

SERVED: June 17, 2015

NTSB Order No. EA-5749

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 15th day of June, 2015

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| _____ |) | |
| MICHAEL P. HUERTA, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-19494 |
| v. |) | |
| |) | |
| LAZLO PETERFAI, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

OPINION AND ORDER

1. Background

Respondent appeals the decision and order of Administrative Law Judge Patrick G. Geraghty, issued July 25, 2014.¹ By that order, the law judge affirmed the Administrator's order of suspension, finding respondent violated 14 C.F.R. §§ 91.123(a)² and 91.13(a)³ by deviating

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

² Section 91.123(a) provides:

from an air traffic control (ATC) clearance without first receiving an amended clearance. The law judge affirmed the Administrator's suspension of respondent's airline transport pilot (ATP) certificate for a period of 60 days. We remand this case for a new hearing.

A. Procedural Background

The Administrator's order of suspension, issued May 8, 2013, alleged respondent, an employee of Sun Quest Executive Charter, operated as pilot-in-command a Cessna Citation Model 550 (hereinafter, "N200VT"), on an instrument flight rules (IFR) flight from Burbank Airport (BUR), Burbank, CA, to Santa Monica Airport (SMO), Santa Monica, CA, on May 22, 2012.⁴ Respondent received an ATC clearance for a VOR-GPS-A⁵ instrument approach procedure to SMO runway 21, and respondent acknowledged the clearance. The Administrator's order alleged the VOR-GPS-A approach to SMO required respondent to maintain a final

(continued..)

When an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory. However, except in Class A airspace, a pilot may cancel an IFR flight plan if the operation is being conducted in VFR weather conditions. When a pilot is uncertain of an ATC clearance, that pilot shall immediately request clarification from ATC.

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

⁴ Compl. ¶2, Am. Answer ¶2.

⁵ The Very High Frequency Omni-Directional Range (VOR) is a type of radio navigation system for aircraft. A VOR ground station broadcasts a very high frequency (VHF) radio composite signal including the station's identifier, voice (if equipped), and navigation signal. The navigation signal allows an aircraft's airborne receiving equipment to determine a magnetic bearing from the station to the aircraft. This line of position is called the radial from the VOR. The intersection of two radials from different VOR stations on a navigational chart provides the position of the aircraft for a pilot. See *Administrator v. Jacquet*, NTSB Order No. EA-5616 at 1 n.3 (2012). The VOR-GPS-A approach procedure allows the use of a certified global positioning system (GPS) receiver to fly the approach rather than relying on the VOR signal for navigation.

approach heading of 212; however, respondent made a 360 degree turn without ATC authorization.

Lewis Peake was respondent's first officer on this flight; respondent and First Officer Peake had flown together "hundreds of times."⁶ The flight lasted approximately five to six minutes, and respondent had flown into SMO "numerous times."⁷ Southern California Terminal Radar Approach Control (SoCal) issued an instruction for the VOR-GPS-A instrument approach to SMO runway 21, and N200VT acknowledged receipt of the clearance.⁸ After SoCal handed off control to the SMO ATC tower, Andre Phillips, the SMO air traffic controller working the control position at the time, cleared respondent to land.⁹ At 1636:12 UTC, First Officer Peake advised the SMO tower they needed to perform a 360 degree turn because they were too high.¹⁰ Respondent commenced the turn as First Officer Peake made the

⁶ Tr. 134.

⁷ Id.

⁸ Tr. 16-17.

⁹ Tr. 143-44, Exh. A-2 at recorded transmission 1635:06.

¹⁰ A partial transcript of relevant communications between N200VT and SMO ATC Tower Local Control (LC) is as follows. See Exh. A-2:

| | | |
|---------|--------|---|
| 1634:53 | N200VT | ga morning santa monica tower citation two zero zero victor tango we're on the ah v-o-r inbound |
| 1634:59 | LC | citation two zero zero victor tango santa monica tower runway two one cleared to land |
| 1635:04 | N200VT | verify cleared to land (unintelligible) |
| 1635:06 | LC | citation two zero zero victor tango affirmative runway two one cleared to land and if I can get a uh pirep from ya a base and tops report |
| 1635:12 | N200VT | uh zero victor tango (unintelligible) |

transmission.¹¹ As Mr. Phillips looked out of the tower cab window, he observed N200VT start the turn to the northwest at the same time First Officer Peake's transmission came through.¹² Mr. Phillips briefly conferred with the controller-in-charge to see how best to handle the unauthorized turn and did not respond immediately to the call.¹³ First Officer Peake made a second radio transmission at 1636:26; Mr. Phillips responded "roger" at 1636:31 indicating he received and understood the transmission.¹⁴ Nineteen seconds elapsed between the first transmission regarding the turn and the SMO ATC response.¹⁵ Mr. Phillips did not issue instructions for a missed approach, but rather allowed N200VT to complete the turn already in progress.¹⁶ Seconds later, Mr. Phillips contacted the Los Angeles ATC tower at Los Angeles

