IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

21-1062, 21-1083

YDIL W. PHAM,

Petitioner,

—v.—

NATIONAL TRANSPORTATION SAFETY BOARD;
FEDERAL AVIATION ADMINISTRATION,

Respondents.

ON APPEAL FROM THE NATIONAL TRANSPORTATION SAFETY BOARD

PETITION FOR REHEARING AND REHEARING *EN BANC*

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May 20, 2022

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TABLE OF AUTHORITIES

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INTRODUCTION AND RULE 35 STATEMENT

COMES NOW, Ydil Pham, Petitioner herein and pursuant to Rules 35(b)(1)(A), 40(a)(1), FRAP, and seeks an *en banc* determination and/or panel rehearing for the reason that the panel decision conflicts with *Martin v. Occupational Safety and Health Review Commission,* 499 U.S. 144, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991); and, moreover, the legal effect of the panel decision is to thwart the clear will of Congress as expressed in the Pilot's Bill of Rights, Pub.L. 112-153 (Oct. 5, 2018), that the National Transportation Safety Board ("NTSB") shall not be "bound" to follow the FAA policy guidance with respect to sanction. *See* 49 U.S.C. §44709(d)(3) (2003) providing that the NTSB is "bound" by FAA guidance with respect to sanctions in contrast to 49 U.S.C. §44709(d)(3) (2018) which deleted that requirement and providing the NTSB "is not bound by the findings of fact of the Administrator." Language in 49 U.S.C. §44709(d)(3) that the NTSB was "bound" by the FAA's determination of sanction was deleted by Section 2(c) of the Pilot's Bill of Rights, Pub. L. 112-153 (Oct. 5, 2018). The NTSB in its Opinion and Order of January 4, 2021, did "defer" to the sanction guidance policy of the Federal Aviation Administration ("FAA"). A-559-560. However, the NTSB found the FAA's choice of sanction was not "reasonable," a position FAA counsel admitted at oral argument is a legal basis for rejecting the Administrator's choice of sanction. Oral Arg. Tr. at 26, 27. Not only

is the panel decision contrary to *Martin*, but it is further a repudiation of this Court's holding in *Dillmon v. NTSB*, 588 F.3d 1085 (2009), where this Court noted it is bound to adopt the agency's factual findings as conclusive if supported by substantial evidence, even though a plausible alternative interpretation of the evidence would lead to a contrary view. *Id.* at 1089. According to NTSB precedent, "…a lack of qualification is a factual finding that does not command deference." *Administrator v. Millennium Propeller Systems, Inc.,* NTSB Order No. EA-5218, 2006 WL 979342 at 4. *See also* 49 U.S.C. §44709(d)(3) (2018) ("…the Board is not bound by findings of fact of the Administrator.").

The panel decision which is effectively a *de novo* review[1] of the NTSB's Opinion and Order cannot be reconciled with decisions of the Supreme Court and of this Court requiring a limited scope of review of the NTSB's decision. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 285 ("the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency."); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court does not substitute its judgment for that of the agency."); *Clark County, Nevada v. FAA,* 522 F.3d 437, 441 (D.C. Cir. 2008) ("'The scope of review under the arbitrary and

[1] "*De Novo*. Anew; afresh; a second time…" *Black's Law Dictionary* (4th Ed. Rev.) at 483.

capricious" standard is narrow and a court is not to substitute its judgment for that of the agency'"); 5 USC §706(2)(A) ("the reviewing court shall – …hold unlawful and set aside agency action, findings and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.")

The panel, after specifically admitting it lacked the authority to conduct a *de novo* review on the "reasonableness" of the Board's decision (comments by Judge Srinivasan, "Well, we don't, we don't review that *de novo*." Oral Arg. Tr. at 27), nevertheless embarked on a *de novo* review substituting its opinions and conclusions for those of the Board with respect to whether the Administrator's choice of sanction was reasonable. In doing so, the panel conflated the two-year revocation period of an airman's medical certificate for refusing a drug test[2] with 14 C.F.R. §120.11(b)(2) that authorizes the "suspension" of an airman's pilots license in the event he refuses a drug test. The distinction between suspending a pilot's license and revoking it is significant. If the license is suspended, at the end of the period of suspension, the license is returned and the pilot returns to flight status. If the license is revoked, the individual must take all of his examinations and flight checks anew and "requalify" as a pilot. The panel's unauthorized interpretation of the regulations led it to conclude that the Board was in error when the panel was in error and lacked an understanding and appreciation of the

[2] 14 C.F.R. §§67.107(b)(2), 67.207(b)(2), 67.307(b)(2).

distinction between an airman's pilot license and an airman's medical certificate. The panel failed to appreciate why the NTSB had the authority to impose a "suspension" of the airman's certificate when that very sanction is specifically authorized by the governing regulation.[3] Rather, in the panel decision, the panel portrayed the governing regulation as only authorizing "revocation" of the airman's certificate.[4] Not only did the panel do real and palpable harm to the cause of justice and American jurisprudence by engaging in an unwarranted *de novo* review where it substituted its views on "reasonableness" for those of the NTSB, but it grossly mischaracterized the Opinion and Order of the NTSB of January 4, 2021, pretending as though the Board failed to appreciate the obligation of according the FAA's choice of sanction deference when, in fact, the Board went into excruciating detail about how and why it was rejecting the FAA's choice of sanction as unreasonable. *See, e.g.*, A-559 – 560 where the Board specifically cited *Martin*, *supra*, specifically cited two Board decisions decided after the

[3] "Refusal by the holder of a certificate issued under Part 61 of this Chapter to take a drug or alcohol test required under the provisions of this Part is grounds for: …(2) suspension or revocation of any certificate, rating, or authorization issued under Part 61 of this Chapter." 14 C.F.R. §120.11(b).

[4] See Panel Decision in the instant case, May 10, 2002, at 12, where the Panel portrayed §120.11 as only authorizing "revocation of any [airman] certificate."

adoption of the Pilot's Bill of Rights[5] and specifically made reference to the *FAA Compliance and Enforcement Program Manual* noting that refusal of a drug test would "*generally* warrant a revocation" and further noting: "The guidance permits lesser sanctions." Language in FAA Order 2150.3C stating revocation is generally the sanction confirms, in an appropriate case like this, that suspension **is** the proper sanction. *See* NTSB Opinion and Order at 31, n.166, A-559. The Board, specifically cited and specifically complied with *Martin* and gave two reasons the FAA's choice of sanction was completely unreasonable. *Id.* First, there was no clear evidence in the record the test collector gave Pham a shy bladder warning, that is, told him he could remain at the testing facility for three hours and consume 40 ounces of fluid. A-559. Secondly, the test collector told Pham he could return to the testing facility with a new confirmation order and take a new drug test. A-560. Because Pham was not instructed he could remain at the facility and consume water for three hours and was misguided into believing he could get a new confirmation order and take a new drug test, the Board *reasonably* concluded: "…These mitigating factors compounded in a way that revocation is not a reasonable sanction." A-560.

