SERVED: May 30, 2014

NTSB Order No. EA-5720

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 29th day of May, 2014

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. LUCIANO HORNA, Respondent.	Docket SE-19413

OPINION AND ORDER

1. ***Background***

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued October 22, 2013.[1] By that decision, the law judge affirmed the Administrator's order of suspension of respondent's airline transport pilot (ATP) certificate for a period of 60 days. The hearing and initial decision only addressed the sanction for respondent's violation

[1] A copy of the law judge's initial decision, an excerpt from the hearing transcript, is attached.

of 14 C.F.R. § 135.83(a)(3),[2] because the Chief Administrative Law Judge, prior to the hearing, issued an order deeming all allegations in the complaint admitted, based on respondent's failure to file an answer to the complaint. We deny respondent's appeal.

A. *Procedural Background*

The Administrator ordered suspension of respondent's ATP certificate by order dated December 19, 2012. On January 11, 2013, the order became the complaint in the case. The complaint alleged respondent operated a Navajo aircraft on December 16, 2011, on two flights between Fort Lauderdale, Florida, and the Bahamas, on behalf of Twin Air Calypso, Inc. The complaint stated respondent failed to carry with him the aeronautical charts required under § 135.83(a)(3) on both legs of the trip.

Pursuant to our Rules of Practice, respondent's answer to the Administrator's complaint was due January 31, 2013. Respondent did not file an answer to the complaint, but filed a motion to dismiss on February 4, 2013, arguing the Administrator untimely filed the complaint. On February 13, 2013, the Administrator responded to respondent's motion. The response included a motion for judgment on the pleadings, based on respondent's failure to answer. On May 28, 2013, the Chief Law Judge issued an order granting the Administrator's motion and deeming the allegations in the complaint admitted.[3] Respondent appealed the Chief Law Judge's affirmation of the 60-day suspension. The Chief Law Judge assigned the case to Administrative Law Judge Woody, who ordered a hearing concerning the sanction.

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[2] Section 135.83(a)(3) requires operators of aircraft to provide "pertinent aeronautical charts" that are "in current and appropriate form, accessible to the pilot at the pilot station." The regulatory text also requires the pilot to use them.

[3] Exh. ALJ-1. Based on § 821.31(b), the Board has stated a respondent's failure to submit a timely answer will result in judgment on the pleadings against the respondent. Administrator v. Diaz, NTSB Order No. EA-4990 (2002), aff'd, Diaz v. Dep't of Transp., 65 Fed. Appx. 594 (9th Cir. 2003).

B. *Facts*

At the hearing, respondent and Federal Aviation Administration (FAA) Aviation Safety Inspector Loftis Rollins testified. Inspector Rollins investigated respondent's violation, but could not recall whether a global positioning system (GPS) was on the aircraft at the time of the investigation. Respondent testified on his own behalf. He stated he had charts on board the aircraft during both December 16, 2011 flights in the form of his GPS. Respondent admitted he carried passengers on one leg of the flights, but asserted he conducted the other flight under 49 C.F.R. part 91. Respondent further contended a 60-day suspension period was too severe.

In support of the 60-day suspension, the Administrator's attorney argued aggravating factors existed to support the sanction. In particular, he argued the fact respondent holds an ATP certificate and has 30,000 hours of flight time. He was also the Chief Pilot of Twin Air Calypso, Inc. As a result, the Administrator's attorney asserted respondent should be held to a high standard of care.

C. *Law Judge Oral Initial Decision*

Following the hearing, the law judge issued an oral initial decision. The law judge determined the 60-day suspension of respondent's ATP certificate was appropriate, based on the aggravating factors the Administrator articulated, as well as the determination respondent's actions were not inadvertent. The law judge stated, "[n]o matter how experienced a pilot the [r]espondent may be, he is not free to simply determine on his own which [Federal Aviation Regulation] provisions must be strictly complied with."[4]

[4] Initial Decision at 113.

