificate, it may not be airworthy because it doesn't
8 meet it, but it may be in a condition for safe flight so we
9 can give a special flight permit with listed limitations that
10 ensures that it is operated safely; but the pilot is not
11 making an airworthiness determination, unless the pilot is
12 also an A&P mechanic and is doing a complete inspection of the
13 aircraft.

14 When the Respondent, however detailed he did his
15 walk around, he was not making an airworthiness determination;
16 he could not. He was making a determination based upon his
17 visual inspection that the aircraft did not present on that
18 inspection any visible defects which would cause him to
19 question the airworthiness of the aircraft, such as fuel
20 running out from beneath the wing, you know, part of the
21 empennage is curled up, you know, damage to the wing tip.
22 That is, you know, a question of safe flight and would also
23 then carry over into a question that should arise in his mind,
24 you know, this aircraft may not be airworthy; I better have
25 someone who is qualified look at this.

1 So I disagree with the assertion that a pilot on a
2 daily basis is making a determination of airworthiness; he is
3 not. He's making a determination that, based upon a visual
4 inspection, that the aircraft appears to be in a condition
5 safe for flight.

6 And, in any event, I also note that Mr. Kerr in his
7 deposition, which is Exhibit D attached to the Respondent's
8 response, does not exonerate the Respondent, because on the
9 excerpted page, which is page 32 from his deposition, on
10 line 17, there is a question, apparently from Respondent's
11 counsel: "Based on your experience, and you have a lot of
12 experience, do you think my client," meaning the Respondent,
13 "did anything wrong?" Answer: "Yes. He violated the rule."

14 The rule at issue here is FAR 91.405(a) and (b). So
15 Mr. Kerr, in his deposition testimony under oath, asserts that
16 in his opinion, the Respondent was the one who by his actions
17 violated the provision of 91.405(a) and (b).

18 Turning then to what is actually charged based upon
19 the allegations of the complaint. It is charged that the
20 Respondent has operated in regulatory violation of Sections
21 91.405 (a) and (b) and additionally, section 91.13(a) of the
22 FARs.

23 Going in reverse, Section 91.13(a) FAR prohibits an
24 operation by an individual of an aircraft in either a careless
25 or reckless manner so as to endanger the life or property of

1 another. I will discuss that in more detail subsequently.
2 The real crux of the issue here is the charge under the prior
3 regulation 91.405.

4 Section 91.405(a) provides -- and you must read the
5 regulation, and I will do that, "Each owner or operator" --
6 Respondent was an operator, therefore he is covered by this
7 regulation; he was operating the aircraft -- "shall have" --
8 shall is defined in the regulations as a mandatory word that
9 means you must comply -- "have the aircraft inspected as
10 prescribed in subpart E of this part" -- and that's not
11 pertinent herein -- "and shall" -- again, mandatory --
12 "between required inspections" -- that would be the 100-hour
13 inspections, annual inspections, inspections under an
14 inspection program that has been approved for a 135 or a 121
15 operator possibly -- "except as provided in paragraph (c)."
16 And paragraph (c) is inapplicable in this instance, and shall
17 between inspections "have discrepancies repaired as prescribed
18 in Part 43 of this chapter."

19 This language clearly states a responsibility
20 mandatory on the part of the operator of the aircraft to have
21 the aircraft inspected. Respondent didn't have to have it
22 inspected to begin with, but going to the second part of this,
23 he must -- he shall, between the inspections -- "have
24 discrepancies repaired as prescribed in Part 43 of this
25 chapter."

1 And when we refer to Part 43 in this regulation,
2 what they're referring to is the requirements placed upon the
3 A&P mechanic who can perform maintenance. That's what's
4 prescribed in Part 43 and the disposition of records and
5 entries that are required to be made by the A&P mechanic
6 reflecting what he did and his signoff and his return of the
7 aircraft to service after he has performed the maintenance or
8 the inspection. And inspection, by definition in Part 1 of
9 the regulations, is maintenance. So, an entry has to be made
10 by the A&P mechanic.

11 And I simply note here that under the FARs, it is
12 entirely possible for one instance to result in violations by
13 more than one party. For example, an A&P doesn't make his
14 entry and we'll see in part (b) there's also an obligation on
15 the pilot. If there's no entry, it may fall on him.

16 However, going back to having discrepancies repaired
17 during or between inspections, there was an argument made in
18 the response that since a repair to the malfunction of the
19 gear system. And a malfunction where the gear does not lower
20 in its normal operation and its snipes design, that is a
21 malfunction. And I treat the Respondent's statement of the
22 description of his actions on his arrival at Phoenix Sky
23 Harbor on May 23, 2010, the statement that he sent to
24 Mr. Dufriend, which is dated July 6th, 2010, I attach more
25 significance to the statements contained therein than to the

1 subsequent statement that he made and is attached to the
2 response, that statement being made on October 31st of this
3 year. The events are much clearer back in July of 2010 and
4 the issue of self-serving does not arise as clearly with
5 respect to the earlier statement, since at that point there
6 was no initiation or involvement in an actual enforcement
7 action.

8 In that statement, in the first paragraph thereof,
9 Respondent states that he discovered on final approach that
10 the gear would not deploy when the gear handle was lowered
11 several times. So there was more than one attempt, there were
12 several attempts, he initiated go around, and then in the
13 interest of safety, declared an emergency. I commend him for
14 doing so; that was a reasonable and prudent thing to do
15 because he didn't know what was wrong with the gear. Nothing
16 wrong with having people standing by in case something
17 catastrophic happened. He states herein, "The alternate gear
18 extension check got three green lights." Again, the three
19 green lights usually indicates down and locked, but with a
20 malfunction that may not be true. And again, that's why I
21 think it was prudent for him to declare the emergency and have
22 fresh equipment on alert or standing by.

23 But the issue is on the assertion that the
24 Respondent, after the events on May 23rd and his discussions
25 with other persons, being told that he did need a ferry permit

1 and on his description to the people, Mr. Robinson apparently,
2 talking on the telephone, that he determined that he could fly
3 the airplane from Sky Harbor to Williams. And he did that
4 with the gear extended and fortunately there was no further
5 malfunction or event and the flight was completed safely.

6 However, the fact that the repair was done prior to
7 the next annual inspection on this aircraft does not satisfy
8 this regulation. This regulation on its clear meaning and
9 intent is that where a discrepancy occurs between the period
10 of inspections, whether it's the 100-hour or an annual, that
11 the owner or the operator must have that discrepancy repaired;
12 that's what it says, "have the discrepancies repaired". And
13 it's prescribed in Part 43. That means an A&P mechanic who is
14 certified to work on the aircraft does the repairs and makes
15 the required entries. Otherwise, we would have the reasonable
16 assertion, to me -- and that's what it is; it's a reasonable
17 assertion -- that a discrepancy could occur 1 month after the
18 annual inspection and the pilot could fly for the next
19 11 months with a known discrepancy and satisfy this regulation
20 by having that discrepancy repaired a week before the next
21 annual inspection is due. How does that promote or satisfy
22 the public interest and air safety? It doesn't.

