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NTSB Order No. EA-5910

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of October, 2021

_____)	
STEPHEN M. DICKSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-30710
)	
PATRICK J. HIPPLE,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

I. Background

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued November 20, 2019.¹ By that decision, the law judge determined the Administrator proved respondent violated 14 C.F.R. § 61.37(a)(6).² The law judge ordered revocation of respondent’s commercial pilot certificate pursuant to the authority of 49 U.S.C. §§

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

² Section 61.37 pertains to cheating or other unauthorized conduct concerning pilot and instructor knowledge tests. Subsection 61.37(a)(6) states that an applicant or a knowledge test may not “[u]se any material or aid during the period that the test is being given, unless specifically authorized to do so by the Administrator.”

44709³ and 46105(c).⁴ Respondent timely appealed. We deny respondent's appeal and affirm the law judge's decision and revocation of respondent's certificates.

A. Facts

Respondent had a career as a helicopter pilot in the Navy, retiring honorably with the rank of the lieutenant and having received two Navy achievement awards for life-saving missions.⁵ Respondent retired from the Navy to care for his ill mother and due to the emotional strain his mother's medical conditions were causing him.⁶ Respondent submitted evidence from the Cleveland Clinic showing that, as of June 18, 2019, his mother was diagnosed with hypertension, carotid artery and congenital pulmonic stenosis, transient ischemic attack, dizziness, cardiac palpitations and murmur, visual disturbances, numbness of the extremities, cervicalgia, vertigo, abnormality of gait, thyroid disorder, bipolar disorder, and subungual exostosis.⁷

On April 11, 2019, respondent appeared at the Zone Aviation Testing Center to take the airline transport pilot (ATP) knowledge test.⁸ That day, respondent brought into the testing room and used during the period of the test a personal electronic device in the form of an iPad mini.⁹ Prior to the test, respondent was verbally instructed by the test proctor, Triston Snezek, that cell

³ Under § 44709, the Administrator may revoke a pilot certificate if the Administrator decides, after conducting a reinspection, reexamination, or other investigation, that safety in air commerce or air transportation and the public interest require that action.

⁴ Section 46105(c) allows the Administrator to proceed on a complaint on emergency basis.

⁵ Tr. at 58; Exh R-1.

⁶ Tr. at 59-61.

⁷ Exh. R-3.

⁸ Amended Compl. at ¶ 2; Second Amended Answer at ¶ 2. *See also* Tr. at 24, 40-41.

⁹ *See* Tr. at 26-29, 40-44, 70.

phones and other electronic devices were prohibited in the testing room, and respondent signed forms acknowledging his understanding of the same.¹⁰ In addition, the following signs were posted around the testing center: “unauthorized personal possessions are not allowed in the testing room during test administration;” “no personal writing instruments, portable phones, electronic planners, or any type of device with text or video recording capabilities allowed in the testing room during test administration;” and “you must secure your own personal possessions before entering the testing area (e.g., lock personal items in vehicle, etc.)”¹¹ Respondent did not express any confusion about the instructions and did not inform Triston Snezek of the iPad in his possession.¹² While respondent asked Triston Snezek whether he could have an E6B device in the testing room, he did not ask him whether an iPad device with an E6B application was allowed.¹³ Although an E6B device was allowed in the testing room, it had to be a separate device and not part of a tablet or a phone.¹⁴ Also, prior to a test applicant’s use of an E6B device, the testing center would first need to inspect the device and clear its memory.¹⁵

Approximately five or six minutes into the test, respondent began using his iPad mini.¹⁶ Sometime afterwards, the proctor Triston Snezek noticed that respondent’s books were untouched, that respondent was looking down on his lap and moving his hands as if he was scrolling, and that he would then look up and use his computer mouse to answer a question,

¹⁰ *Id.* at 25, 40.

¹¹ Exh. A-1 at 1, 4, 6.

¹² *See* Tr. at 40-41.

¹³ *See id.* at 40-41, 92-93. An E6B device is used to calculate values such as cross-country planning, weather, etc. *Id.* at 32.

¹⁴ *Id.* at 32, 45.

¹⁵ *Id.* at 32, 45, 52.

¹⁶ *Id.* at 73.

going back and forth between his lap and the computer.¹⁷ Triston Snezek then called the test administrator Robert Snezek and notified him of respondent's behavior.¹⁸ Robert Snezek asked Triston Snezek to go back into the testing room while he observed respondent's reaction on the video surveillance cameras.¹⁹ Robert Snezek observed that, when Triston Snezek walked into the testing room, respondent "hovered" on top of something as if hiding it.²⁰ Robert Snezek then went into the testing room with Triston Snezek; walked up to respondent; reached over his shoulder, where he saw the iPad; and terminated the test.²¹ The test was terminated at the 20-25-minute mark.²² Robert Snezek then notified the FAA, which precipitated the investigation in the current case.²³

After respondent's iPad mini was discovered and the test was terminated, respondent put forth various explanations for his use of the device during the test. He told the test administrator Robert Snezek and the proctor Triston Snezek that he found the test boring and that he was e-mailing, texting, or using Facebook.²⁴ On the same day and sometime after the test was terminated, respondent called the FAA's Cleveland Flight Standards District Office (FSDO) and spoke to the administrative assistant Mark Spencer, whom he told that he got bored while he was taking the test and was "surfing" social media.²⁵ Sometime in the afternoon of the same day,

¹⁷ *Id.* at 41, 43.

¹⁸ *Id.* at 27, 41.

¹⁹ *Id.* at 41.

²⁰ *Id.* at 41.

²¹ *Id.* at 29, 42, 44.

²² *Id.* at 91.

²³ *See id.* at 29, 48-49.

²⁴ *Id.* at 30, 42.

²⁵ *Id.* at 54, 78.

respondent called Sarah Nicholson, the Cleveland FSDO's operations supervisor, and informed her that he was dealing with a family situation and was either using FaceTime or texted a family member.²⁶ In support of the assertion he was dealing with a family situation, respondent submitted a copy of the web browser history on April 11, 2019, showing he searched "breast cancer" and visited the websites for Cleveland Clinic, WebMD, cancer.org, breastcancer.org, and Mayo Clinic.²⁷ His browser history from April 11, 2019, also shows that he searched "facebook messenger" and visited the website for Facebook Messenger, and that he searched "usaa insurance" and visited usaa.com.²⁸

B. Procedural History and Testimony

On August 23, 2019, the Administrator issued an emergency order revoking respondent's commercial pilot certificate. The Administrator submitted the emergency order of revocation as the complaint in this case.²⁹ The complaint alleged that respondent violated 14 C.F.R. § 61.37(a)(6) during the ATP knowledge test on April 11, 2019, by using a material or aid during the period the test was being given.³⁰ The order further noted that a violation of 14 C.F.R. § 61.37(a)(6) was a basis for revoking respondent's commercial pilot certificate.³¹ In his answer to the complaint, respondent admitted that, on April 11, 2019, he reported to the Zone Aviation

²⁶ *Id.* at 49, 52.

²⁷ Exh. R-2.

²⁸ Exh. R-2.

²⁹ On August 30, 2019, respondent waived the emergency time periods. On November 7, 2019, the Administrator amended the complaint, changing the date of the ATP knowledge test from May 15, 2018, to April 11, 2019. Amended Compl. at ¶ 2. In the second amended answer, respondent admitted that he took the ATP knowledge place on April 11, 2019. Second Amended Answer at ¶ 2. *See* Tr. at 6-7.

³⁰ Amended Compl. at 2.

³¹ *Id.*

Testing Center to take the ATP knowledge test.³² However, respondent stated that, after reasonable investigation, he was unable to admit or deny whether the test proctor observed him using an unauthorized material or aid during the test.³³ Respondent further denied that he used any “material” or “aid” to assist him in taking the ATP knowledge test or that he intentionally caused, assisted, or participated in any act prohibited by 14 C.F.R. § 61.37.³⁴

The law judge conducted a hearing on November 19, 2019, and issued the oral initial decision on November 20, 2019. Respondent timely appealed on November 20, 2019, and filed a supporting brief on January 9, 2019, after an approved request for extension of time. The Administrator filed a reply brief on February 10, 2020. At the hearing before the law judge, the Administrator called three witnesses: Robert Snezek, owner of the Zone Aviation Testing Center and the administrator of the ATP knowledge test on April 11, 2019; Triston Snezek, a proctor of the ATP knowledge test on April 11, 2019; and Sarah Nicholson, the operations front-line manager with the FAA’s Cleveland FSDO. The respondent testified on his own behalf.

1. Testimony of Robert Snezek

Mr. Snezek has owned the Zone Aviation Testing Center since 2007 and been conducting FAA testing for about eight years.³⁵ He explained that he and respondent were acquainted from the time respondent had trained at his school.³⁶ He testified that respondent took the ATP knowledge test at the Zone Aviation Testing Center on April 11, 2019.³⁷ He testified that

³² *Id.* at ¶ 2; Second Amended Answer at ¶ 2.

³³ Second Amended Answer at ¶ 3. *See* Amended Compl. at ¶ 3.

³⁴ Second Amended Answer at ¶ 4. *See* Amended Compl. at ¶ 4.

³⁵ Tr. at 23.

³⁶ *Id.* at 24, 31-32.

³⁷ *Id.* at 24.

applicants were normally given three hours to take the ATP knowledge test and that this test was the hardest and longest to take.³⁸ He gave applicants forms to read and sign, containing prohibitions against taking anything in or out of the testing center and went through the forms and explained them to the applicants.³⁹ He testified that applicants could bring a wallet into the testing room, but that applicants could not bring or take back anything they could write on or any electronic devices, except a manual or electronic E6B device.⁴⁰

Mr. Snezek stated that he was not the proctor of the ATP knowledge test on April 11, 2019; was not present when respondent first entered the testing room; and was not aware respondent had brought an iPad into the testing center.⁴¹ He explained that, had he known that, he would not have allowed respondent to proceed with the test and that he would try to confiscate or at least ask him to put the device in his car or leave it with the proctor before entering the testing room.⁴²

Mr. Snezek testified that, on April 11, 2019, after he was notified by Triston Snezek of potential misuse of a prohibited device by respondent and began observing respondent's behavior on the video surveillance cameras, he saw respondent "hovering" over something.⁴³ He explained that the camera from the video surveillance system was pointed at respondent's back and that he could not see what was in front of the respondent, but that the cameras were there

³⁸ *Id.* at 24.

³⁹ *Id.*

⁴⁰ *Id.* at 25, 32.

⁴¹ *Id.* at 26-27.

⁴² *Id.* at 27.

