

SERVED: October 1, 2013

NTSB Order No. EA-5680

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 30th day of September, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-19548
)	
EITAN LEASCHAUER,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent, who proceeds *pro se*, appeals the oral initial decision Administrative Law Judge Patrick G. Geraghty issued on September 17, 2013.¹ By that decision, the law judge ordered suspension of respondent’s private pilot certificate, pending respondent’s successful

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

completion of a reexamination under 49 U.S.C. § 44709.² We deny respondent's appeal.

A. Facts

On December 30, 2012, respondent was the pilot-in-command of a Cessna 172 aircraft, with registration number N733YG, on a flight departing from Reid-Hillview Airport in Santa Clara County, California. The Federal Aviation Administration (FAA) has an air traffic control (ATC) tower at the Reid-Hillview Airport, directing both ground control and local control.³ Melinda Formby, the ATC specialist covering ground control, asked respondent to inform her when he was ready to taxi to the runway. When respondent was ready, Ms. Formby provided him instructions to proceed to runway 31R. After repeating her instructions three times, Ms. Formby informed respondent to contact the tower because, as ground control, she would not provide clearance for takeoff.⁴

Ms. Formby noticed respondent proceeded to the runway and continued moving. She pointed out respondent's movement to Andrew Yau, the ATC specialist covering local control at the airport. Mr. Yau had not authorized respondent to depart and attempted to get respondent to abort the takeoff. Respondent proceeded to take off. Mr. Yau informed him of a possible pilot deviation and requested respondent contact the Reid-Hillview ATC once he landed at his destination.

Upon arriving at his destination, respondent contacted Ms. Formby. He asked her not to submit a pilot deviation report to the FAA because he believed she authorized him to take off.

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

³ Ground control is responsible for aircraft on the ground of the airport during taxiing, while local control is responsible for movement of aircraft in the air, including during takeoff and landing. Tr. 28.

⁴ Tr. 29, see also Exh. C-1 (ATC recording) and Exh. C-2 (transcript of ATC recording) at 3.

Ms. Formby, however, informed respondent the FAA would conduct an investigation of the incident.

Jeffrey Ebey, an FAA aviation safety inspector, received the investigative file. He reviewed the ATC tapes from December 30, 2012, and attempted to contact respondent. Upon receiving no response from respondent, on March 18, 2013, Inspector Ebey sent respondent a letter requesting reexamination under 49 U.S.C. § 44709.

As a result of respondent's failure to submit to the reexamination, by order dated August 27, 2013, the Administrator suspended respondent's private pilot certificate, pending successful completion of a reexamination. Paragraph 3 of the original complaint read, "[d]uring the above-described flight, ATC instructed you to hold short, and then contact the [Reid-Hillview] Air Traffic Control Tower to receive a takeoff clearance. You failed to follow this ATC instruction and proceeded to takeoff from [Reid-Hillview] without clearance. As a result, you caused conflicts with [Reid-Hillview] air traffic." Counsel for the Administrator moved to amend the complaint on September 5, 2013, requesting the law judge strike the words "hold short, and then" and "[a]s a result, you caused conflicts with [Reid-Hillview] air traffic" from the complaint. The law judge permitted the amendment because he found it simply removed a factual allegation to the benefit of respondent. In relevant part, the amended complaint alleged:

3. During the above-described flight, ATC instructed you to contact the [Reid-Hillview] Air Traffic Control Tower to receive a takeoff clearance. You failed to follow this ATC instruction and proceeded to takeoff from [Reid-Hillview] without clearance.
4. On or about March 18, 2013, you were sent a letter from the San Jose Flight Standards District Office advising you that, based on the above-described incident, the FAA has reason to believe that your competence as a certificated airman is in question, and that a reexamination of your qualification to hold an airman certificate is necessary in the interest of safety, pursuant to 49 USC Section 44709.