The law judge also explained the Pilot's Bill of Rights[5] removed language from 49 U.S.C. §§ 44709 and 44710, which previously entitled the Administrator to a significant amount of deference concerning the Administrator's choice of sanction. The law judge stated the Administrator is now entitled to the same amount of deference the Supreme Court set forth in Martin v. OSHRC.[6] In particular, the Supreme Court in Martin stated the Occupational Safety and Health Review Commission (OSHRC) "should defer to the Secretary [of Labor] only if the Secretary's interpretation [of an ambiguous regulation] is reasonable."[7] The Court further stated, "[t]he Secretary's interpretation of an ambiguous regulation is subject to the same standard of substantive review as any other exercise of delegated lawmaking power."[8] The law judge summarized this holding, and determined it appropriate to defer to the Administrator's choice of sanction, although the Pilot's Bill of Rights no longer accords heightened deference to the Administrator's decision.

D. *Issues on Appeal*

On appeal, respondent presents several arguments. He contends the law judge erred in not accepting his late-filed answer; the law judge should have accepted his affirmative defense of the doctrine of *laches*; the law judge should have granted respondent's motion to dismiss the complaint based on the Administrator's alleged failure to provide him with all documents within

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[5] Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012).

[6] 499 U.S. 144 (1991).

[7] Id. at 158.

[8] Id. (citing 5 U.S.C. § 706(2)(A) and Batterton v. Francis, 432 U.S. at 416, 426 (1977)). This holding indicates OSHRC need not provide *heightened* deference to the Secretary of Labor's interpretation of a regulation, but instead should view the Secretary's interpretations with the same amount of deference a reviewing court would view an agency's interpretations under the Administrative Procedure Act, in general.

the enforcement investigation report (EIR); and the 60-day suspension was excessive, based on the circumstances.

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.[9]

A. *Timeliness of Answer*

Respondent's attorney concedes he did not file a timely answer. He requests we excuse this lack of timeliness because he recently suffered from a stroke, which affected his vision. Respondent's attorney asserts the standard of excusable neglect, rather than good cause, in support of his argument. This argument is without merit as we expressly have rejected the excusable neglect standard.[10]

We have long held we will not accept late-filed answers, motions, or pleadings unless the party requesting our acceptance of the untimely document articulates good cause for the delay.[11] Respondent contends our acceptance of a late-filed motion for additional time to file an appeal brief in Administrator v. Bond[12] indicates we apply an excusable neglect standard to late-filed documents. This interpretation is incorrect. In Bond, we granted reconsideration of the respondent's motion based upon an express finding of good cause because our Office of General

[9] Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991).

[10] Administrator v. Montague, NTSB Order No. EA-5617 (2012); Administrator v. Bandiola and Bagamastad, NTSB Order No. EA-5677 (2013).

[11] Administrator v. Hooper, 6 NTSB 559, 560 (1988), on remand from Hooper v. Nat'l Transp. Safety Bd., 841 F.2d 1150 (D.C. Cir. 1988). The Board strictly adheres to this standard of timeliness, and the requirement for a showing of good cause in cases of untimely appeals. See, e.g., Administrator v. Gallaway, NTSB Order No. EA-5487 at 4 (2009).

[12] Administrator v. Bond, NTSB Order No. EA-5671 (2013), granting pet. for recon. Respondent's attorney in the case *sub judice* also served as the attorney of record in Bond.

Counsel did not realize Mr. Bond's attorney had provided hospital records in support of his motion to the agency. We decline to depart from our jurisprudence in the case *sub juice*, and therefore analyze respondent's lack of timeliness under the good cause standard.

In the present case, respondent's attorney contends he suffered the stroke in November 2012, was admitted to the hospital, and his vision became impaired. Following the stroke, respondent's attorney contends his doctor placed him on bed rest for 2-3 months, during which he was unable to represent respondent effectively.[13] In his appeal brief, respondent's attorney states the complaint was buried among other documents, and was difficult for him to see. However, respondent's attorney filed a notice of appeal in January 2013, a motion to dismiss in February 2013, and a supplement to his motion to dismiss in April 2013. The fact respondent's attorney was able to submit these documents belies his contention that he was physically unable to submit a timely answer to the complaint. In this regard, the facts of this case are clearly distinguishable from the facts that formed the basis for our finding of good cause in the Bond case. The medical records respondent's attorney provided in Bond established respondent's attorney was in the hospital on the date Mr. Bond's appeal brief was due, whereas in the case at hand, respondent's attorney was in the hospital approximately six weeks before the appeal commenced. We note, in general, a respondent's attorney's illness does not amount to good cause.[14] In the case *sub judice*, the record shows respondent's attorney was able to transmit substantive filings for the case, and if he could not do so, sufficient time existed for substitution of counsel.

