

SERVED: September 23, 2016

NTSB Order No. EA-5791

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 23rd day of September, 2016

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-19815
v.	)	
	)	
GARY WAYNE STREET,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

***1. Background***

The Administrator of the Federal Aviation Administration (FAA) appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued December 11, 2015, modifying the Administrator's order of suspension against respondent.<sup>1</sup> The Administrator's

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

order alleged respondent violated 14 C.F.R. §§ 61.15(d)(2)<sup>2</sup> and 61.15(e).<sup>3</sup> The Administrator ordered the suspension of respondent's airline transport pilot (ATP) certificate for a period of 240 days. We grant the Administrator's appeal.

#### *A. Facts*

The facts and resulting regulatory violations are undisputed in this case.<sup>4</sup> Respondent has held an ATP certificate for more than 30 years, and has been a captain for 28 years.<sup>5</sup> Over the course of his aviation career, respondent logged nearly 22,000 hours of flight time.<sup>6</sup> In 2007, respondent, a pilot for a Part 121 air carrier, went on medical disability due to his physical

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<sup>2</sup> Section 61.15(d) provides, "[e]xcept for a motor vehicle action that results from the same incident or arises out of the same factual circumstances, a motor vehicle action occurring within (...continued)

3 years of a previous motor vehicle action is grounds for ... (2) [s]uspension or revocation of any certificate, rating, or authorization issued under this part."

<sup>3</sup> The pertinent portion of Section 61.15(e) provides that, "[e]ach person holding a certificate issued under this part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division ... not later than 60 days after the motor vehicle action."

Section 61.15(f) lists the consequences for failing to comply with Section 61.15(e). The regulation provides, "[f]ailure to comply with paragraph (e) of this section is grounds for:

- (1) Denial of an application for any certificate, rating, or authorization issued under this part for a period of up to 1 year after the date of the motor vehicle action; or
- (2) Suspension or revocation of any certificate, rating, or authorization issued under this part."

Section 61.15(c) defines motor vehicle action as "[a] conviction ... for the violation of any Federal or State statute related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug" or "[t]he cancellation, suspension, or revocation of a license to operate a motor vehicle ... for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug."

<sup>4</sup> Reply Br. 4-5; Tr. 10-11; Initial Decision at 303-04.

<sup>5</sup> Tr. 167-69; Reply Br. 3, 8; Compl. ¶ 1; Answer at ¶ 1.

<sup>6</sup> Tr. 168; Reply Br. 3.

ailments.<sup>7</sup> Respondent became addicted to medications that were prescribed following medical procedures he underwent.<sup>8</sup> Respondent did not submit a medical certificate application to the FAA between February 2007 and September 2014 – a period of more than 7 years, and did not exercise the privileges of his ATP certificate.<sup>9</sup> Respondent has no prior enforcement actions for violating the Federal Aviation Regulations (FAR).<sup>10</sup>

*i. Traffic-Related Offenses*

Respondent was convicted of driving under the influence of prescription drugs (DUI)<sup>11</sup> on November 22, 2013.<sup>12</sup> As a result of the DUI conviction, on December 9, 2013, the State of Arizona suspended respondent's driver's license for 90 days.<sup>13</sup> On August 26, 2014, respondent was, again, convicted of DUI.<sup>14</sup> As a result of this DUI conviction, the State of Arizona suspended respondent's driver's license for 90 days on September 5, 2014.<sup>15</sup> Respondent failed to report the DUI convictions and resulting driver's license suspensions to the FAA Civil

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<sup>7</sup> Tr. 169-71, 177, 181; Reply Br. 3.

<sup>8</sup> Tr. 154, 181.

<sup>9</sup> Tr. 169-70, 181; Exh. A-2 at 1.

<sup>10</sup> Tr. 169, 206.

<sup>11</sup> While documents in the record indicate that respondent was “driving under the influence of intoxicating liquor,” the law judge noted correctly that respondent was charged with and convicted of DUIs involving prescription drugs. Initial Decision at 292; Tr. 36, 38, 183; Reply Br. 3; Exh. R-1(A) at 3.

<sup>12</sup> Exh. A-6. The November 22, 2013 conviction stems from respondent's September 5, 2013 DUI arrest. Exh. R-4 at 1.

<sup>13</sup> Exh. A-5 at 8.

<sup>14</sup> Exh. A-3 at 2-3. The August 26, 2014 conviction stems from respondent's DUI arrest a year earlier on August 4, 2013. Exh. R-4 at 1. The record indicates the delay to adjudicate this DUI charge was due to awaiting blood test results. Tr. 182.

<sup>15</sup> Exh. A-4 at 1.

Aviation Security Division (Security Division) within 60 days, as required by 14 C.F.R.

§ 61.15(e).<sup>16</sup>

On or about September 24, 2014, the State of Arizona revoked respondent's driver's license due to his multiple DUI convictions within an eighty-four month period.<sup>17</sup> On or about November 18, 2014, respondent reported the driver's license revocation to the Security Division, within the 60-day reporting requirement of § 61.15(e).<sup>18</sup>

*ii. Prescription Drug Addiction Treatment*

Respondent sought help for his prescription drug addiction from Walter Forred, M.D., and completed 30-day inpatient treatment in January 2014.<sup>19</sup> Respondent met monthly with Dr. Forred after completing treatment and, on one occasion, advised Dr. Forred that his employer had an eight-year cutoff at which point respondent would be removed from the pilot seniority list.<sup>20</sup> Dr. Forred recommended that respondent meet with a psychiatrist and with Robert Elliott, M.D., an aviation and Human Intervention Motivation Study (HIMS) psychologist.<sup>21</sup> In August 2014, Dr. Elliott recommended to the FAA that respondent be granted a special issuance Airman Medical Certificate.<sup>22</sup>

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<sup>16</sup> FAA Special Agent Brenda Smith testified that, with regard to the § 61.15(e) violations, a DUI conviction and resulting license suspension originate from one incident but are considered to be separate reportable motor vehicle actions because a DUI conviction is an action by the Court and a driver's license suspension is an action by the State of Arizona's Department of Motor Vehicles. Tr. 24, 26, 32, 34-35. Consequently, respondent was charged with four separate § 61.15(e) violations.

<sup>17</sup> Tr. 57-58, 199; Exh. A-7 at 1; see also Ariz. Rev. Stat. Ann. §§ 28-1383(A)(2) and 28-1381.

<sup>18</sup> Compl. ¶ 9; Answer at ¶ 1.

<sup>19</sup> Tr. 89-90, 133, 186-92.

<sup>20</sup> Tr. 188-90, 192-93.

<sup>21</sup> Tr. 137, 193.

<sup>22</sup> Exh. R-2 at 8; Tr. 146-47. A person may be granted, at the discretion of the Federal Air Surgeon, a special issuance medical certificate "if the person shows to the satisfaction of the

*iii. Medical Certificate Application and FAR violations*

On September 16, 2014, respondent applied for a special issuance medical certificate using the FAA's online system called MedXPress.<sup>23</sup> In filling out the application, respondent selected the "yes" box for question 18.v<sup>24</sup> and explained that he became dependent on prescription drugs and was arrested for DUI on three occasions.<sup>25</sup> Upon review of respondent's application, FAA requested a report of respondent's driving record from the National Driver Registry (NDR), and FAA received the report on September 24, 2014.<sup>26</sup> FAA Special Agent Brenda Smith requested respondent's Arizona driving record from the Arizona Department of Motor Vehicles after reviewing the NDR report.<sup>27</sup> The Arizona records showed respondent's DUI convictions on November 22, 2013 and August 26, 2014 and driver's license suspensions on December 9, 2013 and September 5, 2014.<sup>28</sup> Special Agent Smith's investigation revealed that respondent failed to report these four motor vehicle actions (MVA), consisting of the two

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Federal Air Surgeon that the duties authorized by the class of medical certificate applied for can be performed without endangering the public safety during the period in which the Authorization would be in force." 14 C.F.R. § 67.401(a).

