SERVED: September 28, 2012

NTSB Order No. EA-5638

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 27th day of September, 2012

MICHAEL P. HUERTA, Acting Administrator, Federal Aviation Administration, Complainant, v. [redacted] Respondent.	Docket [redacted]

OPINION AND ORDER

1. ***Background***

Respondent appeals the oral decisional order of Administrative Law Judge Patrick G. Geraghty, issued November 9, 2011.[1] By that order, the law judge granted the Administrator's motion for summary judgment, finding respondent violated 14 C.F.R. §§ 91.405(a) and (b),[2] and

[1] A copy of the law judge's decision order is attached.

[2] Subsections 91.405(a) and (b) provide:

91.13(a).[3] Specifically, the law judge found respondent failed to have his landing gear inspected and his Cessna C560 aircraft returned to service after the landing gear failed to extend upon arrival at the Phoenix Sky Harbor International Airport (PHX) , in violation of § 91.405(a) and (b). Additionally, the law judge found respondent's actions were careless and reckless because respondent subsequently operated the aircraft between PHX and the Mesa Citation Repair Station at the Williams Gateway Airport (IWA) without the aforementioned inspection and return to service and without retracting the landing gear during the flight, in violation of § 91.13(a). As a result, the law judge ordered a 50-day suspension of respondent's airline transport pilot (ATP) certificate. We set aside the law judge's order granting summary judgment in its entirety and remand this case for a full and complete hearing.

A. *Procedural Background*

The Administrator issued an order dated February 25, 2011, suspending respondent's ATP certificate for a period of 60 days, based on the alleged violations described above. Respondent answered the complaint with admissions to some, but not all, of the allegations. He denied the landing gear failed to extend and contended he properly coordinated with maintenance personnel prior to his departure for the repair station at IWA. He also raised several

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(..continued)

> Each owner or operator of an aircraft:
>
> (a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter;
>
> (b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service.

[3] Section 91.13(a) provides, "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

affirmative defenses. The Administrator subsequently filed a motion for summary judgment, which respondent opposed.

B. *Law Judge Oral Decisional Order*

On November 9, 2011, the law judge ordered the parties to appear before him for the limited purpose of providing the parties with his oral decisional order on summary judgment. The law judge deemed all essential facts necessary for resolution of the case admitted and granted summary judgment in favor of the Administrator. He also rejected respondent's affirmative defenses, by which respondent asserted (1) respondent was entitled to waiver of sanction under the Aviation Safety Reporting Program (ASRP)[4] and (2) respondent reasonably relied on maintenance personnel who informed him he did not need to obtain a ferry permit to transport the aircraft to a repair station.[5] The law judge did not find merit in respondent's assertion that he was entitled to waiver of sanction due to the Administrator's failure to follow internal procedures by taking enforcement action, rather than administrative action, against his

[4] Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where: (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action under 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past five years; and (4) the person completes and mails a written report of the incident to NASA within ten days of the violation.

[5] A respondent may assert he or she reasonably relied upon the actions of another, and that such reliance excuses the alleged violation. In asserting this affirmative defense, the respondent must fulfill the following test:

> If … a particular task is the responsibility of another, if the pilot-in-command [PIC] has no independent obligation (e.g., based on the operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

Administrator v. Fay & Takacs, NTSB Order No. EA-3501 at 4 (1992).

certificate.[6] In reaching these conclusions, the law judge made credibility determinations unfavorable to respondent, even though respondent did not testify.[7] The law judge considered mitigating circumstances, such as respondent's alleged reliance on maintenance personnel, and ordered a 50-day suspension of respondent's ATP certificate rather than the 60-day suspension the Administrator sought.

D. *Issues on Appeal*

Respondent appeals the law judge's order, raising three issues. First, he asserts the law judge erred in granting summary judgment because genuine issues of material fact exist. Respondent specifically contends the aircraft was airworthy on the flight between PHX and IWA and he did not need to obtain a ferry permit to conduct the flight. Additionally, he argues the law judge improperly concluded respondent admitted the landing gear did not extend upon landing at PHX. He also asserts the law judge needed to consider factual evidence concerning whether maintenance personnel informed respondent he could safely fly to the repair station. Second, respondent argues he committed no violation under the plain language of the regulation. In this regard, he contends the regulation requires known discrepancies on an aircraft be repaired

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[6] FAA Compliance and Enforcement Program, FAA Order 2150.3B (May 19, 2011); see also Administrator v. Moshea, NTSB Order No. EA-5523 at 8 (2010) (stating, in light of remand by the United States Court of Appeals for the District of Columbia Circuit, we will consider an affirmative defense when it amounts to an allegation that the Administrator failed to follow FAA procedures, regardless of whether such procedures are found in a rule, regulation, or statement of policy).

[7] The law judge stated,

> I attach more significance to the statements contained [in respondent's July 6, 2010 statement] than to the subsequent statement that he made and is attached to the response, that statement being made on October 31st of this year. The events are much clearer back in July of 2010 and the issue of self-serving [sic] does not arise as clearly with respect to the earlier statement.

Decisional Order at 18-19.

between periodic inspections, and he made the necessary repairs to the loose wire harness in accordance with that requirement. Third, he states the law judge erred in resolving factual issues surrounding all three of his affirmative defenses without taking any evidence at a hearing. As to his assertion the Administrator failed to follow internal FAA procedures, respondent argues the law judge failed to consider the fact the Administrator's own Enforcement Decision Tool and Enforcement Decision Process, enumerated in FAA Order 2150.3B, indicated respondent's alleged misconduct should have been addressed administratively through remedial training, rather than through an enforcement action and certificate suspension. As a result of the Administrator's alleged failure to impose remedial training, respondent contends he was entitled to a waiver of sanction by the law judge. In conclusion, respondent requests the Board dismiss the complaint or, in the alternative, remand the case for a hearing.

2. *Decision*

We find the law judge erred in granting summary judgment in this case. Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis the pleadings and other supporting documents establish no genuine issue of material fact exists, and the moving party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d).[8] In order to defeat a motion for summary judgment, the non-moving party must provide more than a general denial of the allegations.[9] The law judge must view the evidence in the motion for

[8] Administrator v. Wilkie, NTSB Order No. EA-5565 at 5 (2011); Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)); Administrator v. Giannola, NTSB Order No. EA-5426 (2009); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986) (a *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the non-moving party); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986) (an issue is *material* when it is relevant or necessary to the ultimate conclusion of the case).

[9] Administrator v. Hendrix, NTSB Order No. EA-5363 at 5-6 n.8 (2008) (citing Doll, supra note 8, at 1296).

summary judgment in the light most favorable to the non-moving party.[10]

In responding to the Administrator's motion for summary judgment, respondent clearly raised issues of material fact, particularly with regard to his affirmative defenses. In the case of Singleton v. FAA, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the Board's order, which affirmed the law judge's granting of summary judgment, based upon the need for a credibility hearing. The Circuit Court noted, "[i]n the past, the FAA and NTSB have suggested that credibility hearings are the norm in intentional falsification cases because factual determinations about knowledge do not readily lend themselves to adjudication on paper."[11] The case *sub judice* required resolution of credibility issues surrounding respondent's affirmative defenses. Rather than holding a hearing to accept evidence and testimony on these matters, the law judge improperly made credibility determinations adverse to respondent based solely on exhibits submitted as part of the motion for summary judgment.[12] As we indicated in Singleton, following the Circuit Court's remand, and expressly articulate here today—if resolution of an issue requires a law judge to make credibility findings, the law judge must do so by taking testimony and developing the record ***at a hearing***. It is not appropriate to dispose of a case via summary judgment when a credibility determination is needed. We continue to view decisions granting summary judgment with disfavor when genuine issues of material fact, including credibility determinations, exist for resolution at

[10] United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962).

[11] Singleton v. FAA, 588 F.3d 1078, 1083 (D.C. Cir. 2009).

