

SERVED: December 5, 2014

NTSB Order No. EA-5731

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 4th day of December, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-19621
)	
PAUL CONNORS [N1800H],)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent¹ appeals the decisional order of Administrative Law Judge Patrick G. Geraghty, issued May 29, 2014, granting the Administrator’s motion for summary judgment.²

¹ In his reply brief, the Administrator notes this certificate action is against the registration of the civil aircraft rather than an airman; therefore, we add the “N1800H” to name of respondent in addition to “Paul Connors.” At the time of the certificate action, Mr. Connors was the owner of the aircraft.

² A copy of the decisional order is attached.

By that decision, the law judge ordered revocation of the aircraft registration of civil aircraft N1800H under 49 U.S.C. § 44106(b)(1), because respondent knowingly transported 15 pounds of marijuana in the aircraft.³ We deny respondent's appeal.

A. Procedural Background

The Administrator issued an order dated January 16, 2014, revoking the aircraft registration of N1800H, based on the alleged violation described above. The revocation order alleged the following: on October 16, 2012, respondent operated N1800H as pilot-in-command on a flight landing at the Portales Municipal Airport in Portales, New Mexico. Respondent knowingly transported approximately 15 pounds of marijuana and was the only person on board the aircraft when it landed in Portales. Law enforcement personnel met the aircraft and found the marijuana pursuant to a search warrant, which a New Mexico state court later determined to be invalid. N1800H was registered to PJC Development Company, of which respondent was listed as the company president. In his answer, respondent admitted nearly all of the allegations, including that respondent knowingly transported the marijuana. Respondent's answer also asserted a New Mexico court later ruled the search warrant for the marijuana was invalid. The

³ 49 U.S.C. § 44106(b)(1) states as follows:

(1) The Administrator of the Federal Aviation Administration shall issue an order revoking the certificate of registration for an aircraft issued to an owner under section 44103 of this title and any other certificate of registration that the owner of the aircraft holds under section 44103, if the Administrator finds that—

(A) the aircraft was used to carry out, or facilitate, an activity that is punishable by death or imprisonment for more than one year under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance); and

(B) the owner of the aircraft permitted the use of the aircraft knowing that the aircraft was to be used for the activity described in clause (A) of this paragraph.

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

B. Law Judge's Decisional Order

The law judge issued a decisional order, in which he granted summary judgment and affirmed revocation of the aircraft registration of N1800H, under 49 U.S.C. § 44106(b)(1), because respondent transported 15 pounds of marijuana in the aircraft. The law judge found respondent admitted paragraphs 1 through 9 of the complaint, noting respondent did assert the search warrant used to seize the marijuana later was found to be invalid. The law judge held,

[T]he language of [§ 44106(b)(1)] requires only that the proscribed activity be punishable by more than one year imprisonment, it does not require a conviction, nor the imposition of the punishment of imprisonment. That is *if* [r]espondent had been successfully criminally prosecuted the offense exposed him/subjected him to a punishment, i.e., was punishable – by imprisonment of more than one year.⁴

The law judge noted the relevant New Mexico criminal statute authorized up to 1.5 years imprisonment for possession of more than eight ounces or distribution of less than 100 pounds of marijuana. Because respondent admitted to knowingly transporting 15 pounds in his aircraft, the law judge concluded respondent violated 49 U.S.C. § 44106 and granted the Administrator's motion for summary judgment.

C. Issues on Appeal

Respondent appealed the law judge's decision, and raises two main issues. Respondent contends the Federal Aviation Administration (FAA) and law judge erred as a matter of law in finding respondent's actions were punishable by more than one year imprisonment because the New Mexico court suppressed the evidence against him. Next, respondent argues the law judge erred as a matter of law in finding revocation was authorized because respondent was acquitted of the charge.

⁴ Decisional Order at 3 (emphasis added).

2. Decision

On appeal, we review the law judge's decision *de novo*, as our precedent requires.⁵

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 fact exists, and the moving party is therefore entitled to judgment as a matter of law.⁶ In order to defeat a motion for summary judgment, the non-moving party must provide more than a general denial of the allegations.⁷ The law judge must view the evidence in the motion for summary judgment in the light most favorable to the non-moving party.⁸

In this appeal, respondent does not argue the law judge erred in granting the Administrator's motion for summary judgment on the basis that genuine issues of material fact existed. Rather, respondent argues the law judge erred as a matter of law. We find no genuine issue of material fact exists in this case necessitating a hearing. Here, respondent, as the pilot-in-command and owner of the aircraft, admitted he knowingly transported 15 pounds of marijuana

⁵ 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).