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[5] *See Administrator v. Jones,* NTSB Order No. EA-5647 (2013); *Administrator v. Greene,* NTSB Order No. EA-5841 (2018), where the Board, after passage of the Pilot's Bill of Rights, declared with the elimination of language in 49 U.S.C. §44709(d)(3), it would consider both aggravating and mitigating factors in imposing sanction.

Because the panel (1) refused to follow Supreme Court precedent (*Bowman, supra*; *State Farm*, *supra*) and precedent of this Court (*Clark County, supra*) that required a deferential review by this Court, (2) portrayed the Board as having not complied with *Martin* when it had, (3) portrayed the Board as not having given deference to the FAA's choice of sanction when it had, (4) conducted a *de novo* review of the Board's Decision after the panel had admitted a *de novo* review is not authorized, (5) conflated a two-year revocation of a medical certificate with a suspension of an airman certificate and failed to give deference to the Board's expertise in matters relating to air safety, an *en banc* determination of this case is required. If an *en banc* determination is not afforded Petitioner, then the panel decision shall have effectively eviscerated Section 2(c) of the Pilot's Bill of Rights and require from this day forward that the NTSB be "bound" by the FAA's policy guidance with respect to sanction.

STATEMENT OF FACTS

A. The Opinion and Order of the NTSB

On January 4, 2021, the NTSB rendered its Opinion and Order and stated as follows on pages 31 and 32 of that document:

F. Sanction

In accordance with *Martin v. Occupational Safety and Health Review Commission*[6] we apply principles of judicial deference to the Administrator's interpretation of laws, regulations, and policies. In *Martin*, the United States Supreme Court emphasized the importance of the reasonableness inquiry when determining whether an agency's statutory interpretation is entitled to deference.[7] We have emphasized that the determination of whether the Administrator's choice of sanction is reasonable is case specific and is based upon the facts and circumstances adduced at the hearing.[8] Further, we will consider both aggravating and mitigating factors in evaluating the reasonableness of an imposed sanction.[9] The FAA has proposed a revocation of Respondent's airline transport pilot and airman medical certificates for his refusal to test.[10] The Board has conducted a fact-specific examination of the entire record and finds that there are mitigating factors that warrant a reduction in sanction. First, there was no clear evidence in the record that the test collector urged Respondent to drink up to 40 ounces of fluid to produce another sample within the three hour test period, which is part of the shy bladder process. Ms. West said she could only clearly recall telling Respondent that "it would be considered a refusal if he left."[11] When asked about the shy bladder process, she testified that she believed she explained the process to Respondent, but could not remember specifically.[12] Second, as discussed above, the law judge found that Respondent "was advised that, if he left, he would have to have another confirmation

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[6] 499 U.S. 144 (1991). [This footnote appears as footnote 162 in the original Opinion of the Board].
[7] *Id.* at 145, 150-158. [This footnote appears as footnote 163 in the Board's Opinion and Order].
[8] *Administrator v. Jones,* NTSB Order No. EA-5647 at n.62 (2013); *see also Administrator v. Greene,* NTSB Order No. EA-5841 at 36-37 (2018). [This footnote appears as footnote 164 in the Board's Opinion and Order].
[9] *Id.* [This footnote appears as footnote 165 in the Board's Opinion and Order].
[10] Although FAA Order 2150.3C advises that certain, single acts of misconduct, such as a drug test refusal, are egregious to *generally* warrant a revocation, the guidance permits lesser sanctions. *See* Order 2150.3C, *FAA Compliance and Enforcement Program* at 9-13 (eff. Jan. 24, 2020) (emphasis added). [This footnote appears as footnote 166 in the Board's Opinion and Order].
[11] Tr. at 20. [This footnote appears as footnote 167 in the Board's Opinion and Order].
[12] *Id.* at 20, 39. [This footnote appears as footnote 168 in the Board's Opinion and Order].

form when he returned."[13] The Board believes that this discussion between the test collector and Respondent would create confusion for a reasonable person about whether they could return for a new drug test as long as they obtained a new form, and thus would have interpreted it to mean a new test was possible.[14]

We hold certificate holders to a high standard. But the interaction of these mitigating factors compounded in a way that revocation is not a reasonable sanction. There existed ambiguity surrounding the consequences of his departure, and the Administrator did not prove that the test collector explained the shy bladder procedures. The unique circumstances of this case lead us to reduce Respondent's sanction to a 180-day suspension.[15]

ACCORDINGLY, it is ordered that:

1. Respondent's appeal is denied;

2. The Law Judge's Oral Initial Decision is affirmed in part; and

3. The Administrator's Emergency Revocation of Respondent's Airlines Transport Pilot and medical certificates is reduced to a 180-day suspension.

Sumwalt, Chairman, Landsberg, Vice Chairman, Homendy, Graham, Chatman, Members of the Board, concurred in the above Opinion and Order.[16]

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[13] Initial Oral Decision at 159. [This footnote appears as footnote 169 in the Board's Opinion and Order].

[14] *See*, *supra,* n.142-43 and accompanying text. [This footnote appears as footnote 170 in the Board's Opinion and Order].

[15] 14 C.F.R. §120.11(b)(2) provides for a suspension or revocation of a Part 61 certificate-holder's refusal to drug test. [This footnote appears as footnote 171 in the Board's Opinion and Order].

[16] The foregoing text by the Board on pages 31 and 32 of its Opinion and Order appears at A-559 – 560.

B. Comments During Oral Argument

During oral argument on December 13, 2021, the following exchange took place between Judges Jackson and Srinivasan and Mr. Koppel, the Department of Justice lawyer representing the FAA:

> **Judge Jackson:** But strict liability is – it goes to whether he committed a violation. What I'm trying to understand is the sanction and who gets to decide what should happen as a result of his violation.
>
> So assuming we agree with you that the facts are such that the violation was established, as the NTSB found, *I had understood you to be arguing that the NTSB had no choice but to apply the sanction that the FAA recommended*. Now I hear you saying something different, which is *the NTSB might do something other than what the FAA recommended, but only if they find that the FAA sanction is unreasonable*. Is that what you are saying?
>
> **Mr. Koppel:** Yes, Your Honor. The NTSB is required to defer to the FAA Administrator's choice of sanction. So – and *review the sanction for reasonableness* – so if, you know, the FAA Administrator sanction in a case is *completely unreasonable, the NTSB is permitted to modify it*.
>
> **Judge Jackson:** All right. *And they say its unreasonable in light of the two mitigating factors*. So if I now, as a court of appeals judge, we as a body are looking at this, how are we – *what's our level of scrutiny of their determination that it was unreasonable given those two mitigating circumstances that they mentioned?*
>
> **Mr. Koppel:** This court has said that it is – that the NTSB acts contrary to law where it does not apply the appropriate level of deference. *So if this Court finds*, as it should, that the FAA Administrator's *choice of sanction is reasonable, then the NTSB erred* and acted contrary to law by finding the opposite, by finding –

Judge Srinivasan: Well, we don't, we don't review *de novo*… (italics supplied).