<sup>23</sup> Tr. 22, 199-200; Exh. A-2; Exh. R-1(A); see also <https://medxpress.faa.gov/medxpress>.

<sup>24</sup> Question 18.v reads:

HAVE YOU EVER IN YOUR LIFE ... HAD ANY OF THE FOLLOWING? ...  
 Convictions and/or Administrative Action History, History of (1) any arrest(s) and/or conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any arrest(s) and/or conviction(s) and/or administrative action(s) involving an offense(s) which resulted in denial, suspension, cancellation, or revocation of driving privileges, or which resulted in attendance at an educational or rehabilitation program.

<sup>25</sup> Respondent was charged with three prescription drug DUIs: August 4, 2013; September 5, 2013; and September 16, 2013. On October 1, 2013, the September 16, 2013 DUI was dismissed without prejudice and is not relevant to the case at hand. Exh. A-1.

<sup>26</sup> Tr. 18-22; Exh. A-2 at 1, 3.

<sup>27</sup> Tr. 20-22.

<sup>28</sup> Exh. A-1; Exh. A-3 at 2; Exh. A-4 at 1; Exh. A-5; Exh. A-6; Tr. 23-25, 29-32.

DUI convictions and the two resulting driver's license suspensions, within the prescribed 60-day timeframe of § 61.15(e).<sup>29</sup> Her investigation also revealed that respondent's four MVAs, also violated § 61.15(d)(2)'s prohibition against two MVAs arising from different incidents within a three-year period.<sup>30</sup>

Special Agent Smith sent respondent a letter of investigation in November 2014.<sup>31</sup> On November 20, 2014, respondent was granted a special issuance medical certificate and returned to work for his employer, a Part 121 air carrier; although, respondent did not resume flying at that time.<sup>32</sup> Upon returning to work, respondent participated in his employer's HIMS Program, which included weekly meetings, "Back to Basics" workshops four times per month, monthly meetings with the chief pilot and HIMS Program Director, and weekly discussions with his pilot peer monitor.<sup>33</sup> On February 7, 2015, respondent resumed flying as an airline captain for his employer.<sup>34</sup>

### *B. Procedural Background*

On November 6, 2015, the Administrator issued a First Amended Order of Suspension to respondent, which became the complaint in this case. The complaint alleges that, on November 22, 2013 and August 26, 2014, respondent was convicted of DUIs. The complaint alleges that, as a result of the DUI convictions, the State of Arizona suspended respondent's driver's license on December 9, 2013 and September 5, 2014. The complaint contends that

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<sup>29</sup> Tr. 37; Exh. A-8.

<sup>30</sup> Tr. 37.

<sup>31</sup> Tr. 62-63.

<sup>32</sup> Tr. 151, 180-81, 200, 217; Exh. R-1(B).

<sup>33</sup> Tr. 202-03, 205, 222-23.

<sup>34</sup> Tr. 168-69, 215-17. Respondent was issued a first-class medical certificate on September 3, 2015. Exh. A-1 at 8.

respondent violated 14 C.F.R. § 61.15(e) because respondent failed to report his DUI convictions and driver's license suspensions to the Security Division within the required 60-day reporting period. The complaint further alleges that respondent violated 14 C.F.R. § 61.15(d)(2) because respondent had two MVAs arising from different incidents within a three-year period. The complaint asserts these violations form the basis for the suspension of respondent's ATP certificate.

The case proceeded to hearing on December 10, 2015. Special Agent Smith testified on behalf of the Administrator. Respondent testified on his own behalf. Dr. Elliott and Robert Clark Vinson, former Director of the HIMS Program for respondent's employer, also testified on behalf of respondent.

Special Agent Smith testified, in relevant part, how she determined the appropriate sanction in the case *sub judice*. Special Agent Smith explained that the recommended sanction range for a violation of § 61.15(d)(2) is 90 to 120 days, and explained that she started at the middle of the range, which was 105 days.<sup>35</sup> She testified the following aggravating factors warranted increasing the sanction to 120 days for the § 61.15(d)(2) violation: respondent held an ATP certificate, respondent had 22,000 flight hours, and respondent was an airline pilot capable of carrying passengers.<sup>36</sup>

Special Agent Smith further testified that the recommended sanction range for a violation of § 61.15(e) is 15-45 days, and explained that she, again, started at the middle of the range, which was 30 days.<sup>37</sup> She testified that respondent's flight time and status as an ATP certificate holder capable of carrying passengers served as aggravating factors for the § 61.15(e)

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<sup>35</sup> Tr. 40-41.

<sup>36</sup> Tr. 41, 46.

<sup>37</sup> Tr. 44.

violations.<sup>38</sup> She also testified that the following served as mitigating factors for the § 61.15(e) violations: respondent called and had a conversation with her, respondent was not actively flying and did not have a medical certificate at the time of the MVAs, and respondent voluntarily reported his September 2014 driver's license revocation to the Security Division.<sup>39</sup> Special Agent Smith stated she weighed the aggravating and mitigating factors and concluded that 30 days was the appropriate sanction for each of the four § 61.15(e) violations, for a total of 120 days. Special Agent Smith testified she imposed a sanction of 120-day suspension for violating § 61.15(d)(2) and 120-day suspension (30 days for each of the four MVAs) for violating § 61.15(e), for a total period of suspension of 240 days.<sup>40</sup>

Respondent testified, in relevant part, that he went on medical disability due to his physical ailments in 2007 and did not believe he would return to work.<sup>41</sup> Respondent testified the prescription medications helped to manage his pain, he took the medications as prescribed, and he was unaware of his addiction.<sup>42</sup> Respondent testified that he was "remotely" aware of the reporting requirements in § 61.15(e), but compliance was not his "forethought."<sup>43</sup> Respondent also testified that he was aware that § 61.15(e) specified an address to report MVAs to the Security Division.<sup>44</sup>

Dr. Elliott, a fact and expert witness, explained that the HIMS Program was established to provide pilots who have been in treatment for alcohol and/or drug issues a mechanism to

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<sup>38</sup> Tr. 44.

<sup>39</sup> Tr. 45.

<sup>40</sup> Tr. 43, 45-46.

<sup>41</sup> Tr. 169-79, 189.

<sup>42</sup> Tr. 180, 184-85.

<sup>43</sup> Tr. 189; see also Tr. 214.

<sup>44</sup> Tr. 214-15.



undergo treatment and monitoring for a specific period of time to ensure public safety and return to gainful employment.<sup>45</sup> Dr. Elliott explained that an applicant, who applies for a FAA medical certificate after treatment for substance abuse, must participate in evaluations performed by a HIMS trained psychologist and psychiatrist; and that he was respondent's HIMS psychologist.<sup>46</sup> Dr. Elliott testified that respondent engaged in recovery activities beyond what the FAA required.<sup>47</sup> Dr. Elliott reviewed respondent's records, conducted extensive psychological and neural cognitive evaluations, and recommended that respondent apply for a special issuance medical certificate.<sup>48</sup> Dr. Elliot testified that he did not advise respondent to report the MVAs to the Security Division, and further testified he did not tell respondent that he would report the MVAs to the Security Division on respondent's behalf.<sup>49</sup>

Mr. Vinson, former HIMS Program Director for respondent's employer, testified that respondent's special issuance medical certificate required him to meet monthly with a peer pilot and a chief pilot.<sup>50</sup> He testified that respondent was "always in compliance" with the HIMS Program requirements, attended more aftercare than the average pilot, contacted his peer pilot more frequently than others and without reminders, and that people spoke highly of respondent.<sup>51</sup> Mr. Vinson indicated that he, along with respondent's peer pilot and chief pilot, would make a monthly assessment regarding whether respondent was complying with the HIMS Program, and

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<sup>45</sup> Tr. 128-29.

<sup>46</sup> Tr. 134.

<sup>47</sup> Tr. 153.

<sup>48</sup> Tr. 134, 137, 146-47.

<sup>49</sup> Tr. 165.