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[13] Tr. 18-19.

[14] Administrator v. McKinney, NTSB Order No. EA-5284 at 10-11 (2007); see also Administrator v. Gallaway, NTSB Order No. EA-5487 (2009).

B. Doctrine of Laches

The doctrine of *laches* is an equitable doctrine "by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought."[15] The United States Court of Appeals for the District of Columbia Circuit has defined the doctrine as "an equitable defense that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[16] Following the District of Columbia Circuit's opinion in Manin v. Nat'l Transp. Safety Bd. , we have applied the two-prong test when considering the defense of *laches*.[17]

In the case *sub judice*, respondent has not offered evidence to fulfill either prong of the *laches* test. He did not proffer any potential evidence that is no longer available due to the delay between the flights, which occurred in December 2011, and the Administrator's December 19, 2012 issuance of the order.[18] In addition, he offered no argument or evidence to show the Administrator did not proceed with the case in a diligent manner after discovering respondent's violation. As a result, we reject respondent's affirmative defense of *laches*.

C. *Provision of Enforcement Investigation Report*

Respondent contends the Administrator failed to provide him with a complete copy of the EIR. The Pilot's Bill of Rights requires the Administrator provide respondents with an

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[15] Black's Law Dictionary 891 (8th ed. 2004).

[16] Manin v. Nat'l Transp. Safety Bd., 627 F.3d 1239, 1241 (D.C. Cir. 2011) (quoting Pro Football. Inc. v. Hario, 565 F.3d 880, 882 (D.C. Cir. 2009)).

[17] See, e.g., Administrator v. Tinlin and White, NTSB Order No. EA-5658 (2013).

[18] Prior to issuing the order, the Administrator had issued a Notice of Proposed Certificate Action.

opportunity to request the EIR from the FAA. In implementing this requirement, the Board published a rule stating respondents may move to dismiss a case when the Administrator fails to provide the report upon request.[19]

In his appeal brief, respondent contends the law judge erred in not granting his motion to dismiss, which was based on his contention the Administrator had failed to provide him with a copy of all portions of the EIR. However, at the hearing, respondent acknowledged the Administrator's attorney provided him with the EIR.[20] He now argues the Administrator's attorney neglected to provide him with copies of the operations specifications and operations manual, which were part of the EIR.

We review such procedural decisions by our law judges under an abuse of discretion standard, after a party can show such a ruling prejudiced him or her.[21] Respondent agreed he received the EIR upon requesting it. We find no prejudice to respondent in the fact the EIR package did not include copies of the operations specifications and operations manual for Twin Air Calypso. Respondent, as Chief Pilot for Twin Air Calypso, had these documents. In fact, at the hearing, respondent testified the General Operations Manual advised him of the type of

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[19] Title 49 C.F.R. § 821.19(d)(1) provides, in part, as follows:

> [W]here the respondent requests the EIR and the Administrator fails to provide the releasable portion of the EIR to the respondent by the time it serves the complaint on the respondent, the respondent may move to dismiss the complaint…

[20] Tr. 22-25.

[21] Administrator v. Walker, NTSB Order No. EA-5656 at 15n.39 (2013); see also Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

charts he needed to have on the aircraft before operating it.[22] We conclude the law judge did not abuse his discretion in determining the omission of these documents in the EIR package did not constitute a basis for dismissal under 49 C.F.R. § 821.19(d).

D. *Sanction*

We will consider aggravating and mitigating factors in determining whether to amend the Administrator's choice of sanction.[23] The Court of Appeals for the District of Columbia Circuit has recognized this practice, and we continue to consider such factors in light of the Pilot's Bill of Rights.[24]

Respondent's appeal brief includes a list of many factors, which he asserts are mitigating and should lead us to reduce the sanction. However, the majority of the factors respondent lists consist of arguments regarding the merits of the case, rather than the sanction. For example, respondent contends the regulations do not require "paper charts or hard copy books," and respondent's use of "rolling charts in the GPS" was appropriate.[25] In addition, respondent argues he conducted both flights at issue under 49 C.F.R. part 91, rather than part 135; therefore, he contends he did not need to have charts on the aircraft. Respondent also characterizes some procedural arguments as mitigating factors: he reiterates his argument concerning the documents within the EIR, and argues the Administrator's attorney failed to respond to discovery. Based on the Chief Law Judge's order deeming the facts alleged in the complaint as admitted, none of these arguments on the merits are persuasive. As for the remaining mitigating factors respondent

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[22] Tr. 91.