REASONS FOR GRANTING THE PETITION

I.

THE PANEL EMPLOYED AN ARTIFICIALLY HIGH STANDARD IN EVALUATING DEFERENCE WHICH IS INCONSISTENT WITH THE SUPREME COURT'S DECISION IN *MARTIN*

The panel, in reversing the NTSB found, *inter alia*:

> Although the Board states it deferred to the FAA's choice of sanction, *see* NTSB Order at 31, and lists two mitigating factors that may cast doubt on the FAA's sanction, *id.* at 31-32, it adjusted the sanction without finding that the sanction is *unwarranted in law or without justification in fact*. 14 C.F.R. §120.11 provides that a refusal to test is grounds for "revocation of any [airman] certificate," and 14 C.F.R. §§67.107(b)(2), 67.207(b)(2), 67.307(b)(2) provides that a refusal to test in the prior two years disqualifies a pilot from holding medical certificates…[17]

The standard employed by the panel with regard to deference was whether the sanction is "unwarranted in law and without justification in fact."[18] This language is nowhere to be found in the United States Supreme Court's opinion in *Martin*. Rather, this language heralds back to a case decided just after the end of World War II, *American Power & Light Co. v. Securities Exchange Commission,*

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[17] Panel Opinion in the case *sub judice* at 12 (italics supplied). The reference to 14 C.F.R. §120.11 ignores the express language in subsection (b)(2), "*suspension* or revocation of any certificate, rating, or authorization issued under Part 61 of this chapter (italics supplied)."
[18] Panel Op. at 12.

329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946). *American Power* dealt with the authority of the Securities and Exchange Commission to order the dissolution of two corporations. Besides being over seven decades old, the *American Power* case *has nothing whatever to do with the split-enforcement proceedings* rationale discussed at length in *Martin*. Moreover, the panel decision did not even acknowledge it was employing an inapposite case in making this pronouncement.

If we turn our attention to the Supreme Court's decision in *Martin*, we discover that the underlying criterion for evaluating the conduct of a reviewing agency with respect to sanction is "reasonableness." The term "reasonable" or "reasonableness" appears *five times* in the Board's Opinion and Order. The panel decision ignores that fact. The Supreme Court, in articulating a standard to be employed in evaluating whether deference had been displayed by a reviewing agency declared that the criterion for evaluating the conduct of the reviewing agency was whether it was "reasonable." 499 U.S. at 156. The fact that "reasonableness" or being reasonable" is the criterion for evaluating agency action in displaying deference was discussed at length at oral argument when Judge Jackson questioned Mr. Koppel, and he admitted that the NTSB could decline to apply the Administrator's sanction if it was "completely unreasonable." Oral Arg.Tr. at 26, 27. When Judge Jackson asked Mr. Koppel what was the Court's level of scrutiny in evaluating reasonableness, he asked that the Court determine

whether the FAA choice of sanction was reasonable, and Judge Srinivasan rejected the FAA's argument noting that the Court does not review emergency decisions *de novo*. *Id.* at 27, 28.

It was clear from the questions of Judges Srinivasan and Jackson at oral argument that if the Board gave a reasoned explanation for departing from the FAA's selection of sanction, then it would be upheld. For some mysterious reason, the term "reasonable" as approved in *Martin* was replaced in the panel's decision with the obscure language from *American Power* elevating the standard of review from reasonableness to "unwarranted in law and without justification in fact."[19] Not only did the panel invoke an unauthorized and artificially high standard, but it maintained that the Board failed to acknowledge the FAA's policy rationale for revoking Pham's certificate or explain why those reasons were inapplicable when the Board's Opinion reveals *exactly the opposite*. The Board specifically cited to the *FAA Compliance and Enforcement Program Manual*, FAA Order 2150.3C, noting that *generally* revocation is the appropriate sanction.[20] However, based upon the two concerns expressed in the Board's Opinion (the fact that Pham was not given a shy bladder warning and was told he could return with a new confirmation

[19] Panel Opinion in the instant case, May 10, 2022, at 12.
[20] Board's Opinion and Order at n.166.

order and take a new test) led the Board to conclude "that revocation is not a reasonable sanction."[21]

A. The Dangers Presented by Allowing the Panel Decision to Stand

One danger of allowing this panel decision to stand is it effectively eviscerates Section 2(c) of the Pilot's Bill of Rights which deleted language from 49 U.S.C. §44709(d)(3) that required the NTSB to be "bound" by the FAA's policy guidance with respect to sanction. *See* Pub. L. 112-153, §2(c) (Oct. 5, 2018); 49 U.S.C. §44709(d)(3) (2003); 49 U.S.C. §44709(d)(3) (2018). While replacing the word "reasonable" (found in *Martin*) with "unwarranted in law and without justification in fact" (found in *American Power*) may appear to be innocent, the fact remains that the selection of this unfortunate language will have adverse consequences to airmen for decades to come unless this miscarriage of justice is corrected. As explained above, this artificially high standard for recognizing deference in the panel's decision is inconsistent with the will of Congress in promulgating the Pilot's Bill of Rights. Pub.L. 112-153, §2(c) (Oct. 5, 2018).

Prior to the passage of the Pilot's Bill of Rights, the NTSB was "bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to

[21] Board's Opinion and Order at 32, A-560.

sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." 49 C.F.R. §44709(d)(3) (2003). After passage of the Pilot's Bill of Rights, the requirement that the NTSB be "bound" by sanction and policy guidance of the FAA was eliminated; and the 2018 version of 49 C.F.R. §44709(d)(3) provides: "When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator." 49 U.S.C. §44709 (2018).

In effect what the FAA has done in this case under the auspices of "deference" is resurrect the language found in the 2003 version of 49 C.F.R. §44709(d)(3) and require the Board to be "bound" to the FAA's policy guidance determinations with respect to sanction. The panel opinion, by employing the unfortunate language of "unwarranted in law or without justification in fact" has unwittingly fallen into the FAA's trap of resurrecting the requirement that the Board be "bound" by the FAA's policy guidance with respect to sanction. The panel opinion ignored the lower standard that the NTSB's decision merely be "reasonable" when departing from the FAA's choice of sanction. *See, e.g., Martin* at 156-57; A-559-560. *In effect, the panel decision effectively repeals Section 2(c) of the Pilot's Bill of Rights*. For that reason, the panel decision is of exceptional importance since it conflicts with the expression of Congressional intent in promulgating the Pilot's Bill of Rights and the elimination of the requirement that

the Board be bound by the FAA's policy guidance with respect to sanction. *See, e.g.*, 49 U.S.C. §44709 (2003); 49 U.S.C. §44709 (2018); Pub.L.112-153, §2(c) (Oct. 5, 2018).