[12] See generally, Administrator v. Singleton, NTSB Order No. EA-5529 at 7 (2010) (requiring law judges fully develop factual testimony and make credibility determinations on the record at a hearing).

hearing.[13]

The law judge also incorrectly disregarded respondent's assertion he was entitled to waiver of sanction due to the Administrator's failure to follow internal procedures by bringing an enforcement action against him, instead of an administrative action.[14] In this regard, the law judge applied our 2007 decision in Moshea in reaching his decision to refuse to consider this affirmative defense. In his oral decisional order, the law judge stated,

> The Board goes on to state, and this [sic] is statements included in the case of Administrator vs. Moshea, EA-5328, 2007 case, stating therein, "Jurisdiction concerning enforcement proceedings extends only to the question of whether safety and public interest require affirmation of the Administrator's order. We"—meaning the Board—"do not insert ourselves at the point where the Administrator has sole discretion to make decisions, and the Board's statutory charter prevents us from doing so. The discretion to pursue one remedy over another or to pursue an enforcement of [sic] action at all is solely within the Administrator's purview or description."

Decisional Order at 49-50. In 2009, however, the District of Columbia Circuit Court found we erred in Moshea and remanded the case to us to consider whether the FAA improperly sought sanction against the respondent. Subsequent to the Circuit Court's remand, we issued a decision reversing the 2007 Opinion and Order. Under our current jurisprudence, law judges must take evidence and consider these procedural issues when respondents contend they are entitled to an alternative type of sanction.[15]

Therefore, we instruct the law judge to hold a hearing in this case. Respondent, as discussed above, raised numerous factual questions which can only be resolved through the

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[13] See, e.g., Administrator v. Carr, NTSB Order No. EA-5635 (2012); Administrator v. Hollabaugh, NTSB Order No. EA-5609 (2011); Administrator v. Manin, NTSB Order No. EA-5586.

[14] See Administrator v. Moshea, NTSB Order No. EA-5523 at 8 (2010), following remand from District of Columbia Circuit Court, 570 F.3d 349 (D.C. Cir. 2009).

[15] See footnote 13, supra.

taking of testimony and evidence at a hearing. Likewise, the law judge improperly made credibility findings unfavorable to respondent without the benefit of a hearing. Additionally, the law judge applied an overturned holding from the Moshea case when he refused to take evidence and consider respondent's affirmative defense that the FAA failed to follow its internal procedures in bringing an enforcement action against him. Although we note the existence of these specific factual issues, this list is not exhaustive. It merely explains our general conclusion as to why summary judgment was the inappropriate disposition. At the hearing, the law judge should not limit the acceptance of evidence to the issues described above. The Administrator has the burden of fully proving the allegations set forth in the complaint.[16] Following the Administrator's case-in-chief, respondent may put on his case-in-chief. Respondent also has the burden of proving any affirmative defenses he raises.[17] Finally, the Administrator should have an opportunity to rebut the respondent's case-in-chief and affirmative defenses.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's request for a remand is granted;

2. The law judge's oral decisional order granting summary judgment is set aside; and

3. This case is remanded for a full and complete hearing.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

[16] Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (stating the Board's role is to determine, after reviewing evidence the Administrator presents, whether the Administrator fulfilled the burden of proof); see also, e.g., Administrator v. Opat, NTSB Order No. EA-5290 at 2 (2007); Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005).

[17] Administrator v. Kalberg, NTSB Order No. EA-5240 at 7 (2006) (citing Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994)).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
J. RANDOLPH BABBITT,	*	
ADMINISTRATOR,	*	
FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-19059
	*	JUDGE GERAGHTY
[redacted]	*	
	*	
Respondent.	*	

U.S. Tax Court, Courtroom 406
Sandra Day O'Connor U.S. Courthouse
401 West Washington Street
Phoenix, Arizona 85003

Wednesday,
November 9, 2011

The above-entitled matter came on for hearing, pursuant to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

ADMINISTRATIVE LAW JUDGE GERAGHTY: The matter is before the Board on the appeal of the Respondent, Mr. [redacted] from an Order of Suspension which seeks to suspend his airline transport pilot's certificate for a period of 60 days. The Order of Suspension was filed as provided by Board rule as the complaint herein; therefore, I use those terms interchangeably. The Order of Suspension is the complaint and vice versa. The complaint was filed on behalf of the Administrator of the Federal Aviation Administration and he is nominated the Complainant herein.

The allegations supporting the proposed enforcement action against the Respondent are set forth in 11 numbered paragraphs of the complaint and subsequently in this order I will address each of those factual allegations and the response made by the Respondent to the assertions by the Complainant in his motion, that in light of the Respondent's answer filed to the Complainant there is no material fact remaining in dispute. I will address those seriatim

subsequently herein.

Before proceeding to that, however, I believe it would be helpful and, in fact, it is necessary to discuss some ancillary matters that have arisen as a result of the various arguments and assertions in the pleadings and also to discuss the Federal Aviation Regulations, which have arisen in the course of this proceeding.

There has been argument made on the part of the Respondent that a special flight permit, also called a ferry permit, is -- and it's stated on page 6 of the Respondent's response to the motion, where it is asserted that according to the FAA the Respondent's transgression was not in obtaining a ferry permit so that he could fly the aircraft to the manufacturer's facility, which I believe was in Williams, apparently not obtaining a ferry permit despite determining -- that is, the Respondent determining, the aircraft was airworthy and soliciting advice from the manufacturer.

It goes on, on page 7, to assert that as was stated in deposition that the special flight permit is really just a ministerial action or requirement, or here, the word ministerial exercise in obtaining the permit, and that it was really enhancing form over substance. I disagree. And Mr. [sic] Dufriend in his deposition, which is Exhibit C to the Respondent's response, clearly states the grounds for that assertion.

A special flight permit is obtainable in accordance with provisions of Section 21.197 of the FARs. That is not a regulation contrary to what appears to be the assertion here that can be charged as a violation on the part of an owner or an operator of an aircraft. It does not include any prohibitory language; it's a procedural regulation. It sets forth when a ferry permit is required and how to go about it. But that is not simply formality, because the purpose is there is an event that puts into question the standard airworthiness that the particular aircraft possesses, and therefore to fly it, you might be flying the aircraft when it is in an unairworthy condition. Usually, you're flying it from point A to point B for purposes of obtaining some sort of specialized maintenance.

However, as a condition to the obtaining of a special flight permit, or ferry permit, it is required that that particular aircraft be inspected, as Mr. Dufriend correctly stated in his deposition. The regulation itself specifically requires that the aircraft be submitted to a certificated mechanic, A&P, and have that mechanic inspect the particular aircraft and make a determination, which he must certify back to the FAA on the form applying for the ferry permit that the aircraft is in safe condition for flight. Not that it's airworthy, just that despite whatever the discrepancy may be with a particular aircraft, that it still

can be operated safely; that is, that there will not be any detriment to the public interest and aviation safety, which is the bottom line for the FAA and the Board.

However, the issue of whether or not a flight permit is obtained or should have been obtained is not an issue in this case. That is not the transgression that is charged in the Administrator's complaint. I will discuss the actual regulatory charge in the complaint subsequently, but it has nothing to do with the issuance or nonissuance of the ferry permit.

I'm willing to accept on the evidence that the Respondent did make an inquiry with, I believe it was Mr. Robinson, as to whether or not he needed a ferry permit; and on the statement of the Respondent himself, and I didn't find anything else, he was told he didn't need one. That was not the person to ask about whether he needed a ferry permit. You should have called the FSDO, the Flight Standards District Office, and spoken to one of the aviation safety inspectors whose specialty is maintenance or maybe even operations inspector, and say, here is what's happening; do I need one?

The advice he received, if he did receive that advice, was erroneous, and it's Respondent's obligation to act correctly. The fact that he relied upon erroneous advice does not excuse anything. But in any event, that is not the basis of the charge in this action which is pending before me, and

it is not a predicate to the regulatory charge set forth in the complaint.

There is also allegations and assertions made as to the failure of the Administrator to charge a violation of section 91.7 of the Federal Aviation Regulations. Again, a charge of 91.7, for whatever reason, the FAA decided not to bring that regulatory charge in this case. Therefore, I do not have to address whether or not the facts in this case would have supported a charge of regulatory violation of that particular FAR.

However, I do note and so hold that a charge and a finding of violation of 91.7 FAR is not a predicate to the charge of regulatory violation -- of the regulation violation charged herein. And the regulation at issue herein is whether or not as a consequence of the flight operations conducted by the Respondent, which commenced on May 23, 2010, and carried over into the following day, May 24th, 2010, that such caused the Respondent to operate in regulatory violation of the provisions of Section 91.405(a)(b) of the FARs. And I will discuss the specific provision of that regulation below.

