

SERVED: April 2, 2014

NTSB Order No. EA-5712

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 2nd day of April, 2014

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket SE-19354
	)	
EITAN LEASCHAUER,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

Respondent, who proceeds *pro se*, appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty issued on January 23, 2013.<sup>1</sup> By that decision, the law judge ordered suspension of respondent’s private pilot certificate for 155 days, for operating an aircraft without a valid medical certificate and proceeding into Class B airspace without first obtaining clearance

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

from air traffic control (ATC), in violation of 14 C.F.R. §§ 91.131(a)(1),<sup>2</sup> 61.23(a)(3)(i),<sup>3</sup> and 91.13(a).<sup>4</sup> We deny respondent's appeal.

*A. Facts*

On December 13, 2011, respondent was the pilot-in-command (PIC) of a Cessna 172 aircraft, with registration number N733YG, on a flight that departed Watsonville Municipal Airport in Watsonville, California, and approached the Class B airspace surrounding San Francisco International Airport (SFO) from the southeast.<sup>5</sup> Respondent held a private pilot certificate and his sole passenger held a recreational pilot certificate.<sup>6</sup>

The portions of the SFO Class B airspace relevant to respondent's flight path, from southeast to northwest, were (i) an outer arc south of SFO, which extends vertically from 8,000 to 10,000 feet above mean sea level (MSL) (the "8–10,000 MSL Arc"), (ii) the next arc to the north, closer to SFO, in which Class B airspace extends from 6,000 to 10,000 feet MSL (the "6–10,000 MSL Arc"), and (iii) a third arc in which Class B airspace extends from 4,000 to

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<sup>2</sup> Section 91.131(a)(1), titled "Operations in Class B airspace," provides:

(a) Operating rules. No person may operate an aircraft within a Class B airspace area except in compliance with § 91.129 and the following rules: (1) The operator must receive an ATC clearance from the ATC facility having jurisdiction for that area before operating an aircraft in that area ....

<sup>3</sup> Section 61.23(a)(3)(i), titled "Medical certificates: Requirement and duration," provides:

(a) Operations requiring a medical certificate. Except as provided in paragraphs (b) and (c) of this section, a person ... (3) Must hold at least a third-class medical certificate—(i) When exercising the privileges of a private pilot certificate.

<sup>4</sup> Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>5</sup> Tr. 137.

<sup>6</sup> Tr. 139.

10,000 feet MSL (the “4–10,000 MSL Arc”).<sup>7</sup> Prior to operating within Class B airspace, a pilot is required to establish two-way radio communication with the ATC facility having jurisdiction over the airspace and receive a clearance to operate in the Class B airspace.<sup>8</sup>

Respondent approached the SFO Class B airspace travelling northwest at an altitude of about 8,500 feet and entered the lateral extent of the 8–10,000 MSL Arc at about 23:48:50 coordinated universal time (UTC) (15:48:50 local time). The transponder on respondent’s aircraft was transmitting 1200, the general code used by visual flight rules (VFR) traffic not receiving ATC services.<sup>9</sup> Respondent continued northwest through the 8–10,000 MSL Arc and most of the 6–10,000 MSL Arc at altitudes between 8,500 and 9,100 feet.<sup>10</sup>

Approaching the northern boundary of the 6–10,000 MSL Arc, at about 23:58:05 UTC, respondent reversed course<sup>11</sup> and headed south southeast.<sup>12</sup> According to respondent’s testimony, during the U-Turn, he recognized his radios were misconfigured, preventing him from receiving ATC transmissions. He testified he flipped a switch on the radio to allow him to receive transmissions, and an ATC controller immediately gave him a clearance into the SFO Class B airspace.<sup>13</sup> Respondent’s aircraft continued to transmit a transponder code of 1200.<sup>14</sup>

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<sup>7</sup> Tr. 24, 102; see also Exh. C-5 (ATC plot and data).

<sup>8</sup> 14 C.F.R. § 91.131(a)(1) (incorporating by reference the requirement for two-way radio communication in 14 C.F.R. § 91.129).

<sup>9</sup> Tr. 24; Exh. C-6 (ATC video).

<sup>10</sup> Exhs. C-5 and C-6.

<sup>11</sup> During testimony at the hearing, this maneuver was referred to as the “U-Turn.”

<sup>12</sup> Tr. 143.

<sup>13</sup> Tr. 145–47.

<sup>14</sup> Exh. C-6.

After the U-Turn, respondent continued on a southerly track, descending from approximately 9,100 feet to 5,900 feet, and reached the southern boundary of the 6–10,000 MSL Arc at about 00:03:10 UTC. At that time, he again reversed direction, and headed northwest at or below the 6–10,000 MSL Arc.<sup>15</sup>

At 00:05:46 UTC, at an altitude of approximately 5,900 feet, respondent contacted a Northern California Terminal Radar Approach Control (“NorCal”) controller. Respondent advised the NorCal controller he had been having radio problems. The controller issued respondent a transponder code of 0331 at about 00:06:24 UTC; the ATC radar received the 0331 code from respondent’s aircraft at about 00:07:23 UTC. Respondent continued descending to approximately 3,500 feet as he travelled northwest below the 4–10,000 MSL Arc. At 00:11:30 UTC, the controller issued respondent a clearance into the SFO Class B airspace.<sup>16</sup>

Respondent continued his flight to the vicinity of Half Moon Bay. About 00:14:00 UTC, the NorCal controller informed respondent that he had violated the SFO Class B airspace and gave him a phone number to call upon landing. Near Half Moon Bay, respondent turned toward the southeast and proceeded to his final destination, Salinas Municipal Airport.<sup>17</sup> After landing, respondent contacted ATC at the number the controller provided.

James Shingledecker, a Federal Aviation Administration (FAA) quality control support manager, received and reviewed the pilot deviation report concerning respondent’s alleged incursion of the SFO Class B airspace. He reviewed the ATC audio tapes and video files of the flight on December 14, 2011.

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<sup>15</sup> Exhs. C-5 and C-6.

<sup>16</sup> Exhs. C-4 (ATC Transcript) and C-6.

<sup>17</sup> Tr. 139–40.