5. The above-described letter further advised you that you were requested to present yourself for reexamination of appropriate tasks, knowledge, and skills, from the Private Pilot Practical Test Standards (Single Engine Land).
6. On or about April 29, 2013, you spoke with an FAA Aviation Safety Inspector and his Front-Line Manager (FLM) on the phone. You acknowledged receiving the letter described in ¶ 3 [sic], and requested a reexamination date in October or November. The FLM stated that the reexamination would have to take place no later than July.
7. To date, you have failed to submit to the reexamination described in paragraphs 4 and 5.

The case proceeded to a hearing before the law judge on September 17, 2013.⁵

B. Law Judge's Oral Initial Decision

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he found the Administrator had a reasonable basis to order reexamination of respondent's competency to operate an aircraft. As a result, under 49 U.S.C. § 44709, the law judge affirmed the Administrator's suspension of respondent's certificate pending his successful completion of such reexamination.

After a detailed discussion of his factual findings based upon a review of the evidence, the law judge concluded both Ms. Formby and Mr. Yau testified consistently with the ATC recordings presented in Exhibit C-1. He also noted respondent's cross-examination of the witnesses served to corroborate their testimonies on direct examination. He expressly found Ms. Formby's testimony credible. As to respondent's ability to meet his burden of proof, the law judge concluded the overwhelming weight of the evidence supported the Administrator's allegation that respondent took off from runway 31R without obtaining the proper ATC

⁵ 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, as amended (77 FR 63252, Oct. 16, 2012).

clearance. He further found respondent's evidence failed to contradict that conclusion.⁶ Based on these determinations, the law judge found the Administrator had a reasonable basis on which to request reexamination of respondent's competency to operate an aircraft.

C. Respondent's Issues on Appeal

Respondent appealed the law judge's decision, and raises two main issues. Respondent argues the law judge erred in denying his motion for summary judgment. Specifically in his motion for summary judgment, respondent alleges 1) the FAA admitted faulty accusations by amending paragraph 3 of the complaint, 2) the FAA tampered with the ATC recording, deleting the final ground instructions and inserting new instructions to contact the tower, and 3) the FAA added irrelevant items in paragraphs 4, 5, 6, and 7 of the complaint. Respondent also contends Chief Administrative Law Judge Alfonso Montaña erred in failing to disqualify Judge Geraghty from the case because Judge Geraghty had served as the law judge in a prior, unrelated enforcement proceeding by the Administrator against respondent. Based on the foregoing arguments, respondent contends the Administrator did not have a reasonable basis to question his competency.

2. Decision

We review the case, as a whole, under *de novo* review.⁷

A. Motion for Summary Judgment

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

⁶ Initial Decision at 147.

⁷ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972).

fact exists, and the moving party is therefore entitled to judgment as a matter of law.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 summary judgment in the light most favorable to the non-moving party.¹⁰

We find the law judge did not err in denying respondent's motion for summary judgment as the Administrator clearly raised issues of material fact necessary for resolution at a hearing. As we indicated in Administrator v. Singleton¹¹ and expressly rearticulated in Administrator v. Gibbs—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*.¹² Law judges must not dispose of a case via summary judgment when resolution of the case requires a credibility determination. Therefore, we will reverse decisions granting summary judgment when genuine issues of material fact, including credibility determinations, exist for resolution at hearing.¹³

⁸ 49 C.F.R. § 821. 17(d). 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).

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

¹¹ 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).

¹² NTSB Order No. EA-5638 at 6 (2012).

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.

Specific to the amendment of complaint, the law judge found both in a written order, dated September 10, 2013, and reiterated on the record at the hearing, the amendment benefitted respondent by removing certain factual allegations against him.¹⁴ We find the amended complaint served to place respondent on notice of the exact same allegation—that he had departed the runway without proper ATC clearance—in a less aggravated manner; the Administrator no longer alleged respondent was instructed to hold short or interfered with air traffic. Nothing in the amendment merits granting a motion for summary judgment, because the factual issue of whether respondent took off without a proper ATC clearance remained.