23 This regulation requires if a discrepancy occurs, it
24 must be addressed and must be corrected regardless of when the
25 next inspection is due. You can't wait for the next required

1 inspection to address and correct a known discrepancy that
2 affects the airworthiness of the aircraft. And this
3 discrepancy malfunction here is a malfunction and a
4 discrepancy to a significant component of the aircraft, the
5 landing gear system. And I will discuss the *Calavaero* case
6 subsequently when I go through the actual allegations. That's
7 C-A-L-A-V-A-E-R-O.

8 Now, without further belaboring, let's turn to
9 subsection (b) of 91.405. It states that "Each owner or
10 operator" -- again, the Respondent is an operator -- "shall
11 ensure the maintenance personnel make appropriate entries in
12 the aircraft maintenance records indicating the aircraft has
13 been approved for a return to service." Again, as I already
14 have stated, the requirement for entries is placed on two
15 people. If no entries were made in a particular instance,
16 then both the A&P mechanic who did the maintenance and the
17 particular operator could be charged with a violation:
18 failure to make required entries.

19 Here there were no entries made, because no
20 inspection of this discrepancy was ever made by an individual
21 who was certificated to actually make a determination as to
22 the cause, nature, and extent of the discrepancy, what
23 corrective action needed to be taken, and signing off and
24 returning the aircraft to service after his inspection or
25 maintenance. And the inspection would be maintenance. So

1 even if nothing had to be done, it was simply, you know,
2 adding some grease, that would still have to be noted in the
3 maintenance log and an entry made, because if the A&P had done
4 an inspection and done something. And the Respondent under
5 subsection (b) was required to assure that the mechanic made
6 that entry.

7 It is also clear from the plain reading of 91.405
8 FAR that a charge of regulatory violation of section 91.7 is
9 not a prerequisite or a predicate to finding or sustaining a
10 charge of regulatory violation of section 91.405(a) and (b);
11 and I so conclude. 91.405 of the regulations stands on its
12 own. It prohibits and requires certain actions on the part of
13 either the owner or the operator. In this case, the operator,
14 Mr. Gibbs.

15 So the issue in front of it seems to me is whether
16 or not on all the facts and evidence in this case as they
17 appear in this pleadings -- and I have reviewed all of the
18 pleadings filed in this case from the original appeal through
19 the motions -- as to whether there remains a genuine dispute
20 as to any material fact as to require a further hearing to
21 resolve that particular material fact. And the material facts
22 are within the scope or delineated, if you will, by the clear
23 terms and requirements of Section 91.405(a) and (b) of the
24 regulations.

25 In my discussion, therefore, I am going to go

1 through the charges, allegations, raised by the Complainant in
2 support of his ultimate charge of regulatory violation by the
3 Respondent of Section 917.405(a) and (b), and the Respondent's
4 answers as they appeared in his answer and also as they are
5 discussed in more detail beginning on page 11 of his response
6 to the motion for summary judgment.

7 Paragraph 1 of the complaint charges that the
8 Respondent at all times pertinent was the holder of an airline
9 transport pilot's certificate with a designated number. And
10 that statement was admitted in the answer and it is also
11 admitted in the response.

12 It is not dispositive of the issue of violation of
13 the regulation charged, but it is still a significant
14 statement, because if the Respondent was not the holder of an
15 airman's certificate, he should not be in front of me on an
16 enforcement action. It should be a civil penalty, possibly.
17 So that allegation is important because it shows jurisdiction.
18 In any event, it's admitted.

19 Paragraph 2 charges on May 23 of 2010, with the
20 local time, that the Respondent operated a Cessna C560
21 aircraft with the registration number given as the pilot in
22 command on a final approach into Phoenix Sky Harbor Airport.
23 Allegation in the answer, which was filed March 18, 2011, was
24 admitted, and it's admitted in the response.

25 It's not dispositive, I would agree. It doesn't

1 mean that there's a violation. But again, it is important,
2 because if the Respondent was not the pilot in command, he
3 wasn't the operator of the aircraft, then we shouldn't be
4 here, we should find out who actually was the operator. But
5 it's admitted that he was the pilot in command; therefore, he
6 falls within the definitions in the regulation:
7 owner/operator is responsible. He was an operator.

8 Paragraph 3 was admitted; and to the extent that he
9 declared an emergency and in his answer and again as set forth
10 in the response partially admitted, partially denied. He
11 denies that his landing gear failed to extend.

12 Possibly, paragraph 3 could have been worded in a
13 better way, shall we say, but on the facts and the admitted
14 facts in this case, there is no question that the Respondent's
15 effort to extend his landing gear on his final approach into
16 Phoenix on the day in question that the landing gear system
17 did not operate as normally it is designed to do; that is, the
18 gear would not extend. Ultimately, he did get the gear
19 extended, but that was through the emergency or auxiliary
20 system provided for an emergency extension of the gear in the
21 event that there is a failure of the primary system.

22 So if you read this, his landing gear had failed to
23 extend and it is clear from his own statement made in July of
24 2010 that there were several attempts made to extend the gear
25 through normal operation of the gear handle and it didn't work

1 and that he ultimately had to extend it through the auxiliary
2 system. So I find on the facts and circumstances here that
3 the allegations in paragraph 3 are admitted and there is no
4 genuine dispute as to the facts charged in paragraph 3 of the
5 complaint.

6 Paragraph 4 is admitted. Again, it is not
7 dispositive of the charge in 91.405, but when you put
8 paragraph 4 admitted along with paragraph 3, it is clear that
9 the landing gear malfunctioned; it did not operate as
10 designed. That is, you put the gear handle down, the gear
11 goes down and locks into place. Several attempts were
12 unsuccessful and he had to use a backup system. So, paragraph
13 4 is established and there is no genuine dispute as to any of
14 the facts charged in paragraph 4.

15 Paragraph 5 was admitted in total in the answer
16 filed back in March of 2011. However, in the response to
17 Complainant's motion, Respondent through counsel states that
18 allegation 5 was improperly admitted, as the Respondent didn't
19 depart Sky Harbor on May 23.

20 Yes, he did not depart on May 23rd, 2010, from Sky
21 Harbor Phoenix on the flight over to Williams Gateway Airport.
22 That occurred on May 24th. So, this event actually occurs
23 over a period of time that begins on the 23rd and extends for
24 purposes of the charges here into the next day. And in any
25 event, the actual wording of paragraph 5 of the complaint is

1 that on or about May 23rd, 2010, you departed Phoenix on the
2 flight to Williams. The date is at most harmless error. The
3 Respondent knows when he arrived at Sky Harbor and he knows
4 when he actually flew from Sky Harbor over to Williams.