⁴³ *Id.* at 27-29.

mostly to monitor and ensure nothing looked abnormal.⁴⁴ He testified that he believed respondent's behavior was not a normal response.⁴⁵ He stated that, subsequently, he and Triston Snezek entered the testing room and saw respondent had an iPad.⁴⁶ He then notified the FAA, terminated the test, and confiscated the materials respondent was using, such as the book, paper, and pencils.⁴⁷

Mr. Snezek testified that he felt disappointed after the incident, because he was acquainted with respondent.⁴⁸ He stated that respondent attempted to explain his actions, saying he did not know he could not have the device, that he found the test boring and was just sending e-mail messages or texting, and that he was not looking up the answers.⁴⁹ Mr. Snezek explained that he could not verify what respondent was saying or what was on the iPad because he was not allowed to confiscate a personal electronic device and because the iPad was off.⁵⁰ He stated that he has never encountered an applicant before who was bored during an ATP test, because usually applicants could not wait to finish and leave.⁵¹ He did not recall whether respondent mentioned during the incident that his mother was ill or that he needed to communicate with her.⁵²

⁴⁴ *Id.* at 33-34.

⁴⁵ *Id.* at 28-29.

⁴⁶ *Id.* at 29.

⁴⁷ *Id.*

⁴⁸ *Id.* at 30-31.

⁴⁹ *Id.* at 30.

⁵⁰ *Id.* at 30, 33.

⁵¹ *Id.* at 31.

⁵² *Id.*

Mr. Snezek further testified that it was odd to him that respondent did not use a pencil, because normally applicants use them to do math or write notes on the paper.⁵³ He agreed that it would not be abnormal for an applicant to do all the questions with calculations first to get them out of the way, therefore not needing to take notes, but testified that the center did not teach such approach and most applicants did not like to skip for fear of missing a question.⁵⁴ He did not know what approach respondent used on the test or how far along in the test he was.⁵⁵

Mr. Snezek testified that, to his knowledge, respondent did not have any problems in the aviation community; that respondent was “a little rusty” when he first joined the school, but that that is what the training was for; and that respondent was trying to advance his career.⁵⁶ He stated that, in his interactions with respondent, he did not see any credibility or veracity issues.⁵⁷ When asked whether he could state that respondent was cheating on the exam, Mr. Snezek responded that he had to assume respondent was cheating.⁵⁸ He explained that he could not tell “a hundred percent” since he did not know what was on the iPad, but that, in his opinion, anybody with an iPad on during a test would be cheating.⁵⁹

2. *Testimony of Triston Snezek*

Mr. Snezek works as an office manager for the Zone Aviation Testing Center and has been proctoring tests for over a year.⁶⁰ He knew respondent from the training he underwent with

⁵³ *Id.* at 34.

⁵⁴ *Id.* at 35.

⁵⁵ *Id.* a 36.

⁵⁶ *Id.* at 32.

⁵⁷ *Id.*

⁵⁸ *Id.* at 36.

⁵⁹ *Id.* at 37.

⁶⁰ *Id.* at 40.

Zone Aviation, but did not have any personal experience flying with him and was not aware of any veracity or credibility issues with respondent apart from this incident.⁶¹ He testified that an E6B device was allowed to be used by an ATP applicant, but that it had to be on a separate device and could not be on a tablet or a phone.⁶² He testified that he was the proctor of respondent's ATP knowledge test on April 11, 2019.⁶³ At the time the test began, he was not aware respondent had an iPad in his possession and that, had he known that, he would not have allowed respondent to begin the test.⁶⁴

Mr. Snezek testified that, during the test, he observed that respondent's head was down; his books were to his left; the computer was in front of him; the iPad was on his lap; and respondent was looking down and moving his hands like he was scrolling through the iPad and then proceeded to his mouse to answer a question, going back and forth.⁶⁵ He did not know if respondent put the iPad in his pocket or pulled it out of his pocket, but stated that the iPad was in his lap during the test.⁶⁶

Mr. Snezek explained that he then called Robert Snezek, who accessed the cameras in the testing room and asked him to go back into the testing room as if to check a file and observe respondent's behavior.⁶⁷ He stated that, when he went into the room, he observed respondent reaching for the pocket where the iPad was later discovered.⁶⁸ He testified that he then left the

⁶¹ *Id.* at 44-45.

⁶² *Id.* at 45.

⁶³ *Id.* at 40.

⁶⁴ *Id.* at 40-41.

⁶⁵ *Id.* at 41, 43.

⁶⁶ *Id.* at 44.

⁶⁷ *Id.* at 41.

⁶⁸ *Id.*

room and called Robert Snezek back, who stated that respondent was indeed cheating, and then both of them went into the testing room.⁶⁹ He stated that Robert Snezek then walked up to respondent; reached over respondent's shoulder, where he saw the iPad; asked respondent what he was doing; took the iPad, advising respondent he was not allowed to have it in the testing room; and terminated the test.⁷⁰ He and Robert Snezek returned the iPad to respondent after the test was terminated.⁷¹ He testified that respondent stated he was using Facebook and that he got bored during the test.⁷²

3. Testimony of Sarah Nicholson

Ms. Nicholson supervises inspectors of operations and has been working with the FAA for 17 years.⁷³ She previously worked as a chief flight instructor for a Part 141 flight school for five years and held an ATP certificate with single and multi-engine ratings.⁷⁴ She testified that she became familiar with respondent's case when she received a phone call from Robert Snezek about alleged cheating on a knowledge test on April 11, 2019.⁷⁵ She testified that she also received an e-mail message regarding the incident from the written test center of the FAA branch informing that it was her office's responsibility to investigate the incident.⁷⁶

Ms. Nicholson explained that, in the afternoon of April 11, 2019, she received a phone call from respondent, who informed her he had an iPad mini in the testing room, that he was

⁶⁹ *Id.* at 41-42.

⁷⁰ *Id.* at 42, 44.

⁷¹ *Id.* at 44.

⁷² *Id.* at 42.

⁷³ *Id.* at 47-48.

⁷⁴ *Id.* at 48.

⁷⁵ *Id.* at 48-49.

⁷⁶ *Id.* at 49.

dealing with a family situation, and that he was either using FaceTime or texted a family member.⁷⁷ She stated that she referred respondent to the regulations, which prohibited unauthorized devices in the testing room.⁷⁸ She also informed respondent that there would be an investigation, but she did not read him the Pilot's Bill of Rights.⁷⁹ She testified that, earlier on April 11, 2019, respondent called the FSDO's administrative assistant Mark Spencer and told Mr. Spencer that he had gotten bored during the test and was "surfing" social media.⁸⁰ She explained that the FAA Order 2150 prescribed a sanction of revocation for cheating because it was the opposite of a good moral character, which was the standard that an airline transport pilot is held to.⁸¹ She stated that an ATP certificate holder was held to the highest standard of truthfulness and judgment.⁸²

Ms. Nicholson further testified that she watched the video recording of respondent in the testing room and observed that respondent did not appear to be using any testing materials.⁸³ She also observed respondent having his head down and then looking up, clicking, and putting his head down, which she thought was odd.⁸⁴ She did not know whether respondent was cheating or whether he used the iPad to aid himself in taking the ATP test, but stated that he had told her he used the iPad to FaceTime and text.⁸⁵

⁷⁷ *Id.* at 49.

⁷⁸ *Id.*

⁷⁹ *Id.* at 54.

⁸⁰ *Id.*

⁸¹ *Id.* at 50.

⁸² *Id.*

⁸³ *Id.* at 51.

⁸⁴ *Id.* at 52.

⁸⁵ *Id.*

Ms. Nicholson further explained that, to use an E6B electronic device for the test, the testing center would need to be aware that an applicant would be using the device and would need to look at the device and clear any memory.⁸⁶ She testified that this procedure was normally described in the order that all testing centers must follow, but that she did not immediately recall the order number.⁸⁷ She stated that the testing center should have advised the applicant of this procedure.⁸⁸ She also stated that respondent did not elaborate about the family situation that he was dealing with during the test.⁸⁹ When asked whether she had any reason to believe respondent was not of good moral character, she responded she was not familiar with respondent apart from this incident.⁹⁰

Ms. Nicholson testified that she reviewed the letters regarding the investigation in this case after they were put together by the inspector who wrote the enforcement recommendation.⁹¹ When asked whether she reviewed the letter respondent's attorney had sent requesting the investigative report and the letter of investigation, she answered that she probably did, but could not recall what it said.⁹² She testified that she did not know whether the investigative report was ever sent to the respondent's attorney's office, but that it would have come from the legal department, and not her office.⁹³

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 53.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 53-54.

4. *Testimony of respondent*

Respondent lives in Cleveland with his 66-year old mother, for whom he is a primary caretaker, including scheduling his mother's doctor's visits and having access to her medical records.⁹⁴ He worked for one year as a supervisor in a factory after his service in the Navy and then for Aitheras Aviation Group as a pilot-in-command, transporting organ teams and critical care patients.⁹⁵ He testified he had no disciplinary actions while at the Navy and during his employment.⁹⁶ He also testified that, a few weeks prior to the hearing, he received a job offer from a Department of Defense contractor to do intelligence, surveillance, and reconnaissance flying, for which he had obtained a top secret security clearance.⁹⁷ Respondent explained that he did not need an ATP certification for employment and that it was the one certification he did not have.⁹⁸ He also explained that he initially took an equivalency examination with the FAA, consisting of 20 questions, and received all the ratings he had in the military.⁹⁹ He stated that, prior to the April 11, 2019 ATP knowledge test, he had not taken any other FAA written tests.¹⁰⁰

Respondent testified that, on April 10, 2019, the day before the ATP knowledge test, he drove his mother to the Cleveland Clinic for a computer tomography (CT) scan.¹⁰¹ He explained that, while his mother's CT scans were initially positive for breast and urinary cancer, they later

⁹⁴ *Id.* at 57, 65-66.

⁹⁵ *Id.* at 63.

⁹⁶ *Id.* at 61.

⁹⁷ *Id.* at 64-65.

⁹⁸ *Id.* at 69.

⁹⁹ *Id.* at 62.

¹⁰⁰ *Id.* at 62-63.

¹⁰¹ *Id.* at 67-68.

came back negative.¹⁰² He stated that, on the morning of April 11, 2019, while he was on his way to the test, he received two phone calls from his mother, who informed him that her magnetic resonance imaging (MRI) test was positive for breast cancer.¹⁰³ He explained that he planned to take the test first and then address his mother's health issue after the test.¹⁰⁴

Respondent testified that he considered the iPad to be an electronic E6B.¹⁰⁵ He explained that he took his iPad into the testing room on April 11, 2019, because he had always used it in his naval and civilian career as an E6B and for flight purposes, that he had used an E6B on an iPad during tests in the Navy, which was allowed; and that he had always had the iPad in his possession in his flight suit.¹⁰⁶ He did not think that he should leave the iPad in his car or that he could not use it.¹⁰⁷ He stated that, apart from an E6B, there was nothing on his iPad that would have assisted him in taking the ATP test.¹⁰⁸ He also stated that his iPad was in his jacket pocket and that he did not try to conceal it.¹⁰⁹ He testified that, when he arrived at the testing facility, he talked briefly with Triston Snezek, then signed something, and then was brought into the testing room.¹¹⁰ He also testified that he did not look at the signs that were posted around the testing center, but that none of them stated iPads were prohibited, only cell phones.¹¹¹

¹⁰² *Id.* at 66.