As to respondent's allegation that the FAA tampered with and/or spliced the ATC recording, we find no evidence of any such malfeasance on the part of the FAA aside from respondent's bald assertions in his briefs and on the record at the hearing. Furthermore, we conclude respondent's allegation of tampering actually supports the law judge's denial of the motion for summary judgment. The law judge needed to permit this issue to proceed to a hearing so he could determine, based upon facts adduced on the record, whether respondent's allegations of tampering were meritorious.

Finally, respondent suggests paragraphs 4 through 7 of the complaint were irrelevant. As enumerated above, these paragraphs of the complaint described the steps the FAA took to notify respondent of the need for the reexamination and to document his failure to comply with the FAA's request. They are relevant to the proceedings. Respondent's assertion, in this regard, fails to provide evidence that no genuine issue of material fact existed. As genuine issues of material fact existed for resolution at a hearing, we conclude the law judge did not err in denying respondent's motion for summary judgment.

¹⁴ Tr. 14.

B. *Recusal of the Law Judge*

No evidence in the record supports respondent's contention that the Chief Law Judge erred in failing to grant respondent's motion to disqualify the law judge. In written orders, dated September 4 and 6, 2013, the Chief Law Judge denied respondent's motions to disqualify the law judge. In his September 4 order, the Chief Law Judge stated,

[h]aving reviewed respondent's request, the undersigned notes that he had not articulated any specific incident or matter relating to [the law judge's] handling of the case—which is now under appeal to the full Board—to substantiate that [the law judge] handled that proceeding in an unfair and prejudicial manner. The fact that [the law judge] found in favor of the Administrator in a prior proceeding involving respondent does not establish any animus against him.¹⁵

Section 821.35(c) of our Rules of Practice permits a party to file a motion with the Board requesting relief from the failure of a law judge to disqualify himself from a proceeding. We agree with the Chief Law Judge's finding that respondent failed to present any evidence causing us to question his ability to conduct the hearing in respondent's case in an impartial manner. The mere fact the law judge presided over a prior hearing involving respondent does not disqualify him. Additionally, we find the law judge provided respondent a fair and impartial hearing in the case *sub judice*. He permitted respondent the opportunity to fully cross-examine the FAA's witnesses, present evidence on his own behalf, and even permitted respondent to re-open his case-in-chief to testify on his own behalf over the objection of the Administrator's counsel.¹⁶ Further, we find the law judge exercised significant judicial restraint in comporting himself at the

¹⁵ Order Denying Respondent's Request for Reassignment of Case, dated September 4, 2013, at 2.

¹⁶ Tr. 133.

hearing despite repeated interruptions by respondent.¹⁷

C. Reexamination Request

Finally, we affirm 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.¹⁸ In this regard, the standard the Administrator must fulfill concerning a reexamination request under 49 U.S.C. § 44709 is minimal: the Administrator need only show he has a reasonable basis for requesting reexamination.

In the case at issue, the Administrator provided testimony regarding respondent's questionable conduct on December 30, 2012. As Inspector Ebey testified, respondent's conduct in taking off from Reid-Hillview Airport without first obtaining tower permission is concerning. In response to a question from the Administrator's counsel regarding whether takeoff without permission warranted reexamination, Inspector Ebey stated,

That in itself would definitely in my opinion warrant [sic] a reexamination. A takeoff clearance at a control tower airport is a basic pilot function that is administered by all pilots that are operating out of a control tower airport.¹⁹

¹⁷ See e.g. tr. 10, 15, 18, 19, 49, 50 (the court reporter asked respondent to "please stop interrupting the judge"), 61, 63, 72, 89 (the court reporter again asked respondent to stop interrupting).

¹⁸ Administrator v. Sanchez, NTSB Order No. EA-5326 (2007) at 4 (stating that, "[i]t is well-settled that the Board's inquiry into the reasonableness of a reexamination request is a narrow one," and quoting Administrator v. Santos and Rodriguez, NTSB Order No. EA-4266 at 4 (1994), for the standard 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); Administrator v. Wang, NTSB Order No. EA-3264 (1991). We affirmed this reasonableness standard, notwithstanding arguments that the respondent has been subject to sabotage by employers who allegedly attempt to orchestrate failure of proficiency checks. Administrator v. Occhione, NTSB Order No. EA-5537 (2010); Administrator v. Bakhit, NTSB Order No. EA-5489 (2009).