5 I would simply say that the language of on or about
6 May 23 is sufficient to satisfy pleading requirements of the
7 complaint and that on the facts and the admitted operation by
8 the Respondent, May 24th is when he flew the flight, but there
9 is no real material fact to be disputed as to whether or not
10 it was 23 or 24 May of 2010 and, therefore, there's no issue
11 to be resolved by the taking of evidence.

12 As stated in the response in the motion, the
13 allegation in paragraph 6 of the complaint is partially
14 admitted and partially denied. In his answer filed in March,
15 the Respondent states, and I'm quoting, "Respondent admits
16 that the maintenance personnel did not physically inspect the
17 landing gear." So, he's admitting that maintenance personnel
18 did not physically inspect the discrepancy; that is why the
19 landing gear failed to extend after several attempts. That's
20 a clear admission.

21 In the response to the motion, he expands on what is
22 stated also in his answer, "Respondent denies any implication
23 he didn't properly coordinate with certified
24 maintenance/manufacturing personnel prior to departure." But,
25 in his response, he again partially admitted and partially

1 denied. Respondent admits that a physical inspection of the
2 aircraft's gear by maintenance personnel did not occur. And
3 he goes on to say, that's because there's an interlocking
4 system that the gear won't collapse. But we don't know what
5 the malfunction was.

6 The cause of this discrepancy was never known until
7 the aircraft arrived at Williams, and an inspection was done
8 by certified personnel who found the cause of the malfunction.
9 At the time of the flight on May 24th, the Respondent didn't
10 know what had caused the malfunction. It had never been
11 inspected and he was not qualified to make a determination as
12 to what had caused the malfunction. He is not shown to hold
13 an A&P certificate or a repairman's certificate.

14 A discrepancy under 91.405(a) is required to be
15 addressed and repaired. That means it needs to be looked at
16 by someone who is qualified to do so and that person to be
17 qualified to repair whatever that discrepancy in accordance
18 with the requirements placed upon the mechanic in Part 43 and
19 also the procedures that are imposed upon the mechanic in Part
20 43 of the regulations. He has to use methods and practices
21 acceptable to the Administrator. All those things apply in
22 Part 43.

23 On the weight of the reliable and probative evidence
24 in front of me, I find and conclude there is no genuine
25 dispute as to the allegations in paragraph 6 of the complaint.

1 The Respondent, as the operator of the aircraft, did not have
2 maintenance personnel, that is certificated authorized
3 personnel, inspect the landing gear of his aircraft prior to
4 his departure on May 24th from Phoenix Sky Harbor. There is
5 no genuine dispute as to that allegation, and I so find.

6 And before passing on, I'd simply note again that in
7 the responses in the motion, there is the assertion by the
8 Respondent that the Respondent denies that a proper inspection
9 was not made. No question. The Respondent on -- and I'm
10 willing to accept the statements made by him, and that's all
11 Mr. Kerr had to go on, too. He accepted the Respondent's
12 description of what he did. I'm willing to accept that he did
13 a detailed walk around and as an experienced pilot in command,
14 made a reasonable determination of airworthiness. I've
15 already discussed that. As pilot in command, he is not making
16 an airworthiness determination; he is simply determining on a
17 visual inspection whether the aircraft is in a condition for
18 safe flight. That is not airworthiness and is not a
19 determination of airworthiness by him under 91.7. He is not
20 qualified to make an airworthiness determination of the
21 aircraft. And whether or not he coordinated with anyone else
22 is not sufficient.

23 Respondent also takes issue with the citation in the
24 Complainant's motion to the case of *Administrator vs. Wing*
25 *Walker*, which is EA-4638, a 1988 case. It involves a hot air

1 balloon. So it is true that this is not a fixed-wing
2 aircraft, but it is an aircraft and operates in airspace. But
3 the issue as is pertinent here is not a determination of
4 airworthiness of the hot air balloon or whether or not it met
5 91.7.

6 The authority in *Administrator vs. Wing Walker* is
7 that as it is applicable in this case is a -- appears on -- or
8 at page 6 of the Board's opinion and order, and I quote, "It
9 is unreasonable for Respondent" -- meaning the Respondent in
10 that case -- "to rely upon Stumps" -- which is a name, capital
11 S-T-U-M-P-S, apparently, someone that Mr. Wing Walker
12 contacted by phone -- "relied on Stumps' telephone opinion."
13 Where Stumps, after talking with the Respondent, rendered an
14 opinion that the hot air balloon was airworthy, and the basket
15 was okay and, you know, the whole thing. And going on, and
16 it's in the citation, "if only because an opinion given
17 without an examination of the balloon." So, the Board is
18 clearly saying that a telephonic opinion as to clearing a
19 discrepancy or on an issue of airworthiness or the severity of
20 the discrepancy is worthless over the telephone.

21 If you have a discrepancy in your automobile that is
22 severe enough that the automobile won't stop when you apply
23 the brakes or it doesn't do something that is normal
24 operation, you take it to the garage or the dealer and have it
25 repaired, get an opinion, unless you're an automotive mechanic

1 yourself. You don't do it over the telephone, other than to
2 make an appointment.

3 Also, I would note that in the case of *Wing Walker*,
4 there was also a separate concurring opinion by member, or
5 then member, Goglia. I knew Mr. Goglia personally. He had a
6 long history in aviation maintenance both as a mechanic and as
7 an official within Aviation Mechanics Union.

8 In his separate opinion, Member Goglia concurred
9 with the language, which I've already just cited, and went on
10 to state separately in his concurring opinion that
11 Respondent's action of consulting with Mr. Stumps by telephone
12 was clearly not reasonable, that action was not reasonable in
13 relying upon this telephone conversation; that is, an opinion
14 given by telephone, as to the nature, extent of the
15 malfunction, and the airworthiness of that hot air balloon.
16 That is what is pertinent here and this citation in *Wing*
17 *Walker* is in accord.

18 There is no issue as to the airworthiness of this
19 aircraft, since that is not charged in this action. And I
20 specifically find that an opinion offered by whoever or
21 whomever over the telephone on a description, and that's all
22 the person on the other end of the phone has, is the
23 particular individual's, in this case the Respondent's,
24 description of the event, and the Respondent didn't know the
25 true cause of the malfunction.

1 So, the opinion expressed over the telephone is
2 based on what that individual is being told by the operator.
3 That does not satisfy the requirement to a discrepancy
4 repaired, nor can it be an adequate determination as to
5 whether or not a particular malfunction renders the aircraft
6 unairworthy. That can only be done after the individual
7 that's making that determination physically inspects the
8 problem and arrives at a conclusion.

9 So in any event, paragraph 6 does not on the
10 evidence present a material fact that is generally in dispute.
11 And I so find.

