

SERVED: June 3, 2005

NTSB Order No. EA-5161

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 1st day of June, 2005

_____)	
In the matter of)	
)	
)	
ROBERT W. NEWTON,)	Docket NA-51
)	
)	
Appellant.)	
)	
_____)	

OPINION AND ORDER

Appellant has appealed from the initial decision of Administrative Law Judge William E. Fowler, Jr., issued on June 14, 2004.¹ The law judge rejected appellant's appeal of an order of the Utah Air National Guard (ANG) withdrawing his air traffic control specialist certificate. The law judge found that the Board did not have jurisdiction to hear appellant's challenge to the ANG's action. We agree with the law judge and deny the appeal.

Appellant received his air traffic control specialist (ATCS)

¹ The initial decision is attached.

certificate in 1968, and initially worked for the FAA at its Salt Lake City Flight Service Station and Idaho Falls Flight Service Station facilities. In 1985, appellant joined the Utah ANG and worked as an ATCS at Hill Air Force Base (AFB). The authorization to work there was written on the back of his ATCS certificate. In 1988, Mr. Newton was hired as a civilian employee of the Department of Defense as an air traffic controller at Hill AFB. In 1993, when his ATCS certificate had no more room on the back for ratings and certifications, he was issued a new one by the local military authorities.

On December 7, 2003, pursuant to Air Force Instruction (AFI) 13-203, the Utah ANG issued a memorandum suspending appellant's ATCS certificate pending an evaluation. The memorandum charged that respondent was, "a hazard to aviation safety for repeated failure in performing the duties of an Air Traffic Control Supervisor." The memorandum recited the appeal and review procedures available to appellant under AFI 13-203.² There is no information in the record indicating that appellant took advantage of that appeal process.

On February 24, 2004, after the ANG evaluation was concluded, Mr. Newton was notified that his ATCS had been permanently withdrawn and that he was no longer authorized to, "perform any function related to ATC³ in the Air National Guard

² No right of appeal to or review before the NTSB was mentioned in this instruction.

³ Air traffic control.

or USAF.”⁴ On March 5, 2004, appellant appealed that decision to this Board, claiming that the action of the ANG was taken under delegated authority from the Administrator of the Federal Aviation Administration, and that this Board had jurisdiction to hear appellant’s challenge to the ANG’s action.

The law judge rejected appellant’s jurisdictional analysis and claims. He concluded that appellant’s ATCS certificate was not an airman certificate issued under Title 49 U.S.C. Chapter 447 and that, because the Board’s authority to review certificate actions of the Administrator is limited to certificate actions issued under 49 U.S.C. 44703, 44709, or 44710, the Board had no authority to review the action. We agree with these conclusions.

Title 49, Section 1133, provides, as pertinent:

The National Transportation Safety Board shall review on appeal -

- (1) the denial, amendment, modification, suspension, or revocation of a certificate issued by the Secretary of Transportation under section 44703, 44709, or 44710 of this title[.]

Section 44703 is titled “*Airman Certificates.*” That term is defined at section 40102(a)(8):

- (8) “airman” means an individual -
 - (A) in command, or as pilot, mechanic, or member of the crew, who navigates aircraft when under way;
 - (B) except to the extent the Administrator of the Federal Aviation Administration may provide otherwise for individuals employed outside the United States, who is directly in charge of inspecting, maintaining, overhauling, or repairing

⁴ United States Air Force.

aircraft, aircraft engines, propellers, or appliances; or

- (C) who serves as an aircraft dispatcher or air traffic control-tower operator.⁵

The only possible category in which an ATCS certificate might fit would be the air traffic control-tower operator certificate category noted in paragraph C. However, the Administrator argues that control-tower operator and ATCS are two different positions, each clearly defined, and we agree. FAA Order 7220.14, which governs certification and rating of air traffic controllers generally, clearly establishes a difference between these positions. See, e.g., p. 2 (the definition of air traffic control specialist certificate includes a statement that this certificate cannot be used in lieu of the control-tower operator certificate).

Furthermore, section 44703, *Airman Certificates*, provides that such certificates shall be numbered and recorded by the Administrator; contain the name, address and description of the individual to whom the certificate is issued;⁶ contain terms the Administrator decides are necessary to ensure safety in air commerce, including terms on the duration of the certificate, periodic or special examinations, and tests of physical fitness;

⁵ Section 44709 is discussed later in this decision. Section 44710, the other provision cited in the section 1133 jurisdictional discussion, provides no additional authority relevant to appellant.

⁶ I.e., personal information such as is on a driver's license.

specify the capacity in which the holder of the certificate may serve as an airman with respect to an aircraft; and designate the class the certificate covers. Appellant's ATCS certificate contains none of the information that is required for an airman's certificate, including an air traffic control-tower operator certificate. We also note that, while training is required for both certificates, only the control-tower operator position requires a written examination.

Appellant's argument stems from the premise that this Board has jurisdiction over the revocation of any certificate issued by the Administrator under chapter 447. This paints with too broad a brush. In fact, our authority, as shown above, is more circumscribed than that. We do not have authority to review any adverse action against any certificate the Administrator might issue. Our authority extends only to what is specifically included in section 1133. Thus, even were we to conclude that this was a certificate issued by the Administrator under chapter 447, it must still fit within one of the categories of 49 U.S.C. 40102(8)(A), (B), or (C) above to be subject to our jurisdiction. The ATCS certificate does not.

Moreover, we see no evidence that the action the ANG took here was under authority delegated from the Administrator, as appellant claims. It is potentially misleading for the Air Force to use the "Department of Transportation Federal Aviation Administration" heading on these certificates. However, there is no information suggesting these certificates are registered with

the FAA, subject to any kind of FAA review (centralized or not), or even acknowledged by that organization. It is true that the Air Force procedures and standards reflect and mimic the procedures and standards of the FAA. Similarly, it is without question that the activities of military ATCSs are critical to safe flight throughout these United States as they control both civilian and military aircraft in their assigned geographic areas. It may also be true that the rules contained in FAA Order 7220.14 *Certification and Rating Procedures*, including those that apply to ATCSs, as well as the implementing rules contained in AFI 13-203, are issued to effect section 44701(a)(5)'s authorization to prescribe standards for procedures necessary for aviation safety. This does not, however, either compel or support a finding that AFI 13-203 was implemented under delegated authority. In any case, even were appellant's ATCS certificate issued under delegated authority, that would not make it an airman certificate under sections 40102 and 44703.

In sum, appellant makes two basic arguments: that his certificate is an airman certificate issued by the Administrator and therefore revocation is subject to our review; and that his certificate is issued under more general authority of the Administrator and is subject to our review because our authority extends to all chapter 447 certificate actions. We disagree on both counts. First, this certificate is not an airman certificate under section 44703. Second, even if it were a chapter 447 certificate issued by the Administrator, its

withdrawal by the ANG is not a certificate action taken pursuant to section 44703, 44709, or 44710, as is required to invoke Board jurisdiction. Appellant is incorrect in arguing that our review authority is coextensive with the Administrator's broader authority under 44709(b)(1)(A) to amend, modify, suspend or revoke certificates issued under chapter 447. The ANG's action here is a personnel matter not subject to our review. The result would be the same if appellant were an FAA employee.

ACCORDINGLY, IT IS ORDERED THAT:

Appellant's appeal is denied.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.