¹⁹ Tr. 80.

The evidence adduced at the hearing shows neither Ms. Formby nor Mr. Yau gave respondent the necessary permissions to depart the airport, and the certified ATC recordings corroborated their testimonies at the hearing. Respondent's failure to adhere to this most basic flight rule constitutes a reasonable basis for ordering reexamination of respondent's competency.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's oral initial decision is affirmed; and
3. The Administrator's suspension of respondent's private pilot certificate, pending respondent's successful completion of a reexamination under 49 U.S.C. § 44709, is affirmed.

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

APPEARANCES:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the appeal of Eitan Leaschauer, hereinafter referred to as Respondent, from an amended Emergency Order of Suspension pending compliance with a request for reexamination. That amended emergency order was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant, and the document serves as the complaint herein.

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The matter has been heard before this judge. And as provided by the Board Rules of Practice and required in emergency proceedings, which this is, I am issuing a bench decision in the proceeding.

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DISCUSSION

22

The issue presented in this proceeding is framed by the complaint and the amended complaint issued by the Administrator in this case. Observing the pleadings at this point, there is no dispute as to the allegations contained in paragraphs 1 and 2 of

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1 the complaint, and therefore, those allegations are taken as
2 having been established; that is, the Respondent is the holder of
3 the certificate as alleged, and that he was in fact the pilot in
4 command of aircraft 733YG departing on December 30, 2012, from the
5 Reid-Hillview Airport.

6 The remainder of the complaint has been disputed, and
7 the evidence offered by the parties herein were directed by the
8 allegations contained in paragraph 3, 4, 5, 6, and 7 of the
9 complaint.

10 The Complainant's case was made by the testimony from
11 several witnesses and also from the exhibits offered and received
12 during the course of the proceeding.

13 First witness was Ms. Formby. She is an air traffic
14 control specialist. She was the ground controller on duty at
15 Reid-Hillview Airport, or just the airport herein, on the date in
16 question. She was the one communicating with the Respondent for
17 purposes of controlling his movement on the ground at the airport.

18 As she indicated, on the date in question, there were
19 two positions being controlled. Her control was the ground
20 control. Ground control is exactly what it says: control of
21 aircraft movement on the surface of the airport. The separate
22 controller on duty was the local controller. And on her
23 testimony, the local controller is the controller with the sole
24 authority to control the movement of the aircraft in the air
25 within the airspace delegated to that airport jurisdiction and

1 also to issue landing and takeoff clearance to people operating
2 onto or off the surface of that airport.

3 Ms. Formby indicated that she first had contact with the
4 Respondent when he was at the compass rose on the airport, and
5 that she issued taxi instructions to taxi to runway 3-1 right via
6 taxiway Zulu.

7 We also listened to the recording of the voice
8 transmission of the communications between Ms. Formby and the
9 Respondent. And what the witness testified to is verified by the
10 voice transcript, which is C-2, and also by the recording itself,
11 C-1.

12 Also looking at C-2, the ground controller position, I
13 do see that at 20:48:44, the communication from ground control is
14 to 733YG to advise when the aircraft was ready to taxi. The
15 response, the aircraft was ready to proceed to the takeoff.
16 Ground control then gives the taxi instruction, 733YG, 3-1 right
17 via taxi Zulu. It is true, as testified to by Respondent, that
18 that taxi clearance is repeated three times. But in context,
19 because after the first ground control clearance, 733YG comes back
20 and says, "say again" --

21 MR. LEASCHAUER: That is --

22 ADMINISTRATIVE LAW JUDGE GERAGHTY: Stop interrupting.

23 The transcript clearly indicates that the clearance by
24 the ground control was in fact repeated. And then there's again
25 an inquiry from 733YG, "Did you say right or left?" And this is

1 the third time the controller gives the taxi instruction, taxi
2 runway to 3-1 right via Zulu. And then the response is, "3-1
3 right, eh?" And then there's a communication of "3-1 right, ready
4 for takeoff, yankee golf."