(continued..)

| | | |
|---------|--------|--|
| 1636:12 | N200VT | hey tower citation two hundred victor tango we're gonna do a right three sixty we're a little high |
| 1636:26 | N200VT | santa monica tower citation uh zero victor tango |
| 1636:31 | LC | citation zero victor tango roger |

¹¹ Tr. 18.

¹² Tr. 50-51.

¹³ Tr. 51-52.

¹⁴ Tr. 53.

¹⁵ Exh. A-2 at recorded transmissions 1636:12 and 1636:31.

¹⁶ Tr. 71-72.

International Airport (LAX) to advise N200VT performed an unauthorized turn.¹⁷ Upon landing, SMO ATC issued respondent a Brasher notice¹⁸ alleging a possible pilot deviation.¹⁹

B. Law Judge Decision and Order

Following a one-day hearing, the law judge issued a written decisional order. The law judge determined the Administrator proved respondent was cleared for the VOR-GPS-A approach to SMO runway 21, the approach procedure required respondent to maintain the published final approach heading of 212, and respondent did not comply with the published approach procedure by executing a 360 degree turn without obtaining ATC authorization.²⁰ Respondent argued he was experiencing radio problems which constituted an emergency sufficient to authorize deviation from the clearance. The law judge rejected this argument noting the evidence did not establish such an emergency existed.²¹ Respondent argued repeated calls requesting authorization to SMO ATC went unanswered. The law judge rejected this argument on the basis the evidence showed Mr. Phillips responded “roger” 19 seconds after the first call was made concerning the 360 degree turn.²² In making this determination, the law judge determined the 19-second delay resulted from Mr. Phillips’ surprise when he observed

¹⁷ Exh. A-2 at recorded transmission 1636:47 (from SMO local controller to LAX, “that citation that was ah on final he just did a right three sixty on his own so ah he said he said he had to get lower so he just bust out a right three sixty”).

¹⁸ Under the Brasher doctrine, the Board may not impose a sanction if ATC personnel did not provide the pilot a timely deviation notice. Administrator v. Brasher, 5 NTSB 2116(1987); see also Administrator v. Winton, NTSB Order No. EA-5415 at 17 n.8 (2008); Administrator v. Pate and Yoder, NTSB Order No. EA-5105 at 4 (2004).

¹⁹ Tr. 20-21.

²⁰ Decision and Order at 8-9.

²¹ Id. at 6.

²² Id. at 8.

respondent making the unauthorized turn.²³ Respondent also argued his actions were in accordance with the Aeronautical Information Manual (AIM), the Aeronautical Information Publication (AIP), and regulations, which only required he *advise* SMO ATC of his intent to perform the turn rather than seek authorization to do so. The law judge rejected this defense finding relevant language in the AIM did not serve to relieve respondent from the responsibility to obtain ATC authorization prior to deviating from the issued clearance.²⁴

D. Issues on Appeal

Respondent presents several arguments on appeal. First, respondent contends the law judge erred in finding the Administrator met his burden of proof. Respondent also contends the law judge erred in making evidentiary rulings, particularly with regard to respondent's opportunity to present evidence to prove his affirmative defense. Finally, respondent argues the law judge violated his due process right to a fair hearing.

2. Decision

On appeal, we review the law judge's decision *de novo*, as our precedent requires.²⁵ After a careful review of this record, we remand this case for a full and complete new hearing.

A. Exclusion of Evidence

Under our longstanding jurisprudence, we afford our law judges wide latitude in conducting hearings. In this regard, we only will overturn a law judge's evidentiary ruling when the appealing party can show the law judge's ruling amounted to an abuse of discretion, and

²³ Id.

²⁴ Id. at 7-8.

