

SERVED: June 10, 2010

NTSB Order No. EA-5523

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 8<sup>th</sup> day of June, 2010

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
	Complainant,	)	
		)	Docket SE-17479RM
	v.	)	
		)	
RYAN J. MOSHEA,		)	
		)	
	Respondent.	)	
		)	
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**OPINION AND ORDER**

On remand from the United States Court of Appeals for the District of Columbia Circuit,<sup>1</sup> we revisit respondent's appeal of

<sup>1</sup> Moshea v. FAA, 570 F.3d 349 (D.C. Cir. 2009). Although respondent named the National Transportation Safety Board (NTSB) as a respondent in his petition for review before the Court of Appeals, the NTSB performed a quasi-judicial function in that it adjudicated respondent's appeal from the Administrator's order of suspension. The Federal Aviation Administration is the party

the oral initial decision of Administrative Law Judge Patrick G. Geraghty, in which he denied respondent's appeal of the Administrator's suspension order.<sup>2</sup> The order was based on respondent's alleged failure to make, or have made, an entry regarding a mechanical irregularity in an aircraft maintenance log in violation of § 135.65(b); on his alleged operation of the aircraft with a mechanical deficiency that caused the aircraft to be unairworthy, in violation of § 91.7(a); and on his alleged careless or reckless operation in violation of § 91.13(a). We denied respondent's appeal on the basis that, pursuant to our statutory charter, 49 U.S.C. § 44709(d), the Board did not have jurisdiction to review the Administrator's decision to pursue the enforcement action.

The following facts are drawn from the court's succinct recitation of the facts. Respondent worked as a pilot for Key Lime Air Corporation, a commercial air cargo carrier. While conducting a flight in October 2004, he encountered difficulty extending the aircraft's landing gear. After landing, he told a Key Lime mechanic about the problem. According to respondent, the mechanic said that such difficulties were normal in cold

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in interest, not the NTSB, which does not typically participate in the judicial review of its decisions. See 49 C.F.R. § 821.64(a).

<sup>2</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

weather. Respondent did not enter the problem in the aircraft maintenance log, as required by § 135.65(b). Several days later, after a few uneventful flights in the same aircraft, respondent again had trouble lowering the aircraft's gear. Upon landing, he contacted another Key Lime mechanic and received assurances that the difficulties likely resulted from cold weather. This time the mechanic relayed the report to his supervisor, who scheduled the aircraft for maintenance 2 days later. Respondent again did not enter the problem in the maintenance log. On the intervening day, another pilot flying the aircraft experienced difficulty in deploying the landing gear. After that pilot landed safely, the ground crew found that the landing gear was damaged. Shortly thereafter, Key Lime voluntarily disclosed those incidents to the FAA pursuant to FAA Advisory Circular (AC) 00-58, *Voluntary Disclosure Reporting Program*.<sup>3</sup>

At the hearing before the law judge, respondent asserted the affirmative defense of immunity based on his *employer's* voluntary self-disclosure of violations under the Circular. The law judge held that the Board lacked jurisdiction to review implementation of the Circular, and did not allow respondent to

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<sup>3</sup> We note that the Circular was reissued on September 8, 2006, as 00-58A. The May 4, 1998 version was in effect at all times pertinent to this case. Nothing in the revised AC affects our decision here. All references are to the 1998 version.

present evidence related to compliance with it. The law judge found that respondent violated the Federal Aviation Regulations (FARs) as alleged, and affirmed the suspension of respondent's airline transport pilot (ATP) certificate, but reduced the sanction from 60 to 50 days, taking into account that respondent consulted with two mechanics regarding the irregularity. Respondent appealed the law judge's decision.

In his appeal to the Board, respondent argued that the law judge erred in ruling that the Board had no jurisdiction to review the Administrator's decision to pursue enforcement action. In his reply to respondent's appeal, the Administrator urged the Board to affirm the law judge's decision, arguing that the Board did not have jurisdiction to review an affirmative defense under the Circular.

In our opinion and order,<sup>4</sup> we noted that we had previously held that the Board does not have the authority to review the Administrator's determination to pursue a matter through legal enforcement action. We also noted that, according to paragraph 3 of the Circular, the program does not appear to apply to violations of Part 91.<sup>5</sup> Respondent sought reconsideration, but

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<sup>4</sup> Administrator v. Moshea, NTSB Order No. EA-5328 (2007).

<sup>5</sup> Paragraphs 1.a. and 3 indicate that the covered violations are those of Parts 21, 107, 108, 109, 121, 125, 129, 133, 135, 137, 141, 142, 145, and 147. We also note that the sanctions to which the Circular refers appear to be civil (monetary)

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penalties, as opposed to certificate actions, which is the case with this respondent. See AC 00-58, ¶ 4, lines 4 and 12, and ¶ 6, line 6. We also pointed out that the Circular appears to pertain primarily to companies or carriers, not to individuals, and that, while it outlines foregoing enforcement actions for voluntarily disclosed noncompliance, it extends immunity provisions to individuals only under limited circumstances. In particular, the Circular provides that:

a. The voluntary disclosure policy applies to individual airmen or other agents of an employing certificate holder, indirect air carrier, foreign air carrier, or PAH [production approval holder] when:

(1) The apparent violation involves a deficiency of the employing entity's practices or procedures that causes the employing certificate holder, indirect air carrier, foreign air carrier, or PAH to be in violation of a covered violation of an FAA regulation;

(2) The airman or other agent of the employing entity, while acting on behalf of the employing entity, inadvertently violates the FAA's regulations as a direct result of a deficiency of the employing entity that causes the employing entity to be in violation of the regulations. (The voluntary disclosure policy does not apply to the airman or other agent when his/her apparent violation is the result of actions unrelated to the employing entity's deficiency);

(3) The airman or other agent immediately makes the report of his/her apparent violation to the employing entity; and

(4) The employing certificate holder, indirect air carrier, foreign air carrier, or PAH immediately notifies the FAA of both the airman or other agent's apparent violation and the apparent deficiency in its practice or procedures.

we denied his petition, stating that we had already addressed his arguments or that they contained nothing that would cause us to reverse or modify our previous decision.

In a June 30, 2009 opinion, in a divided panel,<sup>6</sup> the Court of Appeals disagreed with our decision, finding that the Board does have jurisdiction to review the Administrator's decision to pursue enforcement action in the face of AC 00-58, and that our decision was inconsistent with a prior case. The court found unreasonable our finding that the Board lacked jurisdiction to review respondent's affirmative defense, in light of the Circular's provision "that no sanctions will be imposed in cases of voluntary disclosure," and concluded that our analysis was contrary to our statutory charter. Moshea, 570 F.3d at 352.

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b. When all the above conditions are met, a separate EIR [enforcement investigative report] is opened for the individual and closed with an administrative action.

c. If all the above conditions are not met, the principal inspector will review all facts associated with the case and determine what action is appropriate for individual airmen or other agents of the employing entity.

d. This provision does not apply to matters concerning qualifications to hold an airman certificate.

AC 00-58, ¶ 13.

<sup>6</sup> Senior Circuit Judge Randolph did not concur in the majority's conclusion that an analysis of the immunity provisions under AC 00-58 related to the imposition of sanction.

The court vacated our decision and remanded for further proceedings.

In Administrator v. Montgomery, 3 NTSB 2150 (1980), the issue before the Board concerned our jurisdiction to consider compliance with published guidance of the Administrator, under AC 00-46, *Aviation Safety Reporting Program* (ASRP), as an affirmative defense regarding sanction in an enforcement action. We find that same issue before us, but now it is under AC 00-58, the *Voluntary Disclosure Reporting Program*. Also before us, as it was in Montgomery regarding the ASRP, is the "further and interconnected issue" whether the Administrator, by issuance of the *Voluntary Disclosure Reporting Program* under AC 00-58, "has limited his prosecutorial discretion such that he is bound to grant immunity where the terms of the Advisory Circular have been met." Id. at 2152. In light of the court's holding in the instant case, and revisiting our previous cases, we now accept the court's finding that the Board does have jurisdiction to consider a report under the *Voluntary Disclosure Reporting Program* as an affirmative defense regarding sanction. "The Board's review authority must inherently include the jurisdiction to consider any matter, such as the affirmative defense advanced" in this case, which bears "on the validity of the Administrator's order and on the question of whether that order is required by safety and the public interest." Id. at

2153. Similar to the ASRP, set forth in AC 00-46, the *Voluntary Disclosure Reporting Program*, set forth in AC 00-58, "is not a general statement of intention or policy, but rather is a system whose components are spelled out with a considerable degree of specificity." Id. at 2154. We find that this includes AC 00-58's "policy of forgoing civil penalty actions when one of these [covered] entities detects violations, promptly discloses the violations to the FAA, and takes prompt corrective action." AC 00-58, ¶ 2. It also includes AC 00-58's extension to individual airmen "[w]hen all ... conditions are met," such that "a separate [Enforcement Investigative Report] is opened for the individual and closed with no more than administrative action...." AC 00-58, ¶ 12.

Regardless of whether the *Voluntary Disclosure Reporting Program* "is characterized as a rule, regulation, or statement of policy," the Administrator should be bound by its terms, and should be subject to our review when raised as an affirmative defense in an enforcement action's sanction reviewed by the Board. See Montgomery, supra. Where an entity or an airman timely reports an incident which comes within the terms of the Circular, the Administrator may not be allowed to ignore any protections—regarding covered violations—that are provided by



the program.<sup>7</sup> As explained in Montgomery, the Board is not interfering with the Administrator's prosecutorial discretion, but is considering and applying the terms of a program by which the Administrator has limited his discretion with regard to sanction.

In sum, in accordance with the court's *vacatur* and remand for further proceedings, and based on our reexamination of the issue, we vacate the law judge's oral initial decision regarding respondent's alleged violations and as to sanction. We remand to the law judge for receipt, and consideration, of evidence regarding the issue of respondent's compliance with Advisory Circular 00-58, and for reconsideration of sanction.

**ACCORDINGLY, IT IS ORDERED THAT:**

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

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

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<sup>7</sup> See AC 00-58, ¶¶ 3 and 13.