Served: March 30, 1992

NTSB Order No. EA-3530

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 27th day of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-12365

v.

IVAN A. JORDAN,

Respondent.

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman rendered in this proceeding on February 5, 1992, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's mechanic certificate with airframe rating for his alleged violation of section 65.18(a)(5) of the Federal Aviation

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

Regulations, "FAR," 14 CFR Part 65.[2] For the reasons discussed below, we will deny the appeal.[3]

The January 7, 1992 Emergency Order of Revocation addressed to respondent alleges, in pertinent part, as follows:

> 1. At all times material herein you were and are the holder of Mechanic Certificate No. 592444963 with Airframe Rating.
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> 2. On or about September 9, 1991, you took the Aviation Mechanic Powerplant FAA Written Test administered by Ms. Ginger Tash, Authorized Assistant to George H. Perry, FAA Designated Written Test Examiner, at the American Institute of Aeronautics, Opa Locka Airport, Opa Locka, Florida.
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> 3. During the course of taking the Aviation Mechanic Powerplant test, you were observed by the designated test examiner to be using an unauthorized answer sheet to aid you while taking the above-mentioned test.

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[2]Section 65.18(a)(5) provides as follows:

"Section 65.18 Written Tests: Cheating or other unauthorized conduct.

(a) Except as authorized by the Administrator no person may

* * * * *

(5) Use any material or aid during the period that the test is being given."

[3]The Administrator has filed a motion to strike respondent's appeal brief and to dismiss his appeal for his failure to serve the Administrator with a copy of the notice of appeal and of the brief. We will deny the motion, to which no response was received, as it does not appear that the respondent's lack of compliance with our rules on service compromised the Administrator's ability to file an answer, albeit belatedly, to the appeal, and the Administrator does not argue that respondent's noncompliance prejudiced him in any way.

We should point out, moreover, that our judgment as to the propriety of dismissal in this case reflects a determination that respondent's procedural error has not significantly affected our ability to decide his appeal within the applicable statutory deadline.

> 4. By reason of the foregoing, you have demonstrated that you lack the qualifications necessary to be the holder of a mechanic certificate with Airframe Rating.

On appeal, respondent contends that the law judge erred in concluding that the evidence was sufficient to establish the Administrator's charge against him.[4] Based on our review of the record and the parties' submissions on appeal, we find no merit in respondent's attack on the adequacy of the showing adduced by the Administrator at the hearing that respondent is the individual observed by Ms. Tash, as referenced in the complaint.

Despite Ms. Tash's identification of him at the hearing, respondent maintained that he had not gone to take the test until September 14, at which time he was denied permission to take the exam by Mr. Perry. Thus, respondent's challenge to his identification by Ms. Tash as the individual caught cheating on September 9, 1991, rests primarily on his mistaken belief that the Administrator could not prevail unless he proved that the

[4]Although the law judge repeatedly expresses the view that the evidence in support of the Administrator's charge is "overwhelming," his decision is essentially bereft of any review of the testimony of the parties' witnesses or of their documentary submissions. Given this shortcoming, the initial decision does not reveal why the law judge was so strongly recommending that the Administrator urge the Department of Justice to pursue a perjury action against the respondent. In any event, we think it the better practice, even where a recounting of the evidence pointedly suggests that a witness has not testified truthfully, for our law judges to refrain from advising parties on matters that are extraneous to a full and fair disposition of the issues before them.

person Ms. Tash identified as the individual[5] who had appeared to take the test on September 9th was the same person who had identified himself as Mr. Jordan to Mr. Perry on September 14. We disagree. While we think the Administrator clearly proved that respondent was the person both Ms. Tash and Mr. Perry had identified as Mr. Jordan, his failure to have done so would not dictate an overturning of the law judge's credibility assessment favoring Ms. Tash's testimony.

In our view, Ms. Tash's identification would have been sufficient to establish the Administrator's case even if it were not supported by the testimony of Mr. Perry. He indicated that he recognized Ms. Tash's handwriting on test-related paperwork that, in an apparent second effort to sit for the test, respondent gave to him on the 14th--paperwork that Mr. Perry assumed, based on Ms. Tash's telling him of her encounter with a Mr. Jordan, that the respondent had taken from her on the 9th.[6] Consequently,

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[5]We see no infirmity in Ms. Tash's ultimate identification of respondent. Although she initially seemed to hedge as to whether he was the person who had appeared to take the exam, by remarking, for example, when asked whether she saw Mr. Jordan in the hearing room, "[a]s far as I can tell" (Tr. at 27), she did not qualify her identification after she was given the opportunity to approach the respondent for a close look at him. See Tr. at 28-29. In fact, we think this witness' disinclination to be cavalier in this connection supports the law judge's conclusion as to the trustworthiness of her testimony.

[6]Ms. Tash had apprised Mr. Perry of the incident shortly after it had occurred. He therefore knew, before respondent showed up on September 14, that an individual named Jordan had had a powerplant exam terminated for cheating on the 9th and that that individual had forcefully snatched from her all test materials and the offending crib sheet during a hurried departure

respondent's efforts to discredit Ms. Tash's identification on the ground that Mr. Perry could have been mistaken as to how respondent had acquired the paperwork and as to whose writing was on it are unavailing. The validity of Ms. Tash's identification of respondent as the person she had seen on the 9th of September is in no way dependent on the accuracy of Mr. Perry's observations and assumptions as to the individual he had seen on the 14th.[7]

In view of the foregoing, we conclude that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order of revocation. Respondent has demonstrated no adequate basis for disturbing the law judge's resolution of the conflicting testimony the parties' witnesses presented, and the violation found proved clearly reveals a lack of the care, judgment and responsibility required of a certificate holder.

(..continued)
from the test site. As a result, the only remaining record the facility had of this individual was a notation in Mr. Perry's appointment book scheduling a "Jordan" for an exam on the 9th. The notation also bore respondent's telephone number. Respondent presented no evidence at the hearing to support his allegation on appeal that the Administrator "created" this entry for purposes of this action.

[7]Administrator's exhibit A-3 is a statement prepared by Mr. Perry and signed by a Col. A. T. House who, for medical reasons, could not write the statement himself and, apparently, could not attend the hearing. Col. House witnessed most of the incident related by Ms. Tash, and his statement is consistent with her account of the matter.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and

2. The initial decision and the emergency order of revocation are affirmed.

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