[23] See Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010) (recon. denied, NTSB Order No. EA-5522 (2010)) and Administrator v. Simmons, NTSB Order No. EA-5535 (2010).

[24] Taylor v. Huerta, 723 F.3d 210, 215 (D.C. Cir. 2013).

[25] Appeal Br. at 6.

lists, we do not find these factors persuasive. A decision another pilot may make concerning whether to fly without pertinent aeronautical charts does not excuse respondent's conduct. To the extent respondent appears to contend the Administrator condones such conduct, we note respondent failed to produce any evidence or statement from the Administrator concerning the Administrator's interpretation of § 135.83(a)(3).[26]

Regarding the FAA Sanction Guidance Table, respondent asserts the table does not list a sanction for his conduct and he simply should receive a letter of warning. Respondent also asserts the FAA should consider whether his actions compromised safety. None of these factors persuade us to conclude a 60-day sanction is inappropriate. We base this determination on respondent's admission he did not have the requisite charts in his aircraft, because he decided to substitute his own judgment for the plain language of § 135.83(a)(3). A pilot who holds an ATP, was chief pilot of a part 135 air carrier, and has 30,000 hours of flight time should have the judgment and discernment to know the plain language of the Federal Aviation Regulations are not subject to negotiation.

Respondent finally contends the law judge erred in not considering *any* mitigating factors before issuing his decision. We have examined the record for this case, as well as the law judge's decision, and determined respondent's assertion in this regard is not correct. The law judge's decision included a synopsis of respondent's arguments concerning the sanction, as well as the law judge's rationale for affirming the 60-day suspension.

[26] We further note respondent did not explain, and we cannot surmise, the relevance of the Brasher doctrine, under which the Board may not impose a sanction if Air Traffic Control personnel did not provide the pilot a timely deviation notice. Administrator v. Brasher, 5 NTSB 2116 (1987); see also Administrator v. Winton, NTSB Order No. EA-5415 at 17 n.8 (2008); Administrator v. Pate and Yoder, NTSB Order No. EA-5105 at 4 (2004).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision is affirmed; and

3. The 60-day suspension of respondent's ATP certificate shall begin 30 days after the service date indicated on this opinion and order.[27]

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

[27] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
MICHAEL P. HUERTA,	*	
ADMINISTRATOR,	*	
FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-19413
	*	JUDGE WOODY
LUCIANO HORNA,	*	
	*	
Respondent.	*	

U.S. Tax Court
51 SW 1st Avenue
Courtroom 1524
Miami, Florida

Tuesday,
October 22, 2013

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

BEFORE: STEPHEN R. WOODY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

CHRISTOPHER STEVENSON, ESQ.
Federal Aviation Administration
Southern Region
1701 Columbia Avenue
College Park, Georgia 30337
Tel: 404-305-5200
Fax: 404-305-6730

On behalf of the Respondent:

MICHAEL A. MOULIS
1100 Lee Wagener Boulevard
Suite 101
Fort Lauderdale, Florida 33315
Tel: 954-547-0555

ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE WOODY: This has been a proceeding under the provisions of 49 United States Code, Section 44709, the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board, and the Federal Rules of Evidence and the Federal Rules of Procedure, to the extent practicable.

This matter has been heard before this Administrative Law Judge and, as provided by the Board's Rules, I've elected to issue an oral initial decision in this matter.

Pursuant to notice, this matter came on for hearing on October 22, 2013, in Miami, Florida. The Administrator was represented by one of his staff counsel, Mr. Christopher Stevenson, Esquire, of the Southern Region, Regional Counsel's Office. Respondent was represented by represented by Mr. Michael Moulis, Esquire.

The parties were afforded a full opportunity to offer evidence, to call and examine and cross-examine witnesses and to make arguments in support of their respective positions.

I will not discuss all the evidence in detail. I have, however, considered all of the evidence, both oral and documentary. That which I do not specifically mention is viewed

by me as being corroborative or as not materially affecting the outcome of this decision.