*B. Procedural History*

On July 12, 2012, the Administrator issued an order suspending respondent's private pilot certificate. In relevant part, the complaint alleged respondent operated in the SFO Class B airspace without a clearance from the ATC facility. The complaint also charged respondent with operating the aircraft without a current medical certificate, and with operating the aircraft in a careless or reckless manner. Based on these allegations, the Administrator ordered a suspension of respondent's private pilot certificate for a period of 165 days.

In response to the complaint, respondent admitted he operated the aircraft as PIC during the flight in question. Respondent also admitted his operation of the aircraft occurred when he did not possess a current medical certificate.<sup>18</sup>

In the course of discovery and pre-hearing motions, respondent filed a "Request to Modify an Order" in which he requested his passenger be removed from the witness list. By Order, dated December 18, 2012, the law judge granted the request, and ordered, "[r]espondent need not reveal the requested passenger/witness identity to Complainant, and said individual may not appear and testify at hearing."<sup>19</sup>

The case proceeded to a hearing before the law judge on January 23, 2013.

*C. Law Judge's Oral Initial Decision*

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he modified the Order of Suspension, reducing the suspension to a period of 155 days.<sup>20</sup> After a detailed discussion of his factual findings based upon a review of the evidence, the law judge

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<sup>18</sup> Tr. 8–11, 135, 137, 138–39.

<sup>19</sup> Order, dated December 18, 2012.

<sup>20</sup> Initial Decision at 175.

concluded during the above-described flight respondent operated the aircraft as PIC without a valid medical certificate, and in the SFO Class B airspace without a clearance from the controlling ATC facility in a careless and reckless manner.

The law judge noted respondent's testimony, in which respondent stated he knew his medical certificate was expired at the time of the flight. The law judge further noted while respondent may have thought his passenger could act as PIC at the time of the flight, respondent did not make a reasonable effort to verify the passenger's qualifications. Since respondent owned and operated the aircraft in addition to overseeing and conducting all communications during the flight, the law judge concluded respondent was the PIC and therefore operated as such without a valid medical certificate, in violation of 14 C.F.R. § 61.23(a)(3)(i).<sup>21</sup>

Regarding the alleged incursion into SFO Class B airspace, the law judge noted the discrepancy in testimony regarding when respondent received his first clearance from ATC to enter the SFO Class B airspace. Respondent testified he received a clearance from ATC while or immediately after making the U-turn from a northwesterly heading to a southeasterly heading at about 2358 UTC. The Administrator presented evidence that respondent first received clearance at approximately 0006 UTC, after respondent contacted the NorCal controller. For purposes of the initial decision, the law judge accepted as true respondent's testimony that he received a clearance during the U-turn. The law judge found the undisputed testimony and evidence showed at the time of the U-turn, respondent already was operating in the Class B airspace without a clearance from the ATC facility having jurisdiction over the airspace. The law judge concluded this conduct amounted to a violation of 14 C.F.R. § 91.131(a)(1).<sup>22</sup>

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<sup>21</sup> Initial Decision at 169–70.

<sup>22</sup> Id. at 170–72.

The law judge noted respondent was careless in mishandling his radio configuration and making assumptions about his passenger's qualifications while knowing he did not possess a valid medical certificate. The law judge determined such carelessness endangered the life or property of another in violation of 14 C.F.R. § 91.13(a). The law judge also found respondent's operation in the SFO Class B airspace without a clearance potentially hazardous to others operating in the same airspace.<sup>23</sup>

*D. Respondent's Issues on Appeal*

On appeal, respondent raises several issues, summarized below. Respondent contends the law judge's findings of fact were not supported by a preponderance of the reliable, probative evidence, the law judge's credibility determinations were arbitrary and capricious, and the law judge erred in several procedural and evidentiary rulings. In particular, respondent argues the law judge erred by denying respondent's motion for summary judgment, granting the Administrator's partial summary judgment motion, disregarding 23 minutes of ATC voice communications that were "deliberately erased by the Administrator,"<sup>24</sup> and excluding testimony of respondent's passenger witness. Finally, respondent appeals the law judge's denial of respondent's motion for the law judge to recuse himself.

*E. The Administrator's Motion to Strike Respondent's Reply Brief*

In accordance with 49 C.F.R. § 821.48(c), the Administrator timely filed a brief in reply to respondent's appeal brief. Respondent subsequently filed a "1<sup>st</sup> Response to Administrator's Reply Brief," dated June 20, 2013. On June 24, 2013, the Administrator filed a Motion to Strike Respondent's Reply Brief for failure to comply with 49 C.F.R. § 821.48(d). Section 821.48(d)

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<sup>23</sup> *Id.* at 172–73.

<sup>24</sup> Appeal Br. 3.

provides, “[s]ubsequent to the filing of appeal and reply briefs, the parties may [only] file citations to supplemental authorities.”<sup>25</sup> Such filings may not be used to correct omissions in briefing, respond to a reply brief, or include further argument.<sup>26</sup> Section 821.48(d) also precludes parties from making any “other submissions, except by leave of the Board, upon a showing of good cause.”<sup>27</sup>

The NTSB General Counsel advised respondent of the limitations on 49 C.F.R. § 821.48(d), after which, on June 29, 2013, respondent re-captioned his response as a Citation to Supplemental Authorities. The re-captioned submission, however, merely contains the first ten pages of respondent’s original response to the Administrator’s reply brief.

We find respondent’s “1<sup>st</sup> Response to Administrator’s Reply Brief,” both in original form and re-captioned as a Citation to Supplemental Authorities, was not filed in accordance with 49 C.F.R. § 821.48(d). Respondent does not establish good cause to permit either filing. Thus, we grant the Administrator’s Motion to Strike.

## **2. Decision**

We review the case, as a whole, *de novo*.<sup>28</sup>

### *A. Sufficiency of the Evidence*

As an initial matter, we find the record contains uncontroverted evidence showing respondent entered the SFO Class B airspace without obtaining a clearance from ATC. This

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<sup>25</sup> 49 C.F.R. § 821.48(d).