²⁵ 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).

resulted in prejudice to the party.²⁶ As explained below, the law judge's exclusion of evidence in the case *sub judice* resulted in prejudice to respondent's defense, and amounted to an abuse of discretion.

The law judge refused to admit evidence to create a record concerning respondent's affirmative defense. At the hearing, respondent attempted to explore the Administrator's policies concerning how ATC must handle certain situations. Respondent sought to elicit testimony and present guidance and letters of agreement at the hearing.²⁷ Such evidence was an ostensible attempt to create a record to prove the affirmative defense that an ATC error would excuse respondent's conduct when he circled the aircraft above the airport to achieve a lower altitude suitable for approach.

We find the law judge incorrectly disregarded respondent's assertion that an ATC error occurred and would excuse his conduct. In asserting an affirmative defense, the respondent must fulfill his or her burden of proving the factual basis for the affirmative defense, as well as the legal justification.²⁸ In the case *sub judice*, the law judge refused to permit evidence through which respondent sought to establish the factual basis for his defense that an ATC error excused his conduct. In particular, the law judge stated:

²⁶ See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001); see also Lackey v. FAA, 386 Fed.App'x 689, 2010 WL 2781583 (9th Cir. 2010).

²⁷ Respondent argues the letter of agreement between SMO and SoCal contains a requirement that specific instructions be issued to aircraft that cannot land straight-in, as well as other ATC standard operating procedures in effect at the time of the incident. Appeal Br. at 29, 31.

²⁸ See, e.g., Administrator v. Hermance, NTSB Order No. EA-5308 (2007) (citing Administrator v. Gibbs, NTSB Order No. EA-5291 at 2 (2007); Administrator v. Kalberg, NTSB Order No. EA-5240 at 3 (2006); Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

ADMINISTRATIVE LAW JUDGE: I see no relevance for [the local standard operating procedures for ATC].

FAA COUNSEL: I would object.

ADMINISTRATIVE LAW JUDGE: Yeah, it doesn't -- the standard operating procedures of the tower. The question in front of me is whether or not an amended clearance was given.

RESPONDENT'S COUNSEL: And, Your Honor, I --

ADMINISTRATIVE LAW JUDGE: If he didn't follow standard procedures, that is an issue within the FAA for disciplinary action and not for the Board. The Board's function in these hearings is to determine whether the evidence supports the charges made by the Administrator as to regulatory violation, period.

RESPONDENT'S COUNSEL: Thank you, Your Honor.

And I assume then that I am going to not try to admit the letter of agreement between the Southern Cal and SMO.

ADMINISTRATIVE LAW JUDGE: That's right. It will be the same objection --

FAA COUNSEL: Same objection.²⁹

Earlier in the hearing, the law judge had elaborated on this rationale, stating:

The issue in front of me is framed by the complaint. The complaint has two factual paragraphs which are in dispute, and that is whether or not he is required to maintain a heading of 212 degrees on the final approach course, and whether or not he made a 360-degree turn without ATC communications. His understanding of the letters of agreement -- how does that do anything for paragraph 7 and 8 [of the complaint]?³⁰

The law judge's narrow view of the scope of the issues resulted in his failure to consider respondent's affirmative defense. This failure resulted in prejudice to respondent. Therefore, we instruct the law judge to hold a full and complete hearing in this case to permit evidence relevant to respondent's affirmative defense that the Administrator failed to follow internal procedures, policies, and ATC rules warranting a waiver of the imposition of sanction.³¹

²⁹ Tr. 120-21.

³⁰ Tr. 77.

³¹ Am. Answer at ¶ 5.

*B. Direction to Hold a Full and Complete New Hearing*³²

We hereby order a full and complete new hearing, at which the law judge must accept evidence and testimony on: the Administrator's case-in-chief, respondent's case-in-chief along with any affirmative defenses, and the Administrator's rebuttal case. Both the Administrator and respondent must introduce their exhibits in the record.³³ The Administrator has the burden of proving the allegations set forth in the complaint with his exhibits and witnesses.³⁴ Following the Administrator's presentation of the case-in-chief, respondent may put on his case-in-chief. Respondent also has the burden of proving his affirmative defenses.³⁵ Finally, the Administrator should have an opportunity to rebut respondent's case-in-chief and affirmative defenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's request for a remand is granted;
2. The law judge's decisional order affirming the Administrator's complaint is set aside in its entirety; and
3. This case is remanded for a full and complete hearing.³⁶

³² As we remand this case based on the law judge's improper exclusion of evidence, we need not reach respondent's additional issues on appeal.