¹⁰³ *Id.* at 68-69.

¹⁰⁴ *Id.* at 68.

¹⁰⁵ *Id.* at 80.

¹⁰⁶ *Id.* at 70, 80.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 76-77.

¹⁰⁹ *Id.* at 71.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 81. *See* Exh. A-1.

Respondent further explained that, approximately five or six minutes into the exam, he took the iPad out of his pocket and placed it right in front of him, without trying to conceal it.¹¹² He stated that he used the iPad to login to Cleveland Clinic to check his mother's test results and then to figure out the next iteration of the examinations his mother needed.¹¹³ He indicated that, because his mother was always "front and center" and he did not need an ATP certification for his job, he thought he could do both – answer the test questions and look up information concerning his mother's health issue.¹¹⁴ He stated that he did not and would not ever use the iPad to aid himself in the ATP test.¹¹⁵ He also stated that he had not encountered any questions on the test requiring use of a reference guide or a pencil to doodle and that there were very few questions that required doing math.¹¹⁶

He further testified that, approximately 20-25 minutes into the test, Triston Snezek and Robert Snezek came into the testing room, told him he could not have the iPad, and terminated the test.¹¹⁷ He stated that he was not far into the test when the test was terminated.¹¹⁸ He also stated that, after Triston Snezek and Robert Snezek reported the incident to the FAA, he told Robert Snezek that he wished to speak to the FAA and left the testing center.¹¹⁹ He explained that he then received a call from his mother and told her about what had happened.¹²⁰ He then called

¹¹² Tr. at 72-73.

¹¹³ *Id.* at 73. *See* Exh. R-2.

¹¹⁴ Tr. at 75-76.

¹¹⁵ *Id.* at 76.

¹¹⁶ *Id.* at 72-73.

¹¹⁷ *Id.* at 77, 91.

¹¹⁸ *Id.* at 91.

¹¹⁹ *Id.* at 78.

¹²⁰ *Id.*

the FAA to explain his side of the story and first spoke with an assistant and then with Ms. Nicholson.¹²¹ He testified that he told Ms. Nicholson that he had been dealing with family issues and that she referenced him to the regulations.¹²²

He testified that he had always had a passion for flying, that he was worried about the ramifications of the revocation, that it hurt him to have his integrity questioned, and that he had no reason to hide from a test over the course of his Navy or civilian career.¹²³ He stated that he had never had his integrity questioned until this point, that his veracity and credibility had never been challenged before, and that he never cheated on anything.¹²⁴

On cross-examination, respondent agreed that his iPad had a video recording capability.¹²⁵ He also agreed that the evidence of his mother's medical conditions did not demonstrate any diagnosis or visit from April 2019.¹²⁶ When asked whether there was any way to confirm that the screenshots provided are from his iPad, he testified he did not have an answer for that beyond his testimony that they were from his iPad.¹²⁷ He testified that he used the web browser that was originally on the iPad and then went to "Settings" and took screenshots of the web browsing history.¹²⁸ He agreed that the evidence he submitted only showed the browser history and did not show any other use, such as applications he could have been using.¹²⁹ He

¹²¹ *Id.* at 78-79.

¹²² *Id.* at 79.

¹²³ *Id.* at 61, 82-83.

¹²⁴ *Id.* at 76, 79-80.

¹²⁵ *Id.* at 83.

¹²⁶ *Id.* at 83-84. *See* Exh. R-3.

¹²⁷ Tr. at 84. *See* Exh. R-2.

¹²⁸ Tr. at 85-86. *See* Exh. R-2.

¹²⁹ Tr. at 86.

testified that, although his mother's health became a priority over the test itself, he did not stop taking the test or try to finish it early so that he could then deal with his mother's issue.¹³⁰ He stated that he instead "compartmentalized" the two and multi-tasked, switching back and forth between a search for information about his mother's health issue and taking the test.¹³¹ He testified that there was no reason for him to finish early and not use the three hours he was given for the test.¹³² However, he agreed that he used a part of those three hours to look up the medical information.¹³³

On redirect examination, he testified that, in hindsight, the options were to leave the testing center or not be there to begin with, but that at the time he thought he could deal with multiple situations.¹³⁴ He indicated that the medical record from June 18, 2019, accurately reflected the medical conditions his mother had in place in April 2019 and that the only other event between April and June 2019 was a negative CT scan.¹³⁵ He stated that the evidence showing his search history was true and correct as to what he was searching during the test and that he did not use any other browser.¹³⁶ He testified that he took the screenshots of the history of his iPad browser on April 12, 2019, at the instruction of his attorney.¹³⁷ He explained that he

¹³⁰ *Id.* at 86-87.

¹³¹ *Id.* at 87.

¹³² *Id.*

¹³³ *Id.* at 87-88.

¹³⁴ *Id.* at 88.

¹³⁵ *Id.* at 88-89. *See* Exh. R-3.

¹³⁶ Tr. at 89-90. *See* Exh. R-2.

¹³⁷ Tr. at 90. *See* Exh. R-2.

made sure to take the screenshots of the browser history for April 10, 2019, and April 12, 2019, so that the search history for April 11, 2019, the day of the test, was encompassed completely.¹³⁸

On questioning by the law judge, respondent stated that he did hear the briefing about electronic devices being prohibited inside the testing room, but that this briefing may have been given during the time he spoke with Triston Snezek.¹³⁹ He testified that he asked whether he was allowed to have an E6B and was told “yes.”¹⁴⁰ He testified that, while he did not show the device he would be using, it was visible in his front pocket.¹⁴¹ He also stated that he did not know of a digital E6B device and that he’s always used an E6B through his iPad, including in the Navy for testing.¹⁴²

C. Law Judge’s Oral Initial Decision

In the oral initial decision, the law judge determined that the Administrator proved the regulatory violations of 14 C.F.R. § 61.37(a)(6) as alleged by a preponderance of reliable and probative evidence.¹⁴³ In making this determination, the law judge summarized the procedural history of the case; the Administrator’s allegations and the regulatory violations alleged in the complaint; the admitted exhibits; and the testimony of the witnesses and respondent and addressed their credibility.¹⁴⁴

The law judge found that the evidence clearly established that respondent used the

¹³⁸ Tr. at 90-91. *See* Exh. R-2.

¹³⁹ Tr. at 92.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 92-93.

¹⁴² *Id.* at 93-94.

¹⁴³ Oral Initial Decision at 138.

¹⁴⁴ *Id.* at 119-137.

material in the form of an iPad without an authorization from the Administrator on April 11, 2019, during the ATP knowledge test.¹⁴⁵ The law judge also noted that, when respondent's counsel demonstrated during the hearing where the iPad was located in respondent's jacket, it was apparent that the iPad was not in plain view and took some effort to remove from the jacket's pocket.¹⁴⁶ The law judge further found that the copy of the browser history on April 11, 2019, was not reliable or persuasive evidence, and that respondent's testimony was "less than fully credible."¹⁴⁷

The law judge further noted that it was not necessary for him to make a specific finding whether the regulation required a showing that the unauthorized material was used to cheat on the test to establish a violation of § 61.37, but that he found the Administrator's argument on this point somewhat compelling, since the Administrator had no authority to seize or conduct a forensic analysis of an unauthorized device to determine precisely what may have been utilized during the testing period.¹⁴⁸ The law judge indicated that, similar to the respondent in *Administrator v. Singer*,¹⁴⁹ respondent here engaged in conduct that created the potential for improper utilization of information, and this potential in and of itself may be enough to establish a violation of § 61.37(a)(6).¹⁵⁰ The law judge then found revocation to be the appropriate sanction and affirmed the emergency order of revocation.¹⁵¹

¹⁴⁵ *Id.* at 132.

¹⁴⁶ *Id.* at 133.

¹⁴⁷ *Id.* at 136-137.

¹⁴⁸ *Id.* at 138.

¹⁴⁹ See NTSB Order EA-4704 (1998).

¹⁵⁰ Oral Initial Decision at 138-139.

¹⁵¹ *Id.* at 140-141.

D. Issues on Appeal

On appeal, respondent contends that the law judge improperly considered evidence obtained in violation of the Pilot's Bill of Rights.¹⁵² Respondent also argues that the law judge improperly credited the Administrator's witnesses' testimony on the allowed use of E6B devices and discredited respondent's testimony regarding his belief an E6B device on an iPad was allowed.¹⁵³ Respondent further argues that the law judge erred in the definition of "use" when determining whether respondent used the iPad during the test and in failing to consider whether the iPad contained any information that aided respondent during the exam.¹⁵⁴ Finally, respondent contends that the law judge erred in finding that he was compelled to give deference to the Administrator's choice of sanction and in failing to consider any mitigating factors.¹⁵⁵ The Administrator argues the law judge committed no error and opposes respondent's arguments for reversal.

II. Decision

While we give deference to our law judge's rulings on certain issues, such as credibility determinations,¹⁵⁶ we review the law judge's decision *de novo*.¹⁵⁷

¹⁵² Appeal Br. at 19.

¹⁵³ *Id.* at 23-25.

¹⁵⁴ *Id.* at 20-23.

¹⁵⁵ *Id.* at 12-19.

¹⁵⁶ *Administrator v. Porco*, NTSB Order No. EA-5591 at 13 (2011), *aff'd sub nom., Porco v. Huerta*, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

¹⁵⁷ *Administrator v. Smith*, NTSB Order No. EA-5646 at 8 (2013); *Administrator v. Frohmuth and Dworak*, NTSB Order No. EA-3816 at 2 n. 5 (1993); *Administrator v. Wolf*, NTSB Order No. EA-3450 (1991); *Administrator v. Schneider*, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

A. Notification of Investigation

Respondent contends that the FAA obtained statements from him in violation of the Pilot's Bill of Rights, because, when respondent called the Cleveland FSDO on April 11, 2019, and made statements to Mr. Spencer and Ms. Nicholson, neither Mr. Spencer nor Ms. Nicholson notified him that he was the subject of an investigation and did not read him his rights under the Pilot's Bill of Rights.¹⁵⁸ On April 11, 2019, after respondent was discovered with an iPad in the testing room for the ATP knowledge test, the test's administrator, Robert Snezek, called the Cleveland FSDO's manager Ms. Nicholson to inform her of the discovery.¹⁵⁹ Ms. Nicholson also received an e-mail from the FAA written test center informing her that it was her office's responsibility to investigate the incident, but she did not herself investigate respondent's case.¹⁶⁰ On the same day, April 11, 2019, respondent called Mr. Spencer, the Cleveland FSDO administrative assistant, and told him he used his iPad during the test because he had gotten bored and "surfed" social media.¹⁶¹ Afterwards, in the afternoon on the same day, respondent called Ms. Nicholson and told her that he used the iPad during the test because he was dealing with a family issue and either texted a family member or used FaceTime.¹⁶² It is these contradictory explanations of why respondent used his iPad that respondent now alleges were obtained from him improperly. We disagree with respondent's contentions.