It is instructive to look at the requirement of 91.7 for several reasons herein. Section 91.7 applies to civil aircraft airworthiness and consists of two subparagraphs: subparagraph (a), subparagraph (b). Subparagraph (a) is prohibitory. It says no person may operate a civil aircraft

unless it's in an airworthy condition. Straightforward, the aircraft's not airworthy, you can't operate it. That falls over into, I have a malfunction or discrepancy with my particular aircraft; it may be unairworthy or the mechanic has told me it's unairworthy, but it's in a condition for safe flight, so I can get a ferry permit. That's the only way to get around 91.7(a) other than not flying the airplane.

Subparagraph (b) needs to be discussed in this case. There was a report made by Aviation Safety Inspector James Kerr, K-E-R-R, and that report is attached to the Respondent's response as Exhibit B. Before going into the details of his report, it should be noted that Inspector Kerr's involvement in this event was not in the enforcement action which is before me. Rather, he was assigned to conduct a possible re-examination of the qualifications, that is, the competency, of the Respondent. The issue for re-examination is whether or not there is a reasonable basis to request the re-examination. For example, the person trying to land the aircraft runs off the runway; that's probably a basis to ask for a re-examination, unless there was a mechanical problem, and have the person demonstrate that he can land an aircraft and stay on the runway.

In this case, Mr. Kerr conducted a re-examination interview with the Respondent. Whatever Mr. Kerr determined in the course of the re-examination is not relevant to

resolution of the issues in the enforcement proceeding which is pending before me. They are two separate and distinct actions that the FAA can bring. They, in fact, can bring both actions against an individual as a result of a single occurrence. That is, an occurrence may result in a finding or an allegation that there was a violation of a particular operational FAR and also be grounds to question the competency of the pilot or his knowledge. Or there could be an event where there is no charge of regulatory violation, but there is a question as to the competency of the pilot, such as a pilot possibly flying an ILS. Maybe not committing any regulatory violation, not following ATC instructions, but so messed up the ILS approach, missed the approach and go around and miss it again, that there's a question as to whether or not he's competent to hold a instrument rating, and so there's a re-examination. It has nothing to do with the violation.

Mr. Kerr, based upon discussion that he had with the Respondent in the course of this, determined that it was unnecessary to do a complete re-examination, but that counseling was sufficient. That finding, again, is not relevant to any determination in this case.

Also, in his report, Mr. Kerr lastly indicates that he understands the rule. I would assume that he's talking about 91.405 and possibly also 91.7 in saying that an experienced pilot can make a determination of aircraft

airworthiness, and pilots do this on a day-to-day basis. And, of course, there is also the assertions that, you know, the aircraft and the facts do show that on May 24th, it was flown with the gear down from Phoenix Sky Harbor to Williams Gateway Airport and it arrived there without further incident. The fact that it arrived there without further incident as far as I'm concerned is fortuitous, because at that time there was an unknown discrepancy; the cause was unknown. The impact of a second landing at Williams could, just within the realm of reasonable probability, cause a failure of the gear system entirely and its collapse. There could have been a crack in some of the mechanism and another impact, even with a smooth landing, could have caused a total failure. So the fact that it arrives at another destination safely, again, is not determinative of the issues herein.

But I specifically do take issue with the statement that pilots make airworthiness determinations on a daily basis. And I believe he's referring to a pilot's obligation to do a preflight check, a walk around, inspect the aircraft, ensure that the required entries are in the logbook, that it's within times for inspection, et cetera; but that's not an airworthiness determination.

91.7, in subparagraph (b) says what the pilot in command is responsible to determine, and I quote, "The pilot in command of a civil aircraft is responsible for determining

whether that aircraft is in a condition for safe flight." That is not an airworthiness determination.

Airworthiness consists of two things: whether the aircraft meets its type design certificate and it's in a condition for safe flight. We've already gone through that with a special flight permit. If it doesn't meet its type design certificate, it may not be airworthy because it doesn't meet it, but it may be in a condition for safe flight so we can give a special flight permit with listed limitations that ensures that it is operated safely; but the pilot is not making an airworthiness determination, unless the pilot is also an A&P mechanic and is doing a complete inspection of the aircraft.

When the Respondent, however detailed he did his walk around, he was not making an airworthiness determination; he could not. He was making a determination based upon his visual inspection that the aircraft did not present on that inspection any visible defects which would cause him to question the airworthiness of the aircraft, such as fuel running out from beneath the wing, you know, part of the empennage is curled up, you know, damage to the wing tip. That is, you know, a question of safe flight and would also then carry over into a question that should arise in his mind, you know, this aircraft may not be airworthy; I better have someone who is qualified look at this.

So I disagree with the assertion that a pilot on a daily basis is making a determination of airworthiness; he is not. He's making a determination that, based upon a visual inspection, that the aircraft appears to be in a condition safe for flight.

And, in any event, I also note that Mr. Kerr in his deposition, which is Exhibit D attached to the Respondent's response, does not exonerate the Respondent, because on the excerpted page, which is page 32 from his deposition, on line 17, there is a question, apparently from Respondent's counsel: "Based on your experience, and you have a lot of experience, do you think my client," meaning the Respondent, "did anything wrong?" Answer: "Yes. He violated the rule."

The rule at issue here is FAR 91.405(a) and (b). So Mr. Kerr, in his deposition testimony under oath, asserts that in his opinion, the Respondent was the one who by his actions violated the provision of 91.405(a) and (b).

Turning then to what is actually charged based upon the allegations of the complaint. It is charged that the Respondent has operated in regulatory violation of Sections 91.405 (a) and (b) and additionally, section 91.13(a) of the FARs.

Going in reverse, Section 91.13(a) FAR prohibits an operation by an individual of an aircraft in either a careless or reckless manner so as to endanger the life or property of

another. I will discuss that in more detail subsequently. The real crux of the issue here is the charge under the prior regulation 91.405.

Section 91.405(a) provides -- and you must read the regulation, and I will do that, "Each owner or operator" -- Respondent was an operator, therefore he is covered by this regulation; he was operating the aircraft -- "shall have" -- shall is defined in the regulations as a mandatory word that means you must comply -- "have the aircraft inspected as prescribed in subpart E of this part" -- and that's not pertinent herein -- "and shall" -- again, mandatory -- "between required inspections" -- that would be the 100-hour inspections, annual inspections, inspections under an inspection program that has been approved for a 135 or a 121 operator possibly -- "except as provided in paragraph (c)." And paragraph (c) is inapplicable in this instance, and shall between inspections "have discrepancies repaired as prescribed in Part 43 of this chapter."

This language clearly states a responsibility mandatory on the part of the operator of the aircraft to have the aircraft inspected. Respondent didn't have to have it inspected to begin with, but going to the second part of this, he must -- he shall, between the inspections -- "have discrepancies repaired as prescribed in Part 43 of this chapter."

And when we refer to Part 43 in this regulation, what they're referring to is the requirements placed upon the A&P mechanic who can perform maintenance. That's what's prescribed in Part 43 and the disposition of records and entries that are required to be made by the A&P mechanic reflecting what he did and his signoff and his return of the aircraft to service after he has performed the maintenance or the inspection. And inspection, by definition in Part 1 of the regulations, is maintenance. So, an entry has to be made by the A&P mechanic.

And I simply note here that under the FARs, it is entirely possible for one instance to result in violations by more than one party. For example, an A&P doesn't make his entry and we'll see in part (b) there's also an obligation on the pilot. If there's no entry, it may fall on him.

However, going back to having discrepancies repaired during or between inspections, there was an argument made in the response that since a repair to the malfunction of the gear system. And a malfunction where the gear does not lower in its normal operation and its snipes design, that is a malfunction. And I treat the Respondent's statement of the description of his actions on his arrival at Phoenix Sky Harbor on May 23, 2010, the statement that he sent to Mr. Dufriend, which is dated July 6th, 2010, I attach more significance to the statements contained therein than to the

subsequent statement that he made and is attached to the response, that statement being made on October 31st of this year. The events are much clearer back in July of 2010 and the issue of self-serving does not arise as clearly with respect to the earlier statement, since at that point there was no initiation or involvement in an actual enforcement action.

In that statement, in the first paragraph thereof, Respondent states that he discovered on final approach that the gear would not deploy when the gear handle was lowered several times. So there was more than one attempt, there were several attempts, he initiated go around, and then in the interest of safety, declared an emergency. I commend him for doing so; that was a reasonable and prudent thing to do because he didn't know what was wrong with the gear. Nothing wrong with having people standing by in case something catastrophic happened. He states herein, "The alternate gear extension check got three green lights." Again, the three green lights usually indicates down and locked, but with a malfunction that may not be true. And again, that's why I think it was prudent for him to declare the emergency and have fresh equipment on alert or standing by.