³³ See Administrator v. Mashadov, NTSB Order No. EA-5627 (2012).

³⁴ Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (stating that the Board's role is to determine, after reviewing evidence the Administrator presents, whether the Administrator fulfilled his burden of proof); see also, e.g., Administrator v. Opat, NTSB Order No. EA-5290 at 2 (2007); Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005).

³⁵ Administrator v. Kalberg, NTSB Order No. EA-5240 at 7 (2006) (citing Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

³⁶ The Board's Rules of Practice do not prohibit the Chief Law Judge from reassigning the case to another law judge. See 49 C.F.R. § 821.35(c). In this regard, we invite the Chief Law Judge to consider whether reassignment of this case would be prudent.

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT and WEENER, Members of the Board, concurred in the above opinion and order.

Served: July 25, 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-19494

LASZLO G. PETERFAI, *

Respondent. *

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DECISION AND ORDER

This proceeding arose before the Board upon the Appeal by Laszlo Peterfai (herein Respondent) from an Order of Suspension, which sought to suspend his Airline Transport Pilot Certificate and any other airman pilot certificate for a period of sixty (60) days.

That Order was filed on behalf of the Administrator, Federal Aviation Administration (FAA) Complainant, and serves in this matter as the Complaint.

As grounds for the sanction sought, the Complaint alleges that Respondent, acting as pilot-in-command of aircraft N200VT, so operated the aircraft in executing the VOR-GPS-A approach¹

¹ VOR or GPS-A approach plate diagram, Attachment 1.

into Santa Monica Municipal Airport, as to be in violation of the provisions of Sections 91.123(a) and 91.13(a) Federal Aviation Regulations (FARs).²

AGREEMENTS

An Answer to the Complaint was filed by Respondent, thru his counsel, and therein admitted the allegations stated in Paragraphs 1 through, and including, Paragraph 6 of the Complaint.

The factual allegations stated in those Paragraphs are, therefore, held as established herein.

DISCUSSION

This matter arose from alleged action by Respondent, as pilot-in-command, on a flight on May 22, 2012, conducted under Instrument Flight Rules in a Cessna 550, N200VT, on a flight from Burbank Airport (BUR), Burbank, California, to Santa Monica Airport (SMO), Santa Monica, California.

Complainant called Lewis Peake, who had acted as First Officer on the flight, and who has about 21,000 hours of flight time, and has flown with Respondent during the past five (5) years. The witness stated that, at the time at issue, Respondent was the pilot-in-command, and was operating the aircraft's flight controls.

Mr. Peake testified that, for the flight from BUR to SMO, air traffic control (ATC) was exercised by Southern California TRACON (SoCal). As the flight neared SMO, the flight was issued a clearance by SoCal to intercept the final approach course for the VOR-GPS-A instrument approach to SMO for Runway 21.

The flight, however, was unable to intercept, and flew through the final course heading of 212 degrees. The flight was given a re-intercept heading by SoCal, and then ATC was handed off, switched, to the SMO tower controller. This testimony was not contradicted, and hence, it is established that at the time of the occurrence, ATC rested with the SMO tower controller.

² See Attachment 2 for statement of allegations and the provisions of the FARs cited in the Complaint.

The witness testified that, after the re-intercept of the final course, Respondent told him to advise SMO tower that the aircraft was high, and that Respondent was going to do a right 360-degree turn. The witness was positive in stating that as he was making that transmission that the aircraft had already begun to turn. The witness stated that, upon receiving no reply, he made a second call to SMO tower, and that a landing clearance was not issued until after a third call.

That testimony was given by the witness without benefit of reference to Exhibit A-2, the printed transcript of the communications between SMO tower and N200VT. Reference to that Exhibit shows that witness recollection of sequence was in error. The Exhibit shows that immediately after initial check-in by N200VT, the tower issued to N200VT clearance to land on Runway 21. N200VT then called to verify that clearance, to which tower replied in the affirmative and asked for a piper. That this tower call was received is demonstrated by the fact, as seen from the Exhibit, that, without a further request, N200VT did, at 1637:55, give a piper to the controller.