12 In his answer of March, Respondent admits that he
13 failed to have maintenance personnel, and he puts it in
14 quotation marks, "repair the landing gear". And he goes on to
15 say he conferred with certificated maintenance manufacturing
16 personnel, and that was, again, by phone, who instructed him
17 to take the action that the Respondent took. And that is
18 essentially what is reiterated in his response to the motion
19 when he addresses the allegations in paragraph 7 of the
20 complaint. And he notes that the Respondent was never charged
21 with a violation in 91.7 and it goes on to state that not
22 every defect whereby the aircraft at the departs from its
23 state at the time of manufacture makes an aircraft
24 unairworthy. That the Complainant is asserting without proper
25 foundation or supporting evidence the violations charged in

1 the complaint, that is 91.405(a).

2 So we've already restated a charge of 91.7. And
3 whether or not it could have been made in this case is not for
4 me to even comment on. It was not made for whatever reason,
5 but it is not a predicate to a charge of violation of 91.405.
6 And I think I've already covered that in sufficient detail.
7 And peripherally here what the Respondent is referencing is
8 essentially the Board's opinion in the case of *Administrator*
9 *vs. Calavaero*, which is at 5 NTSB 1099 at 1101, 1986 case.
10 Respondent does cite to the *Calavaero* case in his response and
11 it is correct that not every minor dent, scratch, or loose
12 screw is sufficient to cause an aircraft to depart from its
13 airworthiness. But, you have to read the language of the
14 *Calavaero* decision. The Respondent, other than in his
15 footnote, does not include what to me is the key word in the
16 *Calavaero* decision.

17 In *Calavaero*, the Board does state, "Not every
18 scratch, dent, pinhole, or missing screw, no matter how minor,
19 renders or equals an aircraft being in an unairworthiness
20 condition." That is not dispositive of the issue in this
21 case. We are not dealing with a minor discrepancy. We are
22 not dealing with a loose screw or a pinhole. It might have
23 been a loose screw, but at the time of the operation, nobody
24 knew. It turned out it wasn't just a loose screw.

25 A malfunction of the landing gear after several

1 attempts to properly deploy as it is designed to do is not a
2 minor malfunction; it is a significant discrepancy, a
3 significant malfunction. And the fact that the Respondent
4 talked to someone on the telephone, Mr. Robinson, and that
5 Mr. Robinson in his deposition really doesn't say anything
6 that is, in my view, helpful to the Respondent's assertions in
7 this case.

8 In the excerpt included with the Respondent's
9 response to the motion, which is Exhibit F, Mr. Robinson
10 expressed a very limited recollection of what had transpired
11 between himself and the Respondent. On line 8, after being
12 asked about what the Respondent stated the problem was,
13 Mr. Robinson says, "I just remembered that he said he had an
14 issue with his gear and he had to blow his gear down, that is
15 what I remember." We already know that he had to -- he
16 couldn't extend it normally, he had to use the auxiliary
17 system.

18 As to further questions about what had transpired in
19 conversation between Robinson and the Respondent, his answer
20 on line 19, "I don't recall." Could it have happened? You
21 know, just about anything is possible, but that's not
22 evidence.

23 In any event, as I've already indicated, you can't
24 clear a discrepancy by telephone. The Board has held that,
25 that is clear as a matter of Board precedent and it is also,

1 to me, clear as a matter of simple logic. Unless somebody
2 who's qualified looks at the discrepancy and makes a
3 determination, his opinion as to what it is or the severity of
4 it is essentially useless.

5 In any event, I find on the preponderance of the
6 reliable evidence that the allegations in paragraph 7 are
7 established by a preponderance of that evidence and that there
8 is no genuine dispute as to this fact as it would require
9 further hearing.

10 The allegation in paragraph 8 of the complaint is
11 that you, the Respondent, failed to ensure maintenance
12 personnel approved the aircraft for return to service prior to
13 your departure from Sky Harbor.

14 In his answer of March of this year, the Respondent
15 denied the allegation, stating, "The Respondent denies the
16 allegation 8, as properly licensed supervisory A&P holder
17 personnel are aware of all the facts." And the only way they
18 were aware of all the facts is whatever it is that the
19 Respondent told him. That is, the person at the other end of
20 the telephone regarding the operation and employed by the
21 aircraft manufacturer approved the flight operation. The
22 person at the other end of the telephone cannot make an
23 airworthiness determination by phone, nor can he return an
24 aircraft to service by telephone for all the reasons which
25 I've already discussed; and I don't think I need to belabor

1 that.

2 Respondent did call people; however, whatever
3 information that he received over the telephone was erroneous
4 both as to the necessity for the special flight permit and the
5 fact that he could fly the airplane without anyone else having
6 to actually physically inspect the discrepancy. Board
7 precedent clearly precludes such a conclusion.

8 Respondent failed to have maintenance personnel
9 properly inspect and repair the discrepancy and return the
10 aircraft to service. That is what's required by 91.405.
11 91.405(a) states that the operator shall, that is must, have
12 the discrepancies repaired as described in Part 43. And that,
13 again, is that a properly certificated aviation mechanic does
14 the inspection, uses proper techniques and methods, makes the
15 required entries, does the repair, lists what he's done, and
16 signs off the maintenance logbooks of the particular aircraft.
17 Telephone discussions do not satisfy the language of 91.405(a)
18 and I so find and conclude.

19 Since this aircraft was never inspected at Phoenix
20 Sky Harbor by a certificated aviation mechanic, no repairs
21 were made, no entries were ever made in the maintenance
22 records of this particular aircraft, the Cessna C560 with
23 registration number N10 RU, Romeo, uniform.

24 Since maintenance personnel were never called to
25 work on the aircraft or inspect the aircraft, nobody made an

1 entry. And even the individual spoken to, apparently
2 Mr. Robinson, he never made an entry because he's at a place
3 removed from Phoenix Sky Harbor expressing an opinion based
4 upon what the Respondent is telling him, he's not -- he didn't
5 sign anything and wasn't present to do it, never made a
6 personal inspection.

7 I find on the evidence in front of me that the
8 Respondent on a preponderance of that evidence failed to have
9 required and certificated maintenance personnel inspect the
10 aircraft, perform the repair of the discrepancy as required by
11 91.405(a), and then make the appropriate entries as required
12 by subparagraph(b) of 91.405 FAR; and that, therefore, on a
13 preponderance of that evidence that there is no material
14 dispute as to this material fact.

15 And I just simply observe, Respondent has never
16 offered any record to show that somebody at Phoenix Sky Harbor
17 on May 24th or the evening of May 23rd made a logbook entry
18 returning this aircraft to service. After the aircraft has
19 been inspected or any work done on it, the maintenance person
20 doing that had to make an entry as to what he did. "I
21 inspected the aircraft and found nothing wrong with it."
22 Maybe there was some ice and it melted and everything is fine.
23 But he makes that entry and signs it. Or he signs, "I added
24 grease or tightened a screw", or whatever and signs it.
25 Respondent has shown nothing that any entries were made and,

1 in fact, no repairs were ever made.