But the issue is on the assertion that the Respondent, after the events on May 23rd and his discussions with other persons, being told that he did need a ferry permit

and on his description to the people, Mr. Robinson apparently, talking on the telephone, that he determined that he could fly the airplane from Sky Harbor to Williams. And he did that with the gear extended and fortunately there was no further malfunction or event and the flight was completed safely.

However, the fact that the repair was done prior to the next annual inspection on this aircraft does not satisfy this regulation. This regulation on its clear meaning and intent is that where a discrepancy occurs between the period of inspections, whether it's the 100-hour or an annual, that the owner or the operator must have that discrepancy repaired; that's what it says, "have the discrepancies repaired". And it's prescribed in Part 43. That means an A&P mechanic who is certified to work on the aircraft does the repairs and makes the required entries. Otherwise, we would have the reasonable assertion, to me -- and that's what it is; it's a reasonable assertion -- that a discrepancy could occur 1 month after the annual inspection and the pilot could fly for the next 11 months with a known discrepancy and satisfy this regulation by having that discrepancy repaired a week before the next annual inspection is due. How does that promote or satisfy the public interest and air safety? It doesn't.

This regulation requires if a discrepancy occurs, it must be addressed and must be corrected regardless of when the next inspection is due. You can't wait for the next required

inspection to address and correct a known discrepancy that affects the airworthiness of the aircraft. And this discrepancy malfunction here is a malfunction and a discrepancy to a significant component of the aircraft, the landing gear system. And I will discuss the *Calavaero* case subsequently when I go through the actual allegations. That's C-A-L-A-V-A-E-R-O.

Now, without further belaboring, let's turn to subsection (b) of 91.405. It states that "Each owner or operator" -- again, the Respondent is an operator -- "shall ensure the maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for a return to service." Again, as I already have stated, the requirement for entries is placed on two people. If no entries were made in a particular instance, then both the A&P mechanic who did the maintenance and the particular operator could be charged with a violation: failure to make required entries.

Here there were no entries made, because no inspection of this discrepancy was ever made by an individual who was certificated to actually make a determination as to the cause, nature, and extent of the discrepancy, what corrective action needed to be taken, and signing off and returning the aircraft to service after his inspection or maintenance. And the inspection would be maintenance. So

even if nothing had to be done, it was simply, you know, adding some grease, that would still have to be noted in the maintenance log and an entry made, because if the A&P had done an inspection and done something. And the Respondent under subsection (b) was required to assure that the mechanic made that entry.

It is also clear from the plain reading of 91.405 FAR that a charge of regulatory violation of section 91.7 is not a prerequisite or a predicate to finding or sustaining a charge of regulatory violation of section 91.405(a) and (b); and I so conclude. 91.405 of the regulations stands on its own. It prohibits and requires certain actions on the part of either the owner or the operator. In this case, the operator, Mr. [redacted]

So the issue in front of it seems to me is whether or not on all the facts and evidence in this case as they appear in this pleadings -- and I have reviewed all of the pleadings filed in this case from the original appeal through the motions -- as to whether there remains a genuine dispute as to any material fact as to require a further hearing to resolve that particular material fact. And the material facts are within the scope or delineated, if you will, by the clear terms and requirements of Section 91.405(a) and (b) of the regulations.

In my discussion, therefore, I am going to go

through the charges, allegations, raised by the Complainant in support of his ultimate charge of regulatory violation by the Respondent of Section 917.405(a) and (b), and the Respondent's answers as they appeared in his answer and also as they are discussed in more detail beginning on page 11 of his response to the motion for summary judgment.

Paragraph 1 of the complaint charges that the Respondent at all times pertinent was the holder of an airline transport pilot's certificate with a designated number. And that statement was admitted in the answer and it is also admitted in the response.

It is not dispositive of the issue of violation of the regulation charged, but it is still a significant statement, because if the Respondent was not the holder of an airman's certificate, he should not be in front of me on an enforcement action. It should be a civil penalty, possibly. So that allegation is important because it shows jurisdiction. In any event, it's admitted.

Paragraph 2 charges on May 23 of 2010, with the local time, that the Respondent operated a Cessna C560 aircraft with the registration number given as the pilot in command on a final approach into Phoenix Sky Harbor Airport. Allegation in the answer, which was filed March 18, 2011, was admitted, and it's admitted in the response.

It's not dispositive, I would agree. It doesn't

mean that there's a violation. But again, it is important, because if the Respondent was not the pilot in command, he wasn't the operator of the aircraft, then we shouldn't be here, we should find out who actually was the operator. But it's admitted that he was the pilot in command; therefore, he falls within the definitions in the regulation: owner/operator is responsible. He was an operator.

Paragraph 3 was admitted; and to the extent that he declared an emergency and in his answer and again as set forth in the response partially admitted, partially denied. He denies that his landing gear failed to extend.

Possibly, paragraph 3 could have been worded in a better way, shall we say, but on the facts and the admitted facts in this case, there is no question that the Respondent's effort to extend his landing gear on his final approach into Phoenix on the day in question that the landing gear system did not operate as normally it is designed to do; that is, the gear would not extend. Ultimately, he did get the gear extended, but that was through the emergency or auxiliary system provided for an emergency extension of the gear in the event that there is a failure of the primary system.

So if you read this, his landing gear had failed to extend and it is clear from his own statement made in July of 2010 that there were several attempts made to extend the gear through normal operation of the gear handle and it didn't work

and that he ultimately had to extend it through the auxiliary system. So I find on the facts and circumstances here that the allegations in paragraph 3 are admitted and there is no genuine dispute as to the facts charged in paragraph 3 of the complaint.

Paragraph 4 is admitted. Again, it is not dispositive of the charge in 91.405, but when you put paragraph 4 admitted along with paragraph 3, it is clear that the landing gear malfunctioned; it did not operate as designed. That is, you put the gear handle down, the gear goes down and locks into place. Several attempts were unsuccessful and he had to use a backup system. So, paragraph 4 is established and there is no genuine dispute as to any of the facts charged in paragraph 4.

Paragraph 5 was admitted in total in the answer filed back in March of 2011. However, in the response to Complainant's motion, Respondent through counsel states that allegation 5 was improperly admitted, as the Respondent didn't depart Sky Harbor on May 23.

Yes, he did not depart on May 23rd, 2010, from Sky Harbor Phoenix on the flight over to Williams Gateway Airport. That occurred on May 24th. So, this event actually occurs over a period of time that begins on the 23rd and extends for purposes of the charges here into the next day. And in any event, the actual wording of paragraph 5 of the complaint is

that on or about May 23rd, 2010, you departed Phoenix on the flight to Williams. The date is at most harmless error. The Respondent knows when he arrived at Sky Harbor and he knows when he actually flew from Sky Harbor over to Williams.

I would simply say that the language of on or about May 23 is sufficient to satisfy pleading requirements of the complaint and that on the facts and the admitted operation by the Respondent, May 24th is when he flew the flight, but there is no real material fact to be disputed as to whether or not it was 23 or 24 May of 2010 and, therefore, there's no issue to be resolved by the taking of evidence.

As stated in the response in the motion, the allegation in paragraph 6 of the complaint is partially admitted and partially denied. In his answer filed in March, the Respondent states, and I'm quoting, "Respondent admits that the maintenance personnel did not physically inspect the landing gear." So, he's admitting that maintenance personnel did not physically inspect the discrepancy; that is why the landing gear failed to extend after several attempts. That's a clear admission.

In the response to the motion, he expands on what is stated also in his answer, "Respondent denies any implication he didn't properly coordinate with certified maintenance/manufacturing personnel prior to departure." But, in his response, he again partially admitted and partially

denied. Respondent admits that a physical inspection of the aircraft's gear by maintenance personnel did not occur. And he goes on to say, that's because there's an interlocking system that the gear won't collapse. But we don't know what the malfunction was.

The cause of this discrepancy was never known until the aircraft arrived at Williams, and an inspection was done by certified personnel who found the cause of the malfunction. At the time of the flight on May 24th, the Respondent didn't know what had caused the malfunction. It had never been inspected and he was not qualified to make a determination as to what had caused the malfunction. He is not shown to hold an A&P certificate or a repairman's certificate.

