

SERVED: January 4, 1996

NTSB Order No. EA-4414

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 21st day of December, 1995

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-13713
v.)	
)	
MICHAEL JAMES BERRYHILL,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The respondent, *pro se*, has appealed from Administrative Law Judge Patrick G. Geraghty's decision to grant the Administrator's motion for summary judgment¹ on an order that revokes his Airline

¹The law judge's decision is set forth in orders dated June 22 and 30, 1995 (copies attached). The latter order, which essentially reaffirmed the conclusions of the first order, was issued in response to the respondent's late answer to the Administrator's motion.

Transport Pilot Certificate (No. 545686659) and his Flight Instructor Certificate (also No. 545686659) for his alleged violations of sections 61.15(a) and 91.19(a) of the Federal Aviation Regulations ("FAR," 14 CFR Parts 61 and 91).² The appeal, to which the Administrator has filed a reply in opposition, will be denied.

In his June 14, 1994 Order of Revocation the Administrator alleged, among other things, the following facts and circumstances concerning the respondent:

2. On or about October 6, 1992, you were convicted in the United States District Court, Northern District of Florida, Gainesville Division, of the offenses of Conspiracy to Possess With Intent to Distribute and to Distribute in Excess of 50 Kilograms of Cocaine, and Possession With Intent to Distribute Approximately 225 Kilograms of Cocaine, 21 USC 841 and 846.

²FAR sections 61.15(a) and 91.19(a) provide as follows:

§61.15 Offenses involving alcohol or drugs.

(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 is grounds for --

* * *

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

§ 91.19 Carriage of narcotic drugs, marijuana, and depressant or stimulant drugs or substances.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.

3. The facts leading to the conviction referenced in paragraph 2 included your operation of an aircraft and the use of an aircraft facilitated the commission of the offense.

4. You operated said aircraft within the United States with knowledge that cocaine was on board the aircraft.

In light of the conviction on the felony charges and the conduct on which it was predicated³, the order further alleges that the respondent has demonstrated that he lacks the qualifications necessary to hold any airman certificate.

On appeal, respondent urges us to reverse the law judge's decision because it is based on a criminal conviction respondent claims to be still contesting at the federal district court level. He maintains in effect that until his post-judgment attacks in that litigation are finally resolved, the Administrator's revocation action is premature and should not be permitted. He also complains, essentially on due process grounds, that the law judge should have held a hearing at which respondent could put on evidence to establish his innocence of the federal drug offenses for which he was convicted. We find no error in the law judge's disposition of the matter.⁴

³Respondent was sentenced to two concurrent 10 year prison terms for the felony conviction referenced in paragraph 2 of the order of revocation, which served as the complaint in this proceeding.

⁴In addition to his appeal brief, respondent has filed a motion to dismiss the revocation order on the ground that it constitutes a second punishment for his criminal drug offense in violation of the Double Jeopardy Clause of the U.S. Constitution. The motion is denied. The Board, as recently as its decision in Administrator v. Manning, NTSB Order EA-4363 (served May 26, 1995), has long rejected the suggestion that revocation is a

Respondent points to no case support for the proposition that the Administrator cannot act on a drug conviction until all available avenues for challenging it have been exhausted, and we are aware of none.⁵ Moreover, notwithstanding the law judge's clearly correct ruling that the Board lacks authority to entertain collateral attacks on federal court convictions, see, e.g., Administrator v. Manning, supra, at 4, Administrator v. Pimental, NTSB Order EA-4382 at 3, n. 3 (1995), and Administrator v. Gilliland, NTSB Order No. EA-4149 at 4, n. 7 (1994), respondent does not undertake to explain his insistence that the law judge erred by not affording him the opportunity, by holding a hearing, to relitigate issues involving guilt or innocence that the federal court has already adjudicated. In any event, respondent's position is unavailing. A Board hearing is not necessary in a case where the fact of a drug conviction, even one that may be open to further review, is not in issue and where, as here, no genuine question exists as to the appropriate sanction to be imposed.

(..continued)

punitive sanction, given the remedial intent behind removing unqualified airman from the ranks of those who hold aviation licenses. See Administrator v. Franklin, 3 NTSB 985, 986 (1978), aff'd., Franklin v. FAA, No. 78-3336 (5th Cir. June 12, 1979); Administrator v. Davids, NTSB Order No. EA-3740 at 3 (1992), aff'd., Davids v. FAA, No. 93-70009, slip op. at 3 (9th Cir. September 13, 1993); and Administrator v. Byrom, NTSB Order No. EA-3866 at 4 (1993).

⁵See Administrator v. Kreuzhage, NTSB Order No. 4209 (1994), cf. Administrator v. Hernandez, NTSB Order No. EA-3164 (1990) (finality of conviction relevant where Administrator so prosecuted the matter).

In cases not based on a drug conviction for an unlawful *commercial* connection to an illicit substance, we have invariably viewed aircraft involvement in the offense as a factor supporting revocation. See, e.g., Administrator v. Pekarcik, 3 NTSB 2903 (1980). In this case, however, the question of aircraft involvement is essentially superfluous to the matter of sanction because the drug conviction clearly reflects respondent's participation in a criminal enterprise for economic gain. Consequently, revocation is the appropriate sanction without regard to the Administrator's allegations regarding the respondent's use of an aircraft in the commission of the criminal acts for which he was convicted.⁶ See Administrator v. Piro, NTSB Order No. 4049 at 4 (1993) ("In our judgment, any drug conviction establishing or supporting a conclusion that the airman possessed a controlled substance for profit or commercial purposes is a flagrant one warranting revocation under [FAR section 61.15]."), aff'd, Piro v. NTSB, 66 F.3d 335 (9th Cir. 1995).

⁶The law judge appears not to have construed the respondent's evasive answer to the complaint to have constituted a general denial to the Administrator's allegations that the drug conviction involved the operation of an aircraft with knowledge that cocaine was aboard. That is to say, he appears to have understood the respondent to be conceding the accuracy of the Administrator's allegations as to the circumstances underlying the federal charges, without conceding that he was guilty of them. Nevertheless, to the extent the respondent did intend by his answer to deny the allegations supporting the FAR section 91.19(a) charge, the dismissal of that charge would have no bearing on the appropriateness of revocation for the FAR section 61.15 violation alone.

For the foregoing reasons, we find no merit in the respondent's appeal from the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied, and
2. The decision of the law judge and the Administrator's order of revocation are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.