

SERVED: November 13, 1998

NTSB Order No. EA-4723

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 12th day of November, 1998

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-15331
	v.)	
)	
EVAN P. SINGER,)	
)	
	Respondent.)	
)	
_____)	

ORDER DENYING MOTION

The respondent, by counsel, has filed a "Motion for Review by Members of the National Transportation Safety Board" of NTSB Order No. EA-4704 (served September 18, 1998), wherein the Board affirmed an emergency order of the Administrator revoking respondent's private pilot certificate for his alleged violation of section 61.37(a)(6) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61). The motion, which we will treat as a petition for reconsideration under Section 821.57(d) of our Rules of Practice (49 CFR Part 821), must be denied because it is not based on the discovery of new matter, a requirement under the rules applicable to emergency cases.¹ It presents, rather, an

¹Section 821.57(d) provides as follows:

§ Procedure on appeal.

* * * * *

(d) *Petitions for reconsideration, rehearing, reargument,*

argument for reversal of our original decision based on a misreading of the law judge's initial decision in the case.

Respondent contends in his motion that the Board relied on testimony that the law judge did not credit when it accepted as true a witness' account that, during the examination on which respondent was accused of cheating, she had seen him put some papers into his pocket.² The law judge did not credit this testimony, in respondent's view, because he stated that this witness, one of three proctors observing the test, "really didn't see anything" (I. D. at 237).³ We see no indication in the initial decision that the law judge did not find this witness creditable or her testimony credible.⁴ Rather, we think it clear from the law judge's discussion of the evidence that his observation that this witness had not seen anything meant no more than that her testimony did not establish that she had seen the respondent use, that is, actually look at, the papers she had seen in his hand. Thus, respondent's insistence that the law judge did not credit the witness' testimony is, in our view, without merit.⁵

(..continued)

or modification of order. The only petitions for reconsideration, rehearing, reargument, or modification of an order which the Board will entertain are petitions based on the ground that new matter has been discovered. . . .

²These papers were later shown to contain aviation formulas and information pertinent to the exam respondent was taking.

³The fact that the law judge noted that the other proctors had not seen the pocketing of these papers or any viewing of them by the respondent does not imply that he did not believe the one proctor who testified differently. It is, rather, simply consistent with the law judge's rationale, with which we disagreed, that a regulatory violation could not be proved unless at least one of them had seen the respondent look at the papers or other evidence supporting a conclusion of use had been produced.

⁴Indeed, if the law judge had not believed this witness, he would have had little reason to suggest to the Administrator that she might have been able to demonstrate use of the unauthorized papers during the test by correlating the information on them with respondent's answers on the exam.

⁵In a response opposing the motion for review, the

ACCORDINGLY, IT IS ORDERED THAT:

The respondent's motion for review is denied.

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

(..continued)

Administrator, in addition to arguing that the respondent's motion provides no proper basis under our rules for further consideration, asserts, with respect to correspondence sent to each Board Member along with a copy of the motion, that she "strongly objects to counsel for Respondent's act of knowingly sending a written communication relevant to the merits of this proceeding. . .outside of the public record and without notice to the Administrator." Response at 2. A copy of the referenced correspondence, which, unlike the motion, sets forth accusations directed at the Board and its staff rather than objections aimed at its decision, was furnished to counsel for the Administrator by the Board. The Administrator asks, among other things, that the Board institute, with respect to the ex parte communication, the show cause procedure set forth in Subpart J of the Board's rules of practice. We will take up the Administrator's request in a separate order to be issued at a later date.