¹⁵⁸ Appeal Br. at 19. *See* Tr. at 49, 54.

¹⁵⁹ *See* Tr. at 48-49.

¹⁶⁰ *See id.* at 49, 53.

¹⁶¹ *Id.* at 54.

¹⁶² *Id.* at 49.

The Pilot's Bill of Rights requires the FAA to "provide timely, written notification to an individual who is the subject of an investigation" in the form of a letter of investigation.¹⁶³ Here, respondent does not allege that the FAA did not provide him with a letter of investigation or that it was untimely.¹⁶⁴ Respondent instead alleges that the Pilot's Bill of Rights obligated the FAA to provide him with a letter of investigation prior to accepting his statements during the phone calls he made to the FAA on April 11, 2019, the day of the ATP knowledge test.¹⁶⁵ Respondent thus interprets the statute to require that a letter of investigation be sent to the subject of the investigation immediately after the appropriate FAA office receives a notice of behavior potentially in violation of the FAA regulations. However, we previously indicated that the requirement of "timely" notification does not mean "immediate" notification.¹⁶⁶

When Ms. Nicholson was asked at the hearing whether she advised respondent during his phone call to her that he was under an investigation, she testified that she "notified [him] that there would be an investigation."¹⁶⁷ It is apparent that, while the FAA had received a report of the events on April 11, 2019, it had not begun investigating respondent when respondent made the calls to the FAA. Furthermore, the FAA did not solicit any statements from respondent; instead, respondent, on his own accord, called the FAA to explain his "side of the story."¹⁶⁸ As such, respondent's contention that the FAA did not properly notify him under the Pilot's Bill of Rights prior to speaking to him on the phone on the day of the events that gave rise to the

¹⁶³ 112 P.L. 153, 126 Stat. 1159, 1160 (2012).

¹⁶⁴ See Appeal Br. at 19.

¹⁶⁵ See Appeal Br. at 19. Also see Tr. at 49, 54.

¹⁶⁶ See *Administrator v. Siwarski*, NTSB Order No. EA-5729, at 5-7 (2014).

¹⁶⁷ Tr. at 54.

¹⁶⁸ *Id.* at 78-79.

investigation in this case is without merit. In addition, while Ms. Nicholson testified that she did not read him the Pilot's Bill of Rights, there is no requirement under the statute that the pilot who is the subject of an investigation be read the language of the statute, and respondent points to no authority in support of this contention.¹⁶⁹

B. Definition of "Use"

Respondent contends that 14 C.F.R. § 61.37(a)(6), stating that applicants may not "use any material or aid during the period that the test is being given, unless specifically authorized to do so by the Administrator," prohibits the use for purposes of aiding in taking in the ATP knowledge test and not merely the possession of prohibited material.¹⁷⁰ In support of this contention, respondent cites to *Singer v. Garvey*, which noted that our definition of "use" as "any effort to obtain help from an unauthorized source of information or assistance, whether successful or otherwise" was entitled to deference.¹⁷¹ However, this citation understates our holding in *Administrator v. Singer*.¹⁷² In *Singer*, we overruled the law judge's narrow definition of "use" as "use to derive benefit."¹⁷³ The respondent in that case was observed sliding papers, containing aviation formulas, into his pocket prior to completing the test, but was not observed actually using the papers during the test.¹⁷⁴ We rejected the respondent's explanation they were notes for a later exam and he had forgotten they were in his pocket, holding that intent was not

¹⁶⁹ See 112 P.L. 153, 126 Stat. 1159, 1160 (2012).

¹⁷⁰ Appeal Br. at 20.

¹⁷¹ See 208 F.3d 555 (2000).

¹⁷² See NTSB Order EA-4704 at n.9 (1998).

¹⁷³ See *Administrator v. Singer*, Docket No. SE-15331 (1998).

¹⁷⁴ See NTSB Order EA-4704, at 3-4 (1998).

an element of the charge under § 61.37(a)(6).¹⁷⁵ We explained that the Administrator only needed to show it was “more likely true than not that the respondent had used the unauthorized material in his possession..., not that no other inference could fairly be reached on the evidence.”¹⁷⁶

We further noted that, “while possession of an unauthorized material may not be sufficient to prove that they were used, it would appear to be enough coupled with a negative credibility assessment to prove intent to use them.”¹⁷⁷ We concluded that “an unauthorized material was effectively ‘used’ when respondent, by having the notes in his hand outside of his pocket, engaged in conduct that created the potential for improper reliance on them.”¹⁷⁸ In *Singer v. Garvey*, Sixth Circuit Court of Appeals upheld our decision overruling the law judge on the interpretation of “use” under § 61.37(a)(6).¹⁷⁹ Thus, our precedent defines “use” as not “use to aid” but merely as “conduct creating the potential for improper reliance.” Other relevant case law also interprets “use” as not requiring proof that the authorized material was used to aid in taking the test and only that the prohibited material was available to the applicant for use during the test.¹⁸⁰

¹⁷⁵ *See id.* at 4-6.

¹⁷⁶ *See id.* at 5-6.

¹⁷⁷ *See id.* at 25, n.8.

¹⁷⁸ *See id.* at 7.

¹⁷⁹ *See Singer v. Garvey*, 208 F.3d 555, 560 (6th Cir. 2000).

¹⁸⁰ *See, e.g. Administrator v. Mignano*, Order No. EA-3435, 1991 NTSB LEXIS 232 (1991) (rejecting respondent’s argument that the Administrator was required to show respondent used the written notes during the test to aid himself in taking the test and holding that actual use of an unauthorized aid during the test was not a necessary element of the offense, because requiring that the proctors actually observe the test taker who they knew or reasonably believed to be in possession of unauthorized material until the test taker actually consulted it would nullify the purpose of the regulation of preventing cheating); *Administrator v. Thompson*, NTSB Order No. EA-3854, 1993 NTSB LEXIS 67, *2 (1993) (holding that “use” of an unauthorized test aid does

Here, respondent was observed by three witnesses – proctor Tristan Snezek, administrator Robert Snezek, and the Cleveland FSDO supervisor Ms. Nicholson (reviewing the video recording) – not using the testing materials and, instead, “hovering” over something at his seat and going back and forth between looking down on his lap and looking up at the computer to answer questions, a behavior these witnesses described as “odd” or “not a normal response.”¹⁸¹ Respondent was also seen looking down and moving his hands like he was scrolling through the iPad, and, when Tristan Snezek returned to the testing room, respondent reached for the pocket where the iPad was later discovered.¹⁸² The testimony of these witnesses is consistent with each other’s, and they have nothing to gain by saying respondent cheated.

Respondent contends that he used the iPad during the test to research information about his mother’s health and not to aid himself in taking the test.¹⁸³ However, the law judge provided sufficient basis in rejecting respondent’s explanation of the reason he used the iPad and finding respondent “less than fully credible.”¹⁸⁴ A law judge’s credibility determination must be based explicitly on factual findings in the record.¹⁸⁵ And, we will not overturn a law judge’s credibility

not require that the test taker actually utilize the information he or she obtained from the unauthorized material or aid); *Administrator v. DiSilvestro*, Docket No. SE-18490, 2009 NTSB ALJ LEXIS 569 (2009) (holding that 14 C.F.R. § 67.37 did not require a showing that an attempt to cheat was successful); *Administrator v. Hernandez*, Docket No. SE-17622, 2006 NTSB ALJ LEXIS 340 (2006) (finding that a respondent, who had notes in his possession during the test but did not use the notes, violated 14 C.F.R. § 61.37, because it was sufficient that the unauthorized aid was available to him to sustain a finding of violation).

¹⁸¹ Tr. at 28-29, 34, 41, 43, 52.

¹⁸² *Id.* at 41-44.

¹⁸³ *Id.* at 73; Appeal Br. at 20-23.

¹⁸⁴ See Oral Initial Decision at 137.

¹⁸⁵ See *Dillmon v. NTSB*, 588 F.3d 1085, 1094 (D.C. Cir. 2009); *Administrator v. Singleton*, NTSB Order No. EA-5529 (2010); *Administrator v. Reynolds*, NTSB Order No. EA-5641 at 8 (2012).

determination, unless it is arbitrary and capricious.¹⁸⁶ Here, the law judge relied on a multitude of facts, including the testimony of respondent and the witnesses and the evidence provided by respondent, in finding respondent “less than fully credible” and concluding that respondent’s use of the iPad constituted improper use under § 61.37(a)(6).¹⁸⁷ We have no reason to disturb this finding.

Apart from respondent’s testimony during the hearing, there is no corroborating evidence he brought the iPad into the testing center for the sole purpose of using it as an E6B device. First, respondent did not apprise anyone of the iPad in his possession despite the visual, written, and verbal warnings against having electronic devices in the testing room. And, second, respondent did not put forth this explanation for having the iPad in the testing room even after he had been discovered with it in possession.¹⁸⁸ Respondent also provided no corroborating evidence in support of his assertion that he used the iPad solely to research his mother’s health issue. Respondent testified that the CT scans, which he helped his mother obtain on April 10, 2019, the day before the ATP knowledge test, initially came back positive and then negative, and that, on the morning of April 11, 2019, his mother informed him her MRI was positive was breast cancer.¹⁸⁹ However, he did not provide copies of either the CT or the MRI reports reflecting a positive finding of cancer nor any contemporaneous medical treatment notes or letters from his

¹⁸⁶ *Administrator v. Porco*, NTSB Order No. EA-5591 at 13 (2011), *aff’d sub nom.*, *Porco v. Huerta*, 472 Fed. Appx. 2 (D.C. Cir 2012) (per curiam).

¹⁸⁷ *See* Oral Initial Decision at 134-138.

¹⁸⁸ *See* Tr. 30, 42, 49, 52, 54, 70. The warnings given to respondent at the Zone Aviation Testing Center are consistent with the FAA regulations, requiring a test proctor to “instruct the applicant that he or she may not enter the testing area with personal possessions, including any type of written instrument, portable phone, electronic planner, or any type of device with test or video recording capabilities.” *See* FAA Order 8080.6H, Chapter 3, ¶ 4.a. (2017).