DISCUSSION

The Respondent, Mr. Luciano Horna, appealed the Administrator's Order of Suspension dated December 19, 2012. Pursuant to the Board's Rules, the Administrator filed a copy of that order on January 11, 2013, which serves as the complaint in this case.

The Administrator ordered the suspension of Respondent's airline transport pilot, or ATP, certificate based on Respondent's violation of the Federal Aviation Regulations, Section 135.83(a)(3).

More specifically, the complaint alleged that Respondent acted as the pilot in command of a civil aircraft, tail number N350MJ, on flights between Fort Lauderdale, Florida and the Bahamas during Part 135 operations for air carrier Twin Air Calypso with no current aeronautical charts on board the aircraft.

The Respondent did not file an answer to the Administrator's complaint. As a result, and after considering matters submitted by the parties, on May 28, 2013, Chief Judge Montaño entered an order granting the Administrator's motion for judgment on the pleadings and deeming all the allegations in the Administrator's complaint as admitted.

As those allegations are admitted, they're deemed as established for purposes of this decision, and again, a copy of

Judge Montaño's ruling and order was admitted into evidence as Exhibit ALJ-1. Thus, this hearing was limited to the issue of sanctions and findings as to the propriety of the 60-day suspension of Respondent's ATP certificate based upon evidence presented in support of or in mitigation of the proposed sanction.

Having found consistent with Judge Montaño's ruling and order that the Administrator has established all of the allegations in the Administrator's complaint by a preponderance of evidence, I will now address the sanction imposed by the Administrator in this case.

First, I will note that on August 3, 2012, Public Law 112-153, known as the Pilot's Bill of Rights, was signed into law by the President of the United States. The law applies to all cases before the National Transportation Safety Board involving reviews of actions of the Administrator of the Federal Aviation Administration to deny airman medical certification under 49 United States Code, Section 44703, or to amend, modify, suspend or revoke airman certificates under 49 United States Code, Section 44709. That law became effective immediately upon its enactment.

The Pilot's Bill of Rights specifically strikes from 49 United States Code, Sections 44709 and 44710, language that in cases involving amendments, modifications, suspensions or revocation of airman certificates, the Board, "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance

available to the public relating to the sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to the law."

Now while I am no longer bound to give deference to the Federal Aviation Administration by statute, that Agency is entitled to judicial deference due all other federal administrative agencies under the Supreme Court decision in Martin v. Occupational Safety and Health Review Commission. That's at 499 U.S. 144; 111 S.Ct. 1171.

In applying the principle of judicial deference to the interpretations of laws, regulations and policies that the Administrator carries out, I must analyze and weigh the facts and circumstances in each case to determine if the sanction selected by the Administrator is appropriate.

In this case, the Administrator offered or moved admission of Exhibits A-1 and A-2, which were admitted without objection by Respondent. Respondent moved admission of Exhibit R-1, which was also admitted without objection by the Administrator.

The Administrator called no witnesses to testify. Respondent called Aviation Safety Inspector, or ASI, Loftis Rollins as a witness, and Respondent also testified in his own behalf.

Inspector Rollins confirmed that he conducted the investigation of Respondent in this matter. Given the passage of

time, he could not recall if there was a GPS on board the aircraft at the time of the investigation or whether the aircraft was placarded for VFR only. He is familiar with Mr. Horna and had written him up for one prior Air Defense Identification Zone, or ADIZ, violation in the past. He does not recall if Respondent had other violations, but those would have been noted in the Enforcement Investigative Report, or EIR, if they existed. Inspector Rollins knows the Respondent holds an ATP certificate, but he is not aware of other ratings or how long he has been flying.

Mr. Horna next testified that he's been flying since approximately 1970 in Panama and in the United States since approximately 1985. He is an ATP pilot with approximately 30,000 flight hours. He's continued flying since the violation at issue here, adding approximately 1,000 flight hours since that violation. At the time of the violation, he was the chief pilot for Twin Air Calypso with responsibility for other Twin Air pilots as well as himself.

