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NTSB Order No. EA-4701

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 September, 1998

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JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-15005
v.	)	
	)	
KEVIN L. AHL,	)	
	)	
Respondent.	)	
	)	

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**OPINION AND ORDER**

Respondent and the Administrator both appeal the initial decision of Administrative Law Judge William R. Mullins, rendered after an evidentiary hearing held on December 9, 1997.<sup>1</sup> By that decision, the law judge found that respondent violated section 91.13(a), but not, as also

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<sup>1</sup> An excerpt from the hearing transcript containing the law judge's initial decision is attached.

alleged, section 91.155(c), of the Federal Aviation Regulations ("FARs").<sup>2</sup> The law judge accordingly reduced the 30-day suspension sought by the Administrator to a 20-day suspension of respondent's airman certificates, including his airline transport pilot ("ATP") certificate. We deny respondent's appeal and grant the Administrator's appeal.

The Administrator's charges stem from an approach and landing flown by respondent at Nome, Alaska ("OME"), on April 16, 1997, as pilot in command of a passenger carrying Cessna C-208 Caravan being operated as Bering Air Flight 620. As Flight 620 approached the vicinity of OME, the following transmissions between respondent and an OME Flight

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<sup>2</sup> FAR §§ 91.13 and 91.155 (14 C.F.R. Part 91) provide, in relevant part, as follows:

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

\* \* \* \* \*

**§ 91.155 Basic VFR weather minimums.**

\* \* \* \* \*

(c) Except as provided in § 91.157, no person may operate an aircraft beneath the ceiling under VFR within the lateral boundaries of controlled airspace designated to the surface for an airport when the ceiling is less than 1,000 feet.

\* \* \* \* \*

Service Station ("FSS") specialist took place:

Respondent: "Bering 620, we're, ah, 8 miles to the northeast of the VOR, and we're inbound for landing Nome."

OME FSS: "Bering 620, Nome Radio, Nome weather ceiling 900 overcast, visibility 3 in light snow, weather in the surface area is below VFR minimum[s] and ATC clearance is required -- advise intentions."

Respondent: "Requesting a ah, well we're inside the zone, we'll land."

(42-second pause)

OME FSS: "Bering 620, Nome Radio, understand you're already inside the zone and you're going to go ahead and land."

Respondent: "That's affirmative."

OME FSS: "Roger."

(7-second pause)

OME FSS: "Bering 620 say your position."

Respondent: "We're presently 5 miles to the, ah, east of the VOR."

OME FSS: "620, roger."

Exhibit ("Ex.") C-3. The Administrator alleges that respondent entered the Class E airspace surrounding OME without an air traffic control ("ATC") clearance which, she claims, was required because OME was below visual flight rules ("VFR") minimums at the time. Although respondent claims that the weather at OME was actually VFR, his primary argument is that he reasonably believed that the OME FSS had

conveyed the necessary ATC clearance.<sup>3</sup>

The law judge, apparently crediting respondent's claim that he could see OME from an altitude of 1,500 feet and a distance of 12 miles, found that the Administrator had not met her burden of demonstrating that the weather at the time of the incident was below VFR minimums at OME, and, therefore, dismissed the section 91.155(c) charge. The law judge upheld the section 91.13(a) violation, however, not as a residual violation as pled by the Administrator, but because he concluded that, regardless of whether a clearance was actually required, it was careless to proceed without a clearance after being advised by the OME FSS specialist that one was required. On appeal, respondent argues that the law judge erred in upholding the 91.13(a) violation. The Administrator argues that the law judge erred in dismissing the section 91.155(c) violation.

