

SERVED: July 20, 1994

NTSB Order No. EA-4209

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 6th day of July, 1994

_____)	
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12741
v.)	
)	
HOLGER KREUZHAGE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent, appearing pro se, has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on March 23, 1993, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator revoking respondent's pilot certificate(s). We deny the appeal.

¹The initial decision, an excerpt from the hearing transcript, is attached.

In 1988, respondent was convicted of conspiracy with intent to distribute opium (in gum form) and possession with intent to distribute opium, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a) and 846. According to the underlying indictment, in 1982 respondent was involved in an attempt to sell opium to undercover Federal agents. He was sentenced to 15 years in prison and a substantial fine. The FAA's order of revocation charged that, in light of his conviction, respondent had violated 14 C.F.R. 61.15.² At the time the FAA issued its order, respondent was confined, but his appeal of the conviction was pending.

Prior to the hearing on the Administrator's order, respondent filed a number of motions, including a motion to dismiss, all of which the law judge denied. Respondent filed no answer to the Administrator's complaint.³

At the start of the hearing, the law judge partially granted the Administrator's motion for judgment on the pleadings based on

²§ 61.15, as pertinent, provides:

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for -

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of final conviction; or

(2) Suspension or revocation of any certificate or rating issued under this part.

³Respondent's motions included argument that his conviction was on appeal. He also argued that the substance the Drug Enforcement Agency and district court found to be opium was not.

information in the indictment and judgment. The law judge declined to hear further argument from respondent on various issues disposed of in his denial of respondent's motion to dismiss, and concluded that revocation was appropriate in view of respondent's crime and that revocation should not await his pending judicial appeal. On appeal, respondent repeats arguments he made before the law judge.

1. The stale complaint rule, 49 C.F.R. 821.33, and other arguments regarding the Administrator's delay in prosecution.

Respondent argues that our rule 33, and the Constitution, prohibit the FAA from prosecuting a case that stems from an 11-year old incident. We do not agree.

The stale complaint rule does not apply to cases in which a respondent's qualification to hold a certificate is legitimately an issue. Administrator v. Wells, NTSB Order EA-3424 (1991). Respondent's drug conviction raises legitimate issues of lack of qualification. Administrator v. Hernandez, NTSB Order EA-3821 (1993), aff'd Hernandez v. NTSB, No. 93-9521 (10th Cir., January 31, 1994). Although a respondent may still show prejudicial delay that could warrant dismissal (Wells, supra), such a showing has not been made here.

Respondent's Constitutional argument is an equal protection one, stemming from allegedly selective prosecution by the Administrator (i.e., that there were individuals at LOMPOC who had been convicted of drug offenses, but the FAA had not sought to revoke their certificates). However, the prosecutorial

discretion exercised here by the enforcement agency is not relevant to the Board's adjudicatory role. Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987).⁴

2. Respondent's in forma pauperis motion. Respondent argues that the law judge erred in failing to rule on this motion, and that this resulted in a lack of due process. The Board's rules are not those of criminal cases, and do not contemplate handling such motions. Respondent was told, in the Board's form letter response to his appeal from the Administrator's order, that it was advisable to have an attorney. The Board has neither the mechanism nor the obligation in these administrative proceedings to ensure that respondent, pro se, conducts a viable defense. See generally Administrator v. Dudek, 4 NTSB 385, 387 (1982) at footnote 5, and Administrator v. Smith, NTSB Order EA-3558 (1992) at 2-3.

Thus, for example, respondent's lack of counsel leads him to suggest, incorrectly, that discussion at the hearing between counsel for the Administrator and the law judge concerning applicable case law constitutes prohibited ex parte communication because respondent allegedly had no access to the discussed cases. We would also note that, although respondent may not have

⁴Respondent earlier raised other arguments that the law judge properly rejected. There is no statute of limitations on FAA prosecution other than the stale complaint rule. Ex post facto principles, as noted by the law judge, do not apply to these proceedings, Hernandez, supra, and in any case were not violated, as even before 1984 suspension or revocation of certificates was authorized for drug convictions without use of aircraft. Id.

had the opportunity to read copies of the Board cases cited by the Administrator, our review of the law judge's decision includes a review of them.⁵

3. Quality of notice. Respondent argues that he was not adequately informed as to "the nature of the hearing" (see 49 C.F.R. 821.37(a)), and there was some misunderstanding as to its scope. On a number of occasions the law judge prevented respondent from continuing argument on a particular subject; respondent sees this as a notice failure. That is not the case.

Respondent's expectations were inconsistent with Board precedent and procedure, as well as basic legal principles. "The nature of the hearing" was clear from the Administrator's order and our letter responding to respondent's appeal: to take evidence on the substance of the Administrator's factual allegations, to decide whether they were true, and, if so, whether respondent's pilot certificate(s) should be revoked. There is no notice failure in the law judge limiting the scope of the hearing as he did. See discussion infra.

4. Availability of subpoenas and presentation of defense witnesses. Respondent claims that the law judge was too late in supplying information regarding the use of subpoenas and denied respondent the opportunity to present witnesses in his defense.

⁵Respondent filed two motions intended to require the Administrator to provide him copies of cited cases, the latter of which also encompassed a related extension of time. The Administrator replied in opposition. Our General Counsel denied the sought relief, by letter to respondent dated September 1, 1993.

We see no merit in this argument. As discussed above, it is not the law judge's function to serve as respondent's counsel, advising him how to conduct his defense. The subpoena issue arose -- not after the hearing as respondent argues -- but in connection with respondent's suggestion during the hearing that he bring witnesses to testify on the issue of selective prosecution. Respondent, however, sought a guarantee from the FAA that revocation orders would not be issued against these persons. The FAA declined, and respondent did not pursue the matter. Tr. at 21-29. We can see no procedural error by the law judge.⁶

5. Consideration of the Administrator's motion for summary judgment and for judgment on the pleadings. Respondent argues that this motion should not have been considered because it was not filed at least 10 days before the hearing, as the Federal Rules of Civil Procedure require. Not only do those rules not apply to our proceedings (see 49 C.F.R. 821.19(c)), respondent has shown no harm in the law judge's ruling on the motion at the hearing. Respondent was given every opportunity to explain why the motion should not be granted, and the law judge acted within his discretion in deciding, in light of the Administrator's evidence of conviction, that there was no issue of fact other than whether the sanction of revocation was appropriate.

⁶As noted above, though, testimony of these witnesses introduced to prove selective prosecution would have served no useful purpose.

Respondent follows that he was denied the opportunity to present documents and things in his defense, violating our rule at § 821.38. Again, we disagree. The law judge never declined to accept document exhibits; respondent did not offer any exhibits. The law judge did refuse to allow respondent to reargue motions he had already denied. The law judge also concluded that affirmance of the Administrator's order did not entail taking evidence on the merits of the underlying legal conviction and the validity of his appeal -- the issues respondent wanted to address. See, e.g., Hernandez, supra, and Administrator v. Pinney, NTSB Order EA-3545 (1992). Under the circumstances, we see no error in the law judge limiting the hearing to sanction. As the Administrator points out, respondent failed to offer anything in the way of testimony or documentary evidence in mitigation of sanction and it is well-settled that use of an aircraft in commission of the criminal offense is not required to warrant revocation. Hernandez, supra.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The revocation of respondent's pilot certificate(s) shall begin 30 days from the date of service of this order.⁷

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

⁷For the purposes of this order, respondent must physically surrender his certificate(s) to an appropriate representative of the FAA pursuant to FAR § 61.19(f).