Mr. Horna testified that the director of operations for Twin Air Calypso was the individual in the company responsible for ensuring current charts were on board the aircraft. He had spoken with the director of operations a day or so before the December 16, 2011 flight and believed the current chart would be on board the aircraft. Although he did not have the required charts on board, Mr. Horna testified that he did have electronic charts on

board in the form of a GPS. He testified that oftentimes aircraft tail number N350MJ was used to fly the owner of the company, so there were no other passengers aboard. On December 16, 2011, he believed one leg of the trip to and from Florida and the Bahamas had no passengers but that the other leg did involve passenger-carrying operations.

Now with respect to sanction, the Administrator has argued that the Respondent's actions here are aggravated by the fact that he holds an ATP certificate, he has significant flight experience with over 30,000 flight hours, and by his position as the chief pilot for Twin Air Calypso at the time, with responsibility not only for himself but with supervision over others as well. And, thus his experience level and responsibility dictate that he be held to a higher standard. Also the fact that the violation involved Part 135 air carrier operations was argued that it should also be considered as an aggravating factor.

The Administrator noted the range of sanction per the Sanction Guidance Table, which was admitted as Exhibit A-1, is a period of 30 to 90 days suspension. The Administrator argues that considering the aggravating factors involved here, but also considering that the violation itself was not careless nor reckless nor the most egregious of violations, that the sanction of suspension in the middle of the given range is appropriate. Thus, the Administrator asks that the 60-day suspension be affirmed.

Respondent argued that a potential sanction is mitigated by the fact that Respondent has significant experience and that the violation here involved no breach of safety. Respondent argued that he electronic charts on board that were as good or better than the required aeronautical charts. He asserts that if any sanction is warranted, it should be limited to a letter of warning.

While the Respondent's actions here may not have risen to the level of intentional misconduct, his actions were also not inadvertent. Even in a light most favorable to him, he simply assumed that the correct charts were on board rather than confirming their presence as he was required to do as the pilot in command.

Those actions are further aggravated by Respondent's experience as a pilot and as an ATP certificate holder, pursuant to which he is held to the higher standard of accountability. In addition, he was at the time also the chief pilot for Twin Air Calypso, thus responsible not only for himself but also for other pilots in the company as well.

His actions in not ensuring that the current aeronautical charts were on board the aircraft during Part 135 operations, by his own admission at least one leg of which involved passenger-carrying operations, constituted a substantial deviation from the degree of care and diligence expected from an ATP certificate holder with Respondent's experience and

responsibility.

While the Administrator indicated he did not factor in Respondent's violation history, his prior ADIZ violation could have also been considered an aggravating factor. However, given the lack of documentation regarding the violation and the Administrator's position that it not be considered an aggravating factor, I likewise did not consider it for purposes of determining an appropriate sanction.

Although Respondent argued in mitigation that he had electronic charts aboard the aircraft that were as good or better than the required charts, no evidence was offered to support that contention aside from the uncorroborated testimony of the Respondent. Inspector Rollins could not confirm the existence of a GPS or the electronic charts, and no other documentation or other evidence was offered to support the contention.

However, even assuming those facts were fully established and thereby may provide some minor degree of mitigation, that does not overcome the fact that Respondent, as an experienced airline transport pilot with over 30,000 flight hours and acting as chief pilot for a Part 135 air carrier, did not take the necessary actions to confirm the presence of current aeronautical charts on board before undertaking passenger-carrying operations. No matter how experienced a pilot the Respondent may be, he is not free to simply determine on his own which FAR provisions must be strictly complied with.

Accordingly, having considered the enumerated circumstances and the positions of the parties, I find that the sanction sought by the Administrator is reasonable, appropriate and warranted in the public interest in air commerce and air safety. Therefore I find that the Order of Suspension, the complaint herein, must be and shall be affirmed as issued.

ORDER

IT IS HEREBY ORDERED that the Order of Suspension, the complaint herein, be, and is hereby, affirmed as issued; that the Respondent's Airline Transport Pilot Certificate held by him be, and hereby is, suspended for a period of 60 days.

Entered this 22nd day of October, 2013, in Miami, Florida.

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STEPHEN R. WOODY

Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE WOODY: Now, Mr. Horna, I -- sir, you may stay seated, thank you. In light of my decision, I need to advise you of your appeal rights. I have here written appeal rights that I would ask your counsel, Mr. Moulis, if you would come forward --

MR. MOULIS: Yes.