¹⁸⁹ *See* Tr. at 66-69.

mother's doctors attesting to the false positive cancer diagnoses. All respondent provided was a psychiatric visit summary, dated June 18, 2019, which does not reflect any mention of cancer, whether by history or by current diagnosis. If, as respondent asserts, he was so disturbed from these "aberrant" circumstances that, in this mental state, he was unable to comprehend the gravity of his actions on April 11, 2019, and the impact it would have on his career, he provided no proof of them.

In addition, respondent submitted a copy of the browser history on April 11, 2019, showing he accessed websites related to breast cancer. However, the search history also shows that respondent accessed other sites unrelated to his mother's health, such as USAA insurance and Facebook Messenger. That he accessed Facebook Messenger is consistent with the testimony of Tristan Snezek that, after the iPad was discovered on respondent during the test, respondent told him he was using Facebook.¹⁹⁰ However, without a forensic analysis of respondent's iPad, it is not possible to know what respondent used it for. It is unclear whether the above searches were made during the time of the test on April 11, 2019, or later that day. Also, as the law judge pointed out, it is not possible to know whether the browser history respondent submitted is indeed from the iPad that was discovered on him during the ATP knowledge test.¹⁹¹ Robert Snezek and Ms. Nicholson testified that respondent told them on April 11, 2019, that he used the iPad to e-mail or text.¹⁹² However, it is impossible to know the content of the messages and whether respondent inquired with someone about a test question or whether these messages concerned his mother's condition. It is also not possible to know whether respondent accessed

¹⁹⁰ *See id.* at 47-48.

¹⁹¹ *See* Oral Initial Decision at 136-137.

¹⁹² *See* Tr. at 30, 49, 52.

any note-taking applications or whether he deleted any items from the browser history for that day.

There is nothing in the FAA regulations that allows the test administrator or proctor to confiscate personal materials and conduct a forensic analysis to learn how respondent used his iPad during the test.¹⁹³ Furthermore, the cost of conducting such forensic analysis would invariably be passed on to the applicant, potentially making the test-taking to become an airman cost-prohibitive. In addition, based on the above precedent, to violate the regulation, a prohibited material need not be an actual aid. As such, we reject respondent's contention that the law judge erred in failing to consider whether respondent's iPad contained information that aided respondent in the test, and, consistent with our previous ruling in *Administrator v. Singer*, find that, by using the iPad at all, respondent engaged in conduct that created the potential for improper reliance on this material during the test, and, doing so, he used the material not authorized by the Administrator in violation of 14 C.F.R. § 61.37.¹⁹⁴

C. Sanction

Respondent contends that the law judge erred in finding that he was compelled to give deference to the Administrator's choice of sanction and in failing to consider any mitigating factors.¹⁹⁵ Respondent contends that Congress, in the Pilot's Bill of Rights, "unequivocally and specifically" eliminated deference to the FAA sanction guidance policy and that the law judge attempted to support his flawed rationale by citing the U.S. Supreme Court case of *Martin v. OSHRC*.¹⁹⁶ We disagree. In the Pilot's Bill of Rights, Congress struck the statutory language

¹⁹³ See 14 C.F.R. §61.37. See also FAA Order 8080.6H (2017).

¹⁹⁴ See NTSB Order EA-4704 at 7 (1998).

¹⁹⁵ Appeal Br. at 12-19.

¹⁹⁶ *Id.* at 15-16. See 499 U.S. 144 (1991).

previously requiring the NTSB to defer to the Administrator's choice of sanction in enforcement actions.¹⁹⁷ The Congressional Record clarifies the legislative intent of this provision:

Mr. Rockefeller. It is not the intention of the Senate to eliminate the NTSB's practice to observe the principles of judicial deference to the FAA Administrator when reviewing airmen appeals. The Senate only finds that this language is redundant of what is already provided for under the law and it is not the intent of the Senate to prevent the NTSB from applying the principles of judicial deference in adjudicating Federal Aviation Administration cases.

The purpose of these changes is simply to make the statute consistent with the laws governing all other Federal agencies. Thus, it is the intention of the Senate that the NTSB, in reviewing FAA cases, will apply principles of judicial deference to the interpretations of laws, regulations, and policies that the Administrator carries out in accordance with the Supreme Court's ruling in *Martin v. OSHRC*, 449 U.S. 114 (1991).¹⁹⁸

Thus, after the Pilot's Bill of Rights, we apply principles of judicial deference to the interpretation of laws, regulations, and policies that the Administrator carries out in accordance with the United States Supreme Court's ruling in *Martin v. OSHRC*.¹⁹⁹ Under *Martin*, an adjudicatory body must conduct a reasonableness inquiry when determining whether an agency's statutory interpretation is entitled to deference.²⁰⁰ Whether the Administrator's choice of sanction is reasonable is case-specific and based on the facts and circumstances adduced at the hearing and warrants an evaluation of aggravating and mitigating factors.²⁰¹

¹⁹⁷ See Pub. L. No. 112-153, 126 Stat. 1159 (2012).

¹⁹⁸ 2012 WL 2491446, 158 Cong. Rec. S4733-01 (June 29, 2012).

¹⁹⁹ 499 U.S. 144 (1991).

²⁰⁰ *Martin*, 499 U.S. at 145, 150-158. In *Martin*, the issue was whether, in situations involving interpretations of ambiguous regulations, the Secretary of Labor, who set and enforced the workplace health and safety standards, was entitled to deference by the OSHRC, a body carrying out adjudicatory functions. The Court held that "a reviewing court should give effect to the agency's interpretation so long as it is reasonable." 499 U.S. at 146.

²⁰¹ See *Administrator v. Jones*, NTSB Order No. EA-5647 at 21 n.62 (2013). See also *Administrator v. Hackshaw*, NTSB Order No. EA-5510 (2010) (*recon. denied*, NTSB Order No. EA-5522 (2010)); *Administrator v. Simmons*, NTSB Order No. EA-5535 (2010); *Siegel v.*

Respondent cites to many facts that are either clearly not mitigating or irrelevant to the choice of sanction, such as respondent's testimony as to his intended use of the iPad; the fact that the ATP knowledge test on April 11, 2019, was the first time he had taken an FAA written test; and the fact that he was recently employed as a contractor by the Department of Defense, a position for which he obtained security clearance.²⁰² Respondent also cites his violation free history, excellent reputation in the aviation community, and a distinguished Navy service.²⁰³ However, a violation- or incident-free history is the norm and not a mitigating circumstance,²⁰⁴ and his past Navy service, while commendable, is not sufficient to mitigate the sanction for his conduct on April 11, 2019. On that day, respondent was not forthcoming or honest with the proctor about having the iPad on his person and disregarded the multiple warnings in the testing center about the prohibition of such devices. Moreover, respondent's testimony about his conduct on April 11, 2019, and the reason for the use of the iPad conflicts with the testimony of the test administrator, test proctor, and the Cleveland FSDO supervisor. Respondent also offers the fact that he did not attempt to conceal the iPad as a mitigating factor.²⁰⁵ However, the law judge noted that, in his observation of the demonstration by respondent's counsel during the hearing of where the iPad was in respondent's pocket, the iPad was not in plain view when in the jacket pocket and took some effort to remove.²⁰⁶

Administrator, 916 F.3d 1107 (D.C. Cir. 2019); *Administrator v. DeCruz*, NTSB Order No. EA-5827 (2017).

²⁰² Appeal Br. at 16-18.

²⁰³ *Id.* at 16-18.

²⁰⁴ See FAA Order No. 2150.3C, Chapter 9, ¶ 6.g.(2). Also see, e.g., *Administrator v. Jones*, NTSB Order No. EA-5647, at 22 (2013).

²⁰⁵ Appeal Br. at 18.

²⁰⁶ See Oral Initial Decision at 133.

Finally, respondent contends that the “aberrant” circumstances regarding his mother’s health, which affected his “mental state” during the test, are a mitigating factor.²⁰⁷ As we discussed above, the copy of the browser history is not reliable evidence, and respondent failed to offer any proof, such as medical treatment notes, imaging, or letters from his mother’s doctors, in support of his contention that he used the iPad solely out of concern for his mother’s medical issue. Furthermore, the witness testimony showed that respondent did not offer his mother’s medical condition as the reason for his use of the iPad until he spoke with Ms. Nicholson in the afternoon on April 11, 2019.²⁰⁸ The witness testimony showed that respondent initially told witnesses that he was bored and either e-mailed, texted, used Facebook, or “surfed” social media.²⁰⁹ Thus, respondent offered no mitigating factors to deviate from the Administrator’s chosen sanction of revocation.

In addition, the Board precedent is clear that violations of § 61.37(a)(6) warrant a sanction of revocation to protect safety in air commerce or air transportation.²¹⁰ We previously noted “the obvious and severe dangers which would result, should the cheating have gone undetected, from the acquisition and utilization of a rating by a pilot who does not possess the requisite knowledge as measured by the written examination” and concluded that “the sanction

²⁰⁷ Appeal Br. at 16-17.

²⁰⁸ See Tr. at 49.

²⁰⁹ See *id.* at 30, 42, 54.

²¹⁰ See, e.g. *Administrator v. Thompson*, NTSB Order No. EA-3854, 1993 NTSB LEXIS 67 (1993) (affirming revocation for a respondent who brought a “small cheat sheet with some answers on it” to the testing room); *Administrator v. Beaudoin*, Order EA-3515, 1992 NTSB LEXIS 333 (1992) (affirming revocation for a respondent who brought a “cheat sheet” into the testing room); *Mignano*, NTSB Order No. EA-3435 (noting that revocation was warranted for cheating on an FAA test, because nothing in respondent’s explanation of the incident or the brief contained mitigating circumstances); *Administrator v. Singer*, NTSB Order No. EA-4704 (1998), *aff’d sub nom.*, *Singer v. Garvey*, 208 F.3d 555 (6th Cir. 2000) (affirming revocation for a respondent who was seen sliding papers with aviation formulas into his pocket during the test).

must be severe in order to deter respondent and other pilots similarly situated from committing like improprieties in the future.”²¹¹ Later, we again emphasized that “the contempt for the integrity of the written examination process reveals a lack of the care, judgment, and responsibility required for a certificate holder.”²¹²

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent’s appeal is denied;
2. The law judge’s oral initial decision is affirmed; and
3. The Administrator’s revocation of the commercial pilot certificate held by respondent is affirmed.

HOMENDY, Chair; LANDSBERG, Vice Chairman; GRAHAM

and CHAPMAN, Members of the Board, concurred in the above opinion and order.