A discrepancy under 91.405(a) is required to be addressed and repaired. That means it needs to be looked at by someone who is qualified to do so and that person to be qualified to repair whatever that discrepancy in accordance with the requirements placed upon the mechanic in Part 43 and also the procedures that are imposed upon the mechanic in Part 43 of the regulations. He has to use methods and practices acceptable to the Administrator. All those things apply in Part 43.

On the weight of the reliable and probative evidence in front of me, I find and conclude there is no genuine dispute as to the allegations in paragraph 6 of the complaint.

The Respondent, as the operator of the aircraft, did not have maintenance personnel, that is certificated authorized personnel, inspect the landing gear of his aircraft prior to his departure on May 24th from Phoenix Sky Harbor. There is no genuine dispute as to that allegation, and I so find.

And before passing on, I'd simply note again that in the responses in the motion, there is the assertion by the Respondent that the Respondent denies that a proper inspection was not made. No question. The Respondent on -- and I'm willing to accept the statements made by him, and that's all Mr. Kerr had to go on, too. He accepted the Respondent's description of what he did. I'm willing to accept that he did a detailed walk around and as an experienced pilot in command, made a reasonable determination of airworthiness. I've already discussed that. As pilot in command, he is not making an airworthiness determination; he is simply determining on a visual inspection whether the aircraft is in a condition for safe flight. That is not airworthiness and is not a determination of airworthiness by him under 91.7. He is not qualified to make an airworthiness determination of the aircraft. And whether or not he coordinated with anyone else is not sufficient.

Respondent also takes issue with the citation in the Complainant's motion to the case of *Administrator vs. Wing Walker*, which is EA-4638, a 1988 case. It involves a hot air

balloon. So it is true that this is not a fixed-wing aircraft, but it is an aircraft and operates in airspace. But the issue as is pertinent here is not a determination of airworthiness of the hot air balloon or whether or not it met 91.7.

The authority in *Administrator vs. Wing Walker* is that as it is applicable in this case is a -- appears on -- or at page 6 of the Board's opinion and order, and I quote, "It is unreasonable for Respondent" -- meaning the Respondent in that case -- "to rely upon Stumps" -- which is a name, capital S-T-U-M-P-S, apparently, someone that Mr. Wing Walker contacted by phone -- "relied on Stumps' telephone opinion." Where Stumps, after talking with the Respondent, rendered an opinion that the hot air balloon was airworthy, and the basket was okay and, you know, the whole thing. And going on, and it's in the citation, "if only because an opinion given without an examination of the balloon." So, the Board is clearly saying that a telephonic opinion as to clearing a discrepancy or on an issue of airworthiness or the severity of the discrepancy is worthless over the telephone.

If you have a discrepancy in your automobile that is severe enough that the automobile won't stop when you apply the brakes or it doesn't do something that is normal operation, you take it to the garage or the dealer and have it repaired, get an opinion, unless you're an automotive mechanic

yourself. You don't do it over the telephone, other than to make an appointment.

Also, I would note that in the case of *Wing Walker*, there was also a separate concurring opinion by member, or then member, Goglia. I knew Mr. Goglia personally. He had a long history in aviation maintenance both as a mechanic and as an official within Aviation Mechanics Union.

In his separate opinion, Member Goglia concurred with the language, which I've already just cited, and went on to state separately in his concurring opinion that Respondent's action of consulting with Mr. Stumps by telephone was clearly not reasonable, that action was not reasonable in relying upon this telephone conversation; that is, an opinion given by telephone, as to the nature, extent of the malfunction, and the airworthiness of that hot air balloon. That is what is pertinent here and this citation in *Wing Walker* is in accord.

There is no issue as to the airworthiness of this aircraft, since that is not charged in this action. And I specifically find that an opinion offered by whoever or whomever over the telephone on a description, and that's all the person on the other end of the phone has, is the particular individual's, in this case the Respondent's, description of the event, and the Respondent didn't know the true cause of the malfunction.

So, the opinion expressed over the telephone is based on what that individual is being told by the operator. That does not satisfy the requirement to a discrepancy repaired, nor can it be an adequate determination as to whether or not a particular malfunction renders the aircraft unairworthy. That can only be done after the individual that's making that determination physically inspects the problem and arrives at a conclusion.

So in any event, paragraph 6 does not on the evidence present a material fact that is generally in dispute. And I so find.

In his answer of March, Respondent admits that he failed to have maintenance personnel, and he puts it in quotation marks, "repair the landing gear". And he goes on to say he conferred with certificated maintenance manufacturing personnel, and that was, again, by phone, who instructed him to take the action that the Respondent took. And that is essentially what is reiterated in his response to the motion when he addresses the allegations in paragraph 7 of the complaint. And he notes that the Respondent was never charged with a violation in 91.7 and it goes on to state that not every defect whereby the aircraft at the departs from its state at the time of manufacture makes an aircraft unairworthy. That the Complainant is asserting without proper foundation or supporting evidence the violations charged in

the complaint, that is 91.405(a).

So we've already restated a charge of 91.7. And whether or not it could have been made in this case is not for me to even comment on. It was not made for whatever reason, but it is not a predicate to a charge of violation of 91.405. And I think I've already covered that in sufficient detail. And peripherally here what the Respondent is referencing is essentially the Board's opinion in the case of *Administrator vs. Calavaero*, which is at 5 NTSB 1099 at 1101, 1986 case. Respondent does cite to the *Calavaero* case in his response and it is correct that not every minor dent, scratch, or loose screw is sufficient to cause an aircraft to depart from its airworthiness. But, you have to read the language of the *Calavaero* decision. The Respondent, other than in his footnote, does not include what to me is the key word in the *Calavaero* decision.

In *Calavaero*, the Board does state, "Not every scratch, dent, pinhole, or missing screw, no matter how minor, renders or equals an aircraft being in an unairworthiness condition." That is not dispositive of the issue in this case. We are not dealing with a minor discrepancy. We are not dealing with a loose screw or a pinhole. It might have been a loose screw, but at the time of the operation, nobody knew. It turned out it wasn't just a loose screw.

A malfunction of the landing gear after several

attempts to properly deploy as it is designed to do is not a minor malfunction; it is a significant discrepancy, a significant malfunction. And the fact that the Respondent talked to someone on the telephone, Mr. Robinson, and that Mr. Robinson in his deposition really doesn't say anything that is, in my view, helpful to the Respondent's assertions in this case.

In the excerpt included with the Respondent's response to the motion, which is Exhibit F, Mr. Robinson expressed a very limited recollection of what had transpired between himself and the Respondent. On line 8, after being asked about what the Respondent stated the problem was, Mr. Robinson says, "I just remembered that he said he had an issue with his gear and he had to blow his gear down, that is what I remember." We already know that he had to -- he couldn't extend it normally, he had to use the auxiliary system.

As to further questions about what had transpired in conversation between Robinson and the Respondent, his answer on line 19, "I don't recall." Could it have happened? You know, just about anything is possible, but that's not evidence.

In any event, as I've already indicated, you can't clear a discrepancy by telephone. The Board has held that, that is clear as a matter of Board precedent and it is also,

to me, clear as a matter of simple logic. Unless somebody who's qualified looks at the discrepancy and makes a determination, his opinion as to what it is or the severity of it is essentially useless.

In any event, I find on the preponderance of the reliable evidence that the allegations in paragraph 7 are established by a preponderance of that evidence and that there is no genuine dispute as to this fact as it would require further hearing.

The allegation in paragraph 8 of the complaint is that you, the Respondent, failed to ensure maintenance personnel approved the aircraft for return to service prior to your departure from Sky Harbor.

In his answer of March of this year, the Respondent denied the allegation, stating, "The Respondent denies the allegation 8, as properly licensed supervisory A&P holder personnel are aware of all the facts." And the only way they were aware of all the facts is whatever it is that the Respondent told him. That is, the person at the other end of the telephone regarding the operation and employed by the aircraft manufacturer approved the flight operation. The person at the other end of the telephone cannot make an airworthiness determination by phone, nor can he return an aircraft to service by telephone for all the reasons which I've already discussed; and I don't think I need to belabor

that.

Respondent did call people; however, whatever information that he received over the telephone was erroneous both as to the necessity for the special flight permit and the fact that he could fly the airplane without anyone else having to actually physically inspect the discrepancy. Board precedent clearly precludes such a conclusion.