II.

THE PANEL DECISION EFFECTIVELY RESCINDS SECTION 2(c) OF THE PILOT'S BILL OF RIGHTS CONTRARY TO THE WILL OF CONGRESS

Congress expressed its legislative intent that in administering justice, the NTSB would no longer be "bound" by FAA policy guidance with respect to sanction. Pub. L.112-153, §2(c) (Oct. 5, 2018). Congress expressly stated that the NTSB would not be bound by the FAA's findings of fact. 49 U.S.C. §44709(d)(3) (2018). The language selected in the panel decision that the FAA's selection of sanction must be "unwarranted in law or without justification in fact" once again "binds" the NTSB to the FAA's choice of sanction.

The language employed in the panel decision is a far cry from the correct standard articulated in *Martin* of "reasonableness." *The issues raised in this Petition are of exceptional importance to the administration of justice to certificated airmen and the civil aviation community of the United States*. For these reasons this Honorable Court should grant Petitioner a rehearing *en banc* and/or a panel hearing to correct the gross errors that were made in the panel opinion.

CONCLUSION

WHEREFORE, for the reasons set forth above, Ydil Pham respectfully requests that this Court grant the Petition for Rehearing or Rehearing En Banc.

Dated: May 20th, 2022

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type requirements of FRAP 32 and Circuit Rule 32 because, excluding the parts of the document exempted by the rules, it contains 3,856 words, and was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of May 2020, I caused to be filed with the court through CM/ECF system the foregoing Petition for Rehearing and Rehearing En Banc with the Clerk of the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. Service was accomplished by the following on counsel for the Federal Aviation Administration and National Transportation Safety Board.

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ADDENDUM

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) Parties and Amici.

Petitioner.

The Petitioner herein is Ydil W. Pham who was, at all times material to this action, a certificated airman holding an airline transport pilot certificate issued by the Federal Aviation Administration. His address is 365 Preston Road, Terryville, CT 06786.

Respondent.

There are two respondents in this action. The first respondent is the National Transportation Safety Board ("NTSB"), and the second respondent is the Federal Aviation Administration ("FAA").

Amici.

The Petitioner states that he is not aware of any *amici* in this matter.

(B) Rulings Under Review.

The ruling under review is the Opinion and Order adopted by the National Transportation Safety Board served January 4, 2021, NTSB Order No. EA-5889, in NTSB Emergency Docket No. SE-30891, the same being attached as Exhibit A and appended to the Petition for Review filed with this Honorable Court on February 11, 2021. The Opinion and Order of the National Transportation Safety Board is a final order subject to review pursuant to 49 U.S.C. §46110(a).

(C) Related Cases.

The case on review has not previously been before this Court or any other court, since all proceedings giving rise to this Petition for Review were adjudicated by the National Transportation Safety Board.

On March 5, 2021, Stephen M. Dickson, Administrator of the Federal Aviation Administration, filed a Petition for Review against Petitioner Ydil W. Pham who is a Cross-Respondent in Case No. 21-1083 together with the National Transportation Safety Board.

RULE 26.1 DISCLOSURE STATEMENT

COMES NOW Ydil W. Pham, pursuant to Fed.R.App. 26.1(a) and Circuit Rule 26.1, and submits his Disclosure Statement as follows:

Petitioner, Ydil W. Pham, is an individual and has no corporate affiliation of any nature. Until November 5, 2020, he was a duly licensed airline transport pilot holding a first-class medical certificate, both of those certificates having been revoked by an Emergency Order of Revocation issued by the Federal Aviation Administration on November 5, 2020. There are no corporations of any nature, whether publicly or privately held, that have any interest in this litigation as relates to Petitioner Ydil W. Pham. Again, he is an individual with no corporate affiliation. He resides with his family at 365 Preston Road, Terryville, CT 06786. He is the airman adversely affected by the Opinion and Order issued by the National Transportation Safety Board on January 4, 2021, in the form of Exhibit A attached to his Petition for Review filed with this Court on February 11, 2021.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 13, 2021 Decided May 10, 2022

No. 21-1062

YDIL W. PHAM,
PETITIONER

v.

NATIONAL TRANSPORTATION SAFETY BOARD AND FEDERAL AVIATION ADMINISTRATION,
RESPONDENTS

Consolidated with No. 21-1083

On Petitions for Review of a Decision
of the National Transportation Safety Board

Alan Armstrong argued the cause and filed the briefs for petitioner/cross-respondent.

Joshua M. Koppel, Attorney, U.S. Department of Justice, argued the cause for respondents/cross-petitioners. With him on the briefs were *Brian M. Boynton*, Acting Assistant Attorney General, *Abby C. Wright*, Attorney, *Cynthia A. Dominik*, Assistant Chief Counsel for Enforcement, Federal

Aviation Administration, and *Agnes M. Rodriguez* and *Casey Gardner*, Attorneys.

Before: SRINIVASAN, *Chief Judge*, ROGERS and JACKSON*, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Ydil Pham and the Federal Aviation Administration both petition for review of the National Transportation Safety Board's suspension of Pham's pilot and medical certificates for 180 days. Pham contends that the Board erred in concluding that he refused a drug test when he left the test center before providing the requisite amount of urine because (1) he was not told he could drink water (a "shy-bladder" warning), as required by regulation, (2) he was given permission to leave, and (3) his urine sample was unlawfully discarded. He also contends that the Board impermissibly applied a strict-liability standard. The FAA objects by cross-petition to the Board's decision to suspend rather than revoke Pham's certificates as the FAA ordered, contending that (1) the Board is obligated to defer to the FAA's guidance and interpretations of its regulations, (2) those regulations require revocation of medical certificates for at least 2 years after a refusal to test, and (3) the Board deviated from its precedent without explanation. For the following reasons, the court denies Pham's petition and grants the FAA's cross-petition.

I.

The FAA is authorized to issue "airman certificates," which permit individuals to engage in a range of activities related to aviation. 49 U.S.C. §§ 44702(a), 40102(a)(8),

* Circuit Judge Jackson was a member of the panel at the time the case was argued but did not participate in this opinion.

44711(a). Pursuant to this authority, it issues six types of pilot certificates. 14 C.F.R. § 61.5(a). Among other requirements, pilots must be "physically able" to perform their duties, 49 U.S.C. § 44703(a), and must obtain a "medical certificate" certifying their physical fitness to pilot planes as measured against specific criteria, *see* 14 C.F.R. § 61.23 and pt. 67.