⁶ 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).

⁷ Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, *supra* note 5, at 1296).

⁸ United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

in his aircraft. Therefore, we turn to respondent's legal arguments.

B. Imprisonment for More Than One Year

First, respondent argues he was not subject to imprisonment for more than one year because the prosecutor moved to dismiss the criminal complaint after respondent prevailed in his motion to suppress the evidence. In his decisional order, the law judge noted the plain language of the statute only requires the "proscribed activity be punishable by more than one year imprisonment, it does not require a conviction, nor the imposition of the punishment of imprisonment."⁹ We agree.

1. Plain Language of the Statute

In this case, respondent knowingly transported 15 pounds of marijuana in his aircraft.¹⁰ Under New Mexico Statute § 30-31-22, distribution or possession with the intent to distribute more than eight ounces but less than 100 pounds of marijuana carries a potential punishment of imprisonment for more than one year.¹¹ The plain language of the Federal statute at issue does not require an individual *actually* be convicted and imprisoned for more than one year to find a violation of 49 U.S.C. § 44106(b)(1). Here, respondent admitted he knowingly transported 15 pounds of marijuana in his aircraft and, under New Mexico law, that activity carried with it the possibility of more than one year imprisonment.

⁹ Decisional Order at 3.

¹⁰ See Compl. at 3; Answer at 3.

¹¹ We note the New Mexico court document that respondent attached to the appeal brief indicates the state of New Mexico charged respondent with a second or subsequent offense of distribution or possession with intent to distribute marijuana. Appeal Br. at Exh. 3. A second offense is a felony offense carrying up to three years imprisonment under New Mexico law.

2. *Legislative History*

Assuming, *arguendo*, the plain language of the Federal statute was not clear, an examination of the legislative history of this statute would cause us to reach the same result. As noted by the Administrator in his brief, Congress enacted both 49 U.S.C. §§ 44106 and 44710¹² pursuant to the Aviation Drug-Trafficking Control Act.¹³ The purpose of the Act was to “to expand the powers of the [FAA] to combat aerial trafficking in drugs. The bill accomplished this purpose by authorizing FAA revocation of the airman certificate and aircraft registration certificate of those involved in drug trafficking.”¹⁴ At the time of the enactment, the FAA felt it did not have the authority to revoke certificates absent a criminal conviction and sought broader authority from Congress, which it expressly granted the Administrator in enacting the statute.¹⁵ Therefore, we uphold the Administrator’s revocation of respondent’s aircraft registration certificate as a matter of law.

C. *Effect of Dismissal*

Respondent also argues the revocation cannot stand because the prosecutor dismissed the criminal case against respondent, which functioned as an acquittal in this case.¹⁶ We disagree.

¹² 49 U.S.C. § 44710 is similar to § 44106; it permits the Administrator to revoke airman certificates for certain activities involving controlled substances.

¹³ Pub. L. No. 98-499, 98 Stat. 2312 (October 19, 1984).

¹⁴ S. Rep. 98-228, 1984 U.S.C.C.A.N. 3916, 1983 WL 25408 at *1 (September 15, 1983).

¹⁵ *Id.* at *2.

¹⁶ 49 U.S.C. § 44106(e) precludes the Administrator from revoking a certificate under § 44106 if the respondent is acquitted. The relevant paragraph states as follows:

(1) The Administrator may not revoke, and the Board may not affirm a revocation of, a certificate of registration under this section on the basis of an activity described in subsection (b)(1)(A) of this section if the holder of the certificate is acquitted of all charges related to a controlled substance in an indictment or information arising from the activity.