Respondent failed to have maintenance personnel properly inspect and repair the discrepancy and return the aircraft to service. That is what's required by 91.405. 91.405(a) states that the operator shall, that is must, have the discrepancies repaired as described in Part 43. And that, again, is that a properly certificated aviation mechanic does the inspection, uses proper techniques and methods, makes the required entries, does the repair, lists what he's done, and signs off the maintenance logbooks of the particular aircraft. Telephone discussions do not satisfy the language of 91.405(a) and I so find and conclude.

Since this aircraft was never inspected at Phoenix Sky Harbor by a certificated aviation mechanic, no repairs were made, no entries were ever made in the maintenance records of this particular aircraft, the Cessna C560 with registration number N10 RU, Romeo, uniform.

Since maintenance personnel were never called to work on the aircraft or inspect the aircraft, nobody made an

entry. And even the individual spoken to, apparently Mr. Robinson, he never made an entry because he's at a place removed from Phoenix Sky Harbor expressing an opinion based upon what the Respondent is telling him, he's not -- he didn't sign anything and wasn't present to do it, never made a personal inspection.

I find on the evidence in front of me that the Respondent on a preponderance of that evidence failed to have required and certificated maintenance personnel inspect the aircraft, perform the repair of the discrepancy as required by 91.405(a), and then make the appropriate entries as required by subparagraph(b) of 91.405 FAR; and that, therefore, on a preponderance of that evidence that there is no material dispute as to this material fact.

And I just simply observe, Respondent has never offered any record to show that somebody at Phoenix Sky Harbor on May 24th or the evening of May 23rd made a logbook entry returning this aircraft to service. After the aircraft has been inspected or any work done on it, the maintenance person doing that had to make an entry as to what he did. "I inspected the aircraft and found nothing wrong with it." Maybe there was some ice and it melted and everything is fine. But he makes that entry and signs it. Or he signs, "I added grease or tightened a screw", or whatever and signs it. Respondent has shown nothing that any entries were made and,

in fact, no repairs were ever made.

Pressing on then, paragraph 9 of the complaint was admitted both by the Respondent in his answer in March and in his response as it appears in -- on page 14 of his response to the motion. Admits paragraph 9 but for the reasons stated in response to paragraph 7, again reciting that a discrepancy does not necessarily make an aircraft unairworthy and he cites to the case of *Administrator vs. Calavaero*, which I've already discussed.

The language used in Respondent's response here, which I quote, "A discrepancy does not necessarily make an aircraft unairworthy." Citing to *Calavaero*. That leaves out the significant term, not every minor discrepancy. That's clearly what the *Calavaero* case says. And it gives examples of what is a minor discrepancy. A failure of the gear to properly operate is not a minor discrepancy.

Calavaero does not support Respondent's assertions. There is no material fact presented by the allegations in paragraph 9 of the complaint. It is admitted, in fact, that the Respondent flew the aircraft from Phoenix back to Williams Gateway Airport with the gear down; there is no genuine dispute.

Paragraph 10 recites that on May 24th, maintenance personnel at the service center at Williams Airport determined the problem, the malfunction, was caused by a loose gear

extension switch assembly, so that was the malfunction. That was a discrepancy.

At the time the aircraft departed from Phoenix, the true nature of the cause of the malfunction was not known. It was not known until it was actually inspected and repaired at Williams Gateway. Respondent admits paragraph 10 both in his answer and in his response to the motion. And the assertions, again that a discrepancy does not necessarily make an aircraft unairworthy, again, citing to *Calavaero*, is not supportive of that position; because we're not dealing with a minor discrepancy, it's dealing with an unknown discrepancy and a major system component of this aircraft, that is the landing gear assembly.

So on the evidence in front of me, all of the pleadings, the answers filed, and the arguments made, I do find that paragraph 10 is established by a preponderance of the evidence and there is no genuine dispute as to any fact that is material as cited in paragraph 10 of the complaint. The last paragraph of allegation in the complaint is that the Respondent denies the allegation in paragraph 11; and he expands on that denial, which was just a straight denial, in his answer. But in his response, he claims it is only a residual violation, if in fact there is a finding of the operational violation of 91.405(a) and (b), which is established independently. I would agree.

However, the allegation in paragraph 11 is really a conclusion of mixed facts and law and it is determined based upon all of the evidence and findings that I make in the particular case and that is the care herein. And so I reserve any statement as to my finding with respect to the allegation in paragraph 11, which really is addressed to the charge of regulatory violation of section 91.13(a) of the FARs.

Turning then to several affirmative defenses which are raised by the Respondent. In his answer, the Respondent listed five affirmative defenses in the discovery response and in his response to the motion. Respondent withdrew his affirmative defense, which was listed as affirmative defense number 2 in his answer. So that is no longer before the Board.

I would also observe that the affirmative defense 5 as listed in his answer was really not an affirmative defense; it was simply a statement that the Respondent reserved the right to amend his answer to incorporate any affirmative defenses that might come up as a result of ongoing discovery. No other affirmative defenses other than the ones originally put forth in the answer have ever been made in this case.

The first affirmative defense deals with whether or not the Respondent is entitled to an immunity under the aviation safety reporting program, otherwise known as the filing of a NASA report.

The evidence does show and there is exhibits attached to the Respondent's response that he filed in a timely manner a report with NASA and, therefore, he at least on the face is entitled to immunity, which is even if there's a finding of a regulatory violation, the imposition of a sanction is waived at least for a period of 5 years.

However, as provided in, I believe, paragraph 9 of the advisory circular dealing with the terms and conditions applicable to the waiver of sanction, the first one is that the charged event must be one which is inadvertent and not deliberate. Respondent in his response argues and asserts that he is entitled to all the immunity granted under the filing of a timely NSAA report and cites to the case of *Ferguson vs. NTSB*, which is at 678 F.2d 821 at 828. It's a Ninth Circuit opinion, 1982, and also the *Administrator vs. Christ*, which is EA Order 4922, 2001 case.

However, neither *Ferguson's* case nor the *Christ* case in any way subtracts from or causes a departure from the language of the advisory circular. In the *Ferguson* case, *Ferguson* does say that the conduct that is excluded from protection is that which approaches deliberate or intentional conduct. That's exactly what the advisory circular says. I think in somewhat garbled function, but nonetheless it does say that the action must be by unintentional -- not intentional and not deliberate. And *Ferguson* does state as emphasized in

Respondent's response to the Ninth Circuit that that would be a sense of reflecting a wanton disregard for the safety of others.

In this case, there is no question that the action of the Respondent flying the aircraft on May 24th without having the discrepancy actually inspected by a qualified maintenance personnel, the repair made and the appropriate entry intentionally flew the aircraft under those conditions from Phoenix Sky Harbor back to Williams Gateway and that was deliberate conduct, not unintentional. Respondent knew what the circumstances were. He knew that the discrepancy had not been diagnosed, had not been repaired or treated, that no entry had been made by any mechanic in the maintenance records, and he decided to make the trip.

He may have made the trip and I accept that he talked to people and he made it upon their advice, but he accepted that advice to his detriment. He's the pilot in command. He's the one ultimately responsible for the operation of the aircraft. Relying upon erroneous advice is not an excuse. And what he was given was erroneous both as to the ferry permit and as to the airworthiness of the aircraft, because that determination could not be made by someone at the other end of a phone. Respondent relied upon that advice to his detriment; he's the pilot in command with the ultimate responsibility. He made an intentional and deliberate choice

to fly. He flew an aircraft, the condition of which was unknown with respect to the gear. As I stated early on, it is equally possible that the malfunction could have been severe enough within that gear that upon the second landing at Williams, the aircraft could have experienced a further failure, even a total gear collapse.

The aircraft being flown without knowing what the condition was is detrimental to the public interest and air safety. It showed a disregard on the part of the Respondent of his obligation and particularly the holder of an airline transport pilot's certificate, who is expected to exercise a much higher degree of judgment and responsibility than the holder of, say, a student pilot or even a private pilot's certificate.

In this case, in my view, he did disregard questions of safety and made a deliberate choice and, therefore, I do find on the evidence in front of me, that the Respondent, although he filed a timely NASA report, is not entitled to the exemption provisions granted under the Aviation Safety Reporting Program. And I further find that on the evidence in front of me, there is no genuine dispute as to that material fact and finding.