2 Pressing on then, paragraph 9 of the complaint was
3 admitted both by the Respondent in his answer in March and in
4 his response as it appears in -- on page 14 of his response to
5 the motion. Admits paragraph 9 but for the reasons stated in
6 response to paragraph 7, again reciting that a discrepancy
7 does not necessarily make an aircraft unairworthy and he cites
8 to the case of *Administrator vs. Calavaero*, which I've already
9 discussed.

10 The language used in Respondent's response here,
11 which I quote, "A discrepancy does not necessarily make an
12 aircraft unairworthy." Citing to *Calavaero*. That leaves out
13 the significant term, not every minor discrepancy. That's
14 clearly what the *Calavaero* case says. And it gives examples
15 of what is a minor discrepancy. A failure of the gear to
16 properly operate is not a minor discrepancy.

17 *Calavaero* does not support Respondent's assertions.
18 There is no material fact presented by the allegations in
19 paragraph 9 of the complaint. It is admitted, in fact, that
20 the Respondent flew the aircraft from Phoenix back to Williams
21 Gateway Airport with the gear down; there is no genuine
22 dispute.

23 Paragraph 10 recites that on May 24th, maintenance
24 personnel at the service center at Williams Airport determined
25 the problem, the malfunction, was caused by a loose gear

1 extension switch assembly, so that was the malfunction. That
2 was a discrepancy.

3 At the time the aircraft departed from Phoenix, the
4 true nature of the cause of the malfunction was not known. It
5 was not known until it was actually inspected and repaired at
6 Williams Gateway. Respondent admits paragraph 10 both in his
7 answer and in his response to the motion. And the assertions,
8 again that a discrepancy does not necessarily make an aircraft
9 unairworthy, again, citing to *Calavaero*, is not supportive of
10 that position; because we're not dealing with a minor
11 discrepancy, it's dealing with an unknown discrepancy and a
12 major system component of this aircraft, that is the landing
13 gear assembly.

14 So on the evidence in front of me, all of the
15 pleadings, the answers filed, and the arguments made, I do
16 find that paragraph 10 is established by a preponderance of
17 the evidence and there is no genuine dispute as to any fact
18 that is material as cited in paragraph 10 of the complaint.
19 The last paragraph of allegation in the complaint is that the
20 Respondent denies the allegation in paragraph 11; and he
21 expands on that denial, which was just a straight denial, in
22 his answer. But in his response, he claims it is only a
23 residual violation, if in fact there is a finding of the
24 operational violation of 91.405(a) and (b), which is
25 established independently. I would agree.

1 However, the allegation in paragraph 11 is really a
2 conclusion of mixed facts and law and it is determined based
3 upon all of the evidence and findings that I make in the
4 particular case and that is the care herein. And so I reserve
5 any statement as to my finding with respect to the allegation
6 in paragraph 11, which really is addressed to the charge of
7 regulatory violation of section 91.13(a) of the FARs.

8 Turning then to several affirmative defenses which
9 are raised by the Respondent. In his answer, the Respondent
10 listed five affirmative defenses in the discovery response and
11 in his response to the motion. Respondent withdrew his
12 affirmative defense, which was listed as affirmative defense
13 number 2 in his answer. So that is no longer before the
14 Board.

15 I would also observe that the affirmative defense 5
16 as listed in his answer was really not an affirmative defense;
17 it was simply a statement that the Respondent reserved the
18 right to amend his answer to incorporate any affirmative
19 defenses that might come up as a result of ongoing discovery.
20 No other affirmative defenses other than the ones originally
21 put forth in the answer have ever been made in this case.

22 The first affirmative defense deals with whether or
23 not the Respondent is entitled to an immunity under the
24 aviation safety reporting program, otherwise known as the
25 filing of a NASA report.

1 The evidence does show and there is exhibits
2 attached to the Respondent's response that he filed in a
3 timely manner a report with NASA and, therefore, he at least
4 on the face is entitled to immunity, which is even if there's
5 a finding of a regulatory violation, the imposition of a
6 sanction is waived at least for a period of 5 years.

7 However, as provided in, I believe, paragraph 9 of
8 the advisory circular dealing with the terms and conditions
9 applicable to the waiver of sanction, the first one is that
10 the charged event must be one which is inadvertent and not
11 deliberate. Respondent in his response argues and asserts
12 that he is entitled to all the immunity granted under the
13 filing of a timely NSAA report and cites to the case of
14 *Ferguson vs. NTSB*, which is at 678 F.2d 821 at 828. It's a
15 Ninth Circuit opinion, 1982, and also the *Administrator vs.*
16 *Christ*, which is EA Order 4922, 2001 case.

17 However, neither *Ferguson's* case nor the *Christ* case in
18 any way subtracts from or causes a departure from the language
19 of the advisory circular. In the *Ferguson* case, *Ferguson* does
20 say that the conduct that is excluded from protection is that
21 which approaches deliberate or intentional conduct. That's
22 exactly what the advisory circular says. I think in somewhat
23 garbled function, but nonetheless it does say that the action
24 must be by unintentional -- not intentional and not
25 deliberate. And *Ferguson* does state as emphasized in

1 Respondent's response to the Ninth Circuit that that would be
2 a sense of reflecting a wanton disregard for the safety of
3 others.

4 In this case, there is no question that the action
5 of the Respondent flying the aircraft on May 24th without
6 having the discrepancy actually inspected by a qualified
7 maintenance personnel, the repair made and the appropriate
8 entry intentionally flew the aircraft under those conditions
9 from Phoenix Sky Harbor back to Williams Gateway and that was
10 deliberate conduct, not unintentional. Respondent knew what
11 the circumstances were. He knew that the discrepancy had not
12 been diagnosed, had not been repaired or treated, that no
13 entry had been made by any mechanic in the maintenance
14 records, and he decided to make the trip.

15 He may have made the trip and I accept that he
16 talked to people and he made it upon their advice, but he
17 accepted that advice to his detriment. He's the pilot in
18 command. He's the one ultimately responsible for the
19 operation of the aircraft. Relying upon erroneous advice is
20 not an excuse. And what he was given was erroneous both as to
21 the ferry permit and as to the airworthiness of the aircraft,
22 because that determination could not be made by someone at the
23 other end of a phone. Respondent relied upon that advice to
24 his detriment; he's the pilot in command with the ultimate
25 responsibility. He made an intentional and deliberate choice

1 to fly. He flew an aircraft, the condition of which was
2 unknown with respect to the gear. As I stated early on, it is
3 equally possible that the malfunction could have been severe
4 enough within that gear that upon the second landing at
5 Williams, the aircraft could have experienced a further
6 failure, even a total gear collapse.