<sup>50</sup> Tr. 219-20, 225.

<sup>51</sup> Tr. 225-26.

that respondent had a “very minimal” possibility of recurrence.<sup>52</sup> Mr. Vinson opined that the critical issue was whether air safety was ever compromised and, that if someone does not have a medical certificate, there is no impact on air safety.<sup>53</sup>

*C. Administrative Law Judge’s Oral Initial Decision*

At the conclusion of the hearing, the law judge issued an oral initial decision. The law judge read the complaint into the record, and summarized the exhibits admitted into evidence and witness’s testimony.<sup>54</sup> The law judge held that the Administrator had fulfilled the burden of proof with regard to each of the regulatory violations alleged, but reduced the sanction to a 30-day period of suspension of respondent’s ATP certificate.<sup>55</sup> The law judge found the mitigating factors in this case did not support the Administrator’s choice of sanction.

While the law judge stated that witness credibility is not an issue in cases where the facts are undisputed, he assessed the credibility of the witnesses.<sup>56</sup> The law judge made express credibility determinations in favor of respondent and respondent’s witnesses. Specifically, the law judge determined that respondent did not have credibility issues because he had not flown in seven years.<sup>57</sup> The law judge stated that Dr. Elliott testified “many times” before him and credibility was never an issue.<sup>58</sup> The law judge believed Mr. Vinson’s testimony was “spot on”

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<sup>52</sup> Tr. 226-27.

<sup>53</sup> Tr. 224.

<sup>54</sup> Initial Decision at 288-302.

<sup>55</sup> Id. 303-04.

<sup>56</sup> Id. at 302-03.

<sup>57</sup> Id. at 303.

<sup>58</sup> Id. at 302-03.

except for his opinion regarding the recidivism rate among HIMS Program participants.<sup>59</sup> The law judge determined that Special Agent Smith was not credible because she appeared reluctant to answer questions on cross-examination about her investigation and because she made a comment about a cocaine reference in the record that was not at issue in the case *sub judice*, leading the law judge to conclude she “probably had a hidden agenda.”<sup>60</sup> The law judge indicated that Special Agent Smith’s credibility was relevant because she is “the one that chose the sanction.”<sup>61</sup>

Concerning the sanction imposed, the law judge explained that the Sanction Guide Table<sup>62</sup> (SGT) refers to mitigating and aggravating factors, and the law judge stated that Special Agent Smith only considered aggravating factors.<sup>63</sup> The law judge noted that respondent did not exercise the privileges of his ATP certificate for seven years prior to making full disclosure of his MVAs to the FAA Aerospace Medical Certificate Division, and that he was not flying at the time he applied for a medical certificate.<sup>64</sup> The law judge determined the following factors warranted reduction of the 240-day suspension imposed by the Administrator: the violation was nonoperational; the violation was not careless or reckless in the pursuit of respondent’s aviation endeavors; the violation was inadvertent and not a hazard since respondent was not exercising the privileges of his ATP certificate; Mr. Vinson’s testimony that respondent was compliant with

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<sup>59</sup> *Id.* at 303. Mr. Vinson testified that, under the HIMS Program, there was a 15% recidivism rate among the alcohol related participants in that program and the rate for prescription drugs was “minimum.” Tr. 226, 228-30.

<sup>60</sup> Initial Decision at 302; see also Tr. 29-30.

<sup>61</sup> Initial Decision at 302.

<sup>62</sup> Fed. Aviation Admin. Order 2150.3B, App. B (2007). The law judge admitted the SGT into evidence at Exh. A-9.

<sup>63</sup> Initial Decision at 304.

<sup>64</sup> *Id.*

treatment and helping others; and Dr. Elliott’s testimony suggested that respondent did not know what he was doing.<sup>65</sup> The law judge reiterated that respondent’s level of experience could not serve as an aggravating factor because he had not flown in seven years.<sup>66</sup>

In reducing the sanction, the law judge also noted his belief that the FARs should not impose a requirement upon certificate holders to disclose drug or alcohol-related motor vehicle incidents separately to both the Security Division, as required by Part 61, and as part of a medical certificate application, as required by Part 67. In this regard, the law judge acknowledged Administrator v. Smith,<sup>67</sup> for the Board’s holding that § 61.15 is an independent reporting requirement, but declined to follow our jurisprudence and indicated “in this day and age of all things computer,” there should not be multiple reporting requirements.<sup>68</sup> The law judge explained he advocated for years that the FAA should not have multiple reporting requirements, under Part 61 and Part 67, particularly when there is not any exercise of privilege of a certificate.<sup>69</sup>

#### *D. Issues on Appeal*

On appeal, the Administrator contends the law judge erred in reducing the sanction. First, the Administrator argues that the law judge improperly applied the Administrator’s sanction guidance policy and failed to defer to the Administrator’s reasonable determination that respondent’s admitted violations of 14 C.F.R. §§ 61.15(d)(2) and 61.15(e) warranted a

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<sup>65</sup> Id. at 305-08.

<sup>66</sup> Id. at 306.

<sup>67</sup> NTSB Order No. EA-4088 (1994).

<sup>68</sup> Initial Decision at 310.

<sup>69</sup> Id. at 308-09.

suspension of respondent's ATP certificate for 240 days.<sup>70</sup> Second, the Administrator argues that the law judge's disagreement with the Administrator's duly promulgated regulations requiring separate reporting of MVAs under § 61.15(e) did not justify the law judge's modification of the Administrator's reasonable sanction.<sup>71</sup>

## **2. Decision**

On appeal, we review the law judge's decision *de novo*, as our precedent requires.<sup>72</sup>

### *A. Sanction Determination*

Prior to the enactment of the Pilot's Bill of Rights,<sup>73</sup> 49 U.S.C. § 44709(d)(3) required the Board be "bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." Section 2(c)(2) of the Pilot's Bill of Rights amended § 44709(d)(3) and removed the heightened deference requirement concerning the Administrator's choice of sanction. However, in accordance with Martin v. Occupational Safety and Health Review Commission,<sup>74</sup> we will apply principles of judicial deference to the interpretations of laws, regulations, and policies the Administrator carries out. In Martin, the

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<sup>70</sup> Appeal Br. 9-20.

<sup>71</sup> Id. 20-22.

<sup>72</sup> Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2010); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993).

<sup>73</sup> Pub. L. No. 112-153, 126 Stat. 1159 (amending 49 U.S.C. §§ 44701, 44703, 44709, 44710) (August 3, 2012).

<sup>74</sup> 499 U.S. 144 (1991).

United States Supreme Court emphasized the importance of the reasonableness inquiry when determining whether an agency's statutory interpretation is entitled to deference.<sup>75</sup>

We have emphasized that the determination of whether the Administrator's choice of sanction is reasonable is case-specific and is based upon the facts and circumstances adduced at the hearing.<sup>76</sup> As set forth in prior cases, we will consider aggravating and mitigating factors in determining whether the Administrator's choice of sanction is reasonable.<sup>77</sup> The SGT provides sanction ranges of 90 to 120 days suspension of all certificates for a violation of § 61.15(d) and 15 to 45 days suspension of all certificates for a single violation of § 61.15(e).<sup>78</sup>

*ii. Mitigating Factors*

FAA Order 2150.3B indicates that the mitigating and aggravating factors listed therein *may* be relevant and, thus, considered by the FAA when determining the appropriate sanction for a violation.<sup>79</sup> In reducing the Administrator's sanction from 240 to 30 days, the law judge did not explain why the mitigating factors he applied were relevant to the violations charged. Moreover, the law judge did not state the factual basis for the mitigating factors he applied nor did he explain how the mitigating factors he considered reduced the 240-day suspension to 30 days,

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<sup>75</sup> *Id.* at 145, 150-58.

<sup>76</sup> *Administrator v. Jones*, NTSB Order No. EA-5647 at 21 n.62 (2013).