5 And then the other communications have to be taken
6 together. If you look at 20:49:50, the ground control of "Cessna
7 733YG contact (unintelligible)." But immediately after that,
8 within .4 seconds, ground control comes back and says, "Cessna
9 733YG, contact," which is verbatim of the prior transmission of
10 49:50. And then the last word is "tower." So to me it is
11 reasonable that the unintelligible communication at 49:50, in it's
12 total, would have been "contact tower." But that is only the
13 ground control.

14 On the evidence in front of me, it is clear that the
15 ground controller, on a preponderance of the evidence, has no
16 authority to issue takeoff clearance, that it only controls
17 aircraft on the ground.

18 Lastly, I would observe that there's also testimony from
19 Mr. Ebey and from Mr. Tittle as to what is expected of a pilot.
20 As clearly stated in the Airman's Information Manual, a clearance
21 by ground control is taxi to a runway via whatever directions may
22 be given, here taxiway Zulu, is a clearance for that aircraft to
23 taxi, to stay on the ground, and taxi from wherever it is to the
24 whole short line of the departure runway. It's a clearance to
25 cross intersecting runways, but it's not a clearance to take off.

1 That is clearly spelled out in the Airman's Manual. It is a
2 clearance from wherever you are on the ramp to the hold-short line
3 for the active runway. It does not have to be stated. It is
4 basic knowledge.

5 I find the testimony of Ms. Formby is persuasive and
6 credible.

7 The next witness was Mr. Andrew Yau. He was the local
8 controller on duty. As both Ms. Formby and this witness
9 indicated, Mr. Yau, in his position as local controller, was
10 alerted by Ms. Formby when she saw the Respondent's aircraft in
11 the takeoff position on the runway, since she had only issued a
12 taxi instruction, and she asked Mr. Yau whether he had cleared the
13 aircraft for takeoff. And Mr. Yau said no. His testimony -- and
14 it is clear on listening to the tape recording, and this is the
15 important part -- the local controller, since he was the only one
16 with the authority to clear any aircraft operating on the airport
17 on that date for either landing or takeoff.

18 The witness clearly testified, and it is supported by
19 the voice recording, that he never issued a clearance to the
20 Respondent to enter the runway and to take off. In fact, it is
21 clear on his testimony and also on the recording that he requested
22 that the Respondent abort his takeoff. And as the witness
23 indicated, there was plenty of runway so that it could be
24 executed, but if agreeably, if the pilot did not feel comfortable,
25 that it would be no objection to complete the takeoff and come

1 back around and receive a clearance to land or, in this case, the
2 Respondent proceeded to, I think, Salinas or whatever his
3 destination was so he could call back.

4 There was a discussion as to the communication between
5 the local controller and Respondent as to the transmission of a
6 phone number, and it was a question whether by Mr. Yau as to
7 whether the number was received. Respondent indicated he did not
8 have a pencil, and at that point Mr. Yau indicated to him, well,
9 if you are proceeding to Salinas or whatever the destination was,
10 get the phone number for this tower and call back then at your
11 convenience, essentially.

12 But the basic thing is that on the evidence in front of
13 me, that is established by a preponderance of the evidence, that
14 there was never a clearance issued by the one person, the local
15 controller, who could issue that clearance; and therefore, that
16 the Respondent did take off without having received a clearance
17 from Mr. Yau, the local controller.

18 Mr. Tittle is the air traffic control manager. He is a
19 front-line manager. And he talked about the preparation of the
20 C-1, the CD which was received in evidence. And to simply
21 summarize his testimony was that the machine that records the
22 voice transmission is constructed so that no one can go in and
23 tamper with the recording. It cannot be cut in half and something
24 taken out or cut in half and something inserted. It is on his
25 testimony impossible, and there was no evidence offered by the

1 Respondent to dispute that testimony. Mr. Tittle testified based
2 upon his training and experience. And, in my view, his testimony
3 is clear that the voice recording that we heard -- especially the
4 critical part, the local controller -- is a true and accurate
5 rerecording of the transmissions that occurred on the date in
6 question.

