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# The National Transportation Safety Board Bar Association

## Spring 2010 Newsletter

### Recent Developments in FAA Enforcement... by John S. Yodice

This column is intended as an aid to practitioners, including panel attorneys of the AOPA Legal Services Plan, to keep abreast of recent developments in the law and procedures governing FAA enforcement actions. Your comments and suggestions are welcome.

#### **AVIATION SAFETY REPORTING PROGRAM.**

#### **Respondent Must Establish Both “Inadvertent” And “Not Deliberate.”**

The Aviation Safety Reporting Program, as spelled out in FAA Advisory Circular 00-46D, provides for a waiver of sanction in an FAA enforcement case so long as certain requirements are met and certain exceptions do not apply. As a reminder to practitioners, the most important requirement is that a written report must be mailed or delivered (including via the Internet) to NASA within 10 days of the incident that led to the enforcement. However, as relevant in the case we are here reporting, the program also provides that a sanction will be waived only if “the violation was inadvertent and not deliberate.” Over the years, the FAA and NTSB have been reasonable in the interpretation of this language. In recent time, they

have considerably narrowed the interpretation to the detriment of pilots and others.

In this case the respondent’s commercial pilot certificate was suspended for 30 days for operating his aircraft from Martin State Airport, a “fringe airport” within the Washington ADIZ, without complying with the operating requirements and procedures specified in the relevant NOTAM. Respondent contended that he was unable to transmit the appropriate beacon code while in the ADIZ, as required by the NOTAM, because his transponder malfunctioned. The respondent explained that prior to his departure from Martin State he had had the transponder repaired and reinstalled, that while on the ground the numbers on the aircraft’s transponder showed that it was squawking the appropriate code, and that despite his request, the control tower was unable to verify that the appropriate code was being received. After takeoff, air traffic control was receiving the wrong code. According to the respondent, it was only after rebooting, the transponder began transmitting the appropriate code. An NTSB law judge and the full Board on appeal, rejected this defense, affirming the FAA order of suspension.

To the point involved in this

write-up of the case, the respondent’s timely filing of a report under the ASRP was denied. The Board held that in order to be entitled to a waiver “a respondent must establish that his conduct was both inadvertent and not deliberate.” The Board found that while respondent’s actions do not appear to have been deliberate, it could not find that his conduct was inadvertent. Quoting from *Ferguson v. NTSB and FAA*, 678 F.2d 821 (9<sup>th</sup> Cir. 1982), the Board recited an example distinguishing “inadvertent” from “not deliberate”

“A person who turns suddenly and spills a cup of coffee has acted inadvertently. On the other hand, a person who places a coffee cup precariously on the edge of a table has engaged in purposeful behavior. Even though the person may not deliberately intend the coffee to spill, the conduct is not inadvertent because it involves a purposeful choice between two acts—placing the cup on the edge of the table or balancing it so that it will not spill. Likewise, a pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to consult his instruments to verify his altitude.”

As is readily apparent, this is an infinitely flexible standard with which respondents' counsel must contend. This new case would seem to allow the FAA much broader discretion when they consider whether to grant ASRP immunity.

**Administrator v. Schwarzman, NTSB Order No. EA-5468 (2009). FAA REQUEST FOR PILOT REEXAMINATION. The FAA Has Significant Discretion In Determining Whether Such A Reexamination Is Warranted.**

Under 49 USC 44709(a), the FAA has broad power to reexamine a certificated airman's competency or qualifications to hold that certificate. By NTSB precedent, such a request must be "reasonable." However, pilot challenges of unreasonableness have been mostly unsuccessful, as in this case. The FAA had requested the reexamination of an ATP certificated airline pilot on the basis that the pilot had failed two pilot proficiency checks and a pilot line check, all administered by his airline, and one of which was observed by an FAA inspector. The pilot did not submit to a reexamination arguing that the request, based on disputed check rides, was unjustified. As is routine, the FAA then issued an emergency suspension of the pilot's ATP certificate with type ratings in the Boeing 747-400 and BA-3100 aircraft, pending a successful reexamination. The pilot appealed the suspension to the NTSB. He presented as an affirmative defense that the FAA had no reasonable basis to request

a reexamination. There was no clear evidence of incompetence. He testified that he had been on medical leave for two years, and when he returned to work, the airline was searching for a reason to fire him. He alleged that the company used a check captain that is known as a person at the airline who sabotages proficiency checks to orchestrate the removal of certain pilots. After a hearing before an administrative law judge of the NTSB, the judge concluded that based on the evidence presented, the FAA had a reasonable basis for requesting a reexamination. On further appeal to the full Board, the Board emphasized "that the [FAA] Administrator has significant discretion in determining whether such reexaminations are warranted." Citing to Administrator v. Sanchez, NTSB Order No. EA-5326 (2007), "the Board's inquiry into the reasonableness of a reexamination request is a narrow one." This case reinforces for practitioners that it takes a great deal to rule an FAA request "unreasonable." Administrator v. Bakhit, NTSB Order No. EA-5489 (2009).