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> 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).

incursion occurred from 2348 UTC, when respondent entered the 8–10,000 MSL Arc, to the time of his U-Turn at approximately 2358 UTC, which occurred within the lateral boundaries of the 6–10,000 MSL Arc.<sup>29</sup> Respondent never provided any evidence contradicting these facts. In his answer and at the hearing, respondent admitted he was not in communication with ATC as he approached the SFO Class B airspace.<sup>30</sup> He also claimed he made the U-Turn to avoid entering the airspace at issue. At the time of the U-turn, however, the ATC data showed respondent already was in the SFO Class B airspace, within the 6–10,000 MSL Arc at approximately 9,000 feet.<sup>31</sup>

At the hearing, respondent claimed he was unable to communicate with ATC as he flew northwest toward the SFO Class B airspace.<sup>32</sup> In response to the law judge’s questions about his communication attempts and the configuration of the aircraft’s microphone panel,<sup>33</sup> respondent confirmed the radio receiver was set incorrectly, which he fixed by “flip[ping] the switch.”<sup>34</sup> Respondent testified ATC spontaneously issued him a clearance after he reconfigured his radio to allow receipt of ATC transmission.<sup>35</sup> This occurred, according to respondent, during or immediately after the U-Turn.<sup>36</sup> Respondent’s transponder was squawking 1200 throughout this

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<sup>29</sup> Exhs. C-5 and C-6; Tr. 25, 6–10.

<sup>30</sup> Answer ¶¶2, 3.6; Tr. 140, 142–44.

<sup>31</sup> Exhs. C-5 and C-6.

<sup>32</sup> Tr. 140.

<sup>33</sup> Tr. 140–44.

<sup>34</sup> Tr. 144.

<sup>35</sup> Tr. 147.

<sup>36</sup> Tr. 145–46; Exhs. C-5 and C-6.

time, and continued to do so until approximately 0007 UTC,<sup>37</sup> at which point ATC assigned respondent a transponder code of 0331.

The ATC communications in evidence, consisting of an audio recording and transcript thereof covering the timeframe from approximately 00:00 UTC to 00:16 UTC, do not capture the time frame of the U-Turn; therefore, the ATC recording and transcript do not invalidate respondent's claim of a "first clearance" at that time.<sup>38</sup> The ATC plot and ATC video make clear, however, consistent with the testimony of the NorCal Operations Manager, that respondent already had been within the SFO Class B airspace for almost ten minutes *prior to* the U-Turn.<sup>39</sup> Based on this evidence, we find a preponderance of the evidence supports the law judge's determination respondent entered the Class B airspace without a clearance from the ATC facility.

#### *B. Credibility Determinations*

We will not overturn a law judge's credibility determinations unless a party can establish they were arbitrary and capricious.<sup>40</sup> As discussed below, we find no evidence the law judge's credibility determinations were arbitrary and capricious; therefore, we give deference to such determinations.

##### *1. Testimony of Sallyanne Rice*

Sallyanne Rice, the Operations Manager of the NorCal Terminal Radar Approach Control on December 13, 2011, observed respondent's aircraft for about 15 minutes. Ms. Rice's initial testimony was not entirely clear with regard to whether respondent actually was within the SFO

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<sup>37</sup> Exhs. C-4, C-5, and C-6.

<sup>38</sup> Exhs. C-3 (ATC Audio) and C-4.

<sup>39</sup> Exhs. C-5 and C-6; Tr. 25.

<sup>40</sup> Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), aff'd, 472 Fed.Appx. 2 (D.C. Cir. 2012).

Class B airspace, both laterally and vertically, for the entire 15 minutes she observed, or whether she observed respondent fly both within and below the SFO Class B airspace during that period.<sup>41</sup>

Respondent argues the law judge erred in making his credibility determinations by ignoring irregularities in the timeline of events as described in FAA witness testimony and other evidence. Respondent argues the relevant timeframe actually was 23 minutes, and this discrepancy discredits Ms. Rice's testimony. Respondent also focuses considerable attention on the timeframe from 0000 to 0007 UTC, and the lack of ATC voice recordings prior to that time.<sup>42</sup>

The law judge found respondent's arguments and testimony did not impugn Ms. Rice's testimony. He found no inconsistency between her testimony she observed respondent for 15 minutes and the fact the entire event occurred over a time period of about 23 minutes.<sup>43</sup>

On appeal, respondent asserts the law judge found Ms. Rice not credible. In his brief, respondent selectively quoted from the record:

Respondent: I'm arguing that she's not reliable as a witness.

Law Judge: I agree.<sup>44</sup>

However, respondent omitted the rest of the law judge's discussion of this issue, in which he continued, "But we're beating a dead horse, because the issue to me is whether or not you went into Class B airspace without first receiving a clearance. If you got a clearance after you entered

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<sup>41</sup> See Tr. 25, 58 and 72.

<sup>42</sup> Appeal Br. at 6–8.

<sup>43</sup> Initial Decision at 163–64.

<sup>44</sup> Appeal Br. at 15.

Class B airspace, it doesn't make any difference.”<sup>45</sup> We do not interpret the law judge's statement, “I agree,” as a definitive holding on the credibility of Ms. Rice's testimony. At most, the law judge was acknowledging some discrepancy in the testimony regarding the times, while pointing out it was not relevant to the ultimate issue at hearing. Respondent's focus on various timeframes is not inconsistent with Ms. Rice observing respondent for a period of about 15 minutes, at least some of which occurred while respondent was within the SFO Class B airspace.<sup>46</sup> Thus, the law judge's crediting of Ms. Rice's observation of respondent for 15 minutes was not arbitrary and capricious.

## *2. Testimony of James Shingledecker regarding ATC Recordings*

Respondent alleges the Administrator erased almost 23 minutes of ATC voice recordings. Respondent, however, presents no evidence of any malfeasance on the part of the FAA, but instead only proffers bald assertions alleging the Administrator's staff surreptitiously destroyed or altered the ATC recording. Respondent alleges the absence of any recordings of his communications prior to about 0005 UTC is evidence such recordings purposely were destroyed by the Administrator.<sup>47</sup> He also contends, this absence of recordings impeaches the credibility of Mr. Shingledecker's testimony.<sup>48</sup>

At the hearing, the FAA quality assurance manager, Mr. Shingledecker, testified the FAA tracked respondent's aircraft in the SFO Class B airspace starting at 2348 UTC,<sup>49</sup> but there were

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<sup>45</sup> Tr. 65.