Affirmative defense number 3 listed in the answers, that the Respondent reasonably relied upon certificated manufacturer's representatives. And on page 16 of

Respondent's response in subparagraph C, it's entitled Respondent's reasonable reliance on manufacturing and A&P air power plant personnel, is a mitigating factor. And I will discuss that when I reference sanction herein and what should be considered regarding the proposed penalty.

I would note here, however, again there is a question as to Inspector Kerr and the need for a ferry permit; I've already discussed that, I think, in sufficient detail. Kerr's opinion as to airworthiness determinations, Mr. Robinson's statements, if he made any with reference to that, were not determinative.

I would simply note also, there's a citation on page 16 to footnote 70, which is to Exhibit F, which is Mr. Robinson's deposition, and that is an excerpt which is page 12, apparently, of that deposition. And in the response in quotation marks, the employee that Respondent spoke to -- and it must be Robinson because it's a citation in footnote 70 to Exhibit F, which is in the Robinson deposition. The quotation here is, "It depends upon what bearing it has, ellipsis, on him personally." And it cites in the footnote page 12, lines 12 to 19.

I've looked at page 12, lines 12 to 19 and there's -- those lines in the deposition do not support the statement in the response; that footnote doesn't support that. There's no statement to that effect. I can't find that in

lines 12 to 19. Because, actually, line 12 is the middle of a question, which begins on line 11 asking Mr. Robinson:

"Do you remember if he" -- meaning Respondent -- "stated anything about reporting a problem with the gear to any other A&P mechanics including Swift Aviation?

"Answer: No.

"Question: Do you remember if he asked you and said, 'Look, I'm having a problem with Swift, I don't want Swift to look at it, I need you guys, the manufacturer, to take a look at it and tell me what is wrong.'

"Answer: I don't recall. Could that have happened? Yes."

Again, we're into the footnote. I don't know, it's --

MR. PEARSON: Judge, let me interject. It was a mis-cite. I have that for you. She just didn't --

ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, it doesn't make any difference.

MR. PEARSON: -- put the proper exhibit there. Well, I understand, but it's a mis-cite.

ADMINISTRATIVE LAW JUDGE GERAGHTY: You -- I'm just saying that, you know, I have --

MR. PEARSON: If you want that, I can get that for you.

ADMINISTRATIVE LAW JUDGE GERAGHTY: -- read these

documents and I could not find it. So I accept the interjection that it was a misquote, that apparently somewhere, maybe he said it somewhere else in his deposition. I would assume that counsel was not intentionally leading me astray, and I certainly --

MR. PEARSON: It's on video if you're dying to see it.

ADMINISTRATIVE LAW JUDGE GERAGHTY: I make that statement on the record and that is my statement, counsel; I don't believe you were leading me purposely astray. I just simply observe that I did read this and I couldn't follow it. However, we do turn here, really, to the question of reasonable reliance as an affirmative defense.

Reasonable reliance is a doctrine which the Board has adopted probably originally or the primary case is that of *Administrator vs. Fay and Takacs*, EA-3501 at 9, which is a 1992 case. And in the *Fay* case, the Board set forth what are the criteria for a determination of the existence of reasonable reliance as an excuse. And the Board also went on to and in subsequent cases stated that the doctrine of reasonable reliance as the Board has adopted it is one of narrow applicability. And I'll simply cite *Administrator vs. Angstadt*, Board order EA-5421 at pages 18, 19, a 2008 case. There is also *Administrator vs. Jolly*, EA-5307 at 10, 2007 case. And even more recently, *Administrator vs. Carr*, EA-5573

at pages 7 and 8, a 2011 case.

So, what are the criteria and where do Respondent's actions fit within that? The Board has clearly stated that "Under the doctrine of reasonable reliance, the Board's doctrine applies only where the circumstances in their entirety," and I agree we must look at all the circumstances of the particular case in their entirety, "if the pilot in command," herein that would be the Respondent, "has no independent obligation or ability to ascertain the information and if he has no reason, or she has no reason, to question the other's performance, then and only then will no violation be found." And that is the criteria and that is the doctrine.

So there are several things we need to look at in the entirety of this case. Does the pilot in command have an independent obligation herein? Yes, he does. 91.405 clearly states the owner or the operator shall -- and that's his independent obligation, not someone else's that he can rely upon; a particular task is the responsibility of another. Yes, the determination of the actual airworthiness of the aircraft was not the Respondent's responsibility because he's not qualified to make that determination, but it was his responsibility to get someone who was qualified to make that determination, to inspect the aircraft and make a determination. So he had an obligation to get someone who could do that. If he had gotten a mechanic who looked at it

and said "Nothing's wrong," and signed it off and returned it to service and then something untoward happened subsequently, the doctrine might apply because he might have a reasonable basis for relying on the sign-off of an incompetent mechanic. But that's not the case here.

In my view on the circumstances in this case, the Respondent cannot meet the first step of the doctrine of reasonable reliance because he had an independent obligation and he also had an independent ability to get the information necessary to effect the repair of the discrepancy, which he had to do. He must have the discrepancy repaired in accordance with the requirements of 43 FAR, that is, Part 43, and to have a sign-off and to ensure that the sign-off is made. There was no one else for him to rely upon. Relying upon someone at the other end of a telephone is not reasonable reliance, that's what *Administrator vs. Wing Walker* says and what Member Goglia was saying in his concurring opinion.

And I would simply also observe that in *Administrator vs. Hatch*, EA-5230, a 2006 case, in which Respondent therein was charged with violations of 91.7, 91.405(a) and (b) and 91.13, which except for the charge of violation of section 91.7 or the regulatory charges extant in this case. The Board therein affirming a 150-day suspension on pages 7 and 8 where they affirmed a finding of reckless operation. They found it was reckless for the Respondent

therein to arrive at a determination upon a failure to inspect, as Respondent was required to do under FAR 91.405, that an aircraft was satisfactorily repaired and has been returned to service. That is, the failures that are extent in this case and in the actions on which the Board affirmed the sanction imposed in the *Hatch* case.

In summary, therefore, I simply find that upon all of the facts and circumstances in this case, that I find that the Respondent is not entitled to rely upon a doctrine of reasonable reliance, in that he did have an independent obligation and an ability to ascertain the information that was necessary to fly from Phoenix back to Williams in a manner that would not be contrary to the requirements of the Federal Aviation Regulations.

This is completely different in a situation, for example, and I simply interject this here, for example, where the pilot in command of a 121 carrier, he can't push back from the gate unless everybody is seated in the aircraft. The pilot doesn't have to get up and walk back through the aircraft and check 120 seats. He can call the head flight attendant and inquire from him or her, is everybody seated and luggage stowed? And the flight attendant says yes, and pushback occurs and somebody was standing up and falls down, that would be reasonable reliance; the pilot can reasonably rely upon the flight attendant who had an independent

obligation to correctly inform the pilot and the pilot could reasonably rely upon the flight attendant to perform her duty. That's not the situation here. Therefore, there is no material fact in dispute with respect to a defense of reasonable reliance and I so find.

In affirmative defense number 4 in the complaint is that the Administrator failed to follow internal procedures, wants a waiver of the imposition of sanction; and that is essentially the same argument made in subparagraph E of the response in Respondent's response to the Complainant's motion.

Respondent's affirmative defense as claimed in affirmative defense number four is not to a matter that was within the review authority of the Board. The Board has clearly held for example, see *Administrator vs. Liotta*, EA-52.97, a 2007 case, that the Board does not have the authority to review the Administrator's determination to pursue a matter through legal enforcement action. The Board is precluded from deciding the case based upon the Administrator's choice of pursuing an action against an individual. Such action would intrude upon the Administrator's prosecutorial discretion.

The Board goes on to state, and this is statements included in the case of *Administrator vs. Moshea*, EA-53.28, 2007 case, stating therein, "Jurisdiction concerning enforcement proceedings extends only to the question of whether safety and public interest require affirmation of the

Administrator's order. We" -- meaning the Board -- "do not insert ourselves at the point where the Administrator has sole discretion to make decisions, and the Board's statutory charter prevents us from doing so. The discretion to pursue one remedy over another or to pursue an enforcement of action at all is solely within the Administrator's purview or description."

I find, therefore, that upon Board precedent that the affirmative defense related to any failure to follow internal procedures or to make a determination as to whether or not to charge a particular regulatory violation or to charge any regulatory violation at all is a matter solely within the discretion of the Administrator; and the Board has no jurisdictional authority to inquire into any of those circumstances. Therefore, there is no material issue of fact related to this as we require a hearing to resolve.