**SUCCESSFUL REEXAMINATION DOES NOT PRECLUDE CERTIFICATE SUSPENSION.**

On this same subject of reexamination, a recent NTSB decision reaffirms that successfully completing a reexamination does not stop the FAA from pursuing a certificate suspension arising out of the same incident, though in our experience the FAA does not usually pursue both. Administrator

v. Hackshaw, NTSB Order No. EA-5501 (2010).

**THE NTSB WILL NOT REVIEW FAA'S INCONSISTENT ENFORCEMENT OF FAA GUIDANCE OR REGULATIONS, OR THE INEFFECTIVE ASSISTANCE OF COUNSEL.**

In the same Bakhit case, the Board rejected a challenge that the FAA letter requesting reexamination did not fulfill the criteria of the FAA's own guidance, published in FAA Order 2150.3B. The Order is distributed to FAA inspectors and lawyers providing in great detail how enforcement cases are to be investigated and prosecuted. What should be informative to lawyers defending such cases, is the Board's statement: "We have previously held that inconsistent enforcement of FAA guidance or regulations is not subject to our review." In the same vein, the Board refused to review the pilot's claim that his counsel ineffectively represented him at the hearing. "In general, we have previously declined to consider arguments concerning ineffective assistance of counsel."

**NTSB NOT FARING WELL IN FEDERAL COURT.**

Notwithstanding the NTSB's consistent record sustaining FAA enforcement actions against pilots, as indicated above and in the many earlier write-ups in this column, the NTSB has recently suffered a string of defeats in the Federal Courts of Appeal, each finding fault with the Board's decisions and remanding for further

proceedings. One case came out of the Ninth Circuit; four cases came out of the District of Columbia Circuit.

In the one case out of the Ninth Circuit, the Board decision was vacated and remanded to the NTSB because the Administrative Law Judge, improperly curtailed respondent's cross-examination of FAA's lone witness on the key issue in the case. Under these circumstances, the NTSB was held to have abused its discretion in affirming the judge's order. *Ferguson v. FAA*, United States Court of Appeals, Ninth Circuit, November 9, 2009.

In one of the cases in the DC Circuit, the Court agreed with a petitioner who accused the NTSB of "hypocrisy – saying one thing while doing another." The NTSB affirmed an FAA emergency order revoking a private pilot's license and medical certificate for falsifying medical applications that asked for, among many other items, non-traffic convictions. At a hearing before an NTSB law judge, the pilot explained that he did not disclose his bribery conviction because the FAA Aviation Medical Examiner administering the exams had informed him that the question was only concerned with drug- or alcohol-related offenses. The law judge found the pilot to be a forthright and credible witness with no intention to falsify the application, overturning the revocation. The FAA appealed the judge's reversal of its order to the full NTSB. The full Board, in turn, reversed the judge, sustaining the FAA revocations. The Court of Appeals, in its turn, reversed the full Board and remanded the case

back to NTSB. It did so on the ground that the Board departed, without reasoned explanation, from its precedents. The Board may not, without reasoned explanation, depart from its precedent that an airman's subjective understanding of the questions in the medical application is relevant to the offense of intentional falsification. *Dillmon v. NTSB*, the United States Court of Appeals for the District of Columbia Circuit, December 8, 2009. A second case in the DC Circuit was decided against the Board on the same grounds. *Singleton v. FAA*, the United States Court of Appeals for the District of Columbia Circuit, December 8, 2009. A few months earlier, the DC Circuit reversed the Board and remanded a case where the Board refused, on jurisdictional grounds, to allow a pilot's defense that he complied with an FAA voluntary disclosure program. *Moshea v. NTSB*, the United States Court of Appeals for the District of Columbia Circuit, June 30, 2009. And most recently, February 26, 2010, in *Pasternack v. NTSB*, the DC Circuit reversed the Board and remanded a pilot revocation case because the Board relied on a finding of fact that was not supported by substantial evidence. These recent cases in the Federal Courts of Appeal are an encouraging change to the long string of victories the FAA enjoys before the NTSB.