²¹¹ *Administrator v. Slattery*, NTSB Order No. EA-1310, 3 NTSB 1935, 1938 (1979), *citing Administrator v. Hussain and Malvija*, 2 NTSB 1798 (1975).

²¹² *Mignano*, NTSB Order No. EA-3435.

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

* * * * *

In the matter of: *

STEPHEN M. DICKSON, *
ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. *

Docket No.: SE-30710
JUDGE WOODY

PATRICK J. HIPPLE, *

Respondent. *

* * * * *

Celebrezze Federal Building
U.S. Tax Court, Courtroom 3013
1240 East 9th Street
Cleveland, OH

Wednesday,
November 20, 2019

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

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

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I N D E X

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(None.)		

P R O C E E D I N G S

(9:03 a.m.)

JUDGE WOODY: All right, good morning.

MR. BRINGEWATT: Good morning.

MR. LAMONACA: Good morning, Judge.

JUDGE WOODY: This is the second day of our proceeding in the matter of the Administrator versus Hipple. We're here this morning so that I can issue my Oral Initial Decision in this matter.

ORAL INITIAL DECISION AND ORDER

JUDGE WOODY: This has been a proceeding under the provisions of 49 United States Code Section 44709, and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. This matter has been heard before me, and as provided by the Board's rules, I've elected to issue an Oral Initial Decision in this matter.

Pursuant to notice, the matter came on for hearing on November 19th and 20th, 2019 in Cleveland, Ohio. The Administrator was represented by Attorney Jonathan Bringewatt of the FAA Enforcement Division, Midwest Team. Respondent was present throughout the proceedings and represented by Attorney Joseph Lamonaca.

The parties were afforded a full opportunity to offer evidence, to call, examine, and cross-examine witnesses, and to make arguments in support of their respective positions. I will

1 not discuss all the evidence in detail. I have, however,
2 considered all the evidence, both oral and documentary. That
3 which I do not specifically mention is viewed by me as being
4 corroborative or as not materially affecting the outcome of this
5 decision.

6 Respondent Patrick Hipple has appealed the Administrator's
7 Emergency Order of Revocation, dated August 23, 2019. Pursuant to
8 the Board's rules, the Administrator filed a copy of that order as
9 the initial complaint in this matter on September 4, 2019. The
10 complaint was subsequently amended on November 7, 2019.

11 Respondent waived his right to an expedited hearing in this
12 matter.

13 The Administrator ordered the emergency revocation of
14 Respondent's commercial pilot's certificate based on Respondent's
15 alleged violation of Section 61.37(a)(6) of the Federal Aviation
16 Regulations, which are codified at Title 14, Code of Federal
17 Regulations. More specifically, the Administrator's amended
18 complaint alleges that on April 11, 2019, while taking an airline
19 transport pilot, or ATP, knowledge test, Respondent used material
20 or aid without being authorized by the Administrator to do so, in
21 violation of 14 CFR Section 61.37(a)(6).

22 In his answer to the Administrator's amended complaint,
23 Respondent admitted Paragraphs 1 and 2. As Respondent has
24 admitted those allegations, they are deemed as established for
25 purposes of this decision. Respondent denied or indicated he was

1 unable to answer the remaining two paragraphs of the complaint.

2 The Administrator's Exhibit A-1 was admitted into evidence.
3 Respondent's Exhibits R-1 through R-3 were admitted into evidence.

4 The Administrator presented the testimony of Robert Snezek,
5 Triston Snezek and Sarah J. Nicholson. Mr. Robert Snezek
6 testified that he is the owner of Zone Aviation, a flight school
7 and FAA testing center. He said Zone Aviation has been
8 administering pilot knowledge tests for about 8 years.

9 He is familiar with Respondent and said he trained at Zone
10 Aviation during his transition from military to civilian flying.
11 He confirmed that Respondent had taken the airline transport pilot
12 knowledge test at Zone Aviation on April 11, 2019, for which 3
13 hours are allotted to complete the test.

14 He explained that prior to taking the test, each applicant is
15 provided with written materials, as well as given a briefing, in
16 which they are advised that they are not permitted to take outside
17 materials into the testing center, to include personal paper and
18 pencils or electronic devices. Individuals are required to sign
19 an acknowledgment indicating they've read and understood the
20 restrictions. He said all applicants are also told to read the
21 signs on the wall, as illustrated in Exhibit A-1, which reiterate
22 the restrictions.

23 He stated he was not aware Respondent was taking the iPad
24 mini into the testing room, and he would not have allowed that.
25 He explained that he was not the proctor for the test on April 11,

1 that his son, Triston, was proctoring the test. He said he got a
2 call from Triston, who asked about how to deal with possible
3 cheating and advised him that Respondent was acting suspiciously.

4 Mr. Snezek said he then accessed the testing center video
5 surveillance system and observed Respondent acting like he was
6 hiding something, but he was not able to see at that time that he
7 had an iPad. He said he asked Triston to enter the room while he
8 observed, and when Triston entered, Respondent then hovered over
9 his desk like he was covering something. Mr. Snezek said he
10 proceeded to the testing center and entered the room with Triston.
11 He noted that when they entered, Respondent again appeared to be
12 trying to cover something up.

13 He indicated he went over to Respondent and that is when he
14 first saw the iPad. He testified that he terminated the test and
15 gathered the testing materials and the iPad. He then notified the
16 testing administrator and the FAA. He said he told Respondent he
17 was disappointed in him. He said Respondent tried to explain that
18 he wasn't using the iPad for anything related to the test, and
19 said he was bored, so he was using the iPad for texting or face-
20 timing. Mr. Snezek indicated he did not remember Respondent
21 saying that his mom was ill, and he was using the iPad for that
22 purpose, but he could not be sure that he did not say that.

23 On cross-examination Mr. Snezek said Respondent was an
24 acquaintance who had trained at Zone Aviation, so he knew him, but
25 he was not a good friend. He stated he had no prior problems with

1 Respondent. He confirmed that applicants are permitted to have an
2 FAA E6B device in the testing room, but offered that the iPad is
3 not authorized by the FAA for that purpose. He agreed he was not
4 at the testing facility initially, and that he was not able to see
5 what was on the iPad or what Respondent was viewing.

6 He explained that the camera only showed Respondent from
7 behind, so he could not initially see the iPad in front of him.
8 He offered that Respondent's mannerisms were suspicious in his
9 opinions, and he was not utilizing his pencil or the reference
10 materials supplied.

11 Mr. Snezek stated that he could not say what was on the iPad
12 because Respondent had closed the screen before he was able to see
13 it. He offered that he believed anyone using an iPad during
14 testing was cheating.

15 Next, Mr. Triston Snezek testified that he is the office
16 manager for Zone Aviation and was the testing proctor for
17 Respondent's ATP knowledge test on April 11, 2019. He explained
18 the testing process, noting that he verified personal
19 identification and provided a briefing, which included advising
20 that no personal electronic devices were allowed in the test
21 center. He said the same information was on the written materials
22 provided to Respondent prior to testing, which Respondent reviewed
23 and signed, acknowledging the restrictions.

24 He said Respondent asked him no questions and he had no
25 apparent uncertainty about the information provided. He stated he

1 was not aware Respondent had an iPad and would not have allowed it
2 in the testing room, if he was aware of it. He said he became
3 suspicious Respondent might be cheating after he observed that he
4 never touched the reference books provided or his pencil, and
5 after he observed Respondent repeatedly looking down into his lap
6 and then back up to the computer, where he would then use the
7 mouse to access the computer test.

8 He explained that he called his father, who viewed the video
9 surveillance and agreed he was acting suspiciously. He said his
10 father asked him to enter the room and act like he was retrieving
11 a file, and when he did, Respondent reacted like he was trying to
12 cover something up.

13 He noted his father came to the center and both entered the
14 testing room, where they then saw the iPad. He recalled his dad
15 asking what Respondent was doing, and he immediately shut down the
16 test and gathered the testing materials and iPad. He said
17 Respondent stated he was on Facebook and was not working on the
18 test.

19 On cross-examination Mr. Snezek explained that Respondent was
20 reaching into his lap, where the iPad was, and that he was looking
21 down and then back up to the computer test. He denied that
22 Respondent ever offered to surrender the iPad, but did confirm
23 that the iPad was gathered and was given back to Respondent after
24 the test was terminated.

25 He said he knew Respondent from training that he had done at

1 Zone Aviation, and he was not aware of any veracity or credibility
2 issues with him. He confirmed that an electronic E6B device is
3 permitted in the testing room during the test, but stated it must
4 be a separate device and cannot be on an iPad.

5 Next, Ms. Sarah Nicholson testified that she is the
6 operations front-line manager for the FAA's Cleveland's Flight
7 Standard District Office, or FSDO. She noted she's been employed
8 by the FAA for 17 years as a principal operations inspector, and
9 then supervisor, and prior to that worked as a chief flight
10 instructor for a Part 141 flight school.

11 She noted that she received a phone call from Bob Snezek
12 about Respondent's suspected cheating on his ATP knowledge test.
13 She said Mr. Snezek had already contacted the test administrator
14 before he called her. She initiated an investigation. She
15 confirmed that she received a call from Respondent that same
16 afternoon. She noted when she spoke with him, he said he had a
17 family medical situation and had been using the iPad mini to look
18 at information related to that, and that he was face-timing or
19 texting. She said that she referred Respondent to the regulation
20 that addresses use of unauthorized material during the testing
21 period.

22 Ms. Nicholson testified that she is familiar with FAA
23 sanction guidance which calls for certificate revocation for
24 cheating on a knowledge test. She also discussed the fact that
25 Respondent was testing for an ATP certificate, and how an ATP is

1 held to the highest standards for good moral character, as well as
2 truthfulness and judgment.

3 On cross-examination Ms. Nicholson agreed that she was not at
4 the testing center and had no firsthand knowledge of what had
5 taken place. She noted that she had viewed portions of the
6 surveillance video, which she believed demonstrated abnormal
7 behavior. She explained that he did not use any of the testing
8 materials provided and that Respondent kept looking down into his
9 lap, and then up and clicking on the computer test.

10 She agreed she did not know specifically what he used the
11 iPad for. She knew only what Respondent had said. She said
12 Respondent did not elaborate to her on what his family situation
13 was. She confirmed that an E6B is permitted in the testing room,
14 but stated that the test center would have to view it and
15 specifically authorize it. She said the test center order should
16 spell that out.

17 Ms. Nicholson stated that when Respondent contacted her
18 office initially, she informed him that an investigation would be
19 initiated, but she did not read him any Pilot's Bill of Rights at
20 that time. She noted that he also called the office earlier in
21 the day and spoke to an administrative staff member, Mark Spencer.
22 She said Respondent told Mr. Spencer that he had gotten bored
23 while taking the knowledge test and that's why he was surfing
24 social media.