7 The last witness was Mr. Ebey. He is Aviation Safety
8 Inspector. He received this investigation from another Aviation
9 Safety Inspector that was apparently being transferred, and
10 Mr. Ebey completed the investigation. He issued the letter of
11 investigation and also the request for reexamination. And those
12 documents were received as exhibits in this case both by the
13 Complainant and as R-6 from the Respondent. On this witness'
14 testimony, there was a discussion with the Respondent via
15 telephone and testimony that the request for reexamination,
16 standard procedure in the FAA is 15 days to accommodate the
17 request. With that, Mr. Ebey and the FAA realizes that there is a
18 real world and that accommodation could be made. But in this
19 case, the Respondent was asking that not only was he leaving the
20 country, but when he came back, he wanted an additional four to
21 five months into October or November, which the FAA would not
22 agree to.

23 So on his testimony, it is established that on March 18,
24 the Respondent was sent a letter by the Flight Standards District
25 Office indicating that they had reason to believe his competence

1 was in question and that a reexamination of his qualifications was
2 necessary.

3 Respondent attempted to offer evidence concerning
4 letters. Mr. Ebey indicated that FAA never received any letter
5 from the Respondent. And those exhibits, for lack of foundation,
6 1, 2, 3, were refused. But I also observed, I believe, on R-2,
7 which is the envelope itself, that the post office had attached a
8 label that the way the envelope was addressed, which is obscured,
9 that the letter could not be delivered. So the post office is
10 corroborating Mr. Ebey's testimony that the FAA never received
11 that letter because it was never delivered. The fact the post
12 office could not deliver it is not the FAA's responsibility.

13 The Respondent had ample opportunity to cross-examine
14 the witnesses and to recall witnesses as his part of his case in
15 chief. Listening to the testimony -- and I'm not going to repeat
16 it because the evidence that he elicited from Mr. Tittle and from
17 Mr. Ebey and Ms. Formby was essentially all the same testimony
18 they had given on direct -- there was nothing contradicted. The
19 Respondent testified on his own behalf. And listening to his
20 testimony, his explanation as to what he thought he heard, but
21 there is no evidence offered by him that he in fact received a
22 clearance. He thought he had, but he did not. And he
23 misinterpreted the ground controller's instruction or did not
24 understand it to the extent that the ground controller cannot
25 issue a takeoff clearance. And a clearance to taxi to a runway is

1 just that; you taxi to that runway, and then you do not enter it
2 until you get clearance from the controller controlling the runway
3 and the takeoff from that runway.

4 The issue presented in this case was whether or not
5 there is a reasonable basis on the evidence presented for the
6 FAA's request for reexamination. The burden of proof with that
7 rests with the Complainant, and he must carry it by a
8 preponderance of the reliable and probative evidence. The
9 evidence in this case offered on the issue of whether or not there
10 was a clearance issued to the Respondent to meet weighs
11 overwhelmingly in favor of the Complainant. None of the testimony
12 offered by the Complainant's witnesses has been contradicted. The
13 evidence shows by a preponderance of the evidence that the
14 Respondent taxied to the runway 3-1 right, went on the to runway
15 and executed a takeoff without receiving a clearance from the
16 local controller. So there is no doubt on this evidence that the
17 Respondent took off without appropriate ATC clearance for that
18 maneuver.

19 I find therefore that the allegation in paragraph 5 of
20 the complaint is clearly established by the testimony of Mr. Ebey.
21 And also further by Mr. Ebey's testimony, the allegations in
22 paragraph 6 are established. And as of this date, it is clearly
23 also established that the Respondent has failed to submit to a
24 reexamination as described in paragraphs 4 and 5 of the complaint.