Exhibit A-2 also shows that at 1636:12 N200VT called tower to advise of the intent to turn 360 degrees. That as there was no tower response, a call by N200VT at 1636:26, and then a reply from SMO tower at 1636:31, to N200VT, "Roger". There is a time lapse of 19 seconds between the call from N200VT of intent to turn to tower reply. The Exhibit does confirm the witness recollection of three calls: 2 apparently to confirm the landing clearance, and a third after no reply from tower to the call from N200VT of intent to turn. The witness was simply mistaken in his recollection of when tower issued the landing clearance.

However, despite this mis-recollection, to my perception of this witness's testimony on the crux issue of the Respondent's initiation of the 360-degree turn, his recollection of the event was clear and positive, i.e., that Respondent began the turn while the witness was in the process of advising SMO tower of the intent to turn, and that in performing the 360-degree turn, the aircraft had turned away – 180 degrees – from the landing runway.

Andre Phillips was called by Complainant, and the witness first stated his training and experience as an air traffic controller, stating that on the day of the occurrence, he was a certified professional controller at SMO airport working the local control position in the tower.

He testified that while working that control position, he received a radio call-in from N200VT, which was on an Instrument Flight Rules (IFR) flight plan for landing on Runway 21 SMO. He described the aircraft as continuing in-bound, and then making an abrupt right turn. He

stated he observed this maneuver from the tower cab window, and that it was after the aircraft had already initiated the turn that the call was made from N200VT that it was doing a right turn.

The witness stated he delayed his response to that call, as he did not know what to do, as he had never seen an aircraft take such action while on an IFR planned flight. The witness used the expression that what he saw left him “dumbfounded”. He testified he asked his fellow controller for advice, and then as N200VT was already turning, he believed it was safer to merely respond with “Roger”. He stated “Roger” did not mean the turn was approved or authorized, simply that the transmission had been received. The witness’s explanation is identical to that stated in the Pilot/Controller Glossary, Aeronautical Information Manual (AIM). The witness specifically denied having ever authorized Respondent to execute a 360-degree turn while his aircraft was on its approach.

On cross-examination, the witness admitted that in his deposition he had stated that he was unaware that the SMO VOR-GPS-A approach was a circling approach, but asserted that he had answered the question as he had understood it. In explanation, he iterated he answered as he did as he perceived the question as asking if the circling approach was automatically approved, whereas ATC authorization is required for the circling approach.

He also affirmed his direct testimony that he had cleared N200VT to land prior to the right turn maneuver, and that he had never previously seen an aircraft on an IFR plan perform a 360-degree turn while on its approach.

It is also observed that this witness’s testimony at hearing is consistent with that given in his deposition (Depo. pg 64, lines 18-24) in his statement that N200VT was already turning, and he replied “Roger” as it appeared to him as the safest course.

Respondent testified on his own behalf, stating he holds airman certification, as stated in the Complaint, with about 10,000 hours of flight time. With respect to SMO Airport, he stated having flown into that airport numerous times, and further, that he had flown with Mr. Peake hundreds of times over the past four and one-half years (4 ½).

When queried as to whether he had filed a report under the Aviation Safety Reporting Program (ASRP) to claim a waiver of sanction, he admitted that he had not filed such report within the ten (10) days following the incident, as required by provisions of the ASRP.

As to receipt of the clearance to land, he disagreed that it was issued after the 360-degree

turn, rather, that, as shown on Exhibit A-2, the clearance was issued immediately after the flight had checked in with the SMO tower controller.

Respondent discussed the over-shooting and the re-intercept, and confirmed that ATC control had been handed off from SoCal to the SMO tower. On his testimony, the aircraft was on the 212 degree approach course when he determined that the aircraft was high, and that he would perform a right 360-degree turn. Respondent testified that he directed Mr. Peake to request the 360-degree turn, and that two (2) or three (3) requests were made; however, as Exhibit A-2 shows, only one such transmission was made to the SMO tower at 1636:12 UCT.

Respondent testified as to his radio problem, which he described as when Mr. Peake would transmit, he, Respondent, was unable to hear that transmission, but that he, Respondent, could hear replies from the SMO tower controller. Respondent testified that when he heard the controller's "Roger" that he, Respondent, had already turned the aircraft one-quarter way into the turn.

In cross-examination, Respondent admitted that he, at the time he began the turn, had not received any ATC instruction or authorization for performing the turn, and that, in the turn, he had turned the aircraft away from the airport. The witness stated he was aware of the missed approach procedure existing at SMO Airport.