Turning to the law judge's findings regarding the OME weather, we conclude that the record indicates by a preponderance of the evidence that the ceiling at OME was approximately 900 feet when respondent conducted his

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<sup>3</sup> OME does not have an air traffic control tower. However, the OME FSS advises incoming pilots of weather conditions and, per a letter of agreement with Anchorage Air Route Traffic Control Center ("Center"), is authorized, under certain terms, to issue special VFR and IFR clearances when conditions at OME fall below VFR minimums. The FSS specialist testified that "since we had IFR traffic in the zone and the zone was in Center's control[, ] I didn't have control, [and] so I couldn't issue [an ATC clearance to respondent.]"

approach and landing. Aside from respondent's self-serving claims, vaguely corroborated by the non-specific lay observations of one passenger aboard his aircraft, there is virtually nothing in the record that contradicts the official report of IFR conditions, i.e., a ceiling below 1,000 feet. Moreover, the 900-foot ceiling was implicitly confirmed by the FSS specialist because, at that time, he communicated with respondent he could observe the conditions at OME outside his window. Similarly, a different FSS specialist who recorded the official weather observations also observed the weather and, presumably, would have detected an instrument or other recording error. Finally, the record indicates that conditions at OME were steadily deteriorating throughout the afternoon and the next official observation after the incident recorded a 700-foot overcast ceiling. Given these considerations, and our precedent that gives high probative value to official weather observations, we conclude that the law judge erred in finding that the conditions were VFR. See Administrator v. Powell, NTSB Order No. EA-4299 at 9 (1994) ("officially reported weather is normally controlling").<sup>4</sup> Accordingly, because we find that the conditions at OME were below VFR minimums when respondent approached the area, it was incumbent upon

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<sup>4</sup> Respondent's testimony, which does not squarely contradict the reported conditions at OME, does not overcome the other evidence in the record of IFR conditions within the OME Class E airspace.

respondent to obtain either an IFR clearance or, as provided in section 91.157, and referred to in section 91.155(c), a special VFR clearance before he could enter the OME Class E airspace.

We also reject respondent's contention that he reasonably thought he could enter the OME Class E airspace. Regardless of whether respondent encountered VFR conditions during cruise flight and his initial descent, and, indeed, even if he believed that conditions permitted a VFR approach and landing at OME, respondent was clearly informed that the conditions at OME were below VFR minimums and that an ATC clearance was required before he could enter the OME Class E airspace. Moreover, assuming, arguendo, that OME FSS specialists routinely, and without request, issued respondent a special VFR or IFR clearance or would otherwise instruct him to maintain VFR outside of the OME airspace due to specified other special VFR or IFR traffic within the OME Class E airspace, neither instruction was issued to respondent in this case. Respondent's testimony does not indicate that clearances were ever implicit. We simply do not find persuasive, or reasonable, respondent's explanation that when the FSS specialist asked him to "advise intentions," he (respondent) "thought he got [sic] a clearance."<sup>5</sup> Indeed, one reason we find it difficult to

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<sup>5</sup> Respondent argues that he should not be held accountable because the FSS specialist responded "roger" to his declared  
(continued . . .)

believe this explanation is respondent's own rationale: "I thought, well, he'll come back and tell me 'maintain VFR outside the Class E surface area pending the arrival of an IFR aircraft' but he didn't say anything about any IFR aircraft." Tr. at 159. Such unconfirmed assumptions are not appropriate of any pilot, much less an ATP-rated pilot with commercial passengers on board. See, e.g., Administrator v. Combs, NTSB Order No. EA-3616 at 6 (1992) (ATP certificate holders held to the highest standards of care). Thus, we find that respondent knew or should have known that he was not authorized to enter the OME airspace and, therefore, he violated 91.155(c). Moreover, operating an aircraft in controlled airspace without a required ATC clearance in IFR conditions is adequate support for a section 91.13(a) violation.<sup>6</sup>

Finally, we think that the 30-day suspension originally sought by the Administrator should be reinstated given our modification of the law judge's initial decision. A 30-day suspension is not inconsistent with precedent, and a 30-day

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(continued . . .)

intention to land. We disagree, but, in any event, the issue is irrelevant because respondent had already violated the regulations by that time because, by his own admission, he was already within the Class E airspace.

<sup>6</sup> Although in this case we do not think it exonerates respondent, we think the FSS specialist should have reiterated to respondent that he was proceeding without a required clearance, and, of more immediate importance, that IFR traffic had already been cleared into the OME airspace.

suspension is recommended by the Administrator's sanction guidance table for *each* instance of similar regulatory violations.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. Respondent's appeal is denied;
3. The law judge's initial decision is modified; and
4. The 30-day suspension of respondent's ATP certificate shall commence 30 days after the service date indicated on this opinion and order.<sup>7</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not concur.

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