7 The aircraft being flown without knowing what the
8 condition was is detrimental to the public interest and air
9 safety. It showed a disregard on the part of the Respondent
10 of his obligation and particularly the holder of an airline
11 transport pilot's certificate, who is expected to exercise a
12 much higher degree of judgment and responsibility than the
13 holder of, say, a student pilot or even a private pilot's
14 certificate.

15 In this case, in my view, he did disregard questions
16 of safety and made a deliberate choice and, therefore, I do
17 find on the evidence in front of me, that the Respondent,
18 although he filed a timely NASA report, is not entitled to the
19 exemption provisions granted under the Aviation Safety
20 Reporting Program. And I further find that on the evidence in
21 front of me, there is no genuine dispute as to that material
22 fact and finding.

23 Affirmative defense number 3 listed in the answers,
24 that the Respondent reasonably relied upon certificated
25 manufacturer's representatives. And on page 16 of

1 Respondent's response in subparagraph C, it's entitled
2 Respondent's reasonable reliance on manufacturing and A&P air
3 power plant personnel, is a mitigating factor. And I will
4 discuss that when I reference sanction herein and what should
5 be considered regarding the proposed penalty.

6 I would note here, however, again there is a
7 question as to Inspector Kerr and the need for a ferry permit;
8 I've already discussed that, I think, in sufficient detail.
9 Kerr's opinion as to airworthiness determinations,
10 Mr. Robinson's statements, if he made any with reference to
11 that, were not determinative.

12 I would simply note also, there's a citation on page
13 16 to footnote 70, which is to Exhibit F, which is
14 Mr. Robinson's deposition, and that is an excerpt which is
15 page 12, apparently, of that deposition. And in the response
16 in quotation marks, the employee that Respondent spoke to --
17 and it must be Robinson because it's a citation in footnote 70
18 to Exhibit F, which is in the Robinson deposition. The
19 quotation here is, "It depends upon what bearing it has,
20 ellipsis, on him personally." And it cites in the footnote
21 page 12, lines 12 to 19.

22 I've looked at page 12, lines 12 to 19 and
23 there's -- those lines in the deposition do not support the
24 statement in the response; that footnote doesn't support that.
25 There's no statement to that effect. I can't find that in

1 lines 12 to 19. Because, actually, line 12 is the middle of a
2 question, which begins on line 11 asking Mr. Robinson:

3 "Do you remember if he" -- meaning Respondent --
4 "stated anything about reporting a problem with the gear to
5 any other A&P mechanics including Swift Aviation?

6 "Answer: No.

7 "Question: Do you remember if he asked you and
8 said, 'Look, I'm having a problem with Swift, I don't want
9 Swift to look at it, I need you guys, the manufacturer, to
10 take a look at it and tell me what is wrong.'

11 "Answer: I don't recall. Could that have
12 happened? Yes."

13 Again, we're into the footnote. I don't know,
14 it's --

15 MR. PEARSON: Judge, let me interject. It was a
16 mis-cite. I have that for you. She just didn't --

17 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, it doesn't
18 make any difference.

19 MR. PEARSON: -- put the proper exhibit there.
20 Well, I understand, but it's a mis-cite.

21 ADMINISTRATIVE LAW JUDGE GERAGHTY: You -- I'm just
22 saying that, you know, I have --

23 MR. PEARSON: If you want that, I can get that for
24 you.

25 ADMINISTRATIVE LAW JUDGE GERAGHTY: -- read these

1 documents and I could not find it. So I accept the
2 interjection that it was a misquote, that apparently
3 somewhere, maybe he said it somewhere else in his deposition.
4 I would assume that counsel was not intentionally leading me
5 astray, and I certainly --

6 MR. PEARSON: It's on video if you're dying to see
7 it.

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: I make that
9 statement on the record and that is my statement, counsel; I
10 don't believe you were leading me purposely astray. I just
11 simply observe that I did read this and I couldn't follow it.
12 However, we do turn here, really, to the question of
13 reasonable reliance as an affirmative defense.

14 Reasonable reliance is a doctrine which the Board
15 has adopted probably originally or the primary case is that of
16 *Administrator vs. Fay and Takacs*, EA-3501 at 9, which is a
17 1992 case. And in the *Fay* case, the Board set forth what are
18 the criteria for a determination of the existence of
19 reasonable reliance as an excuse. And the Board also went on
20 to and in subsequent cases stated that the doctrine of
21 reasonable reliance as the Board has adopted it is one of
22 narrow applicability. And I'll simply cite *Administrator vs.*
23 *Angstadt*, Board order EA-5421 at pages 18, 19, a 2008 case.
24 There is also *Administrator vs. Jolly*, EA-5307 at 10, 2007
25 case. And even more recently, *Administrator vs. Carr*, EA-5573

1 at pages 7 and 8, a 2011 case.

2 So, what are the criteria and where do Respondent's
3 actions fit within that? The Board has clearly stated that
4 "Under the doctrine of reasonable reliance, the Board's
5 doctrine applies only where the circumstances in their
6 entirety," and I agree we must look at all the circumstances
7 of the particular case in their entirety, "if the pilot in
8 command," herein that would be the Respondent, "has no
9 independent obligation or ability to ascertain the information
10 and if he has no reason, or she has no reason, to question the
11 other's performance, then and only then will no violation be
12 found." And that is the criteria and that is the doctrine.

13 So there are several things we need to look at in
14 the entirety of this case. Does the pilot in command have an
15 independent obligation herein? Yes, he does. 91.405 clearly
16 states the owner or the operator shall -- and that's his
17 independent obligation, not someone else's that he can rely
18 upon; a particular task is the responsibility of another.
19 Yes, the determination of the actual airworthiness of the
20 aircraft was not the Respondent's responsibility because he's
21 not qualified to make that determination, but it was his
22 responsibility to get someone who was qualified to make that
23 determination, to inspect the aircraft and make a
24 determination. So he had an obligation to get someone who
25 could do that. If he had gotten a mechanic who looked at it

1 and said "Nothing's wrong," and signed it off and returned it
2 to service and then something untoward happened subsequently,
3 the doctrine might apply because he might have a reasonable
4 basis for relying on the sign-off of an incompetent mechanic.
5 But that's not the case here.

6 In my view on the circumstances in this case, the
7 Respondent cannot meet the first step of the doctrine of
8 reasonable reliance because he had an independent obligation
9 and he also had an independent ability to get the information
10 necessary to effect the repair of the discrepancy, which he
11 had to do. He must have the discrepancy repaired in
12 accordance with the requirements of 43 FAR, that is, Part 43,
13 and to have a sign-off and to ensure that the sign-off is
14 made. There was no one else for him to rely upon. Relying
15 upon someone at the other end of a telephone is not reasonable
16 reliance, that's what *Administrator vs. Wing Walker* says and
17 what Member Goglia was saying in his concurring opinion.