And it was admitted that, although the aircraft was on the ground at SMO for about an hour, he did not have the aircraft radios checked.

Mr. Charles Hicks was called by Respondent and offered as an expert witness. This witness's resume was received as Exhibit R-25. It suffices to note he has about 4,000 hours flight experience, and had been employed by the FAA for about fifteen (15) years, with experience in both Air Carrier and General Aviation Operations.

He testified that he would, if on an IFR flight plan, and having descended out of IMC (Instrument Meteorological Conditions) into VMC (Visual MC) and had been cleared to the airport, he would proceed to that airport, even without radio communications, and maneuver as necessary, in compliance with the approach procedure (emphasis added) and land.

He testified that it was sufficient to simply advise ATC prior to commencing a 360-degree turn, and that as long as the tower were so advised prior to commencing the turn, the pilot has complied with the relevant FARs.

Ultimately, he expressed that it was his opinion that Respondent's actions were not a

violation of the FARs.

On the disputed fact allegations, in particular, and the proceeding in its entirety, the burden of proof rests upon Complainant.

The first disputed allegation is that stated in Paragraph 7, Complaint, which basically alleges that for execution of the SMO VOR-GPS-A approach, the procedure required Respondent to maintain a final approach heading of 212 degrees.

The approach plate depicting the requirements for proper execution of that approach was received as Exhibit A-9. That Exhibit clearly establishes that, unless otherwise authorized by ATC, that a pilot, when performing the SMO approach, is required to maintain a final approach course heading of 212 degrees to either a missed approach, or when commencing the circle to land maneuver. On the preponderance of evidence, Respondent, when making the 360-degree right turn, was neither executing a missed approach, nor a circle-to-land maneuver, as such is defined in the AIM.

I conclude that the Respondent, who was cleared for the SMO VOP-GPS-A approach, was, while on an IFR flight plan, performing that approach procedure was required, unless otherwise instructed or authorized by ATC, to maintain the published final approach heading of 212 degrees. In reaching this result, I have also considered Mr. Hicks' testimony that a pilot on an IFR plan, without radio communication, with a clearance to an airport, would continue to that airport and land in compliance with the approach procedure for that airport.

Aside from the fact that Respondent was not without radio communication ability – he could not hear Peake's outgoing communications, but he could hear the tower responses – he was not in compliance with the published approach procedure.

The other dispute arises on the allegation in Paragraph 8, Complaint, in that it is alleged that Respondent, instead of maintaining the published final approach course of 212 degrees, he executed the 360-degree turn without obtaining ATC authorization.

Exhibit A-2 shows that First Officer Peake made only one call to the SMO controller to advise of Respondent's intent to perform a 360-degree turn while on final approach. And this witness's testimony was positive in stating that Respondent had already commenced executing the turn as First Officer Peake was making his communication with SMO tower.

That testimony is consistent with that of the SMO controller, Mr. Phillips, who testified,

both in his deposition and at hearing, that from his unobstructed view from the tower cab, he observed that Respondent had already initiated the 360-degree turn as the call from Mr. Peake was being received. I attached significant weight to Mr. Peake's statement, as there was no showing of any bias toward Respondent with whom he has flown numerous times over about 5 years, and no showing that his testimony was influenced by any inducement from FAA.

Respondent maintains that under provision contained in the Aeronautical Information Publication (AIP), that he was only required to advise ATC of his intent and performance of the 360-degree turn, and therefore, he was not in violation of Section 91.123(a) FARs. This is apparently the same authority relied upon by Mr. Hicks for his opinion that Respondent had not violated the cited FAR provision.

However, reference to the AIP does not support either witness's assertion. The statement, as appearing in the AIP, must be read in context of the entire section/provision in which it appears.³ The language of the Section is limited to instance where, although an airport does not have a published straight-in procedure, but only published circling minimums, such does not preclude, under the conditions stated in the Section, that when ATC has cleared the pilot for landing straight-in, the pilot is not expected to circle, even though only circling minimums are published, and that, "If they desire to circle, they should advise ATC..."⁴

In my consideration, this language does not serve to relieve a pilot from the requirement to obtain prior authorization from ATC if he intends or desires to deviate from the published or issued clearance. Rather, it simply informs pilots that in the circumstance where ATC has cleared the pilot for a straight-in landing, but the pilot still desires to execute the published circle-to-land procedure, he should so advise ATC, and obtain the amended clearance.