The FAA is also required to establish a program for "preemployment, reasonable suspicion, random, and post-accident testing of airmen . . . for use of a controlled substance." 49 U.S.C. § 45102. FAA regulations require that each test subject provide at least 45 milliliters of urine for a drug test. 49 C.F.R. § 40.65(a). If the test subject fails to do so, the collector must follow "shy-bladder" procedures, under which the collector must discard the specimen and "[u]rge the [subject] to drink up to 40 ounces of fluid." *Id.* § 40.193(b). If the subject leaves the test center before the collection is completed, the departure is deemed a refusal to test. *Id.* § 40.191(a)(2).

Further, the FAA may revoke certificates if it "decides . . . that safety in air commerce or air transportation and the public interest require that action." 49 U.S.C. § 44709(b)(1)(A). "Refusal . . . to take a [required] drug or alcohol test . . . is grounds for . . . [s]uspension or revocation" of a pilot certificate, 14 C.F.R. § 120.11, and disqualifies the pilot from holding any of the three classes of medical certificate for two years from the refusal to test, *id.* §§ 67.107(b)(2), 67.207(b)(2), 67.307(b)(2). Adversely affected individuals may appeal an FAA order to the National Transportation Safety Board (hereinafter, the "Board"). 49 U.S.C. § 44709(d).

II.

In August 2020, Pham, an experienced airline pilot, interviewed for a job with Private Jets. As a condition of employment, he was required to take a pre-employment drug test. Upon arrival at the test center, the test collector, Lois West, explained the testing procedures, including that he would need to produce a urine sample. Pham began the testing procedures but did not provide the required 45-milliliter urine sample, *see* 49 C.F.R. § 40.65(a), and left the test center. West reported Pham's refusal to test to Private Jets' drug testing manager, Cindy Boone, who, pursuant to FAA guidance, *see* FAA Drug and Alcohol Compliance Enforcement Inspector Handbook, FAA Order 9120.1D, at 43 (Aug. 9, 2018), notified the FAA that Pham had refused a drug test.

On November 5, 2020, the FAA issued an emergency order revoking Pham's airline transport pilot certificate and his airman medical certificates. Emergency Order of Revocation, FAA Case No. 2020 WA 910339 (Nov. 5, 2020) (hereinafter, the "Revocation Order"). The Revocation Order stated that Pham's failure to remain at the test center until the collection process was completed constituted, pursuant to 49 C.F.R. § 40.191(a)(2), a refusal to submit to a required drug test, Revocation Order at 2, and that Pham, therefore, "lack[ed] the qualifications necessary to hold [an airline transport pilot certificate] and any class of airman medical certificate," *id.* at 3. The revocations were made effective immediately, *id.* at 3, because Pham's "refusal to submit to FAA-required drug testing demonstrates that [he] . . . lack[s] the degree of care, judgment, and responsibility required of the holder of a pilot certificate and any class of airman medical certificate," *id.* at 4. Pham appealed to the Board.

Before an administrative law judge ("ALJ") for the Board, West testified that Pham had provided an insufficient urine sample and had told her that he was unable to stay at the test center any longer. *See* NTSB Hearing Tr. (Nov. 23–24, 2020) at 19–20. West also testified that she informed Pham that leaving before the test collection process was completed would be considered a refusal to take a test. *Id.* at 20. West denied giving Pham permission to leave the test center and testified that she had told Pham that "he would have to get a whole new form from [his] job" after leaving because, once she indicated a refusal on his testing form, she could not use that form again. *Id.* at 21. Although West could not recall whether she informed Pham about the shy-bladder procedure, she noted that she was trained to do so. *Id.* at 20, 39. West further testified that after Pham left, she contacted Boone to notify her of Pham's failure to complete the test. *Id.* at 33–34. Boone's testimony confirmed that West told her that Pham left the test center before completing his drug test, although West had warned him that leaving would be considered a refusal. *Id.* at 61. Boone reported Pham to the FAA, she explained, because she is required to report any refusal of a drug test. *Id.* at 62–63.

Pham admitted in his testimony that the urine sample he produced was deemed insufficient, *id.* at 111, and claimed that when he asked West if he could go to lunch and come back to finish the test, she granted him permission to do so, stating that Private Jets could send a new application if Pham returned, *id.* at 112. Pham testified that West neither gave him shy-bladder instructions nor told him that leaving the test center would be deemed a refusal, claiming that he would not have left the center had he been so informed. *Id.* at 113–14.

The ALJ found that West's testimony was "very credible as to advising [Pham] that" leaving the test center before completing the testing process "was a refusal," *id.* at 158,

noting that her testimony was corroborated by paperwork she had filled out the day the test began, *id.* at 157, Exh. A-2. By contrast, the ALJ found Pham's testimony was unpersuasive, because as an air transport pilot, Pham was held to a "higher standard" and should have known the relevant regulations. *Id.* at 158. The ALJ specifically found that Pham (1) had provided a urine sample that was "insufficient" in volume; (2) "was advised that [leaving the test center] constituted a refusal"; and (3) "was advised that, if he left, he would have to have another confirmation form when he returned." *Id.* at 159. Therefore, the ALJ concluded that the FAA had proven a violation of its drug-testing regulations and affirmed the FAA's revocation of Pham's certificates. *Id.* at 159–61.

Pham appealed the ALJ's initial decision to the Board. The Board deferred to the ALJ's credibility determinations, Opinion and Order, NTSB Order No. EA-5889, at 17–21 (Jan. 4, 2021) (hereinafter, the "NTSB Order"), and affirmed the ALJ's determination that Pham had refused a drug test, *id.* at 21–25. In response to Pham's argument that he did not receive a shy-bladder warning as 49 C.F.R. § 40.193(b) required, the Board observed that "West explained the most important part: leaving before providing an adequate sample constitutes a refusal." *Id.* at 25. The Board also rejected Pham's argument that the ALJ had improperly applied a strict-liability standard, finding that the ALJ "considered the witnesses' testimonies, assessed the witnesses' credibility, reviewed the exhibits, and weighed the parties' arguments." *Id.* at 28. Further, it rejected Pham's argument that discarding his sample constituted spoliation of evidence, inasmuch as Pham was sanctioned because he left the test center, not because his sample tested positive. *Id.* at 29. The Board *sua sponte* reviewed the FAA's revocation sanction and reduced it to a 180-day suspension, identifying two "mitigating factors." *Id.* at 31–32. First, there was no clear evidence that Pham was informed he could drink

water to produce another sample. *Id.* at 31. Second, Pham could have been confused by West's statement that he would need a new form if he returned, because Pham may have interpreted that as a suggestion that a new test was possible. *Id.* at 32.

Pham petitioned for review, and the FAA filed a cross-petition for review.

III.

The court must uphold the Board's decision "unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or 'unsupported by substantial evidence.'" *Huerta v. Ducote*, 792 F.3d 144, 153 (D.C. Cir. 2013) (quoting 5 U.S.C. § 706(2)(A), (E)) (internal citations omitted). This court will "'defer to the wisdom of the agency, provided its decision is reasoned and rational . . . .'" *Dillmon v. NTSB*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (quoting *Chritton v. NTSB*, 888 F.2d 854, 856 (D.C. Cir. 1989)).