18 And I would simply also observe that in
19 *Administrator vs. Hatch*, EA-5230, a 2006 case, in which
20 Respondent therein was charged with violations of 91.7,
21 91.405(a) and (b) and 91.13, which except for the charge of
22 violation of section 91.7 or the regulatory charges extant in
23 this case. The Board therein affirming a 150-day suspension
24 on pages 7 and 8 where they affirmed a finding of reckless
25 operation. They found it was reckless for the Respondent

1 therein to arrive at a determination upon a failure to
2 inspect, as Respondent was required to do under FAR 91.405,
3 that an aircraft was satisfactorily repaired and has been
4 returned to service. That is, the failures that are extent in
5 this case and in the actions on which the Board affirmed the
6 sanction imposed in the *Hatch* case.

7 In summary, therefore, I simply find that upon all
8 of the facts and circumstances in this case, that I find that
9 the Respondent is not entitled to rely upon a doctrine of
10 reasonable reliance, in that he did have an independent
11 obligation and an ability to ascertain the information that
12 was necessary to fly from Phoenix back to Williams in a manner
13 that would not be contrary to the requirements of the Federal
14 Aviation Regulations.

15 This is completely different in a situation, for
16 example, and I simply interject this here, for example, where
17 the pilot in command of a 121 carrier, he can't push back from
18 the gate unless everybody is seated in the aircraft. The
19 pilot doesn't have to get up and walk back through the
20 aircraft and check 120 seats. He can call the head flight
21 attendant and inquire from him or her, is everybody seated and
22 luggage stowed? And the flight attendant says yes, and
23 pushback occurs and somebody was standing up and falls down,
24 that would be reasonable reliance; the pilot can reasonably
25 rely upon the flight attendant who had an independent

1 obligation to correctly inform the pilot and the pilot could
2 reasonably rely upon the flight attendant to perform her duty.
3 That's not the situation here. Therefore, there is no
4 material fact in dispute with respect to a defense of
5 reasonable reliance and I so find.

6 In affirmative defense number 4 in the complaint is
7 that the Administrator failed to follow internal procedures,
8 wants a waiver of the imposition of sanction; and that is
9 essentially the same argument made in subparagraph E of the
10 response in Respondent's response to the Complainant's motion.

11 Respondent's affirmative defense as claimed in
12 affirmative defense number four is not to a matter that was
13 within the review authority of the Board. The Board has
14 clearly held for example, see *Administrator vs. Liotta*, EA-
15 52.97, a 2007 case, that the Board does not have the authority
16 to review the Administrator's determination to pursue a matter
17 through legal enforcement action. The Board is precluded from
18 deciding the case based upon the Administrator's choice of
19 pursuing an action against an individual. Such action would
20 intrude upon the Administrator's prosecutorial discretion.

21 The Board goes on to state, and this is statements
22 included in the case of *Administrator vs. Moshea*, EA-53.28,
23 2007 case, stating therein, "Jurisdiction concerning
24 enforcement proceedings extends only to the question of
25 whether safety and public interest require affirmation of the

1 Administrator's order. We" -- meaning the Board -- "do not
2 insert ourselves at the point where the Administrator has sole
3 discretion to make decisions, and the Board's statutory
4 charter prevents us from doing so. The discretion to pursue
5 one remedy over another or to pursue an enforcement of action
6 at all is solely within the Administrator's purview or
7 description."

8 I find, therefore, that upon Board precedent that
9 the affirmative defense related to any failure to follow
10 internal procedures or to make a determination as to whether
11 or not to charge a particular regulatory violation or to
12 charge any regulatory violation at all is a matter solely
13 within the discretion of the Administrator; and the Board has
14 no jurisdictional authority to inquire into any of those
15 circumstances. Therefore, there is no material issue of fact
16 related to this as we require a hearing to resolve.

17 On a motion for summary judgment, the moving party
18 is entitled to summary judgment if all of the facts and
19 circumstances of the particular case establish, and it is his
20 burden to establish that there is, as a consequence of all of
21 the pleadings in evidence, that there is no genuine, that is,
22 real, dispute as to any material fact as would require trial
23 or hearing to resolve. And in doing so, the trier of fact
24 must look at the evidence in a light most favorable to the
25 opposing party. And I have done that in this case. That is,

1 I have disregarded any unfavorable inferences and I have
2 attempted to draw only favorable inferences from the evidence
3 in favor of the Respondent.

4 Nonetheless, upon my review of the evidence as I
5 have already gone through this in detail here, I do find that
6 upon all of the facts and circumstances of this case, that a
7 reasonable trier of fact could not enter a finding in favor of
8 the Respondent and I find that under all the facts and
9 circumstances in this case, that there does not remain any
10 genuine dispute as to any material fact.

11 And therefore, I do find and conclude that the
12 Complainant is entitled to affirmation of his motion for
13 summary judgment.

14 The last issue then too it seems to me is the
15 question of sanction. Deference is to be shown to the choice
16 of sanction made by the Administrator. That is required by
17 statute. Also, it arises that deference does not need to be
18 shown if the action sought by the Administrator is shown to be
19 arbitrary, capricious, or not in accordance with law.

20 I've already had reference to the *Hatch* case. In the *Hatch*
21 case, as already indicated, we have essentially, except for
22 the charge of violation of 91.7, which not in this case, the
23 identical charges. The Board in that case affirmed 150 days.

24 Herein, the Administrator is seeking a suspension of 60
25 days. That's a reduction of 90 days for the fact that there

1 is no charge of operation of unairworthy aircraft in violation
2 of 91.7. So removing that, the *Hatch* case does indicate for
3 these type of violations if we include the 91.7, a range of
4 150 days was appropriate.

5 The Board also affirmed suspension in the
6 *Administrator vs. Armstrong* case, EA-5320, 2007 case, which,
7 again, was 91.7 and 91.405 and 91.13. And that case, again
8 they, as it might be appropriate here, airworthiness is not
9 synonymous with liability. 91.405 requires the owner or
10 operator of an aircraft to have known maintenance
11 discrepancies repaired between required maintenance
12 inspections. I've already belabored that point, but there's
13 another cite to that.

14 But again, it is not arbitrary or capricious for the
15 administrator to charge under the facts and circumstances
16 extent here of violation of Section 91.405, subparagraphs (a)
17 and (b). And where the sanction guidance table, which is
18 available to the general public and which the Board takes
19 judicial notice of, does not contradict the actions sought by
20 the Administrator.

21 I am aware that attached to the Respondent's
22 response there are documents pertaining to some event that
23 involved an incident involving an operation conducted
24 apparently by Senator Inhofe. But reading over the documents
25 that were submitted herein, I do not find that these documents

1 in any way indicate that the Administrator's action in this
2 case is arbitrary or capricious.