ADMINISTRATIVE LAW JUDGE WOODY: -- I'll hand you a copy, one for yourself and one for -- if you wouldn't mind handing one to government counsel, and I'm going to hand a copy as well to the court reporter to attach to the record.

MR. MOULIS: Did you give me another one? I thought you wanted me to give it to --

ADMINISTRATIVE LAW JUDGE WOODY: I did not. If you need another one, I have extras.

Well, here's the question I have for you -- and I do have an extra copy. So here, let me give that to you. You can show that to Mr. Horna in case he has any questions.

I know that, Mr. Horna, that your counsel is experienced and is familiar with appeal rights.

But, counsel, let me ask you this. Do you desire that I orally advise him of his appeal rights or --

MR. MOULIS: No.

ADMINISTRATIVE LAW JUDGE WOODY: -- do you intend to cover that with him?

MR. MOULIS: No need to. I intend to cover it with him.

ADMINISTRATIVE LAW JUDGE WOODY: All right. So the thing that I would emphasize, and I appreciate that you'll cover that with him, but that I would emphasize and that I always emphasize to the parties just the timelines with respect to filing of the appeal are something that you should pay particular attention to just because absent extraordinary circumstances, at least a showing of good cause, the Board typically is disinclined to accept late-filed appeals.

So the period begins to run from the date of my decision. So the 10-day period will begin to run from today's date. So just keep that in mind.

And with that, that concludes my decision. Is there anything of an administrative nature that we need to clarify before we terminate the proceeding?

MR. MOULIS: Not anything I want to put on the record. I'd like to say something off the record just to the Court and, you know, with counsel present, opposing counsel present. So as far as the record, I'm done.

ADMINISTRATIVE LAW JUDGE WOODY: Okay. So you just -- I take it, then, you just wanted to make a comment before we depart, and you wanted to make sure he was present, government counsel was present?

MR. MOULIS: Yeah, it's something that happened last week, and it really has nothing to do with you, I don't think, but

I just wanted to let you know that --

ADMINISTRATIVE LAW JUDGE WOODY: Well, is it related to this? I mean, I'm hesitant to --

MR. MOULIS: Yes, very, very related.

ADMINISTRATIVE LAW JUDGE WOODY: I'm hesitant to --

MR. MOULIS: I'll put it on the record if you'd like.

ADMINISTRATIVE LAW JUDGE WOODY: Okay. That's fine. I'm hesitant to have discussions off the record that are related to the proceeding that you say that happened prior to the proceeding that may be pertinent to this, so --

MR. MOULIS: Do you want me to do it now? I was waiting for you to say you're done, because they asked us if we were done on the record.

MR. STEVENSON: I have -- I didn't have anything else to add on the record. I have no idea what you want to add, so I can't --

ADMINISTRATIVE LAW JUDGE WOODY: Okay.

MR. MOULIS: I didn't want to put this on the record because it happened to me about 8 years ago, too, once, and it was with Judge Pope. And I asked him, when I was trying to get a continuance, and I called your office and you were out of town; you weren't even on the phone. And the response I got, and I'm not going to mention any names because the last time I mentioned names, it was to my chagrin and other things, and to my disadvantage down the road.

The two individuals that were on the phone when I said I wanted to have a hearing and I was going to ask for a continuance, and you were traveling -- I think you were probably traveling at that time, I'm not sure -- and we were going to have to have a conference, broke into almost a yelling match with me, yelling at me that you're not allowed to have any evidence, you're not allowed to have any witnesses, you're not allowed to do this, you're wasting the Board's money, you're wasting the Court's time. And I'm not going to mention any names because it was held against me last time, and I just wish -- you know, my client unfortunately was sitting there in my office with it on speaker, and he said to me, we're never going to get a fair trial.

And I know you could have never made it to be your position that you were involved at all, but if you could, Judge, just -- I'm not going to say who did it, but explain to them that, you know, we are entitled to a hearing. We are entitled to due process and, you know, for them to try to scream me out of a hearing was inappropriate especially in front of my client, and all I was trying to do was trying to get a continuance and, you know, I'm shocked, and it happened once and Judge Pope dealt with it. I don't know how he did it, but he told me he dealt with it and it would never happen again. Well, it happened again this week and, you know, it looks awfully bad when a governmental agency has its employees telling you you're going to lose, you're not allowed to have witnesses, in front of a client, and I mean

they said this. I'm not making this up and, you know, what am I supposed to tell him?