1. *Acquittals*

The United States Supreme Court has long held an “acquittal on the merits ... bars retrial.”¹⁷ In its jurisprudence, the Supreme Court also provides insight into the types of judicial action constituting an acquittal. The Court specifically defines an acquittal as those judicial rulings that substantively relate to a *factual finding* or a *merits-related* ruling relating to guilt or innocence:

Most relevant here, our cases have defined an acquittal to encompass any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. Thus an “acquittal” includes “a ruling by the court that the evidence is insufficient to convict,” a “factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,” and any other “rulin[g] which relate[s] to the ultimate question of guilt or innocence.” These sorts of substantive rulings stand apart from procedural rulings that may also terminate a case midtrial, which we generally refer to as dismissals or mistrials. Procedural dismissals include rulings on questions that “are unrelated to factual guilt or innocence,” but “which serve other purposes,” including “a legal judgment that a defendant, although criminally culpable, may not be punished” because of some problem like an error with the indictment.¹⁸

In respondent’s case, the ruling by the New Mexico court is clearly a procedural dismissal rather than a factual finding of a lack of criminal culpability. Law enforcement personnel found 15 pound of marijuana in the aircraft. The trial judge made an *evidentiary ruling* the search warrant was illegal. Therefore, although respondent arguably was criminally culpable, the court made a legal judgment he could not be punished due to the illegally obtained search warrant. As a result of the evidentiary ruling, the prosecutor moved to dismiss the charge against respondent. At no time did the judge make a factual or merit-based ruling, akin to an

¹⁷ Arizona v. Rumsey, 467 U.S. 203, 211 (1984).

¹⁸ Evans v. Michigan, 133 S. Ct. 1069, 1074, 185 L. Ed. 2d 124 (2013) (internal citations omitted).

acquittal, that the prosecutor's proof was insufficient. Therefore, we conclude the judge's dismissal of the criminal charge against respondent did not constitute an acquittal under 49 U.S.C. § 44106(e), but rather constituted a procedural dismissal based upon an evidentiary ruling unrelated to *factual* guilt or innocence.

2. *Legislative History*

Our finding in this regard is also consistent with the legislative history of the Aviation Drug-Trafficking Control Act. In both 49 U.S.C. §§ 44106 and 44710, Congress provided the FAA could not revoke the airman certificate or aircraft registration certificate of a person who was acquitted of a controlled substance related activity. With respect to § 44710, Congress noted, "the term 'acquittal' was not intended to encompass situations in which the charges were merely dismissed."¹⁹ Specific to § 44106, Congress then went on to state, "the same procedural safeguards apply to the revocation of an aircraft registration certificate as to the revocation of an airman certificate."²⁰ In examining the legislative history of 49 U.S.C. § 44106(e), we conclude Congress did not intend to include procedural dismissals, such as in the case *sub judice*, under the definition of acquittal. Therefore, we find § 44106(e) inapplicable to the instant case. The Administrator fulfilled the burden of proving the aircraft was used to carry out an activity punishable by death or imprisonment for more than one year under New Mexico law regarding controlled substances.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

¹⁹ S. Rep. 98-228, 1984 U.S.C.C.A.N. 3916, 3919, 1983 WL 25408 at *4 (September 15, 1983).

²⁰ Id.

2. The law judge's decisional order is affirmed; and

3. The Administrator's revocation of the aircraft registration certificate for N1800H

under 49 U.S.C. § 44106(b)(1) is affirmed.

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

Served: May 29, 2014

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

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

v. *

Docket SE-19621

PAUL CONNORS, *
Respondent. *

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DECISIONAL ORDER

This is a proceeding before the Board upon the Appeal of Paul Connors, herein Respondent, for review of the Order of Revocation, the Complaint in this matter, which seeks to revoke the aircraft registration of Civil Aircraft N1800H.

The Order of Revocation/Complaint was issued on behalf of the Administrator, Federal Aviation Administration, and alleges, in support of the proposed action, that Respondent knowingly used said aircraft to transport a controlled substance, i.e., approximately 15 pounds of marijuana. For a full statement of the allegations of the Complaint, see Attachment No. 1, Order of Revocation. It is further alleged that, as consequence of the alleged activity, under the

provisions of 49 U.S.C. Section 44106,¹ the aircraft registration of N1800H is subject to revocation.

Respondent filed an Answer to the Complaint, and therein admitted as true the allegations stated in Paragraph 1 through and including Paragraph 9 of the Complaint.

In further response to Paragraph 6, Complaint, Respondent asserts that the search warrant, pursuant to which the aircraft was searched and the marijuana found, was subsequently held as invalid. As to Paragraph 10, Complaint, Respondent denied the allegations therein.