25 Respondent Patrick Hipple testified in his own behalf. He

1 testified that he is 30 years old, single, and resides with his
2 mother, who has a number of physical and mental health issues. He
3 explained that he attended Holy Cross College, where he
4 participated in ROTC and graduated summa cum laude, and then was
5 selected for flight training in the U.S. Navy.

6 He noted he trained initially in fixed wing aircraft, and
7 then transitioned to rotary aircraft. He was a Seahawk helicopter
8 pilot in the Navy, where he noted he had no disciplinary problems
9 or issues during his time of service.

10 He had identified Exhibit R-1 as his DD 214, documenting his
11 honorable discharge as a lieutenant from the Navy in March 2016 on
12 a temporary disability retirement. He explained that he was
13 granted that temporary disability retirement after speaking with
14 his commanding officer and chaplain about his mother's medical
15 condition and the stress on him due to those issues. He explained
16 that he was released from his commitment early, remained in that
17 temporary status until his contract period expired, and now has no
18 further commitment or status with the Navy.

19 He said he made the decision to leave early because he was in
20 the best position to care for his mother and felt that he had to
21 balance his family commitments against his Navy career. He
22 explained that he had taken the FAA equivalency test at the same
23 time that he got his wings with the Navy, and had received his
24 commercial pilot certificate with instrument rating for both fixed
25 wing and rotary aircraft.

1 He noted that test had taken about 20 minutes and he had
2 taken no other FAA test prior to the ATP knowledge test, which he
3 took on April 11, 2019. He indicated that he was away from
4 aviation for about a year after separating from the Navy. He then
5 began flying for an air ambulance company, where he said he
6 accumulated approximately 300 hours.

7 He said he stepped away from that position when he received
8 this Emergency Order of Revocation. He noted that he also secured
9 a job offer with a DoD contractor flying ISR flights, which
10 requires a top secret security clearance, which he said he was
11 granted on November 1, 2019. He indicated he had disclosed this
12 enforcement matter to the security clearance investigators but
13 still received the clearance. He said he did not need an ATP
14 certificate for either the air ambulance or the contractor flying
15 position.

16 Respondent noted that he is the primary caretaker for his
17 mother, who is 66 years old, and has suffered from bipolar
18 depression and anxiety for many years. He identified Exhibit R-3
19 as a summary of her medical care and medications as of June 18,
20 2019. Respondent stated that on April 9th or 10th of 2019 his
21 mother had CT scans at the Cleveland Clinic, which she told him on
22 April 11th were positive for breast and urinary cancer, which
23 later turned out not to be the case. He said he told her he was
24 going to take the ATP exam and then would address setting up
25 follow-up MRI studies.

1 He said he took his iPad to the exam with him, and that he
2 had always been able to use it before in the Navy as an E6B
3 device. He said he did not think it wasn't allowed, that he had
4 it in the front pocket of his jacket and did not try to conceal
5 it. He confirmed that he spoke with Triston Snezek before the
6 test and that he signed something before going into the testing
7 room.

8 He said the reference books were on the left side of the
9 table, and that he did not need or use the reference materials or
10 pencil at that point in the test. He testified that about 5 or 6
11 minutes into the test, he took out the iPad mini and began using
12 it. He said he logged onto the Cleveland Clinic site to check
13 test results. He identified Exhibit R-2 as the browser search
14 history from his iPad for April 10th through 12th, 2019. He said
15 the search history shown for April 11th is what he searched during
16 the test. He explained that even though he thought he could
17 compartmentalize and take the test first, he shifted during the
18 test to thinking more about his mom and dealing with her issues.

19 He said at that point he had no thought of terminating the
20 test, and he was not sure what would happen if he terminated then.
21 He said he believed he could do both, and that he never used the
22 iPad to aid him with the exam.

23 He indicated he did not use the iPad other than as an E6B
24 related to the test. He said Bob and Triston approached him and
25 Bob told him he could not have the iPad during the test, and

1 terminated the exam. He indicated he told Bob he wanted to speak
2 with the FAA and that he reached out to the FAA later that day
3 after he had left the test center.

4 Respondent said his conversation with Ms. Nicholson was very
5 brief, and that he never denied having the iPad. He said she
6 referred him to the regulation and he decided at that point to
7 contact an attorney.

8 He said prior to April 11, 2019, his credibility, veracity
9 and character had never been questioned and that it hurt that his
10 integrity had been questioned. He said he considered the iPad an
11 electronic E6B, and that he had been able to use it in the Navy.

12 Respondent agreed there were signs posted on the wall
13 addressing restrictions on use of electronic materials, but said
14 none of the signs specifically said you cannot have an iPad.

15 On cross-examination Respondent again stated that he did not
16 believe the signs prohibited an iPad; however, after reviewing
17 Exhibit A-1, page 6, he conceded that the sign prohibits any type
18 of device with text or video recording capability in the testing
19 room, which he agreed would include an iPad.

20 Respondent reviewed his mother's medical summary at Exhibit
21 R-3, which he agreed did not reference any office visits prior to
22 June 18, 2019, and said nothing about any April visits or
23 diagnoses.

24 After reviewing Exhibit R-2, Respondent conceded there was no
25 way based solely on the screenshots to tell the search history was

1 from his iPad. He also agreed that the exhibit showed only the
2 Safari browser history, but did not establish if other browsers or
3 other applications had been used. He denied using anything other
4 than Safari during the test, and denied that he was familiar with
5 use of other browsers on an iPad or being able to manipulate
6 personal settings on the device.

7 He stated that even though he decided to prioritize his
8 mother's health, he did not think to stop the test to do so, or to
9 try to focus on finishing the test first and then dealing with her
10 issues. He offered that he had 3 hours to finish the test, that
11 he thought he could do both, and that he saw no reason to rush to
12 finish the test.

13 On redirect Respondent admitted that in hindsight he would
14 have done things differently, but at the time he thought he could
15 deal with both situations. He reiterated that Exhibit R-2 showed
16 what he was searching during the test, and that he used no other
17 browser and searched nothing else during the test.

18 On questions from me, Respondent said that even though he was
19 briefed before the test and signed the acknowledgment, he did not
20 show the iPad to Triston Snezek or ask specifically about using it
21 during the test. He offered that he asked if he was allowed to
22 use an E6B, and he was told yes. He suggested that the iPad had
23 to be visible, sticking out of the pocket of his jacket,
24 referencing his counsel's demonstration of the jacket and the iPad
25 mini in opening statements.

1 Having summarized the testimony and evidence presented, I'll
2 now discuss that evidence as it pertains to the allegations in the
3 amended complaint.

4 As I noted previously, Respondent admitted Paragraphs 1 and 2
5 of the amended complaint, so those are establishes for purposes of
6 my decision. Based on those admissions, as well as the testimony
7 of Robert and Triston Snezek, there's no question that Respondent,
8 then the holder of a commercial pilot's certificate, reported to
9 Zone Aviation on April 11, 2019, to take an FAA ATP knowledge
10 test.

11 The evidence also clearly establishes that Respondent had
12 material, in the form of a personal iPad mini, that he took into
13 the testing room and used during the course of the period of
14 testing without the specific authorization of the Administrator.
15 Both Triston and Robert Snezek testified that Respondent was not
16 authorized to take the iPad into the testing room and had they
17 known or been informed by him that he had the iPad, they would not
18 have permitted him to take it in during the test.

19 Although Respondent suggested that he believed the iPad could
20 be used as an E6B, he also conceded he did not seek and was not
21 given authorization to use the iPad during the test.

22 Ms. Nicholson further confirmed the Snezeks' testimony, that
23 specific authorization was required before any electronic E6B
24 device could be used during testing.

25 Thus, the critical issue to be determined here is whether

1 Respondent's use of the iPad mini during the period of testing
2 without specific authorization by the Administrator was a
3 prohibited use within the meaning of the regulation.

4 Respondent has argued, citing the case of *Administrator vs.*
5 *Singer*, which is an NTSB Order EA-4704, 1998 case, that mere
6 possession of unauthorized materials is not sufficient to
7 establish improper use. He argues that he did not attempt to
8 conceal the iPad, that he believed he could use the iPad as an E6B
9 device, and that he did not attempt to use the iPad to aid him in
10 completing the test, and thus, that his possession and use of the
11 unauthorized iPad during the testing period did not constitute an
12 improper use under the regulation.

13 With respect to whether Respondent attempted to conceal the
14 iPad, his testimony is at odds with that of Robert and Triston
15 Snezek and Sarah Nicholson as to their observations of his
16 behavior before and during the testing. Respondent suggested that
17 the iPad mini was in plain site and that it had to be noticeable
18 in his jacket pocket, as demonstrated by his counsel during
19 opening statements.

20 However, my observation of that demonstration was that the
21 iPad was not in plain view when in the jacket pocket, and in fact
22 took some effort to remove. More importantly, Triston Snezek
23 testified that he did not see and was not aware of the iPad mini
24 prior to Respondent entering the testing room. I found his
25 testimony on this issue to be very credible, particularly since he

1 has absolutely no motivation to fabricate such information, and
2 given his and others' testimony about their observation of
3 Respondent, while in the testing room.

4 Triston and Robert Snezek, as well as Ms. Nicholson,
5 described his actions and movements as suspicious in nature. All
6 consistently described how Respondent did not access provided
7 reference materials or pencils, and how he was looking down in his
8 lap and then immediately back up to the computer test screen.

9 Both Robert and Triston Snezek also described his reaction
10 when Triston entered the testing room, and again, when they both
11 entered, appearing to try to hide the iPad. Although Respondent
12 described the iPad as being in plain view, that testimony is
13 inconsistent with the testimony of the other three witnesses.

14 Respondent's actions as described by the Snezeks and
15 Ms. Nicholson are not consistent with someone who believed he was
16 authorized to have the iPad in the testing room. Rather, they are
17 far more consistent with someone who was utilizing the device for
18 an improper purpose.

19 Although he suggested in his testimony that he believed the
20 iPad could be used as an electronic E6B device, that testimony is
21 inconsistent with substantial evidence to the contrary. Both
22 Triston and Robert Snezek were very consistent in their
23 explanation of the briefings applicants are provided about
24 materials prohibited in the testing room.

25 Respondent was also provided written materials to review and

1 signed, acknowledging his receipt of information regarding
2 prohibited items. Those restrictions were again front and center
3 in the form of signs hanging on the testing room walls, and
4 specifically emphasized to the testing applicants. Respondent did
5 not deny the witnesses' testimony about the briefings provided,
6 although he tried to minimize the significance of those briefings
7 by testifying simply that he spoke to Triston and he signed
8 something before taking the test.