In the event, moreover, that Section 4.4 provisions would not excuse Respondent from his obligation to comply with Section 91.123(a) FARs, such is definitely established by the language in Section 42.1.1 AIP⁵, which clearly states that the pilot's responsibilities are to act as promulgated in the Federal Aviation Regulations. Therefore, contrary to Respondent's Argument, as he had

³ Aeronautical Information Publication (AIP), Section 11.4, 22nd Ed., 22 August 2013.

⁴ Id at Section 11.4.

⁵ Id at Section 42, Pilot/Controller Roles/Responsibilities, 42.1 General, 42.1.1.

deviating from that clearance until he had requested and received an amended clearance. That, on the evidence, he did not do.

In his Answer, Respondent raised seven (7) Affirmative Defenses, which are now addressed. First, however, it is observed that, with respect to an alleged affirmative defense, the burden of proof to establish both a causal and factual connection with the defense asserted rests with Respondent.

Affirmative Defense No. 1 is **DENIED**. Respondent's direct testimony is that, admittedly, he did not submit a report within ten (10) days of the incident, as is required by the provisions of ASRP.

Affirmative Defense No. 2 alleges that an emergency existed, so as to excuse a deviation from the requirements of Section 91.123(a) FARs. However, upon consideration of the credible evidence, I conclude that Respondent assertion of this defense fails, as the evidence does not establish that Respondent has sustained such burden, as the evidence does not establish that, even if N200VT was high on the approach course, Respondent could not have reasonably waited to initiate the turn until receiving ATC authorization. Defense No. 2, is **DENIED**.

Defense No. 3 is **DENIED**, as the evidence does not sustain Respondent's burden. There was only one communication concerning the 360-degree turn, and I find credible Phillips explanation of the 19-second delay in responding "Roger" of being surprised – "dumbfounded" – on observing Respondent turning with having received approval.

Defense No. 4 is **DENIED**, as the pleading demonstrates that the Notice of Proposed Certificate Action (NOPCA) was timely issued, as was the Complaint, and, further, Respondent offered no evidence on this point.

Defense No. 5 is **DENIED**, as no evidence was offered to sustain this assertion, and thus, failure to carry the burden of proof.

Defense No. 6 is **DENIED** – this issue was previously dispositively ruled upon in Orders on Respondent's Motions in Limine.

Defense No. 7 is **DENIED** for the reasons as previously discussed and stated in this Decision.

Ultimately, I find and conclude that Complainant, by a preponderance of the evidence, has established that Respondent, in performance of the landing of N200VT at SMO Airport on May 22,

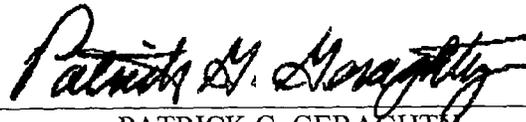
2012, did so as to act in regulatory violation of the requirements of Section 91.123(a) FARs. Further, as such is an operational violation, that at least a residual violation of the provisions of Section 91.13(a) FARs is also established, in that Respondent's action was at least potentially endangering and careless, and I so hold.

On the issue of sanction deference was requested, and the sanction sought of 60 days is within the Sanction Guidance Table, and in my view on this record, appropriate to serve as penalty and deterrence to others.

IT IS ORDERED:

1. The Order of Suspension, the Complaint, be, and is, **AFFIRMED**.
2. That Respondent's Airline Transport Pilot Certificate, and any other airman pilot certificate held, be and hereby is, suspended for a period of sixty (60) days.

ENTERED AND SERVED this 25th day of July, 2014, at Denver, Colorado.



PATRICK G. GERAGHTY
JUDGE

ATTACHMENT #2



U.S. Department
of Transportation

Western-Pacific Region
Office of the Regional Counsel

P.O. Box 92007
Los Angeles, CA 90009-2007

**Federal Aviation
Administration**

Telephone: (310) 725-7112
Fax: (310) 725-6816

May 8, 2013

Case No. 2012WP230045

CERTIFIED MAIL - RETURN RECEIPT REQUESTED and REGULAR MAIL

Mr. Laszlo G. Peterfai
15454 Vintage Street
Mission Hills, CA 91345-2920

ORDER OF SUSPENSION

Through a Notice of Proposed Certificate Action dated September 26, 2012, and amended on November 29, 2012, you were advised of our proposal to suspend your airline transport pilot certificate for a period of 60 days. At your request, an informal conference was held on February 28, 2013, at the FAA Office of the Regional Counsel, Lawndale, California.