Subsequently Complainant submitted a Motion for Summary Judgment with attached supporting Exhibits. Exhibit C is a copy of a Search Warrant, under which Respondent's aircraft was searched, and the marijuana being transported was seized. Complainant, however, in his Motion, concedes that thereafter, upon Respondent's Motion, a State of New Mexico District Court granted Respondent's Motion to Suppress, entering an Order Suppressing Evidence, i.e., the seized 15 pounds of marijuana.

Respondent, in his Response opposing said Motion, asserts that since, as a consequence of the invalidation of the search warrant and the Suppression Order, the criminal charges were dismissed², Respondent's actions were not punishable for the period of time as mandated by 49 U.S.C. Section 44106. On that ground, and the unlawful search, it is averred that Complainant is not entitled to judgment as a matter of law.

The resolution in this proceeding, which is a civil matter, is not grounded upon the action of the District Court, State of New Mexico, rather, it is to be determined upon whether or not Respondent's actions were within those proscribed by the language/terms stated in Section 44106.

That Section provides for revocation of an aircraft's certificates where the aircraft was used in "an activity that is punishable by...imprisonment for more than one year under law of...a State related to a controlled substance..."

¹ See Attachment No. 2 for provisions of 49 U.S.C. Section 44106

² A copy of the Notice of Dismissal is attached as an Exhibit to Respondent's Response.

It is admitted that Respondent used the aircraft alleged herein to transport 15 pounds of marijuana, which Respondent concedes is a controlled substance.

The language of the Section requires only that the proscribed activity be punishable by more than one year imprisonment, it does not require a conviction, nor the imposition of the punishment of imprisonment. That is if Respondent had been successfully criminally prosecuted the offense exposed him/subjected him to a punishment, i.e., was punishable – by imprisonment of more than one year.

Attached to Complainant’s Motion, as Exhibit D, is an extract of applicable State of New Mexico Statutes, and on page 3 of said Exhibit, New Mexico Laws and Penalties , it states that: Possession of more than 8 oz. is punishable as a felony and incarceration of 1.5 years, plus a fine; Distribution (less than 100 lbs.), subject to punishment to the same extent.

I conclude, therefore, that Respondent’s admitted activity was proscribed by the provisions of Section 44106, in that his actions were punishable as provided by terms of that Section, that is, if prosecuted Respondent was subject to such punishment.

Sub-section (B) of Section 44106 requires that the use of the aircraft for the proscribed activity be with the knowledge that the aircraft was to be utilized for the commission of the prohibited activity. In his Answer, Respondent admits that he “...knowingly transported approximately 15 pounds of marijuana on board civil aircraft N1800H...” I conclude that Respondent’s use of said aircraft was as required by Sub-section (B) Section 44106.

As noted above, Respondent’s Answer denied the allegations in Paragraph 10, Complaint. I find, however, that as Respondent admitted knowingly transporting a controlled substance in the specified aircraft in response to Paragraph 3, Complaint, the denial in Paragraph 10 is not credited, and as discussed supra, the New Mexico Laws and Penalties Statute, as shown in Motion Exhibit D, is not disputed. I find that the allegations of Paragraph 10, Complaint, are established.

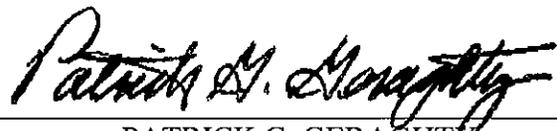
Summary Judgment is warranted wherein on all pleadings it can be found that as a matter of law there are no material facts in genuine dispute, and the evidence of record viewed favorably to the opposing party would not support a holding in his favor. Having looked at this entire record from that aspect, I conclude that Respondent’s actions warrant the imposition of the

sanction provided in 49 U.S.C. 44106, and thus Summary Judgment is warranted as there remain no disputed material facts.

IT IS ORDERED THAT:

1. Complainant's Motion for Summary Judgment is: **GRANTED**.
2. The Order of Revocation, the Complaint, is **AFFIRMED**.
3. This proceeding is hereby terminated.

ENTERED this 29th day of May, 2014, at Denver, Colorado.



PATRICK G. GERAGHTY
JUDGE

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.