9 He also conceded that the signs were on the wall, although
10 again attempting to minimize by suggesting that iPads were not
11 specifically prohibited, but eventually admitting that the
12 prohibition contained in the sign at Exhibit A-1, Page 6, did in
13 fact apply to the iPad.

14 I do not find believable his testimony that he thought the
15 iPad was authorized as an E6B device despite those extensive
16 briefings and other information to the contrary.

17 Respondent's testimony that he asked Triston Snezek about
18 whether he could have an E6B device in the testing room and was
19 told yes is contrary to Triston Snezek's more credible testimony
20 that Respondent asked no questions after being briefed on the
21 prohibitions against unauthorized materials. It is also
22 inconsistent with Robert and Triston Snezek's testimony regarding
23 the need to get specific authorization for any electronic E6B
24 device.

25 Nor do I find it plausible that Respondent would not inquire

1 specifically regarding his use of an iPad, for whatever purpose,
2 after having been briefed extensively on restrictions on bringing
3 materials into the testing room.

4 Perhaps most critically, if in fact Respondent had been told
5 by Triston Snezek that he was permitted to have an E6B device in
6 the testing room, and Respondent understood the iPad was
7 authorized for that purpose, I find it highly unlikely that
8 Respondent would fail to raise that specific issue when confronted
9 by Robert Snezek about its use during the test, yet he did not
10 mention it then or when discussing the matter with Ms. Nicholson.

11 Respondent has also provided varying explanations regarding
12 his use of the iPad, initially offering to the Snezeks that he was
13 bored during the examination and therefore was accessing Facebook
14 or social media, an explanation he repeated to Mr. Spencer in his
15 initial call to the FSDO. Later he suggested to Ms. Nicholson
16 that he was using the iPad to research information related to a
17 family medical situation.

18 He offered Exhibit R-2, screenshots of a search history
19 purportedly from his iPad on April 11, 2019, in support of his
20 position that he was researching his mother's medical situation
21 during the test and was not using the iPad for any nefarious
22 purpose or to aid in any way with his testing. However, there is
23 simply no way, based solely upon the limited information in
24 Exhibit R-2, to know if this search history was in fact from
25 Respondent's iPad; if it represents a complete search history from

1 April 11, 2019; during what time frame on April 11th that listed
2 searches may have been completed; if the search history or
3 settings on the device may have been modified or manipulated in
4 some fashion; if other searches may have been done using another
5 browser, or if other applications may have been utilized in that
6 same time period on the iPad. As a result, I don't find Exhibit
7 R-2 to be terribly reliable or persuasive.

8 I find far more credible and compelling the testimony of the
9 Administrator's witnesses regarding Respondent carrying the iPad
10 mini into the testing room concealed in the pocket of his jacket,
11 despite being extensively briefed and informed about prohibitions
12 on bringing unauthorized materials into the testing room, as well
13 as their observations of his suspicious activities and not
14 utilizing the reference materials or writing instruments provided,
15 having the iPad in his lap, attempting to hide the iPad when the
16 proctors entered the room, and repeatedly glancing down at the
17 iPad and then immediately up to access the computer test.

18 As noted above, I find Respondent's testimony, which is in
19 conflict with the consistent and credible testimony of the
20 Administrator's witnesses, to be less than fully credible.

21 Based on the foregoing, I find that a preponderance of
22 reliable probative and credible evidence supports the conclusion
23 that Respondent attempted to use the unauthorized iPad to aid him
24 in completing the test and, thus, his possession and use of the
25 unauthorized material during the period of the test constituted an

1 improper use under the regulation.

2 Accordingly, I find that the Administrator has established
3 all of the allegations in the amended complaint by a preponderance
4 of reliable, probative and credible evidence, and that
5 Respondent's conduct constitutes an unauthorized use of material
6 or aid during the period that a knowledge test was being given, in
7 violation of 14 CFR Section 67.37(a)(6).

8 Having so found, it is not necessary for me to make a
9 specific finding regarding the Administrator's argument that the
10 regulation doesn't require a showing that the unauthorized
11 material was used to cheat on the test in order to establish a
12 violation of Section 61.37(a)(6). However, I do note that I find
13 the Administrator's argument in this regard somewhat compelling.
14 As pointed out by the Administrator, he has no authority to seize
15 an iPad or other unauthorized device, or the ability to conduct a
16 forensic analysis of the device to determine precisely what may
17 have been utilized during the testing period.

18 In the *Singer* case, addressing whether Respondent had used
19 the cheat sheet he admitted possessing and was observed handling,
20 but which he argued he had not improperly used to his advantage
21 during the test, the Board noted, "We think the unauthorized
22 material was effectively used when Respondent, by having the notes
23 in his hand outside of his pocket, engaged in conduct that created
24 the potential for improper reliance on them."

25 Similarly here, Respondent possessed and was utilizing an

1 unauthorized iPad during the testing period, with the ability to
2 improperly access resources to aid him in the testing process,
3 engaging in conduct that created at least the potential for
4 improper utilization of such information. Under the
5 circumstances, that potential in and of itself may well be enough
6 to establish a violation of the regulation.

7 Having found that the Administrator has proven all the
8 allegations in the amended complaint by a preponderance of
9 reliable, probative and credible evidence, I now turn to the
10 sanction imposed by the Administrator in this case.

11 On August 3, 2012, Public Law 112-153, known as the Pilot's
12 Bill of Rights, was signed into law by the President and became
13 effective immediately. The Pilot's Bill of Rights strikes from 49
14 United States Code Section 44709 and 44710, language that in cases
15 involving amendments, modifications, suspensions or revocation of
16 airman certificates, the Board is bound by all validly adopted
17 interpretations of laws and regulations the Administrator carries
18 out and of written Agency policy guidance available to the public
19 related to sanctions to be imposed under this section unless the
20 Board finds an interpretation is arbitrary, capricious, or
21 otherwise not according to law.

22 While I'm no longer bound to give deference to the FAA by
23 statute, that agency is entitled to judicial deference due all
24 federal administrative agencies under the Supreme Court decision
25 of *Martin vs. Occupational Safety and Health Review Commission*,

1 which is at 499 U.S. 144, 111, S. Ct. 1171.

2 In applying the principles of judicial deference to the
3 interpretations of laws, regulations and policies the
4 Administrator carries out, I must analyze and weigh the facts and
5 circumstances in each case to determine if the sanction selected
6 by the Administrator is appropriate.

7 Here the Administrator has argued, citing FAA sanction
8 guidance and judicial deference, that revocation is the
9 appropriate sanction in cases such as this where cheating on a
10 knowledge test has been established. The Administrator further
11 argued, deference aside, that Board precedent establishes that an
12 individual who compromises the integrity of the written
13 examination process has demonstrated that he lacks the
14 qualifications in the form of the degree of care, judgment and
15 responsibility required of the holder of an airman certificate.

16 Respondent argued that he did not use the unauthorized iPad
17 to aid him in taking the examination, and thus no violation of
18 Section 61.37(a)(6) occurred, thereby warranting dismissal of the
19 amended complaint. In the alternative he suggested that were I to
20 find a violation of the regulation, that a lesser sanction would
21 be appropriate, because there's no evidence that he used the iPad
22 to cheat on the exam.

23 The Board has consistently affirmed revocation as the
24 appropriate sanction in cases involving cheating or unauthorized
25 conduct on a knowledge test, noting that an individual who

1 compromises the integrity of the written examination process has
2 demonstrated that he lacks the degree of care, judgment and
3 responsibility required of a holder of an airman certificate.

4 The *Singer* case cited by Respondent is one such case where
5 the Board upheld revocation as the appropriate sanction.

6 Thus, consistent with the facts and circumstances of this
7 case, with Board precedent, and with appropriate judicial
8 deference afforded the Administrator, I find that the sanction
9 sought by the Administrator is appropriate and warranted in the
10 public interest in air commerce and air safety. Therefore, I find
11 the Emergency Order of Revocation, the amended complaint here,
12 must be, and shall be, affirmed as issued.

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ORDER

IT IS HEREBY ORDERED that the Emergency Order of Revocation, the amended complaint herein, is hereby affirmed as issued, that Respondent's commercial pilot's certificate is hereby revoked.

Entered this 20th day of November 2019, at Cleveland, Ohio.

STEPHEN R. WOODY

Administrative Law Judge

APPEAL

1
2 JUDGE WOODY: That concludes my Oral Initial Decision in this
3 matter.

4 Mr. Hipple, I need to advise you of your appeal rights.

5 Mr. Lamonaca, I've got written appeal rights advisement. If
6 you would approach, I'll provide you with a copy.

7 Do you need a copy, Mr. Bringewatt?

8 MR. BRINGEWATT: No, Your Honor.

9 JUDGE WOODY: All right. I'll give you two copies. You can
10 hand one to your client, if you'd like.

11 Mr. Lamonaca, I assume you'll advise your client?

12 MR. LAMONACA: I will advise him, Your Honor. Thank you.

13 JUDGE WOODY: So, Mr. Hipple, you do have the right to appeal
14 my decision if you so desire, as I'm sure Mr. Lamonaca will
15 explain to you in very specific detail. The one thing I would
16 just emphasize to you, as I do with anyone in your position, is
17 that you need to be very mindful of the filing deadlines that are
18 outlined in the written appeal rights advisement I just provided
19 to you. I know your counsel is very familiar with those and can
20 explain that to you further, but just keep in mind that if your
21 appeal is not filed in a timely manner, the Board is typically not
22 receptive to late-filed appeals. So that's something to keep in
23 mind.

24 Are there any matters of an administrative nature that we
25 should discuss from either side before we terminate the

1 proceedings here?

2 MR. BRINGEWATT: Nothing from the Administrator, Your Honor.

3 MR. LAMONACA: Your Honor, just let me -- and I do this as a
4 matter of record, but since this wasn't an emergency filing, but
5 we waived the emergency, it's our understanding that we are
6 operating under non-emergency procedures as it relates to the
7 appeal?

8 JUDGE WOODY: That's correct.

9 MR. LAMONACA: Thank you, Your Honor.

10 JUDGE WOODY: In terms of the filing deadlines for the appeal
11 rights.

12 MR. LAMONACA: Thank you, Your Honor.

13 JUDGE WOODY: Yes, that's true.

14 Well, thank you both for your time and professionalism with
15 respect to the hearing.

16 Mr. Hipple, I wish you good luck going forward, sir. And at
17 this point we will terminate the proceeding.

18 Off the record.

19 (Whereupon, at 9:42 a.m., the hearing in the above-entitled
20 matter was adjourned.)

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CERTIFICATE

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

IN THE MATTER OF: Patrick Hipple
DOCKET NUMBER: SE-30710
PLACE: Cleveland, Ohio
DATE: November 20, 2019

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.



Craig Smetanka
Official Reporter