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NTSB Order No. EA-3912

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 8th day of June, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11760
v.)	
)	
GREGORY GEORGE BUSHELL,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent, pro se, has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing held on July 26, 1991.¹ The Administrator's order, which served as the complaint, charged respondent with violating sections 91.67(a) and (f), 91.87(a) and (h), and 91.9 of the Federal Aviation Regulations

¹An excerpt from the hearing transcript containing the initial decision is attached.

("FAR," 14 C.F.R. Part 91), and suspended his airline transport pilot (ATP) certificate for 30 days.² The law judge affirmed the order, in part, finding that respondent violated sections 91.87(a), (h), and 91.9. Consequently, he reduced the period of suspension to 15 days.³ Sanction was waived because respondent timely filed a report with the National Aeronautics and Space Administration (NASA) under the Aviation Safety Reporting Program (ASRP).

The facts, essentially undisputed, are as follows.

Respondent operated Martinaire 837, a Cessna 208, on a Part 135

²The pertinent parts of section 91.87 (now 91.129) state:

(a) General. Unless otherwise authorized or required by ATC, each person operating an aircraft to, from, or on an airport with an operating control tower shall comply with the applicable provisions of this section.

* * * *

(h) Clearances required. No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

Section 91.9 (now 91.13(a)) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.67 deals with aircraft right-of-way. The law judge dismissed the charges under this section.

³The Administrator filed a reply brief, but did not appeal the law judge's decision.

flight from Amarillo, Texas to Lubbock, Texas on the evening of December 29, 1989. Ground control (GC) at Amarillo issued him an instrument flight rules (IFR) departure clearance and then instructed him to taxi to Runway 22. This exchange occurred:

GC Martinaire eight thirty-seven
 readback correct. You ready to
 taxi?

MRA837 Affirmative sir.

GC Martinaire eight thirty-seven taxi
 to runway two two juliet's current.

MRA837 And have juliet?

GC Martinaire eight thirty-seven you
 gonna be ready right away? [⁴]

MRA837 Ah---yeah.

GC Bravo's available.

MRA837 Okay.

MRA837 I'm sorry. Which runway did you
 clear me for?

GC Runway two two.

(Exhibit C-2, at 2.)

Without further instruction or clearance, respondent taxied onto the runway and took off. The tower controller testified that he observed respondent, but could not establish radio contact with him. As a result, a Boeing 707 that had been cleared for a touch-and-go landing on Runway 22 was instructed by the control tower to go around.

⁴Although respondent states in his appeal brief that GC asked whether he would be ready for "immediate departure," the transcript of the communications between respondent and GC indicates otherwise.

In his appeal, respondent argues that his actions did not constitute a violation of the FARs because the occurrence resulted from a "communication misunderstanding," not from any deliberate attempt to defy the FARs and that, furthermore, his behavior was reasonable under the circumstances. He also requests that the Board consider the negative impact a violation would have on his employability.

The Administrator maintains that it is not necessary to conclude that respondent deliberately violated the regulations in order to find that he committed the alleged infractions: finding that he took off without the appropriate clearance is enough.

After consideration of the briefs of the parties and the hearing record, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge. Consequently, we deny the appeal.

That respondent took off after communicating only with GC is not in issue. Rather, respondent asserts that he reasonably believed GC had cleared him for takeoff and, as such, he should not be reprimanded for what amounted to a lapse in communication.⁵ Based on the record, the law judge did not view

⁵Respondent maintains that his belief was reasonable, given the fact that it was often the practice at Amarillo airport to have one person operate ground control, clearance delivery, and departure control. The testimony of the ground controller on duty the evening of December 29, 1989, confirmed that although this is occasionally the practice at Amarillo Airport, it was not the case that night. He explained:

"At times in Amarillo we do combine all three positions [ground control, flight data or clearance delivery, and

respondent's assumption as reasonable. To the law judge, the ground controller's directive to "taxi to" the runway did not warrant the conclusion that he had been granted clearance for takeoff.⁶ We agree. An instruction to "taxi to" a runway in no way implies that clearance for takeoff has been issued.

Respondent did not appear to be confused and the controller had no reason to think that he was. The preponderance of the reliable, probative, and substantial evidence supports the law judge's conclusion.

Lastly, respondent suggests that we should dismiss the charges against him because a violation record will have an adverse effect on his future employability.⁷ Assuming, without

(..continued)

local control or tower] at the local control position, but we still have two separate frequencies: We have a ground control frequency and a tower frequency for clearance for takeoff."

Tr. at 19.

He stated that it was not his responsibility as ground controller to provide respondent with a takeoff clearance. Tr. at 18. The controller working the tower position confirmed that, after receiving taxi instructions from ground control, a pilot must switch frequencies to obtain a takeoff clearance unless instructed otherwise. Tr. at 21.

⁶Respondent takes issue with the law judge's finding that respondent's question, "Which runway did you clear me for?" was misleading. Even assuming, without agreeing, that it was not misleading, the controller's reply of "Runway two two" does not justify the belief that a takeoff clearance had been issued.

⁷Notwithstanding respondent's asserted lack of intent to take off without a clearance, Board precedent is clear: an airman may be found to have acted carelessly and in a manner that adversely impacts on air safety even though the violation was inadvertent. See Administrator v. Mohamed, NTSB Order No. EA-2834 at 10-11 (1988). In any event, the finding of a section 91.9 violation is proper as residual to an operational violation. Administrator v. Pritchett, NTSB Order No. EA-3271 at 8, n.17 (1991).

agreeing, that such a consequence will result from affirming the Administrator's order, even in part, we do not think it provides a valid basis for refusing to sustain charges which the Administrator has proved by the evidence.⁸

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, is affirmed; and
3. The 15-day suspension of respondent's airman certificate with commercial pilot privileges is waived as a result of the timely filing of a report under the ASRP.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸Cf. Administrator v. Florent, NTSB Order No. EA-3777 at 6 (1993) ("use of his certificate in his occupation ... does not justify further reduction in an otherwise reasonable certificate suspension"), citing Administrator v. Tuomela, 4 NTSB 1422, 1424 (1984).

Respondent intimates that finding a violation against him will not serve a useful purpose and assures that he has learned from the episode. This also does not justify a reduction in sanction. Administrator v. Agans, NTSB Order No. EA-3630 at 3 (1992). In addition, deterring other pilots from committing a similar infraction is a concomitant goal of the sanction. Administrator v. Crapps, 2 NTSB 437, 438 (1973). See also Administrator v. Mohamed, NTSB Order No. EA-2834 at 10 (1988) ("The Board believes that there is deterrent value when sanctions are imposed even for unintentional violations").