<sup>46</sup> Exhs. C-5 and C-6; Tr. 25, 72–3.

<sup>47</sup> Appeal Br. 9, 26–27.

<sup>48</sup> *Id.* 30–32.

<sup>49</sup> Tr. 110. 94–95, 103–04, 110; Exh. C-5.

no recordings of any communication from respondent to ATC between 2348 and 0005 UTC.<sup>50</sup>

Mr. Shingledecker testified his office prepared the certified ATC recording entered into evidence as Exhibit C-3 within a day or two of respondent's flight.<sup>51</sup> Exhibit C-3 runs from approximately 0000 to 0020 UTC,<sup>52</sup> and is a re-recording created from the FAA's digital audio legal recorder, the master recording of ATC communications.<sup>53</sup> Mr. Shingledecker explained the FAA policy governing creation of ATC recordings is to identify the first relevant communication between a subject aircraft and ATC, and start the recording five minutes prior to the communication.<sup>54</sup> Since there were no recorded transmissions from respondent's aircraft prior to 00:05:46 UTC,<sup>55</sup> he started the recording about five minutes earlier, at approximately 0000 UTC.<sup>56</sup>

We find no evidence of malfeasance. The law judge credited Mr. Shingledecker with acting in accordance with FAA procedures.<sup>57</sup> The law judge determined respondent did not provide evidence contradicting Mr. Shingledecker's testimony.<sup>58</sup> Furthermore, respondent's arguments about the lack of ATC voice recordings prior to 0000 UTC do not call into question whether he was in the SFO Class B airspace from about 2348 to 2358, prior to the U-Turn. Prior to the U-turn, respondent concedes his radio was not functioning properly and, thus, he was not

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<sup>50</sup> Tr. 110–11, 113–14.

<sup>51</sup> Tr. 84–5.

<sup>52</sup> Exh. C-3; Tr. 86.

<sup>53</sup> Tr. 88, 118.

<sup>54</sup> Tr. 116.

<sup>55</sup> Tr. 113–14.

<sup>56</sup> Tr. 121.

<sup>57</sup> Initial Decision at 165.

<sup>58</sup> Id.

in communication with ATC. Furthermore, even respondent did not claim he was outside in the SFO Class B prior to the U-Turn. On cross-examination, respondent only stated he was unsure whether he was in the SFO Class B airspace at that time.<sup>59</sup> Thus, we find the law judge's crediting of Mr. Shingledecker's testimony was not arbitrary and capricious, and further hold the preponderance of the evidence does not support respondent's allegation the Administrator altered or destroyed portions of the ATC recordings prior to 0005 UTC.

*C. Law Judge's Denial of Respondent's 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 fact exists, and the moving party is therefore entitled to judgment as a matter of law.<sup>60</sup> In order to defeat a motion for summary judgment, the non-moving party must provide more than a general denial of the allegations.<sup>61</sup> The law judge must view the evidence in the motion for summary judgment in the light most favorable to the non-moving party.<sup>62</sup>

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.

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<sup>59</sup> Tr. 152.

<sup>60</sup> 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).

<sup>61</sup> Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, 7 NTSB at 1296).

<sup>62</sup> United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962).

As we indicated in Administrator v. Singleton<sup>63</sup> and expressly rearticulated in Administrator v. Gibbs<sup>64</sup>—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*. Therefore, we will reverse decisions granting summary judgment when genuine issues of material fact, including credibility determinations, exist for resolution at hearing.<sup>65</sup>

In the case *sub judice*, the Administrator claimed respondent proceeded into the SFO Class B airspace without a clearance, while respondent claimed he received a clearance from ATC and made a U-Turn to avoid entering the airspace.<sup>66</sup> As a result, the fundamental issue of the case required an assessment of the evidence: the law judge was required to resolve whether respondent operated his aircraft within the SFO Class B airspace, and if he did, whether he had a clearance from the appropriate ATC facility to do so. Moreover, as discussed above, respondent alleged the Administrator's staff tampered with the ATC recording and inappropriately withheld portions of the recording. This allegation supported the law judge's denial of respondent's motion for summary judgment, because the law judge needed to resolve this issue after taking evidence adduced on the record at a hearing.

#### *D. Order Granting the Administrator's Motion for Partial Summary Judgment*

In an order dated November 28, 2012, the law judge granted the Administrator's motion for partial summary judgment, finding respondent operated as PIC without a valid medical

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<sup>63</sup> 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).

<sup>64</sup> NTSB Order No. EA-5638 at 6 (2012).

<sup>65</sup> 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 (2011).

<sup>66</sup> Answer ¶ 5.2.

certificate in violation of 14 C.F.R. § 61.23(a)(3)(i). Respondent admitted in his answer to conducting this flight during a “short interruption in [his] medical certificate.”<sup>67</sup> He argued he thought his passenger could act as PIC; however, his answer also included a concession that his passenger could not operate the aircraft as PIC.<sup>68</sup> Thus, respondent admitted he acted as PIC while he did not possess a valid medical certificate. Therefore, we find the law judge did not err in granting partial summary judgment to dispose of this issue.

*E. The Law Judge’s Exclusion of Respondent’s Witness’s Testimony*

Respondent claims the law judge erred in excluding the testimony of respondent’s passenger. Our law judges have significant discretion in making evidentiary rulings. We review law judges’ evidentiary rulings under an abuse of discretion standard, provided the respondent can also show he or she suffered prejudice as a result of the rulings at issue.<sup>69</sup>

In a motion dated November 26, 2012, respondent requested removal of his passenger from the hearing witness list. Respondent made this request to avoid providing the FAA the identity and contact information of the witness. The law judge granted respondent’s request and dismissed the Administrator’s attorney’s request for discovery sanctions. Therefore, in the case *sub judice*, the law judge did not abuse his discretion in excluding respondent’s witness from testifying at the hearing, because such exclusion resulted from respondent’s own request during

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<sup>67</sup> Answer ¶ 2.