And so that's all I have to say. And, you know, Judge, if -- you know, I don't know, handle it however you want. Please, you know, if you know who it is, please don't tell them I said -- you know, I told on them or anything, because that's just counterproductive. I've got to work with you guys, you know, probably for the rest of my career, and I don't want that to happen again nor do I want, you know, work against me. Thank you, Judge.

ADMINISTRATIVE LAW JUDGE WOODY: You're welcome.

Let me say this. You know, that's certainly the first I've heard of any details of any conversation. What I learned is that when you called and asked for a continuance, you submitted the motion at the end of last week, and we already noted it was toward the end of the day on Friday. I had already left the office. We conducted that telephone conference from my home, actually. I had scheduled leave because I was leaving town.

So I wasn't present for any conversations, didn't hear any part of that conversation, wasn't aware of any part of the conversation, you know, until you mentioned it just now. It's certainly not something that came up in our conversations last week, and I just want to make it clear and hope you understand, and I think you do, and I want to make sure that Mr. Horna understands, that as the Judge, I have the responsibility for

making sure that you get a full, complete and fair hearing, and that that includes the opportunity to call witnesses, to present evidence, and you're certainly entitled to that and I certainly didn't suggest otherwise in any conversations that we had.

And I believe, Mr. Horna, that, you know, despite the outcome here, that you were given a full and fair opportunity to present the evidence you wanted to, including the opportunity to bring up some motions early on, some things which I believe had previously been addressed, but we went ahead and addressed those again. So certainly I don't believe it affected your ability to present evidence here today, and it wasn't something I was aware of, and I think it's important that be clear for purposes of the record.

MR. MOULIS: I'll say, Judge, as far as I know, you had no idea it even happened --

ADMINISTRATIVE LAW JUDGE WOODY: Right.

MR. MOULIS: -- until today because you were not on the phone and the suggestion was you were gone, traveling, and so I assume you were home packing or whatever. And so, you know, it's just, you know, sometimes staff members get carried away, and it's just hard to explain to a client that we're going down there to get a fair hearing when we've just been told we're not. And I know, and I'm going to tell him, that you had nothing to do with it and, you know, you seem nothing but a professional judge to me here today. You tolerated some, you know, things that judges have

to tolerate, me and I guess everybody. So I just wanted to let him hear it from you that you -- and I will tell him that you gave him a fair hearing.

ADMINISTRATIVE LAW JUDGE WOODY: Okay. Certainly you had the opportunity. I mean, I don't want to suggest that you're foreclosed from anything on appeal. You certainly have the opportunity to raise any issues that you want to, but I wanted to make it clear that I wasn't aware of or a party to any of those conversations, just so that that's clear for purposes of the record.

MR. MOULIS: If we do appeal, Judge, that will not be part of it. That's just nonsense.

ADMINISTRATIVE LAW JUDGE WOODY: And, you know, you certainly don't have to commit to that at this point at any rate. You can raise whatever issues you'd like to. That's certainly your right and that's why we have appeals.

MR. MOULIS: Yes.

ADMINISTRATIVE LAW JUDGE WOODY: So, you know, reasonable minds may differ. Folks may see things differently than I did and, if so, you certainly have the opportunity to raise those issues.

So, counsel, I don't know if you had anything you wanted to address. I don't know that there's anything necessarily for you to address.

MR. STEVENSON: I don't think that there is anything in

there for me to address, Your Honor. I certainly was not involved in the conversation.

ADMINISTRATIVE LAW JUDGE WOODY: Right.

MR. STEVENSON: So I have no knowledge of what may or may not have happened.

ADMINISTRATIVE LAW JUDGE WOODY: Okay. So thank you very much, and if there's nothing, then at this point we will terminate the proceedings. Thank you. Thank you all.

MR. MOULIS: Thank you, Judge.

MR. STEVENSON: Thank you.

(Whereupon, at 4:25 p.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: Luciano Horna

DOCKET NUMBER: SE-19413

PLACE: Miami, Florida

DATE: October 22, 2013

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.

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Edward Brady
Official Reporter

_____

Kathryn Mirfin
Transcriber