<sup>77</sup> *Taylor v. Huerta*, 723 F.3d 210, 215 (D.C. Cir. 2013); *Administrator v. Jones*, *supra* note 76 at 21 (recognizing the threshold inquiry of reasonableness and finding the Pilot's Bill of Rights did not remove the Board's obligation to defer to the Administrator's interpretation of sanction guidance) (citations omitted); *see also Administrator v. McGuire*, NTSB Order No. EA-5736 at 8-9 (2014) (indicating "we will defer to the Administrator when the regulation or choice of sanction is unclear and the Administrator offered an interpretation that is *reasonable*") (emphasis in original).

<sup>78</sup> Exh. A-9 at 13.

<sup>79</sup> Exh. R-5 at 4.

well below the recommended ranges set forth in the SGT. The law judge also failed to articulate how he concluded that a 30-day suspension was reasonable. This was error.

The law judge also appears to have based his reduction of the Administrator's sanction, in part, on his disagreement with § 61.15(e) that imposes separate reporting requirements upon certificate holders under Part 61 and Part 67 concerning drug or alcohol-related motor vehicle violations. The law judge stated, "I have advocated for years there's no reason why there's [a] multiple reporting requirement, particularly where there's not any exercise of privilege."<sup>80</sup> The law judge's personal opinion concerning the propriety of duly promulgated regulations does not serve as a mitigating factor in determining a sanction for violating those regulations, and the law judge erred by suggesting otherwise.

The law judge stated incorrectly that the Administrator did not consider mitigating factors in determining the sanction for respondent's §§ 61.15(d)(2) and 61.15(e) violations.<sup>81</sup> While the Administrator determined there were no factors present that would mitigate the sanction for the § 61.15(d)(2) violation, the record shows that the Administrator considered several mitigating factors in determining the appropriate sanction for respondent's four § 61.15(e) violations. Those factors include the fact that respondent had a conversation with Special Agent Smith after he received the letter of investigation, that respondent voluntarily reported his September 2014 driver's license revocation to the Security Division, and that respondent was not actively flying and did not have a medical certificate at the time the MVAs occurred.<sup>82</sup>

In addition to the mitigating factors the Administrator considered and applied to the sanction for the § 61.15(e) violations, respondent argues additional mitigating factors apply to

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<sup>80</sup> Initial Decision at 308-09.

<sup>81</sup> Id. at 304.

<sup>82</sup> Tr. 44-45; Exh. A-7 at 1.

both violations. Respondent contends that the fact that the MVAs resulted from his unrecognized prescription drug addiction and not from alcohol addiction serves to mitigate the Administrator's sanction. Respondent argues that he took remedial steps to cure his addiction once he became aware of it and that his participation in his employer's HIMS Program are mitigating factors. Respondent also states that the sanction should be mitigated because he flew for more than twenty-eight years without an enforcement action for violating the FARs; the violations in the case *sub judice* were unintentional; he reported the MVAs in his medical certificate application; his employer determined he was not a risk to aviation safety and he is currently flying passenger flights; and a 240-day suspension is not consistent with the intent and spirit of the FARs.<sup>83</sup>

With respect to the sanction for the § 61.15(e) violations, we agree with respondent that the fact that respondent was honest and forthcoming about his DUI convictions on his medical certificate application is a mitigating factor. We also agree with the Administrator and with respondent that the fact that respondent discussed the violations with Special Agent Smith and reported his September 2014 driver's license revocation to the Security Division serve as mitigating factors for the § 61.15(e) violations.

We disagree with the Administrator and with respondent, however, that the fact that respondent did not have a medical certificate and was not actively flying at the time of the violations serve as mitigating factors. In Administrator v. Kearney, we found that the reporting requirements of § 61.15(e) were applicable to an airman who temporarily "retired" from flying for five years with no intention to return because intent is not an element of the violation and

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<sup>83</sup> Reply Br. 31-33. Respondent also suggests that the FAA's issuance of a first-class medical certificate, subsequent to his reporting of the DUIs, demonstrates that the Administrator did not believe he was a risk to aviation safety. Reply Br. 19-20. We disagree. FAA's issuance of a medical certificate, under Part 67, is not germane to an enforcement action taken against an airman certificate for violating reporting requirements under Part 61.



“certificate holders are expected to be cognizant of the regulations that apply to them.”<sup>84</sup> While respondent testified that he did not plan to return to flying, his obligation to comply with the FARs continued regardless of whether he was actively flying at the time the MVAs occurred. Sections 61.15(d) and (e) are exclusively concerned with conduct outside the scope of an airman’s certificate. It is immaterial whether respondent was actively flying or had a medical certificate at the time the MVAs occurred because his status as an ATP certificate holder rendered the requirements of §§ 61.15(d) and (e) applicable to him.

We disagree with respondent that the fact that he was convicted of two DUIs involving prescription drugs, rather than alcohol, is a mitigating factor for both violations. We decline to draw a distinction between MVAs involving prescription drugs and MVAs involving other intoxicating substances. We also disagree with respondent that his violation-free history and compliance attitude about his recovery from addiction serve to mitigate the sanction for the violations. While we acknowledge and applaud the work respondent has invested in his recovery, the Board’s jurisprudence dictates that a good compliance attitude, with respect to the FARs, and a violation-free history are expected to be the norm.<sup>85</sup>

We reject respondent’s argument that the sanction should be mitigated because he did not intend to violate §§ 61.15(d)(2) and 61.15(e). Respondent testified that he was “remotely” aware of the § 61.15(e) reporting requirements; he also admitted he knew § 61.15(e) specified an address to report MVAs to the Security Division, but stated compliance was not his

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<sup>84</sup> NTSB Order No. EA-4208 at 4-5 (1994) (citing Administrator v. Smith, NTSB Order No. EA-4088 at 8 (1994); see also Administrator v. Wilson, NTSB Order No. EA-4314 at 5 (1995) (finding intent is not an element of a § 61.15(e) violation, and reliance on an attorney does not constitute a valid excuse for noncompliance).

<sup>85</sup> Jones, *supra* note 76 at 22; Administrator v. Mize, NTSB Order No. EA-5580 at 14-15 n.19 (2011) (citing Administrator v. Hart, NTSB Order No. EA-5536 at 11 (2010)).

“forethought.”<sup>86</sup> Respondent is not free to determine on his own that he will not comply with the FARs, and his lack of forethought is not a mitigating factor. Finally, we are unpersuaded that the remaining mitigating factors proffered by respondent serve to mitigate the sanction for the §§ 61.15(d)(2) and 61.15(e) violations.

*ii. Aggravating Factors*

The Administrator considered respondent’s status as an ATP certificate holder to be an aggravating factor for both violations. In addition, the Administrator also considered respondent’s level of experience and his position as airline pilot to be aggravating factors for the § 61.15(d)(2) violation. We agree. As an ATP certificate holder, the highest level certificate an airman can hold, respondent is held to a high standard of care and accountability.<sup>87</sup> In addition, respondent has more than 20,000 hours of flight time and 28 years of experience as an airline captain. We find respondent’s ATP certificate and level of experience are aggravating factors.

*iii. Sanction*

On balance, weighing the aggravating and mitigating factors considered above, we determine a 240-day sanction is reasonable and find no compelling reason to change the Administrator’s choice of sanction in the case *sub judice*. With regard to the § 61.15(d)(2) violation, a 120-day suspension, which is at the top of the sanction range, is appropriate given the aggravating factors we applied. With regard to the § 61.15(e) violations, a 30-day suspension for each of the four violations, which is in the middle of the sanction range, is appropriate given the mitigating and aggravating factors we previously discussed. The plain language of

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<sup>86</sup> Tr. 189, 214-15.

<sup>87</sup> Jones, *supra* note 76 at 22; Administrator v. McGuire, NTSB Order No. EA-5736 at 9-10 (2014); *see also* Administrator v. Simmons, NTSB Order No. EA-5535 at 10 (2010); Administrator v. Luciano, NTSB Order No. EA-5720 at 10 (2014).