<sup>68</sup> Id.

<sup>69</sup> Administrator v. Walker, NTSB Order No. EA-5656 at 15n.39 (2013). See also Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). We will not overturn a law judge’s evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

the discovery phase of this case.

*F. Recusal of the Law Judge*

On December 20, 2012, respondent requested the law judge recuse himself from the case. He also raises this issue on appeal to us. 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. Regarding such claims of bias by a law judge, we have held, in order to disqualify the judge for bias or prejudice, “the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case.”<sup>70</sup> We carefully have reviewed the record for the case *sub judice* and do not find the law judge exhibited bias.

Respondent’s motion on appeal to disqualify the law judge generally is a re-argument of the case, including the issues already addressed above, as well as a relitigation of the law judge’s orders regarding respondent’s prehearing motions and discovery requests. Furthermore, we find respondent failed to present any evidence causing us to question whether the law judge conducted the hearing in an impartial manner. Respondent contends the law judge was biased at the hearing, and precluded him from presenting his defense. While the law judge did interrupt respondent during the hearing, the law judge only did so in order to maintain an orderly proceeding.<sup>71</sup> The law judge permitted respondent to fully cross-examine the Administrator’s witnesses and present evidence on his own behalf. The law judge also overruled the Administrator’s attorney’s objections on several occasions and permitted respondent to continue

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<sup>70</sup> Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008), *aff’d*, Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010); *see also* Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985).

<sup>71</sup> See, e.g., Tr. 38, 46, 113–14, and 119.

with his cross-examination of the Administrator's witnesses.<sup>72</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The 155-day suspension of respondent's private pilot certificate shall begin 30 days

after the service date indicated on this opinion and order.<sup>73</sup>

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

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<sup>72</sup> See, e.g., Tr. 17, 28–29, 39–42, and 44.

<sup>73</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\* \* \* \* \*

In the matter of: \*

MICHAEL P. HUERTA, \*  
ADMINISTRATOR, \*  
FEDERAL AVIATION ADMINISTRATION, \*

Complainant, \*

v. \*

Docket No.: SE-19354  
JUDGE GERAGHTY

EITAN LEASCHAUER, \*

Respondent. \*

\* \* \* \* \*

Phillip Burton Building  
450 Golden Gate Avenue  
U.S. Tax Court  
Courtroom 2-1350  
San Francisco, California 94102

Wednesday,  
January 23, 2013

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:

CHRISTOPHER MERRILL, Esq.  
Office of the Regional Counsel  
Federal Aviation Administration  
Western Pacific Region  
P.O. Box 92007  
Los Angeles, California 90009-2007  
310-725-7100

On behalf of the Respondent:

EITAN LEASCHAUER, Pro Se  
5340 Bingham Court  
San Jose, California 95123-1705

## 1 ORAL INITIAL DECISION AND ORDER

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: This matter came on  
3 for hearing before the National Transportation Safety Board on the  
4 appeal of Eitan Leaschauer, hereinafter referred to as  
5 "Respondent," from an Order of Suspension which seeks to suspend  
6 his private pilot's certificate for a period of 165 days. The  
7 Order of Suspension serves herein as the complaint, and was filed  
8 on behalf of the Administrator, Federal Aviation Administration.

9 Pursuant to notice, this matter came on for hearing on  
10 January 23, 2013, in San Francisco, California. The Complainant  
11 was represented by one of his staff counsel, Christopher Merrill,  
12 Esquire, of the Western Pacific Region, Federal Aviation  
13 Administration. The Respondent was present at all times and  
14 elected to represent himself, pro se.

15 The parties were afforded full opportunity to offer  
16 evidence, to call, examine and cross-examine witnesses, and to  
17 make argument in support of their respective positions. I have  
18 considered all of the evidence, both oral and documentary, and I  
19 will simply summarize the evidence that I believe leads to the  
20 conclusion I reached herein. Any other evidence that I don't  
21 mention is viewed by me as simply being corroborative or not  
22 materially affecting the outcome of the decision.

## 23 AGREEMENTS

24 By pleading, it was agreed there was no dispute as to  
25 the following numbered paragraphs of the complaint: Paragraphs 1,

1 2, and 4. The matters stated, therefore, in those paragraphs of  
2 the complaint are taken as having been established for purposes of  
3 this decision.

4 DISCUSSION

5 As stated above, the Complainant seeks to suspend the  
6 Respondent's private pilot's certificate for a period of 165 days  
7 based upon the allegations in the complaint which, it is asserted  
8 by the Complainant, shows that the Respondent acted in regulatory  
9 violation of the provisions of 91.131(a)(1) of the Federal  
10 Aviation Regulations, in that he entered Class B airspace at the  
11 time and place as alleged in the complaint without having first  
12 received a clearance from ATC to enter that Class B airspace.

13 It is also charged that the admitted fact that the  
14 Respondent operated the aircraft at a time when his medical  
15 certificate was no longer valid, that he was in regulatory  
16 violation of 61.23(a)(3)(i) of the regulations, in that he did not  
17 have in his possession at least a third class valid airman medical  
18 certificate while he was exercising the privileges of his private  
19 pilot certificate.

20 And, lastly, it is charged as a residual violation that  
21 the Respondent, by acting in either a careless or reckless manner  
22 so as to endanger the life or property of another, that he was  
23 also in regulatory violation of the provisions of Section 91.13(a)  
24 of the Federal Aviation Administration regulations.

25 The Complainant's case was made through several exhibits

1 and also the testimony of two witnesses. The first witness was a  
2 Ms. Sallyanne Rice. She, at the time in question, apparently was  
3 the office manager of the air traffic control facility that was  
4 controlling the Class B airspace on the date in question. She was  
5 operations manager who was in charge of the shift and this  
6 included any alleged incursions into Class B airspace.

7 Ms. Rice stated that she first became aware of this  
8 incident because while she was at her desk and she heard some  
9 person, apparently another controller, obviously, call out or  
10 point out that that controller was observing a Class B airspace  
11 violator. At that point, according to Ms. Rice, she looked at the  
12 scope, observed the return on the aircraft, and inquired of the  
13 other controller whether or not he or she was talking with the  
14 pilot of that aircraft.