Taking into consideration all matters presented on your behalf during that conference, as well as all other presently available information, it has been determined by the Administrator, acting by and through his Regional Counsel that:

1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot Certificate No. 3217210.
2. On or about May 22, 2012, at approximately 9:35 a.m. local time, you were pilot in command (PIC) of a Cessna 550, civil registration number N200VT, on a flight departing from Burbank Airport (BUR), Burbank, California, to Santa Monica Airport (SMO), Santa Monica, California.
3. Your flight from BUR to SMO was operated under instrument flight rules (IFR).
4. During your flight, you were issued an Air Traffic Control (ATC) clearance.
5. ATC cleared you for the SMO VOR Approach for runway 21 into SMO.
6. You acknowledged this clearance.
7. The SMO VOR Approach required you to maintain a final approach heading of 212 degrees.

8. Instead of maintaining a final approach heading of 212 degrees, you made a 360 degree turn without ATC authorization.
9. Your operation of N200VT, in the manner and circumstances described above, was careless or reckless so as to endanger the life or property of another.

By reason of the facts and circumstances described above, you violated the following sections of the Federal Aviation Regulations:

- (a) Section 91.123(a), which states that when an ATC clearance has been obtained, no pilot in command may deviate from the clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory; and
- (b) Section 91.13(a), which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

By reason of your actions as hereinbefore described, you failed to exercise the degree of care, judgment and responsibility required of the holder of an airline transport pilot certificate.

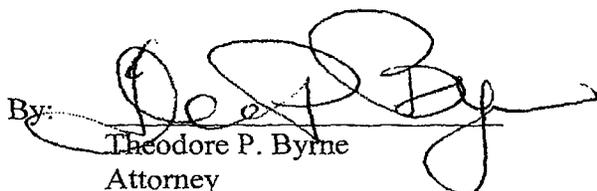
The Administrator has determined that, by reason of the foregoing circumstances, safety in air commerce and the public interest require the suspension of your Airline Transport Pilot Certificate No. 3217210 and any other airman pilot certificate held by you.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by 49 U.S.C. Section 44709, that:

- (1) Airline Transport Pilot Certificate No. 3217210 and any other airman pilot certificate now held by you be and it hereby is suspended;
- (2) Said suspension shall become effective on June 8, 2013, and shall continue in effect until said certificate has been suspended for a period of 60 days;
- (3) Said certificate be surrendered on or before the effective date in this Order by mail or delivery to the Regional Counsel of the Federal Aviation Administration, Post Office Box 92007, Los Angeles, California 90009-2007, or at the Office of the Regional Counsel, Room 6007, 15000 Aviation Boulevard, Lawndale, California 90261;
- (4) If you fail to surrender your certificate on or before June 8, 2013, the effective date of this Order, said suspension shall continue in effect until 60 days subsequent to the actual date of surrender thereof to the Federal Aviation Administration; and

- (5) No application for a new airman pilot certificate shall be accepted from you, nor shall any airman pilot certificate be issued to you, during the period of suspension imposed by this Order.

Naomi Tsuda
Regional Counsel

By: 
Theodore P. Byrne
Attorney

APPEAL

You may appeal from this order within 20 days from the date it was served, which is May 8, 2013, by filing a notice of appeal with the Case Manager, Office of Administrative Law Judges, National Transportation Safety Board, Room 4303, 490 L'Enfant Plaza East, SW, Washington, DC 20594 (telephone (800) 854-8758 or (202) 314-6150; FAX (202) 314-6158).

The National Transportation Safety Board's (NTSB's) Rules of Practice in Air Safety Proceedings, 49 C.F.R. part 821, would apply to such an appeal and are available through the NTSB's website at <http://www.nts.gov/alj/legal.htm>. An original and three copies of your notice of appeal must be filed with the Board. If you appeal, a copy of your notice of appeal must also be sent to the FAA attorney at the address indicated in the order.

Filing a timely notice of appeal will stay the effectiveness of the order during the proceedings before the NTSB. If you appeal to the NTSB, a copy of this order will be filed with the NTSB and will serve as the Administrator's complaint in this proceeding.

cc: AFS-760, AWP-230, FSDO