§§ 61.15(d)(2) and 61.15(f)<sup>88</sup> provide for a sanction of either suspension or revocation, and we agree with the Administrator's determination that the lesser penalty was the appropriate sanction in this case. The law judge erred in reducing the sanction to 30 days. We find that a 240-day suspension period, in light of the facts and circumstances of this case, is reasonable.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed with regard to his reduction in sanction;  
and
3. The 240-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>89</sup>

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

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<sup>88</sup> Section 61.15(f) lists the consequences for failing to comply with § 61.15(e), supra note 3.

<sup>89</sup> For the purpose of this order, respondent must physically surrender his ATP 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

ORAL INITIAL ORDER AND DECISION

-----X  
MICHAEL P. HUERTA, :  
ADMINISTRATOR, FEDERAL :  
AVIATION ADMINISTRATION :  
:   
Complainant, :  
: Docket No.  
v. : SE-19815  
:   
GARY W. STREET, :  
:   
Respondent. :  
-----X

U.S. Bankruptcy Court  
501 West 10th Street  
Room 208  
Fort Worth, Texas

Friday,  
December 11, 2015

The above-entitled matter came on for hearing,  
pursuant to notice, at 9:00 a.m.

BEFORE:

WILLIAM R. MULLINS  
Administrative Law Judge

## APPEARANCES:

On Behalf of the Complainant:

of: SCOTT A. REYGERS, ESQ.  
FAA Enforcement Division, Southwest Team  
P.O. Box 25082  
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405-954-2888 (phone)  
405-954-4676 (fax)  
Scott.Reygers@faa.gov

On Behalf of the Respondent:

of: STEVEN L. GRAFF, ESQ  
Attorney and Counselor At Law  
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Temecula, CA 92592  
951-303-6400 (phone)  
951-303-0723 (fax)  
aviationcounsel@aol.com

1 ORAL INITIAL DECISION AND ORDER

2 JUDGE MULLINS: All right. We'll go back on  
3 the record at this time.

4 This has been a proceeding before the National  
5 Transportation Safety Board held under the provisions of  
6 Section 44709 of the Federal Aviation Act of 1958, as  
7 amended on the Appeal of Gary Wayne Street, who I'll refer  
8 to as, "the Respondent," from an order of suspension that  
9 seeks to suspend his Airline Transport Pilot Certificate  
10 for a period of 240 days.

11 The order of suspension serves as the complaint  
12 in these proceedings and was filed on behalf of the  
13 Administrator of the Federal Aviation Administration  
14 through Mr. Scott Reygers of the Aeronautical Center in  
15 Oklahoma City.

16 And since the filing of this, I understand  
17 there's been a change in their organizational makeup, but  
18 I think Mr. Reygers, I think, would be part of the  
19 enforcement team now under the Southwest Region.

20 Would that be appropriate?

21 MR. REYGERS: Yes, Your Honor.

22 JUDGE MULLINS: Okay. The matter has been  
23 heard before me, William R. Mullins. I'm an  
24 administrative law judge for the National Transportation  
25 Safety Board.

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1 And as is provided by the Board's Rules, I will  
2 issue a bench decision at this time. The matter came on  
3 for hearing yesterday, the 10th day of December of 2015,  
4 for trial here in Fort Worth, and notice was given to the  
5 parties.

6 The Administrator was represented throughout  
7 these proceedings by Mr. Scott Reygers of the Aeronautical  
8 Center Counsel's Office. And the Respondent was present  
9 throughout these proceedings and was represented by Mr.  
10 Steven Graff of the Los Angeles area.

11 The parties were afforded a full opportunity to  
12 offer evidence, to call, examine, cross-examine witnesses.  
13 In addition, the parties were afforded an opportunity to  
14 make argument in support of their respective positions.

#### 15 DISCUSSION

16 JUDGE MULLINS: This matter was on for hearing  
17 on the first amended order of suspension by the  
18 Administrator. And there were ten paragraphs and a couple  
19 of regulatory violations. And I will read that at this  
20 time.

21 Paragraph 1, "You currently are the holder of  
22 an Airline Transport Pilot Certificate,  
23 No. 002754110."

24 Paragraph 2, "On or about August 26, 2014, you  
25 were convicted of driving under the influence of

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1 impaired/alcohol/drug by the Payson Justice Court, Payson  
2 Magistrate Court, County of Gila,  
3 State of Arizona."

4 Paragraph 3, "Incident to your conviction  
5 referenced in Paragraph 2, on or about September 5, 2014,  
6 your driver's license was suspended by the Arizona Motor  
7 Vehicle Division."

8 Paragraph 4, "On or about September 6, 2013,  
9 your driver's license was suspended pursuant to ARS  
10 (Arizona Revised Statute 28-1385). As a result of tests  
11 which you submitted by the Arizona Motor Vehicle Division."

12 Paragraph 5, "Incident to an Appeal of your  
13 September 6, 2013, driver's license suspension referenced  
14 in Paragraph 4 on or about December 9, 2013, your driver's  
15 license was suspended for Admin Per Se by the Arizona Motor  
16 Vehicle Division."

17 Paragraph 6, "On or about November 22, 2013, you  
18 were convicted of possession of drug paraphernalia and  
19 driving or actual physical control while under the  
20 influence of intoxicating liquor and/or drugs by the  
21 Superior Court of Arizona, Maricopa County."

22 Paragraph 7, "On or about September 24, 2014,  
23 your driver's license was revoked by the  
24 Arizona Motor Vehicle Division based on the following:  
25 'Our records indicate you have been convicted of two or more

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1 violations of driving under the influence of intoxicating  
2 liquor within a 84-month period.'"

3 Paragraph 8, "The events referenced in  
4 Paragraphs 2 through 7 are alcohol related motor vehicle  
5 actions in which you were required to report to the Federal  
6 Aviation Administration, Civil Aviation Security Division  
7 not later than 60 days after the motor vehicle actions."

8 Paragraph 9, "On or about November 18, 2014, you  
9 reported the motor vehicle action referenced in Paragraph  
10 7 within the 60-day reporting period following a motor  
11 vehicle action."

12 Ten -- Paragraph 10, "You did not report the  
13 motor vehicle action referenced in Paragraph's 2 through  
14 6 within the 60-day reporting period following a motor  
15 vehicle action."

16 "By reason of the, foregoing, facts and  
17 circumstances, it appears you (a) incident to Paragraph's  
18 2 through 6, 8 and 10 violated Section 61.15(e) of the  
19 Federal Aviation Regulation and that you failed to report  
20 alcohol related motor vehicle actions to the FAA's Civil  
21 Aviation Security Division within 60 days of the motor  
22 vehicle action; (b) incident to Paragraphs 2 through 5  
23 violated 61.15(d)2 of the Federal Aviation regulation by  
24 reason of the fact that the motor vehicle actions described  
25 in Paragraphs 2

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1 and 3 occurred within three years of the motor actions  
2 described in Paragraphs 4 and 5, and; (c) failed to exercise  
3 a degree of care or judgment or responsibility required of  
4 the holder of an Airline Transport Pilot Certificate."

5 First, just a general comment.

6 There are several allegations in here by  
7 the -- well, the allegation in Paragraph 7 by the Arizona  
8 Motor Vehicle Division that these violations were for  
9 driving under the influence of intoxicating liquor.

10 And in Paragraph 8, again, talking about  
11 intoxicating liquor. This case is not about any use of  
12 intoxicating liquor by Respondent.

13 The DUI's in question, which have not been  
14 objected to and have been admitted, were all as a result  
15 of the use of prescription -- being under the use of  
16 prescription medication.

17 There were four witnesses called. One witness  
18 by the Administrator, Brenda Smith, of the Aviation  
19 Security Division of the Federal Aviation Administration,  
20 Oklahoma City.

21 And for the Respondent, Dr. Robert Elliott,  
22 who's an aviation psychologist was called to testify.

23 The Respondent testified, Mr. Street.

24 And then, a Dr. Vinson who is the head of the  
25 HIMS program, and I'll discuss that a little bit. He's now

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1 with Southwest Airlines, but at the time of these events  
2 was manager of the HIMS Program for American Airlines in  
3 the Dallas area.