25 The law applicable in this type of case has been clearly

1 stated by the Board repeatedly, and that is that in a case of a
2 request for reexamination, the Administrator need only show that a
3 reasonable basis for the reexamination request exists and that the
4 Board's review of the Administrator's decision to request a
5 reexamination is extremely limited. And I refer to the cases of
6 *Administrator v. Hutchins*, EA-4899 at 3, a 2001 case; also,
7 *Administrator v. Maitland*, EA-4878 at 3-4, also a 2001 case; and a
8 really early case, *Administrator v. Santos and Rodriguez*, EA-4266
9 at 3-4.

10 So the law applicable here is that, by a preponderance
11 of the evidence, the burden of proof that the Complainant must
12 only show a reasonable basis, and that the inquiry is limited.
13 That is, is the basis related to a specific request for
14 reexamination? Here the evidence is that the Respondent executed
15 a takeoff from the airport without receiving an ATC clearance.
16 That is a reasonable basis to request a reexamination of the
17 pilot's understanding of what is expected from ground control
18 clearances and from local control at an airport so that the
19 aircraft can proceed to a runway and then receive a separate
20 clearance and into the runway at takeoff. The reexamination be
21 limited to that is appropriate under all the facts and
22 circumstances; and I find, therefore, that by a clear
23 preponderance of the reliable evidence, that the Complainant has
24 established that there is in fact a reasonable basis to request
25 the reexamination of these piloting skills as described in

1 paragraph 3 of the complaint. And I so find. And I also find
2 that the Respondent as of this date failed to comply with that
3 reasonable request, and therefore that the suspension of his
4 airman certificate is appropriate until such time as he complies
5 with the request for reexamination.

6 ORDER

7 IT IS THEREFORE ORDERED THAT

8 1. The Emergency Order of Suspension pending
9 compliance of the complaint herein is hereby affirmed as issued.

10 2. That the Respondent's private pilot certificate
11 number 3512076 hereby is suspended until such time it complies
12 with the Complainant's request for reexamination.

13 Entered this 17th day of September, 2013, at San
14 Francisco, California.

15 _____
16 PATRICK G. GERAGHTY

17 Administrative Law Judge

18
19 APPEAL

20 ADMINISTRATIVE LAW JUDGE GERAGHTY: As this is an
21 emergency case, the time limits for purposes of appeal are
22 extremely limited. Therefore, the Respondent is referred to the
23 Board's Rules of Practice, subpart I, which deals emergency
24 proceedings for further information concerning appeals and
25 emergency proceedings. And notice of appeals must be filed with

1 the docket section, Office of Administration Law Judges in
2 Washington, D.C., within two days of the date of entry of this
3 decision and order with copies of that document served upon the
4 opposing party. Appeal party must further effect that appeal by
5 the time of the filing of a brief in support of that appeal. That
6 document must also be sent to the Office of Administrative Law
7 Judges, Washington, D.C. 20594, with copies served upon the
8 opposing party. The parties are cautioned that the Board takes a
9 stringent view of the time limitations and may dismiss an appeal
10 for the untimely filing for either the notice of appeal or either
11 the supporting brief.

12 If no appeal is taken within the time provided, the
13 decision and order shall become final. However, the filing of
14 appeal to the full Board or the Board's decision to review upon
15 its own authority will at least stay my decision until the Board
16 issues its is decision. And under the requirements of the
17 statute, the Board will issue its decision within 60 days of the
18 date of the appeal so that the emergency continues in effect
19 during the pendency of the full Board review.

20 Anything else for the record from either side?

21 MR. MERRILL: Nothing, Your Honor.

22 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing? Proceeding
23 is closed.

24 (Whereupon, at 3:42 p.m., the hearing in the above-
25 entitled matter was closed.)

CERTIFICATE

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

IN THE MATTER OF: Eitan Leaschauer

DOCKET NUMBER: SE-19548

PLACE: San Francisco, CA

DATE: September 17, 2013

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.

Ashley Proxmire
Official Reporter