A.

Pham principally contends that the Board lacked substantial evidence to conclude that he refused a drug test because he was not given a shy-bladder warning and was allegedly given permission to leave. He also contends that the sample collector "spoliated" evidence, Pham Br. 41, and that the Board applied a strict-liability standard, both of which violated his constitutional rights. None of these challenges is persuasive.

Substantial evidence "is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Chritton*, 888 F.2d at 856 (internal citation and

quotation marks omitted). The court must accept all "reasonable credibility determinations" made by the ALJ and approved by the Board. *Dickson v. NTSB*, 639 F.3d 539, 542 (D.C. Cir. 2011) (internal citation and quotation marks omitted). Here, the ALJ evaluated the entire record as well as various inconsistencies in testimony. The ALJ reasonably found that West was more credible than Pham and concluded that, in violation of 49 C.F.R. § 40.191(a)(2), Pham had refused a drug test by failing to remain at the test center until the testing process was complete. NTSB Hearing Tr. (Nov. 23–24, 2020) at 156–61. The Board stated that it deferred to the ALJ's credibility findings and agreed that Pham had refused a drug test. *See* NTSB Order at 1–2, 21. In addition to West's testimony, other evidence adequately supports this finding. For example, the Custody and Control Form stated that Pham refused a drug test, *id.* at Exh. A-2, and West testified that the form reflected her recollection of events, *id.* at 28–29. Private Jets' drug testing manager, Cindy Boone, testified about her telephone call with West as reflected in Boone's email to the FAA. *Id.* at 61, 64, Exh. R-6. And Pham admitted that he left the test center without providing a sufficient urine sample. *Id.* at 117–18.

Undeterred, Pham contends that the Board had no factual basis for its refusal finding because he did not receive the shy-bladder instructions required by 49 C.F.R. § 40.193(b)(2). The Board acknowledged that the record was unclear but found that the test collector "explained the most important part: leaving before providing an adequate sample constitutes a refusal." NTSB Order at 25. The Board reasonably concluded that because the sanction was premised on Pham leaving the test center before completing the testing process, *see* NTSB Hearing Tr. (Nov. 23–24, 2020) at 159–60 (citing 49 C.F.R. § 40.191(a)(2)), the collector's failure to mention shy-bladder procedures was "not fatal to the [ALJ's]

determination" that Pham had refused a drug test, NTSB Order at 24. As to Pham's testimony that the test collector gave him permission to leave when she said he would need a new form to return, the Board acknowledged that this statement might confuse a "reasonable person" by suggesting that a "new test was possible." *Id.* at 25. But that confusion did not alter the fact that Pham was "notified [] that if he left the facility, it would be a refusal," *id.* at 22–23, yet still "left the testing facility without providing an adequate specimen and[,] therefore, violated the applicable regulation," *id.* at 25. And contrary to Pham's contention, there is no inconsistency between the ALJ's finding that Pham was advised that his leaving the facility would constitute a refusal to test and the finding that Pham was advised he would need a new confirmation form if he returned: the need for a new confirmation form for a *future* test is fully consistent with treating a departure from the facility as a refusal to complete the *current* test.

Pham contends that the claims against him should have been dismissed because the test collector disposed of his sample in violation of 49 C.F.R. § 821.19(c), and that although 49 C.F.R. § 40.193(b)(1) requires disposal of insufficient specimens, the provision is unconstitutional because it destroys exonerating evidence in violation of the Due Process Clause of the Fifth Amendment. The Board reasonably concluded there was no violation of 49 C.F.R. § 821.19(c); the regulation prohibits disposal of specimens only when a judge orders production of the specimen or there is a timely request to preserve the sample, neither of which occurred here. NTSB Order at 29. Pham's constitutional objection is meritless; the urine sample could not have been exculpatory because the issue is not whether the sample was positive but whether Pham refused a test by leaving the test center before the process was

complete. *Id.* In any event, Pham cites no precedent holding that disposal of an insufficient sample is unconstitutional.

Nor, contrary to Pham's view, did the Board apply a strict-liability rule in violation of its own precedent and the Duc Process Clause. Rather, the Board noted that the ALJ "considered the witnesses' testimonies, assessed the witnesses' credibility, reviewed the exhibits, and weighed the parties' arguments," *id.* at 28, and relied on evidence that Pham was warned that leaving the test center before providing an adequate sample would constitute a refusal to test, *id.* at 25.

The court therefore denies Pham's petition for review.

B.

In its cross-petition, the FAA contends that the Board acted contrary to law by reducing Pham's sanction from revocation of his certificates to a 180-day suspension. In particular, the Board is required to defer to the FAA's sanction determination if it is reasonable, but the Board did not exercise deference. Further, the FAA contends that the Board acted contrary to law by suspending Pham's medical certificates for 180 days because FAA regulations make Pham ineligible to hold such certificates for two years. The FAA contends that the Board's choice of sanction was also arbitrary and capricious because it deviated from Board precedent.

1.

The Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*, creates a "'split-enforcement'" regime in which the FAA has regulatory and enforcement authority, and the Board has adjudicatory authority. *Garvey v. NTSB*, 190 F.3d 571, 573 (D.C. Cir. 1999) (quoting *Hinton v. NTSB*, 57 F.3d 1144, 1147 n.1 (D.C. Cir. 1995)). In *Martin v. Occupational Safety &*

Health Review Commission, 499 U.S. 144 (1991), the Supreme Court held that the agency with adjudicative power in a split-enforcement regime would play a role similar to a "*court* in the agency-review context" and review the rulemaking agency's interpretations of its rules "only for consistency with the regulatory language and for reasonableness." *Id.* at 154–55. This court has similarly held that the Board and the court "must defer to the FAA's interpretations of its own aviation regulations." *Garvey*, 190 F.3d at 577 (citing *Martin*, 499 U.S. at 147, 150–57). FAA guidance provides that revocation is an appropriate sanction for refusal to test. U.S. Department of Transportation, FAA Order 2150.3C, at 9-14, Fig. 9-5(11) (Sept. 18, 2018). So, the FAA contends that the Board improperly "substituted its own judgment for the [FAA's]" in adjusting the sanction, exceeding its role in the split-enforcement regime. FAA Br. 38.

Pham's case, however, differs from *Martin* to the extent the FAA seeks deference to its application of a policy statement that guides its enforcement discretion rather than an interpretation of its rule as in *Martin*, 499 U.S. at 148–49. Further, the rulemaking agency's interpretation in *Martin* was issued as part of a formal citation against an employer. *Id.* at 157. "[L]ess formal means of interpreting regulations," such as "enforcement guidelines," are "entitled to some weight on judicial review" but "not entitled to the same deference" as a formal citation. *Id.* As such, the approach in *Martin* instructs deference to FAA's enforcement guidelines and sanction determination but does not specify the level of deference the Board owes. Still, the Supreme Court has held that courts should overturn an agency's choice of remedy only if it "is unwarranted in law or is without justification in fact." *American Power & Light Co. v. SEC*, 329 U.S. 90, 112–13 (1946). Because the Board essentially acts as a court in the split-enforcement regime with the FAA, *Martin*, 499 U.S. at

154, this standard guides the court's review of the Board's sanction decision.