On a motion for summary judgment, the moving party is entitled to summary judgment if all of the facts and circumstances of the particular case establish, and it is his burden to establish that there is, as a consequence of all of the pleadings in evidence, that there is no genuine, that is, real, dispute as to any material fact as would require trial or hearing to resolve. And in doing so, the trier of fact must look at the evidence in a light most favorable to the opposing party. And I have done that in this case. That is,

I have disregarded any unfavorable inferences and I have attempted to draw only favorable inferences from the evidence in favor of the Respondent.

Nonetheless, upon my review of the evidence as I have already gone through this in detail here, I do find that upon all of the facts and circumstances of this case, that a reasonable trier of fact could not enter a finding in favor of the Respondent and I find that under all the facts and circumstances in this case, that there does not remain any genuine dispute as to any material fact.

And therefore, I do find and conclude that the Complainant is entitled to affirmation of his motion for summary judgment.

The last issue then too it seems to me is the question of sanction. Deference is to be shown to the choice of sanction made by the Administrator. That is required by statute. Also, it arises that deference does not need to be shown if the action sought by the Administrator is shown to be arbitrary, capricious, or not in accordance with law. I've already had reference to the *Hatch* case. In the *Hatch* case, as already indicated, we have essentially, except for the charge of violation of 91.7, which not in this case, the identical charges. The Board in that case affirmed 150 days.

Herein, the Administrator is seeking a suspension of 60 days. That's a reduction of 90 days for the fact that there

is no charge of operation of unairworthy aircraft in violation of 91.7. So removing that, the *Hatch* case does indicate for these type of violations if we include the 91.7, a range of 150 days was appropriate.

The Board also affirmed suspension in the *Administrator vs. Armstrong* case, EA-5320, 2007 case, which, again, was 91.7 and 91.405 and 91.13. And that case, again they, as it might be appropriate here, airworthiness is not synonymous with liability. 91.405 requires the owner or operator of an aircraft to have known maintenance discrepancies repaired between required maintenance inspections. I've already belabored that point, but there's another cite to that.

But again, it is not arbitrary or capricious for the administrator to charge under the facts and circumstances extent here of violation of Section 91.405, subparagraphs (a) and (b). And where the sanction guidance table, which is available to the general public and which the Board takes judicial notice of, does not contradict the actions sought by the Administrator.

I am aware that attached to the Respondent's response there are documents pertaining to some event that involved an incident involving an operation conducted apparently by Senator Inhofe. But reading over the documents that were submitted herein, I do not find that these documents

in any way indicate that the Administrator's action in this case is arbitrary or capricious.

On the facts and circumstances in this case, I have found that there is an established violation of Section 91.405, and whether or not the Administrator takes action against another individual and the activities in the Inhofe situation are not in any way similar to the events here and really have no bearing.

It might be arbitrary and capricious if in numerous cases, the only suspension is 15 days and all of a sudden the Administrator for identical violations is seeking to impose a suspension for ten months or revocation. That would raise real questions as to whether it's in accordance with Board precedent, law, or arbitrary and capricious. That does not appear herein. So, I specifically find that the sanctions sought by the Administrator is neither arbitrary, capricious, or not in accord with Board precedent on similar cases.

As to the sanctions sought, the Administrator seeks a suspension of 60 days. However, on all the evidence in front of me, there are mitigating circumstances. Respondent did rely upon erroneous information and improperly did so. He was the one ultimately responsible as the pilot in command, but this is not an instance where the pilot simply without any consultation with anyone made a determination on his own as to what he was going to do. Respondent at least made an attempt,

futile though it was, to get correct information. To me, that shows at least an attempt to comply with regulatory provisions.

I also am taking into account that at the time of the actual occurrence, as I stated early on where the Respondent declared an emergency, that was a reasonable and prudent action on the part of the Respondent, and I've taken those into account and I believe those are factors which do warrant mitigation in the sanction sought by the Administrator in this case.

I do not, however, take into account the experience of the Respondent or the fact that he doesn't have, apparently on the evidence in front of me, any prior violation history. That under Board precedent is not a factor considered in mitigation, as pilots are expected to comply with the regulations and not have a violation history.

It is taking into account that he is an airline transport pilot certificate holder, so I have looked at also his judgment and Respondent as shown as being equal to that expected of the holder of the highest type of airmen's certification given by the FAA.

But in any event, based upon my evaluation of all the facts and circumstances in this case, I believe a reduction and modification in the period of suspension sought from that of 60 days to that of 50 days would be appropriate

and would satisfactorily act as a deterrent to any others who are similarly situated and to satisfy the public interest in air safety and air commerce.

ORDER

IT IS THEREFORE ORDERED THAT:

1. The Complainant's motion for summary judgment be, and the same hereby is granted;

2. That the sanction sought in the Order of Suspension, the complaint herein, be, and same hereby is, modified from a period of 60 days to that of 50 days;

3. That the Order of Suspension, the complaint herein as modified as to the sanction, be, and the same hereby is, affirmed;

4. That the Respondent's airline transport pilot's certificate, be, and the same herein is, suspended for a period of 50 days.

Entered this 9th day of November 2011 at Phoenix, Arizona.

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PATRICK G. GERAGHTY

Administrative Law Judge

APPEAL

As this is a dispositive order, the parties are advised that either party may appeal from this order by filing with the Board within ten days from this date a notice of appeal. The appealing party must further within 50 days from this date file with the Board a brief in support of that appeal. Those documents must be filed with the docket section Office of Administrative Law Judges, National Transportation Safety Board, Washington, D.C., 20594, with copies of all documents served upon the opposing party.

Parties are specifically cautioned that with reference to appeal the Board takes a stringent view as to the time limitations imposed upon filing of notices or supporting documents and that the Board may upon its own motion or the motion of an opposing party dismiss an appeal where the appropriate document is untimely filed by even one day. If extensions are required for whatever reason, they must be requested prior to the totaling of any time period from the Office of The General Counsel National Transportation Safety Board in Washington, D.C.

The parties are referred to the Board's rules of practice, subpar dealing with appeals for further information concerning the issues reviewable on appeal and further information concerning the Board's process on review on appeal to the full Board.

If no appeal is taken within the time provided or the Board does not elect to do review upon its own motion, the decision and order entered herein shall become final. However, the timely filing of the notice of appeal and timely filing of supporting brief or election by the Board to review upon its own motion shall stay this decision and order during the pendency of the full Board review.

Anything further from the Complainant?

MR. RUNKEL: No, Your Honor.

MR. PEARSON: Actually, Your Honor, yes, I'd like to make a couple of statements for the record and also ask you to take judicial notice of an NTSB ruling, Board precedent.

ADMINISTRATIVE LAW JUDGE GERAGHTY: No. I've already decided the case, and, you know --

MR. PEARSON: I understand that, I just want to put that on the record that there's --

ADMINISTRATIVE LAW JUDGE GERAGHTY: No. You can do that on your appeal.

MR. PEARSON: And I will, Your Honor, thank you.

ADMINISTRATIVE LAW JUDGE GERAGHTY: Thank you. I mean I -- that's just something that I need to in this case. I'm done. I'm not the Pope; I'm not infallible. If the Board reverses me, that's fine.

MR. RUNKEL: Your Honor, there is only one thing that I just remembered, is that Daren Dufriend is a female --

ADMINISTRATIVE LAW JUDGE GERAGHTY: I can't hear you.

MR. RUNKEL: Daren Dufriend is female and not male, Your Honor.

ADMINISTRATIVE LAW JUDGE GERAGHTY: What?

MR. RUNKEL: You referred to Daren Dufriend as Mr. Dufriend, it should be Mrs., and so --

ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, I couldn't tell the sex from the deposition.

MR. RUNKEL: That's fine.

ADMINISTRATIVE LAW JUDGE GERAGHTY: So I said he, I'm sorry. If it's a female, it's a female. And if I find that when I review the transcript I'll make a change. But for the record, we'll note that appropriately it should be female.

Nothing further in this proceeding; the proceeding is closed.

(Whereupon, at 11:33 a.m., the hearing in the above-entitled matter was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: [redacted]

DOCKET NUMBER: [redacted]

PLACE: Phoenix, Arizona

DATE: November 9, 2011

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

Christina Ihrig
Official Reporter