4 The Administrator had nine exhibits. The  
5 first, was the airman medical file which was suggested as  
6 has about 1,800 pages. Certainly, from the stack that I  
7 saw it would appear to be that many pages. And I'll  
8 reference that.

9 I think all of the exhibits or almost all of the  
10 exhibits are contained within Exhibit A-1.

11 A-2 was the application for the medical that was  
12 filed by the Respondent on September 16, 2014. And I'll  
13 talk about that a little bit. It did state on the face of  
14 that application that he had not flown in the past six  
15 months which is a requirement.

16 It also had a full description of all of these  
17 violations on the back. And I will say this now, if I don't  
18 comment on it later.

19 I've heard enough medical cases to know that any  
20 time there's an issue about motor vehicle actions that  
21 before the Administrator would issue a medical certificate  
22 there has to be all of the paperwork involving those  
23 convictions and the motor vehicle actions have to be  
24 submitted to the Airmen Medical Certification Division,  
25 prior to, the issuance of any kind of certificate, be it

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1 special issuance as the case was here or a regular  
2 certificate.

3 So therefore, all of these exhibits and all of  
4 these motor vehicle actions that have been retrieved by the  
5 Airmen's -- the Security Division were all contained within  
6 Exhibit A-1, and I'm sure that's one of the reasons there's  
7 1,800 pages there.

8 A-3, A-4, A-5, A-6, and A-7 of the  
9 Administrator's exhibits all relate to these motor vehicle  
10 actions which have been all been admitted in the State of  
11 Arizona.

12 There was a couple of county exhibits there and  
13 then, Arizona Department of Transportation. There Admin  
14 Per Se suspension of the motor vehicle license.

15 Exhibit A-8 offered by the Administrator was  
16 the Record of Diligent Search by Ms. Smith. And that  
17 diligent search did not include the aviation medical  
18 records, or any other records by the FAA, except a diligent  
19 search of any reports that might have been filed with the  
20 Aviation Security office.

21 And then A-9, is a Sanction Guidance Table and  
22 I will discuss the sanction guidance table at length later.

23 Respondent had ten exhibits (R-1 through 7),  
24 and then (R-9 through 11).

25 R-1(a) and (b) were the Medical Application

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1 which was Exhibit A-2. And also in A-1 the medical  
2 application that was made in 2014.

3 The R-1(b) is a Special Issuance that was issued  
4 by the Administrator.

5 R-2 is Dr. Elliott's special  
6 issues/psychological evaluation that he presented to the  
7 FAA medical folks.

8 R-3 is a memorandum to the manager of the  
9 Special Issuance branch by Dr. Allen Sager, a psychiatrist.

10 Exhibit R-4 is a memo to the Civil Aerospace  
11 Medical Institute from Brenda Smith about their  
12 enforcement investigation.

13 Exhibit R-5 is the Final Rule for 61.15 and the  
14 report and the comments that were contained in the Federal  
15 Register, which there was a request. And I certainly can  
16 take judicial notice of that and I'll discuss that a little  
17 bit in a few moments.

18 The R-6 and R-7 relate to the compliance  
19 philosophy that was initiated by the Administrator back on  
20 June 26th of this year. And the Counsel points out that  
21 the sanction guidance table and their appendix to it  
22 suggests that, that has no impact on any cases prior to the  
23 date of the acting date there of June 26th. This has all  
24 occurred -- in this case, appeared to occur before that  
25 date.

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1 R-9 is Dr. Elliott's -- his subsequent or well,  
2 not subsequent, but a special issue neurocognitive  
3 reevaluation that he submitted in support of the issuance  
4 of the special issuance.

5 R-10 was Dr. Elliott's CV and Doctor -- I mean,  
6 and R-11 was Dr. Vinson. Dr. Elliott has a PhD in  
7 psychology. Dr. Vinson has a Doctorate Degree in social  
8 work.

9 The first witness called by the Administrator  
10 was Brenda Smith. She's employed by the Aviation Security  
11 Division in Oklahoma City by the FAA. And she testified  
12 about her investigation and her receipt of the Airman  
13 Medical File which indicated that there were some motor  
14 vehicle actions.

15 And she then, requested the information from  
16 the National Driving Register. And she -- upon receipt of  
17 that, she -- those documents, which are contained in  
18 Exhibit's A-3 through 8 -- or 7 -- 3 through 7,  
19 Administrator's exhibit, she did this enforcement report.

20 And she said that -- and she testified based on  
21 her review of that report, that she recommended a 240-day  
22 sanction, suspension of this Respondent's airman  
23 certificate.

24 And after her testimony, the Administrator  
25 rests.

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1 The Respondent then called Dr. Elliott.

2 And his CV is contained there at, I think,  
3 A-10 -- I mean, R-10. I'll say this about Dr. Elliott, I  
4 think, I probably had Dr. Elliott testify before me 25 years  
5 ago.

6 And he's testified before me a number of times  
7 in those ensuing years. And I would say for the record,  
8 this is the first time he's ever testified for a Respondent.

9 All of those other occasions he's been, and as  
10 he testified, he is a consultant for the Federal Aviation  
11 Administration in all those other cases. He talked about  
12 the HIMS Program which stands for  
13 Human Intervention Motivation Study.

14 And when this Respondent came to him, the  
15 Respondent -- he testified that Respondent had already been  
16 a patient -- volunteer patient at the Betty Ford Clinic.  
17 And he came to him about getting his  
18 Special Issuance.

19 And he talked about the history as provided and  
20 he talked about, specifically, -- and I -- this  
21 is -- although, Administrator objected several times to his  
22 testimony, he did testify about the difference between  
23 alcohol and prescription drug addiction.

24 And he talked about in the HIMS Program and  
25 then, he spoke to the issue of recidivism he said that under

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1 the HIMS Program that there was a 15 percent recidivism rate  
2 among the alcohol related participants in that program, but  
3 that he didn't know of any relapse of people who were in  
4 the program as a result of addiction to prescription drugs  
5 or use of prescription drugs.

6 And that -- and he felt that the recidivism rate  
7 for that category was at least minimum.

8 Respondent, Mr. Street, then testified and it  
9 had been argued through this -- Mr. Street has had a number  
10 of medical issues starting back in 2007.

11 And he has not, until the -- until the time of  
12 the -- and since -- or until subsequent to the time of his  
13 application for special issuance, he had not exercised any  
14 of the privileges of his Air Transport Pilot Certificate  
15 for a period of over seven years.

16 He testified that he had two arrests (both  
17 within a month period), in -- in 2013, when he was under  
18 the influence of drugs. He went -- he asked for blood  
19 tests. And he -- and there was another arrest.

20 But none of those arrests indicate any use of  
21 alcohol. They were zero on the blood test on alcohol.  
22 They did show some influence of his prescription medicine.

23 The -- let me back up to, just for a moment, to  
24 Dr. Elliott's testimony. Dr. Elliott did testify about  
25 the requirement under the HIMS Program and the requirement

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1 for the Special Issuance that the Respondent's had to  
2 absolutely make full disclosure of all of their problems  
3 including their legal problems.

4 And Dr. Elliott testified that, that was part  
5 of the criteria. And he was satisfied that this Respondent  
6 did make full disclosure to the FAA on his application for  
7 medical and the subsequent disclosure of those legal  
8 papers, which as I indicated, are all within Exhibit A-1.

9 Mr. Street talked about providing all of this  
10 information. He talked about after these two convictions  
11 or two arrests, he voluntarily went to the Betty Ford  
12 Hospital and was there some period of time.

13 And then, I'm not sure, but subsequent to that  
14 time and I don't know whether this was a recommendation of  
15 the Betty Ford Hospital, but subsequent to that time he went  
16 to see Dr. Elliott and it was only then, the Respondent  
17 testified, that after visiting with Dr. Elliott that he  
18 realized that he might have an opportunity to get back on  
19 the flying status.