15 The individuals, after communications, also indicated  
16 that in the TRACON that no one was actually talking with the  
17 aircraft, and then she apparently told many of the controllers, or  
18 at least the controller, that if communications were achieved with  
19 the aircraft to let her know.

20 That is pertinent. She did testify affirmatively that  
21 she did observe personally on the scope a VFR target inside Class  
22 B airspace. She verified that by looking at the exhibit which was  
23 projected on the screen here, which is a CD, C Exhibit 3, which  
24 she talked about the depiction of the Class B airspace, the  
25 circular lines, saying that the lines on the scope show the Class

1 B airspace and she gave the various altitudes for the Class B  
2 airspace using the typical cliché-type, it's an inverted wedding  
3 cake.

4 She then indicated that she had watched the aircraft for  
5 about 15 minutes. I need to be clear here because as I understood  
6 the testimony, her testimony is that for 15 minutes she watched  
7 this incursion. Her testimony was not that the incursion lasted  
8 for 15 minutes, because she didn't, on her testimony, know that  
9 the incursion had occurred. Her first knowledge that there was an  
10 incursion was a controller pointing it out or calling it out. So,  
11 obviously, it follows that the incursion had already occurred. So  
12 she wasn't seeing it from the instant that the alleged incursion  
13 actually commenced. She started her observation of it some period  
14 of time subsequently, and that at that point, from the subsequent  
15 time, for an additional 15 minutes, she observed the incursion.  
16 So that's the 15 minutes that we're talking about.

17 I know that we had a lot of testimony about  
18 discrepancies as to the time factors. But if you look at the  
19 times as shown on there, it really comes out to about 23 minutes.  
20 And so even if I say that the incursion was 15 minutes on  
21 Ms. Rice's testimony, her testimony is not impugned. She's  
22 testifying about how long she watched, not how long it lasted.  
23 And even if I say that it was 15 minutes, that's more beneficial  
24 to the airman. It's a shorter incursion. So I don't really have  
25 anything more to say than, all of the facts in front of me, there

1 is no evidence that would cause me to reject any of the testimony  
2 of Ms. Rice on the basis as I've already explained, looking at  
3 what she actually has testified to. She watched it for 15  
4 minutes, not that the incursion lasted 15 minutes.

5 She also indicated that at that point while she was  
6 still watching the incursion, that someone was saying that the  
7 pilot was calling, and that at that point she told him to tell the  
8 pilot to call OPS after the pilot got on the ground. And the  
9 record does show that the Respondent was given a phone number. He  
10 copied it down and, to his credit, he did, in fact, as required by  
11 the regs, call OPS in compliance with the request. I make that  
12 observation.

13 With respect to the phone call, Ms. Rice testified that  
14 the Respondent, in fact, did call. He identified himself as the  
15 pilot of the airplane, in question, 33-Yankee-Golf. She obtained  
16 all of the necessary data and stated that in the conversation she  
17 had with him, that the Respondent never indicated to her that he  
18 had received a clearance prior to entering Class B airspace.

19 On the cross-examination, most of the cross-examination  
20 pertained to the assumed discrepancy between the 15 minutes, as  
21 the Respondent viewed it, and the time as reflected in the  
22 exhibits. And I've already commented on that. There is really no  
23 discrepancy if you listen to what is being testified to. To  
24 reiterate, Ms. Rice is saying 15 minutes is how long she observed,  
25 not when the alleged incursion started. Simply, she watched for

1 15 minutes. So there is no discrepancy in her testimony and I  
2 find her testimony, in fact, credible and relevant.

3 Mr. James Shingledecker testified. He's a supervisory  
4 or superintendent manager. He's in quality control, employed by  
5 the Federal Aviation Administration. He recited on his direct  
6 testimony what his duties were and how various procedures are  
7 followed and what is required documentation when there is a  
8 reported pilot deviation, and his office, in fact, receives a  
9 pilot deviation report.

10 There was really no challenge to any of that testimony  
11 and, based upon his testimony as to his background and  
12 qualifications, his curriculum vitae, he is obviously well  
13 qualified to testify about the events and the exhibits received  
14 during this proceeding.

15 With respect to the voice communications, he explained  
16 that the procedure after the violation report in his office, under  
17 his supervision, that they go back and listen to the voice tapes  
18 at least 5 minutes prior to the incursion itself, to at least 5  
19 minutes after. And that if there's no pertinent communication  
20 between the alleged violator and ATC prior to the incursion and  
21 nothing in the subsequent 5 minutes, anything outside those time  
22 frames is not recorded. Obviously, if there are communications  
23 8 minutes before the event that might include communications with  
24 ATC with other aircraft, it has no bearing on the outcome of an  
25 alleged violation case.

1           The witness did testify that he had listened to C-3,  
2 that has, according to his testimony, two files on the cassette  
3 and that he has listened to the voice com and, of course, the  
4 transcription of the voice communications is also received as  
5 Exhibit C-4.

6           The witness testified that the clearance -- and it does  
7 show that on C-4, according to the Complainant's evidence, is that  
8 the clearance did occur at 00:11:30, and it does show on page 2 of  
9 C-4 that a clearance was issued to Yankee-Golf, cleared into Class  
10 B airspace and maintain VFR with the altitude of 3500. And his  
11 further testimony was that, therefore, looking at the printout,  
12 which is also received of the actual track of the aircraft, that  
13 it appears that the duration occurred beginning at 23:48 hours and  
14 ended at -- as I've already indicated -- 00:11. That would be  
15 approximately 23 minutes.

16           On his testimony, also, although there was a squawk  
17 given and you hear the controller attempted to give a squawk the  
18 first time, but there's no two-way communications established. So  
19 even though the controller gave a squawk frequency for the  
20 transponder, apparently it was not received by the Respondent  
21 because there was no acknowledgement and there was no indication  
22 that the controller received a return.