Although the Board states it deferred to the FAA's choice of sanction, *see* NTSB Order at 31, and lists two mitigating factors that may cast doubt on the FAA's sanction, *id.* at 31–32, it adjusted the sanction without finding that the sanction is unwarranted in law or without justification in fact. 14 C.F.R. § 120.11 provides that a refusal to test is grounds for "revocation of any [airman] certificate," and 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), 67.307(b)(2) provide that a refusal to test in the prior two years disqualifies a pilot from holding medical certificates. The FAA's sanction had justification in fact, as the FAA found that Pham had been warned that leaving the test center before providing a sufficient urine specimen would be considered a refusal to test but he left anyway. Revocation Order at 2. The FAA concluded this demonstrated that Pham lacked "the degree of care, judgment, and responsibility required of a certificate holder." *Id.* at 4. "Air safety depends on the willingness of certificate holders . . . [to submit] to drug tests," and Pham's refusal "betray[ed] the public trust." *Id.* Pursuant to 49 U.S.C. § 44709(b)(1), the FAA can revoke certificates upon determining that "safety in air commerce or air transportation and the public interest" require revocation.

The Board failed, however, to acknowledge the FAA's policy rationale for revoking Pham's license or to explain why those reasons were inapplicable or unjustified in Pham's case. Pham's reliance on the 2012 Pilot's Bill of Rights, which removed a statutory provision requiring the Board to defer to the FAA's interpretations of sanction guidance, Pub. L. 112-153, § 2(c)(2), 126 Stat. 1159, 1161 (2012) (amending 49 U.S.C. § 44709(d)(3)), does not advance his challenge to the FAA's cross-petition. Removing a provision that provided for

deference is not the equivalent of enacting a contrary provision disallowing deference, and Pham identifies no reason the court should read the removal of the provision in this situation as an attempt to preclude deference by the Board. In fact, there is at least some indication in the legislative history that the provision was removed only because it was deemed superfluous in light of *Martin*. *See* 158 Cong. Rec. S4733 (daily ed. June 29, 2012) (statement of Sen. Rockefeller and concurrence of Sen. Inhofe); *id.* at H5102 (daily ed. July 23, 2012) (statement of Rep. Bucshon).

Pham's position that FAA Order 2150.3C is invalid because it is a legislative rule promulgated without notice and comment and the FAA's "enforcement practice [is] to always seek a revocation," Pham Reply Br. 37, misrepresents FAA Order 2150.3C, which provides that refusal to test "generally," but not categorically, warrants revocation, FAA Order 2150.3C at 9-13, 9-14. This is a classic example of a policy statement that does not require notice and comment. 5 U.S.C. § 553(b); *see Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 93–94 (D.C. Cir. 1997).

Because the Board's decision did not accord appropriate deference, its modification of the FAA's sanction, on the reasoning it offered, was contrary to law.

2.

The FAA's challenge to the Board's suspension of Pham's medical certificates is persuasive. FAA regulations provide that an airman who has refused a drug test in the preceding two years is automatically ineligible to hold a medical certificate. 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), 67.307(b)(2); *see also id.* §§ 67.101, 67.201, 67.301. Because the Board lacks the authority to invalidate FAA regulations, *see Adm'r v. Ewing*, 1

N.T.S.B. 1192, 1194 (1971); *see also Garvey v. Kraley*, NTSB Order No. EA-4581, 1996 WL 785071, at *1 n.3 (Aug. 18, 1997) (citing *Ewing*, 1 N.T.S.B. at 1194), it was required to apply the FAA's medical certificate eligibility requirements. The Board's Order is contrary to law insofar as it allows Pham to hold medical certificates between 180 days and 2 years after he refused a drug test.

The court need not address whether the Board's decision to adjust the sanction deviated from Board precedent, because the court is instructing the Board on remand to manifest proper deference to the FAA's sanction choice and review it only for justification in law and fact. The Board's role in the split-enforcement regime may require it to deviate from its own precedent if the FAA has taken a different but reasonable position. "[C]onsistency with the FAA's position is more important than consistency with the Board's own." *Garvey*, 190 F.3d at 584.

Accordingly, the court denies Pham's petition for review, grants the FAA's cross-petition for review, and vacates the Board's Order in part. The court remands this matter to the Board for further proceedings consistent with this opinion.

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Pilot's Bill of Rights

[Public Law 112–153]

[As Amended Through P.L. 115–254, Enacted October 5, 2018]

[Currency: This publication is a compilation of the text of Public Law 112–153. It was last amended by the public law listed in the As Amended Through note above and below at the bottom of each page of the pdf version and reflects current law through the date of the enactment of the public law listed at https://www.govinfo.gov/app/collection/comps/]

[Note: While this publication does not represent an official version of any Federal statute, substantial efforts have been made to ensure the accuracy of its contents. The official version of Federal law is found in the United States Statutes at Large and in the United States Code. The legal effect to be given to the Statutes at Large and the United States Code is established by statute (1 U.S.C. 112, 204).]

AN ACT To amend title 49, United States Code, to provide rights for pilots, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. [49 U.S.C. 40101 note] SHORT TITLE.

This Act may be cited as the "Pilot's Bill of Rights".

SEC. 2. [49 U.S.C. 44703 note] FEDERAL AVIATION ADMINISTRATION ENFORCEMENT PROCEEDINGS AND ELIMINATION OF DEFERENCE.

(a) IN GENERAL.—Any proceeding conducted under subpart C, D, or F of part 821 of title 49, Code of Federal Regulations, relating to denial, amendment, modification, suspension, or revocation of an airman certificate, shall be conducted, to the extent practicable, in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

(b) ACCESS TO INFORMATION.—

(1) IN GENERAL.—Except as provided under paragraph (3), the Administrator of the Federal Aviation Administration (referred to in this section as the "Administrator") shall provide timely, written notification to an individual who is the subject of an investigation relating to the approval, denial, suspension, modification, or revocation of an airman certificate under chapter 447 of title 49, United States Code.

(2) INFORMATION REQUIRED.—The notification required under paragraph (1) shall inform the individual—

(A) of the nature of the investigation and the specific activity on which the investigation is based;

(B) that an oral or written response to a Letter of Investigation from the Administrator is not required;

(C) that no action or adverse inference can be taken against the individual for declining to respond to a Letter of Investigation from the Administrator;

(D) that any response to a Letter of Investigation from the Administrator or to an inquiry made by a representative of the Administrator by the individual may be used as evidence against the individual;

(E) that the releasable portions of the Administrator's investigative report will be available to the individual; and

(F) that the individual is entitled to access or otherwise obtain air traffic data described in paragraph (4).