3 On the facts and circumstances in this case, I have
4 found that there is an established violation of Section
5 91.405, and whether or not the Administrator takes action
6 against another individual and the activities in the Inhofe
7 situation are not in any way similar to the events here and
8 really have no bearing.

9 It might be arbitrary and capricious if in numerous
10 cases, the only suspension is 15 days and all of a sudden the
11 Administrator for identical violations is seeking to impose a
12 suspension for ten months or revocation. That would raise
13 real questions as to whether it's in accordance with Board
14 precedent, law, or arbitrary and capricious. That does not
15 appear herein. So, I specifically find that the sanctions
16 sought by the Administrator is neither arbitrary, capricious,
17 or not in accord with Board precedent on similar cases.

18 As to the sanctions sought, the Administrator seeks
19 a suspension of 60 days. However, on all the evidence in
20 front of me, there are mitigating circumstances. Respondent
21 did rely upon erroneous information and improperly did so. He
22 was the one ultimately responsible as the pilot in command,
23 but this is not an instance where the pilot simply without any
24 consultation with anyone made a determination on his own as to
25 what he was going to do. Respondent at least made an attempt,

1 futile though it was, to get correct information. To me, that
2 shows at least an attempt to comply with regulatory
3 provisions.

4 I also am taking into account that at the time of
5 the actual occurrence, as I stated early on where the
6 Respondent declared an emergency, that was a reasonable and
7 prudent action on the part of the Respondent, and I've taken
8 those into account and I believe those are factors which do
9 warrant mitigation in the sanction sought by the Administrator
10 in this case.

11 I do not, however, take into account the experience
12 of the Respondent or the fact that he doesn't have, apparently
13 on the evidence in front of me, any prior violation history.
14 That under Board precedent is not a factor considered in
15 mitigation, as pilots are expected to comply with the
16 regulations and not have a violation history.

17 It is taking into account that he is an airline
18 transport pilot certificate holder, so I have looked at also
19 his judgment and Respondent as shown as being equal to that
20 expected of the holder of the highest type of airmen's
21 certification given by the FAA.

22 But in any event, based upon my evaluation of all
23 the facts and circumstances in this case, I believe a
24 reduction and modification in the period of suspension sought
25 from that of 60 days to that of 50 days would be appropriate

1 and would satisfactorily act as a deterrent to any others who
2 are similarly situated and to satisfy the public interest in
3 air safety and air commerce.

4 ORDER

5 IT IS THEREFORE ORDERED THAT:

6 1. The Complainant's motion for summary judgment
7 be, and the same hereby is granted;

8 2. That the sanction sought in the Order of
9 Suspension, the complaint herein, be, and same hereby is,
10 modified from a period of 60 days to that of 50 days;

11 3. That the Order of Suspension, the complaint
12 herein as modified as to the sanction, be, and the same hereby
13 is, affirmed;

14 4. That the Respondent's airline transport pilot's
15 certificate, be, and the same herein is, suspended for a
16 period of 50 days.

17 Entered this 9th day of November 2011 at Phoenix,
18 Arizona.

19

20

21

PATRICK G. GERAGHTY

22

Administrative Law Judge

23

24

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

As this is a dispositive order, the parties are advised that either party may appeal from this order by filing with the Board within ten days from this date a notice of appeal. The appealing party must further within 50 days from this date file with the Board a brief in support of that appeal. Those documents must be filed with the docket section Office of Administrative Law Judges, National Transportation Safety Board, Washington, D.C., 20594, with copies of all documents served upon the opposing party.

Parties are specifically cautioned that with reference to appeal the Board takes a stringent view as to the time limitations imposed upon filing of notices or supporting documents and that the Board may upon its own motion or the motion of an opposing party dismiss an appeal where the appropriate document is untimely filed by even one day. If extensions are required for whatever reason, they must be requested prior to the totaling of any time period from the Office of The General Counsel National Transportation Safety Board in Washington, D.C.

The parties are referred to the Board's rules of practice, subpar dealing with appeals for further information concerning the issues reviewable on appeal and further information concerning the Board's process on review on appeal to the full Board.

1 If no appeal is taken within the time provided or
2 the Board does not elect to do review upon its own motion, the
3 decision and order entered herein shall become final.
4 However, the timely filing of the notice of appeal and timely
5 filing of supporting brief or election by the Board to review
6 upon its own motion shall stay this decision and order during
7 the pendency of the full Board review.

8 Anything further from the Complainant?

9 MR. RUNKEL: No, Your Honor.

10 MR. PEARSON: Actually, Your Honor, yes, I'd like to
11 make a couple of statements for the record and also ask you to
12 take judicial notice of an NTSB ruling, Board precedent.

13 ADMINISTRATIVE LAW JUDGE GERAGHTY: No. I've
14 already decided the case, and, you know --

15 MR. PEARSON: I understand that, I just want to put
16 that on the record that there's --

17 ADMINISTRATIVE LAW JUDGE GERAGHTY: No. You can do
18 that on your appeal.

19 MR. PEARSON: And I will, Your Honor, thank you.

20 ADMINISTRATIVE LAW JUDGE GERAGHTY: Thank you. I
21 mean I -- that's just something that I need to in this case.
22 I'm done. I'm not the Pope; I'm not infallible. If the Board
23 reverses me, that's fine.

24 MR. RUNKEL: Your Honor, there is only one thing
25 that I just remembered, is that Daren Dufriend is a female --

1 ADMINISTRATIVE LAW JUDGE GERAGHTY: I can't hear
2 you.

3 MR. RUNKEL: Daren Dufriend is female and not male,
4 Your Honor.

5 ADMINISTRATIVE LAW JUDGE GERAGHTY: What?

6 MR. RUNKEL: You referred to Daren Dufriend as
7 Mr. Dufriend, it should be Mrs., and so --

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, I couldn't
9 tell the sex from the deposition.

10 MR. RUNKEL: That's fine.

11 ADMINISTRATIVE LAW JUDGE GERAGHTY: So I said he,
12 I'm sorry. If it's a female, it's a female. And if I find
13 that when I review the transcript I'll make a change. But for
14 the record, we'll note that appropriately it should be female.

15 Nothing further in this proceeding; the proceeding
16 is closed.

17 (Whereupon, at 11:33 a.m., the hearing in the
18 above-entitled matter was adjourned.)

19

20

21

22

23

24

25

CERTIFICATE

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

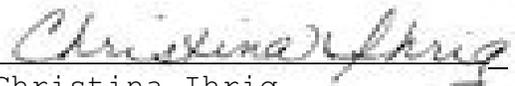
IN THE MATTER OF: Robbie Lynn Gibbs

DOCKET NUMBER: SE-19059

PLACE: Phoenix, Arizona

DATE: November 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.


Christina Ihrig
Official Reporter