23           In any event, as testified to by the witness and not  
24 contradicted as a matter of factual evidence, therefore, and  
25 personal knowledge that the receiving of a squawk code for your

1 transponder is not a clearance into Class B airspace. You must  
2 receive the clearance outside the Class B airspace and then you'll  
3 probably get a squawk so that they can track you while you're in  
4 there or passing through there.

5           In any event, I listened to C-3, the CD, and I also  
6 reviewed Exhibit C-6, and we listened to the testimony revolving  
7 the plot of the aircraft, which was received as Exhibit C-5.

8           With respect to C-3, I would simply make the following  
9 observation, that the witness indicated that it was only a partial  
10 transcript of the voice communications on C-3, which is -- he's  
11 referring to Exhibit C-4, and some further testimony about the ATC  
12 plot, referenced on C-5.

13           On cross-examination, there really was nothing  
14 established in my view that in any way detracted from the direct  
15 testimony offered by this witness. He clearly established as to  
16 the rationale for what appears on Exhibit C-3 and on Exhibit C-5,  
17 taken from the various CDs.

18           There has been no adverse testimony as to the track  
19 depicted on C-5 and this witness did clearly reference the  
20 attached supporting data. And looking at the attached supporting  
21 data, this again confirms the time limits that are already  
22 testified to by the prior witnesses for the Complainant as to the  
23 duration of the incursion into Class B airspace.

24           Respondent testified on his own behalf. He testified  
25 that essentially he was proceeding northwest, he knew the Class B

1 airspace was in front of him. And I think he said at one time it  
2 was maybe about 30 miles ahead of him. At that time, according to  
3 his testimony, attempting to obtain two-way voice communications,  
4 he was broadcasting -- or, at least, he thought he was  
5 broadcasting, but he was not receiving any answers. And so he was  
6 trying to figure out, on his testimony, what the problem would be.

7           He then stated that by looking at C-5, that at the point  
8 where on C-5 it appears to be like a U-turn, an open U, that at  
9 that point he was able to establish communications with San  
10 Carlos, which, on his knowledge, apparently has a good  
11 communication facilities and can be heard by the aircraft. And at  
12 that point he realized that he had mismanaged his radios and that,  
13 in fact, he had the receiver portion of his radio turned off. So  
14 that while he was broadcasting and other people were supposedly  
15 receiving him, he could not hear any return communication.

16           But on closely questioning, to bring out his testimony  
17 -- and I credit his testimony -- at this point the witness was  
18 being, I believe, quite candid as to what was happening at this  
19 point in time. And at the point in time is either as the U-turn  
20 starts or just as it proceeds and starts the rollout and proceeds  
21 back in the direction that he was coming from. That would be, I  
22 guess, he was going northwest, so he was going back to the  
23 southeast. But in any event, that's where, on his testimony,  
24 there are two clearances into Class B airspace. He claims that  
25 somewhere in that U-turn, he was able to establish communications

1 with ATC and that the controller spontaneously gave him a  
2 clearance into Class B airspace without the Respondent even asking  
3 for it. And that that doesn't appear on the tapes. And that the  
4 second one that does appear in C-4, that I've referenced, is the  
5 second ATC clearance into Class B airspace.

6           So there is a divergence of testimony. The Complainant  
7 indicates that there's only one ATC clearance; that is the one  
8 shown on C-4. The Respondent indicates that he believes that some  
9 part of the communications are missing because he did, in fact,  
10 receive the first ATC clearance when he was making the U-turn.

11           That's my view of the evidence.

12                           FINDINGS OF FACT AND CONCLUSIONS OF LAW

13           I'll dispose, first, of the charge violation of Section  
14 61.23(a) (3) (i), in that the Respondent operated the aircraft on  
15 the date in question without having in his possession a current  
16 and valid third class -- at least third class -- airman medical  
17 certificate.

18           The testimony of the Respondent on this part of the  
19 pleadings and today is that he knew his certificate had expired.  
20 And so he had asked this pilot friend to go with him, simply,  
21 "Would you like to go with me," and that the Respondent assumed  
22 that this individual, who he knew as a pilot, would then be the  
23 possessor of a current airman medical certificate and would be  
24 current and qualified to operate this particular aircraft, the  
25 Cessna 172, as the pilot in command and not the Respondent. As it

1 turned out, the assumption was erroneous, and that's the problem  
2 with assumptions, as the cliché goes, you know, if you make an  
3 assumption the first several letters are "a-s-s." And so you've  
4 got to be careful on assumptions.

5           It turned out that this individual only had a  
6 recreational pilot certificate and that, therefore, as provided in  
7 the federal regulations, he could not act as a pilot in command of  
8 this aircraft. On the circumstances, the Respondent is the owner  
9 and the operator of this aircraft. He was flying the aircraft.  
10 He was doing all of the communications, according to what I've  
11 heard, and, therefore, obviously he is the one that was acting --  
12 and the only one who could legally be acting as pilot in command.

13           As I previously indicated in my Order of November 28th,  
14 2012, therefore, the violation of Section 61.23(a)(3)(i) is  
15 established and I so hold.

16           Turning then to the alleged incursion into Class B  
17 airspace. On the weight of the credible, relevant, and probative  
18 evidence in front of me, I do find that in fact the Respondent at  
19 the time -- even if I accept the Respondent's testimony, and I'm  
20 willing to at least accept that for purposes of this discussion,  
21 that he made a communication with ATC while he was making that  
22 U-turn or in the process just immediately before or as he was  
23 rolling out, and that he received a first clearance, even though  
24 on C-4, if one reads the controller's communication, there really  
25 appears that that probably was meant as the first clearance,

1 because as the Respondent said, he thought it was the same  
2 controller and why this controller would then issue another  
3 clearance into Class B airspace if he already had done it doesn't  
4 make a lot of sense. But in any event, for purposes of  
5 discussion, even if I assume that the Respondent did receive a  
6 clearance at the U-turn, on the undisputed testimony and the  
7 evidence at that time of the U-turn, the Respondent was already in  
8 Class B airspace. He was in Class B airspace well before the U-  
9 turn. So the incursion had already occurred.