20 And that's when they started doing the  
21 paperwork for the Special Issuance. And which resulted in  
22 that application, which is A-1, made in September, I guess,  
23 of 2014.

24 He did further state that he believed and he  
25 didn't know anything about special issuance when they

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1 started talking about it. But he said -- and his testimony  
2 was, that he believed that the special issuance and this  
3 full disclosure admonition from  
4 Dr. Elliott would satisfy any reporting requirements that  
5 he might've had.

6 And it was only after receipt of this  
7 Letter of Investigation that he realized that there was  
8 other requirements.

9 And then, the final witness called by  
10 Respondent was Dr. Vinson who manages the HIMS Program for,  
11 now, for Southwest Airline Pilots' Association but prior  
12 to that and during the period of this period of when Mr.  
13 Street first started under this HIMS Program with American  
14 Airlines; that he was the manager of that program.

15 He talked about Respondent had a very positive  
16 compliance attitude and his willingness to work with other  
17 pilots involved in the HIMS program was very commendable.

18 There were some questions on cross-examination  
19 and Counsel asked about the recidivism rate, which I  
20 thought was unique in that Respondent -- I mean, Counsel  
21 for the Administrator did not question Dr. Elliott on that.

22 Dr. Vinson's testimony was he thought the  
23 recidivism rate was about 15 percent. And that's  
24 consistent with what Dr. Elliott said about alcoholism  
25 rate.

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1 And I don't want to discredit Dr. Vinson's  
2 testimony, but that 15 percent was in Doctor -- or -- or  
3 Dr. Elliott's testimony and, I believe, Dr. Vinson may have  
4 just been an error about what the 15 percent applied to.

5 Again, I believe, and I'm convinced by the  
6 evidence, that the recidivism rate for the prescription  
7 drug addicted folks is probably more in the neighborhood  
8 of minimal, as Dr. Elliott testified to.

9 Let me share with you some observations.  
10 First, credibility of the witnesses.

11 Normally, credibility of witnesses,  
12 particularly where all of the facts are admitted, is not  
13 an issue. But Ms. Smith continued to be reluctant to  
14 answer simple questions on cross-examination about her  
15 investigation.

16 And then, she gratuitously commented about a  
17 cocaine issue that wasn't an issue in this case, but that  
18 was contained in one of these reports that she said she  
19 didn't normally read.

20 But her gratuitous offer about that cocaine use  
21 or not use, but that was found in Respondent's  
22 car -- no -- the State of Arizona didn't take any action  
23 on it.

24 But anyway, her comments about that and her  
25 reluctance to answer the questions suggest to me that she

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1 must have a -- probably had a hidden agenda here and it,  
2 certainly, had a negative impact on any credibility I would  
3 assess to her.

4 And it's important here because she's the one  
5 that chose the sanction.

6 Dr. Elliott -- as I said, Dr. Elliott has  
7 testified many times over the years before me. His  
8 credibility has never been an issue and, in fact, the  
9 Administrator in all of those cases except this one -- over  
10 the last 25 years, the Administrator has depended on his  
11 credibility and his reports. And I was very impressed,  
12 again, by Dr. Elliott's testimony.

13 Respondent's testimony, I don't think there's  
14 any credibility issue. He hasn't flown in seven years.  
15 He had some serious medical issues involving a hip surgery  
16 and knee surgery and then, this addiction of this medicine  
17 and his pain management issues.

18 And so I -- there wasn't any credibility issue  
19 there. And -- and except for this -- for  
20 Dr. Vinson, except for this thing about the recidivism  
21 rate, I -- his testimony was spot on. And he was here  
22 simply because he talked about the compliance attitude and  
23 the attitude of this Respondent to help with the other  
24 pilots in this HIMS Program.

25 First -- well, let me say that there's not any

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1 issue before the Court today about the regulatory  
2 violations as alleged. It's clear that the reporting  
3 requirements of 61.15(e) were violated in this case.

4 And it's also clear that the -- there were two  
5 of these motor vehicle actions, arrests -- two arrests.  
6 And then, the subsequent motor vehicle actions as a result  
7 of that, that were not -- that occurred within three years  
8 as required.

9 And so it's real obvious, under the evidence  
10 today, that both regulatory violations alleged have been  
11 committed.

12 The Sanction Guidance Table that the  
13 Administrator asked this Court to give deference to, and  
14 it's contained in Exhibit A-9.

15 Under, "General Guidelines," in Paragraph A1,  
16 which is on page 1 of Exhibit A-9 says,

17 "General: If a Certificate Holder improperly  
18 exercises the privilege of a certificate, a natural  
19 consequence of that act is to lose the privilege for a  
20 period of time, commensurate with the violation."

21 There was no exercise of privilege by this  
22 certificate holder in the seven years up until the time he  
23 made full disclosure to the Federal Aviation Medical  
24 Certificate folks. And at the time, he made that  
25 application he was not flying.

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1           Then, if you go on in -- under the sanction  
2 guidance table it talks about mitigating or aggravating  
3 factors. None of those were considered by Ms. Smith except  
4 to aggravate these circumstances of the nature.

5           But the nature of the violation, and under that,  
6 that's Paragraph 4A, Page -- paragraph or  
7 Page 7-4.

8           "Three elements define the nature of a  
9 violation.

10           First, whether the violation was operational or  
11 nonoperational. Here it was nonoperational.

12           There was no exercise of this Respondent's  
13 airman privileges during the period that these motor  
14 vehicle actions took place.

15           Second, whether the violation involved  
16 careless or reckless conduct. Obviously, it did not  
17 involve careless or reckless conduct in the pursuit of his  
18 aviation endeavors.

19           Now, whether it was careless or reckless before  
20 the State of Arizona, that's not an issue for me.

21           And then third, whether the violation involved  
22 any special aggravating or mitigating factors. Well,  
23 that's what we're considering right now.

24           Paragraph B, was the -- whether the -- and  
25 that's on Page 7-5 of Exhibit A-9 -- whether the violation

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1 was inadvertent or not deliberate.

2 This was inadvertent. He was not exercising  
3 the privileges of an Airline Transport Pilot Certificate.

4 And in that regard -- and it certainly wasn't  
5 argued -- but I'm not even sure he doesn't have any  
6 privileges of an Airline Transport Pilot Certificate  
7 unless he's current in his aviation requirements.

8 He certainly wasn't current. He hadn't flown  
9 in seven years or six years up to this incident. And I'm  
10 not sure you could even say he held an ATP.

11 Historically he did, but he, certainly, didn't  
12 hold an active Airline Transport Pilot Certificate because  
13 he hadn't been flying.

14 You have to fly and maintain currency to  
15 exercise privileges under any certificate.

16 Paragraph C, "Certificate holder's level of  
17 experience."

18 Again, he has 20,000 hours, but that 20,000  
19 hours did not include any time in the past seven years. And  
20 again, I would say that, that's at least a neutral thing.

21 It's not something that as Ms. Smith suggests;  
22 that you should hold against him. He hasn't flown in seven  
23 years.

24 "Attitude of the Violator." Dr. Vinson's  
25 testimony, which was not controverted, was that he has a

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1 compliance attitude and was trying to help these other  
2 folks.

3 Paragraph E, "Degree of Hazard." There was no  
4 hazard involved because there was no exercise of any  
5 privilege under his certificate.

6 Paragraph F, "Action Taken by Employer or other  
7 Authority." Well, it's questionable whether he even had  
8 an employer. He was able to get back on after the issuance  
9 of the Special Issuance.

10 But action taken by the employer since that  
11 time, they have him actively involved in a HIMS Program  
12 that's dealing with these issues that gave rise to these  
13 regulatory violations that I've already confirmed.

14 And then, the last consideration is,  
15 "Use of the Certificate." Again, there was no use of a  
16 certificate. He did not exercise any of the privileges of  
17 an ATP and hadn't for some seven -- six or seven years up  
18 until these -- this incident.