10           The fact that you get a clearance after you've entered  
11 the Class B airspace doesn't excuse the penetration of the  
12 airspace prior to receiving that clearance. The regulation  
13 clearly contemplates that the pilot will contact ATC outside the  
14 controlled airspace, the Class B airspace, and receive the  
15 clearance prior to entering. And if you even look at the Airman's  
16 Information Manual, it goes into some detail in the section on ATC  
17 procedures and pilot responsibilities, specifically warning the  
18 pilot that if you can't make the contact because it might be too  
19 busy, you're expected to circle, remain outside the Class B  
20 airspace, or the other controlled airspace, until you establish  
21 two-way communications and get a clearance. This is even with,  
22 say, Class D airspace, you can't just fly into the Class D  
23 airspace and then contact the tower. You've got to contact the  
24 tower and ask permission to come in. That's the only way it  
25 works. The reason for it is that the controllers have to know

1 who's where and be able to identify the specific aircraft that  
2 they're controlling.

3           In any event, without belaboring it any further, on the  
4 clear evidence in front of me, even looking at it in the light  
5 most favorable to the Respondent, the Respondent clearly had  
6 penetrated Class B airspace without having established  
7 communications with air traffic control and having received from  
8 air traffic control a clearance to enter that Class B airspace.  
9 Specifically, at the time he received even what he calls his first  
10 clearance, he was well within Class B airspace and had been so  
11 operating for some period of time.

12           I find, therefore, that on a preponderance of the  
13 reliable, probative evidence, and by the weight of that evidence,  
14 that the Respondent is in violation of 91.131(a)(1), and that he  
15 did operate his aircraft into Class B airspace without having  
16 first received from ATC a clearance from the ATC facility  
17 controlling that airspace for operating his aircraft in that Class  
18 B airspace. And that, therefore, that violation is found  
19 established.

20           On the evidence in front of me, I must also find that  
21 the Respondent's explanation as to what happened with his radios,  
22 the fact that he made an assumption about his pilot/passenger  
23 friend without, on the testimony of Respondent, he did not  
24 specifically ask to see any certificates. He just made the  
25 assumption that this individual was current and qualified to fly

1 this particular aircraft.

2           That's not exercising the requisite care and judgment  
3 that one would expect, particularly when you know your certificate  
4 is not valid for the operation. So I must find that the  
5 Respondent did operate at least in a careless manner so as to  
6 endanger the life or property of another. And it is sufficient to  
7 find a violation here, simply to show there's a reasonable nexus  
8 between the actions of the individual and a potential endangerment  
9 to others. The operation of an aircraft into Class B airspace  
10 without a clearance is at least potentially hazardous to other  
11 individuals who are operating in that Class B airspace.  
12 Therefore, I do find that a violation of 91.13(a) is found and  
13 that the Respondent operated in at least a careless manner, so as  
14 to endanger the life or property of another.

15           Turning then to the issue of sanction. As argued, the  
16 Complainant seeks a suspension of 165 days and broke down the  
17 Administrator's reasoning on that. It is not arbitrary or  
18 capricious. He assigned 60 days to the airspace violation, and  
19 105 days for deliberately flying without having a current valid  
20 airman medical certificate. That is in conformity and in the mid  
21 ranges of the sanctions table. Deference is to be shown to the  
22 Complainant in the absence of any articulable mitigating factors.

23

24           In this instance, I'm going to take into account that  
25 the Respondent did not simply go out to the airport and knowing

1 that he didn't have a medical certificate, get into his airplane  
2 and go flying. That would be egregious and I would find that as  
3 reckless. Here, the Respondent, while maybe lame attempt -- an  
4 assumption -- at least made an effort to get someone to go with  
5 him who the Respondent assumed -- not a good thing to do, but at  
6 least assumed was qualified.

7 I would have thought that there would be some obligation  
8 on the part of the other individual to say, "Hey, Mr. Leaschauer  
9 -- or Eitan, you know, I'm only a recreational pilot and, you  
10 know, can I really fly this 172?" But on the testimony in front  
11 of me, and it's not contradicted, that the Respondent at least  
12 made some effort. And I will give some credence to that effort.

13 But I would also observe for the benefit of the  
14 Respondent that not having a prior violation history is not viewed  
15 by the Board as a mitigating factor because the Board expects  
16 pilots to comply with the regulations. And if you comply with the  
17 regulations, you won't have a prior violation history.

18 But I take into account, as I've said, the at least  
19 minimal effort. And, therefore, I will reduce the sanction to a  
20 period of 155 days and give the benefit to the Respondent of a 10-  
21 day reprieve for at least making some attempt to find somebody to  
22 go with him and not just deliberately go off by himself.

23

24

ORDER

25

IT IS THEREFORE ORDERED:

1           1. That the Order of Suspension, the complaint herein,  
2 be, and hereby is, modified to provide for a suspension of 155  
3 days of the Respondent's private pilot certificate instead of 165  
4 days.

5           2. That the Order of Suspension, the complaint herein,  
6 as modified, be, and the same hereby is, affirmed.

7           3. That the Respondent's private pilot certificate be,  
8 and the same hereby is, suspended for a period of 155 days.

9           Entered this 23rd day of January 2013, at San Francisco,  
10 California.

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APPEAL

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ADMINISTRATIVE LAW JUDGE GERAGHTY: The record will reflect that at this point that I'm handing to Mr. Merrill two copies of the typewritten appeal provisions from an oral initial decision, one for the Complainant, and I would ask you to kindly give one to the Respondent, so that the parties have been issued the appropriate appeal provisions if either decides to appeal from this Decision and Order.

Is there anything further for the record from the Complainant?

1 MR. MERRILL: No, Your Honor.

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: From the Respondent?

3 MR. LEASCHAUER: No.

4 ADMINISTRATIVE LAW JUDGE GERAGHTY: Nothing further.

5 The proceeding is closed. Thank you.

6 (Whereupon, at 3:22 p.m., the hearing in the above-  
7 entitled matter was adjourned.)

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CERTIFICATE

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

IN THE MATTER OF:           Eitan Leaschauer  
DOCKET NUMBER:            SE-19354  
PLACE:                        San Francisco, CA  
DATE:                         January 23, 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.

---

Richard Friant  
Official Reporter