19 I don't -- my general comment here was that I  
20 don't think that -- well, it was suggested at the outset  
21 that this is a case of first impression before the Board.

22 Certainly, under the facts of this case Counsel  
23 for the Administrator argued in closing argument that he  
24 knew what he was doing when he was out there.

25 Well, that's contrary to Dr. Elliott's

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1 testimony. And the classic is that argument of Counsel is  
2 just argument.

3 The only factual evidence that I have is that  
4 Dr. Elliott said he didn't know what he was doing. It was  
5 totally different than a conscious effort to get  
6 intoxicated versus the use of a medicine to try to curb pain  
7 and manage pain.

8 This is not a case about lack of judgment or  
9 responsibility. And this is not a case involving safety  
10 in air commerce or air transportation. There was no  
11 exercise of any privilege.

12 The Respondent testified, and it was  
13 uncontroverted, that he didn't think he'd ever get back  
14 flying again. And it was only after this visit to Betty  
15 Ford and then, subsequent to Dr. Elliott; that he started  
16 having some glimmer of hope of getting back on with the  
17 airlines, which he is now.

18 This case is captioned, Administrator, Federal  
19 Aviation Administration v. Gary Street.

20 It's not captioned, Security Division of the  
21 Federal Aviation Administration v. Gary Street.

22 The Federal Aviation Administration is one big  
23 agency. I have advocated for years there's no reason why  
24 there's this multiple reporting requirement,  
25 particularly, where there's not any exercise of privilege.

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1 Brenda Smith has testified here and she does,  
2 and I know it's the protocol (bureaucracy), of her Division  
3 that they don't accept airman's Exhibit  
4 A-1 or the Medical Certificate to confirm these motor  
5 vehicle actions.

6 They have to get something from the  
7 National Driver Registry that indicates a negative. And  
8 then, they send off letters to the state. Here, in this  
9 instance, the State of Arizona.

10 And I'm sure, as I've said, that all of the  
11 documents that have been presented here, that she received  
12 from the State of Arizona, are already in the airman medical  
13 file.

14 And why the Administrator can't take all of this  
15 in one move, it's like all of a sudden we find this bad  
16 character because we get this report back from the NDR.

17 Well, they already had the report. It's on his  
18 application for medical, that she testified she had, and  
19 she testified she had access to his airman medical file.

20 This is a troubling case because it is a seminal  
21 case. This Respondent was not exercising any privileges  
22 of any certificate. He was in error.

23 There is a reporting requirement, which the  
24 Board has held in the Smith case, is an independent  
25 reporting requirement of the Federal Aviation

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1 Administration.

2 And in this day and age of all things computer,  
3 it's still a multiple reporting requirement. And, I  
4 believe, and I'm certainly convinced by the testimony of  
5 this Respondent, that he believed a Special Issuance -- and  
6 I think most ATP's don't know what a Special Issuance is  
7 until they have medical issues, here, a seven-year lapse  
8 in flying.

9 And I think any sanction here would have to be  
10 minimal. And I think for purposes of deterrence to any  
11 other airmen that come along, I think under the totality  
12 of the circumstances of this case that an appropriate  
13 sanction would be one of a 30-day suspension and it will  
14 be so ordered.

15 ORDER

16 JUDGE MULLINS: It's, therefore, ordered that  
17 based on the totality of the evidence presented here  
18 yesterday and today, I find that there was regulatory  
19 violation of FAR 61.15(d) and FAR 61.15(e).

20 And under the circumstances of this case, I  
21 believe, an appropriate sanction would be one of a  
22 30-day suspension.

23 And I would suggest, further, that if I had the  
24 authority I would suspend that 30 days given the  
25 circumstances of this case.

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EDITED ON:

WILLIAM R. MULLINS

January 7, 2016

Judge

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## APPEAL

JUDGE MULLINS: All right. Both sides of a right to appeal this order today. And you may do so by filing a Notice of Appeal within ten days of this date with the:

National Transportation Safety Board  
Office of Administrative Law Judges  
490 L'Enfant Plaza East, Southwest  
Room 4704  
Washington, D.C. 20594

And if you file a Notice of Appeal then, within 50 days of this date a brief must be filed in support of that Notice of Appeal. The Brief would go also to the NTSB, but to the: Office of General Counsel

490 L'Enfant Plaza, Southwest  
Room 6401  
Washington, D.C. 20594

I would suggest to both of you that timeliness of an Appeal is critical. And if there's a failure to file within the ten days or to file the brief, the Board will dismiss that Appeal out of hand.

I would ask both counsel to step forward and I'll hand you written copies of your rights to appeal in this case.

MR. REYGERS: Your Honor, when would be the

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1 proper time to note corrections to the record?

2 JUDGE MULLINS: Pardon?

3 MR. REYGERS: What would be the proper time to  
4 note corrections to the record for statements of fact  
5 contained within your closing -- or in your --

6 JUDGE MULLINS: -- I don't understand the  
7 question. Repeat it? Have a seat and repeat it, please?

8 MR. REYGERS: There were certain misstatements  
9 of fact in your decision. Would you like to correct those  
10 now?

11 JUDGE MULLINS: And what were those?

12 MR. REYGERS: Number one, was there was no Dr.  
13 Vinson. It's Mr. Vinson. His curriculum vitae indicated  
14 he was a doctor, but he stated on the stand that he does  
15 not hold a doctorates degree.

16 JUDGE MULLINS: All right. Excuse me. Let me  
17 look here and see if -- he was reluctant to talk about that.  
18 But under, "Education," it says, he has a Doctorate in  
19 social work.

20 MR. REYGERS: Absolutely. But on the stand  
21 and his testimony was that he holds a Master's degree with  
22 a dissertation requirement.

23 JUDGE MULLINS: Well, he also has a Master's.  
24 It says his master's degree.

25 MR. REYGERS: Yeah.

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1 JUDGE MULLINS: Okay. So --

2 MR. REYGERS: -- he stated -- his testimony is  
3 that he is not a doctor.

4 JUDGE MULLINS: Oh, well, I just picked that up  
5 from his CV then.

6 MR. REYGERS: Okay. And -- and -- and second,  
7 you stated that at the time of Brenda Smith's investigation  
8 commenced; that the records for  
9 August 26, 2014, and September 24, 2014, were in the  
10 record -- in the medical record which they were not, as  
11 indicated by Brenda Smith's testimony.

12 JUDGE MULLINS: I thought her testimony was she  
13 had a copy of his application for medical.

14 MR. REYGERS: Yes. Which the application for  
15 medical came before these two motor vehicle events.

16 JUDGE MULLINS: Okay.

17 MR. REYGERS: Therefore, it was factually  
18 impossible.

19 JUDGE MULLINS: Then -- then it would be so  
20 corrected.

21 MR. REYGERS: Thank you.

22 JUDGE MULLINS: Okay. Does Administrator  
23 have any question about the Order?

24 MR. REYGERS: No, Your Honor.

25 JUDGE MULLINS: Any from the Respondent?

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1 MR. GRAFF: One correction. At -- at the  
2 beginning of your opinion, I think, you used the words "six  
3 months," when you meant six years that he hadn't had a  
4 medical certificate.

5 Other than that, that's the only comment I have.

6 JUDGE MULLINS: Oh, okay.

7 MR. GRAFF: The beginning.

8 JUDGE MULLINS: The record speaks for itself,  
9 but the indication -- well, what I was referencing is that  
10 on the application he said how much flying time and there  
11 was zero within the last six months.

12 MR. GRAFF: Oh, oh, oh, okay.

13 JUDGE MULLINS: I think that's what I was  
14 referencing to.

15 All right. Thank you, gentlemen. It's  
16 been -- this is an interesting case. And I wish it could've  
17 gotten settled. But I believe both sides presented their  
18 argument.

19 The pleadings, everything was done spot on, and  
20 I applaud both of you and thank you.

21 We're off the record.

22 (Proceedings concluded at 12:01 p.m.)

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