(3) EXCEPTION.—The Administrator may delay notification under paragraph (1) if the Administrator determines that such notification may threaten the integrity of the investigation.

(4) ACCESS TO AIR TRAFFIC DATA.—

(A) FAA AIR TRAFFIC DATA.—The Administrator shall provide an individual described in paragraph (1) with timely access to any air traffic data in the possession of the Federal Aviation Administration that would facilitate the individual's ability to productively participate in a proceeding relating to an investigation described in such paragraph.

(B) AIR TRAFFIC DATA DEFINED.—As used in subparagraph (A), the term "air traffic data" includes—

(i) relevant air traffic communication tapes;

(ii) radar information;

(iii) air traffic controller statements;

(iv) flight data;

(v) investigative reports; and

(vi) any other air traffic or flight data in the Federal Aviation Administration's possession that would facilitate the individual's ability to productively participate in the proceeding.

(C) GOVERNMENT CONTRACTOR AIR TRAFFIC DATA.—

(i) IN GENERAL.—Any individual described in paragraph (1) is entitled to obtain any air traffic data that would facilitate the individual's ability to productively participate in a proceeding relating to an investigation described in such paragraph from a government contractor that provides operational services to the Federal Aviation Administration, including control towers and flight service stations.

(ii) REQUIRED INFORMATION FROM INDIVIDUAL.—The individual may obtain the information described in clause (i) by submitting a request to the Administrator that—

(I) describes the facility at which such information is located; and

(II) identifies the date on which such information was generated.

(iii) PROVISION OF INFORMATION TO INDIVIDUAL.—If the Administrator receives a request under this subparagraph, the Administrator shall—

(I) request the contractor to provide the requested information; and

(II) upon receiving such information, transmitting the information to the requesting individual in a timely manner.

(5) TIMING.—Except when the Administrator determines that an emergency exists under section 44709(e)(2) or 46105(c), the Administrator may not proceed against an individual that is the subject of an investigation described in paragraph (1) during the 30-day period beginning on the date on which the air traffic data required under paragraph (4) is made available to the individual.

(c) [49 U.S.C. 44703] AMENDMENTS TO TITLE 49.—

(1) AIRMAN CERTIFICATES.—Section 44703(d)(2) of title 49, United States Code, is amended by striking "but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law".

(2) [49 U.S.C. 44709] AMENDMENTS, MODIFICATIONS, SUSPENSIONS, AND REVOCATIONS OF CERTIFICATES.—Section 44709(d)(3) of such title is amended by striking "but 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 related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law".

(3) [49 U.S.C. 44710] REVOCATION OF AIRMAN CERTIFICATES FOR CONTROLLED SUBSTANCE VIOLATIONS.—Section 44710(d)(1) of such title is amended by striking "but shall be bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law".

(d) APPEAL FROM CERTIFICATE ACTIONS.—

(1) IN GENERAL.—Upon a decision by the National Transportation Safety Board upholding an order or a final decision by the Administrator denying an airman certificate under section 44703(d) of title 49, United States Code, or imposing a punitive civil action or an emergency order of revocation under subsections (d) and (e) of section 44709 of such title, an individual substantially affected by an order of the Board may, at the individual's election, file an appeal in the United States district court in which the individual resides or in which the action in question occurred, or in the United States District Court for the District of Columbia. If the individual substantially affected by an order of the Board elects not to file an appeal in a United States district court, the individual may file an appeal in an appropriate United States court of appeals.

(2) EMERGENCY ORDER PENDING JUDICIAL REVIEW.—Subsequent to a decision by the Board to uphold an Administrator's emergency order under section 44709(e)(2) of title 49, United States Code, and absent a stay of the enforcement of that order

by the Board, the emergency order of amendment, modification, suspension, or revocation of a certificate shall remain in effect, pending the exhaustion of an appeal to a Federal district court as provided in this Act.

(e) STANDARD OF REVIEW.—

(1) IN GENERAL.—In an appeal filed under subsection (d) in a United States district court, the district court shall give full independent review of a denial, suspension, or revocation ordered by the Administrator, including substantive independent and expedited review of any decision by the Administrator to make such order effective immediately.

(2) EVIDENCE.—A United States district court's review under paragraph (1) shall include in evidence any record of the proceeding before the Administrator and any record of the proceeding before the National Transportation Safety Board, including hearing testimony, transcripts, exhibits, decisions, and briefs submitted by the parties.

(f) RELEASE OF INVESTIGATIVE REPORTS.—

(1) IN GENERAL.—

(A) EMERGENCY ORDERS.—In any proceeding conducted under part 821 of title 49, Code of Federal Regulations, relating to the amendment, modification, suspension, or revocation of an airman certificate, in which the Administrator issues an emergency order under subsections (d) and (e) of section 44709, section 44710, or section 46105(c) of title 49, United States Code, or another order that takes effect immediately, the Administrator shall provide, upon request, to the individual holding the airman certificate the releasable portion of the investigative report at the time the Administrator issues the order. If the complete Report of Investigation is not available at the time of the request, the Administrator shall issue all portions of the report that are available at the time and shall provide the full report not later than 5 days after its completion.

(B) OTHER ORDERS.—In any nonemergency proceeding conducted under part 821 of title 49, Code of Federal Regulations, relating to the amendment, modification, suspension, or revocation of an airman certificate, in which the Administrator notifies the certificate holder of a proposed certificate action under subsections (b) and (c) of section 44709 or section 44710 of title 49, United States Code, the Administrator shall, upon the written request of the covered certificate holder and at any time after that notification, provide to the covered certificate holder the releasable portion of the investigative report.

(2) MOTION FOR DISMISSAL.—If the Administrator does not provide the releasable portions of the investigative report to the individual holding the airman certificate subject to the proceeding referred to in paragraph (1) by the time required by that paragraph, the individual may move to dismiss the complaint of the Administrator or for other relief and, unless the Administrator establishes good cause for the failure to provide the investigative report or for a lack of timeliness, the adminis-

trative law judge shall order such relief as the judge considers appropriate.

(3) RELEASABLE PORTION OF INVESTIGATIVE REPORT.—For purposes of paragraph (1), the releasable portion of an investigative report is all information in the report, except for the following:

(A) Information that is privileged.

(B) Information that constitutes work product or reflects internal deliberative process.

(C) Information that would disclose the identity of a confidential source.

(D) Information the disclosure of which is prohibited by any other provision of law.

(E) Information that is not relevant to the subject matter of the proceeding.

(F) Information the Administrator can demonstrate is withheld for good cause.

(G) Sensitive security information, as defined in section 15.5 of title 49, Code of Federal Regulations (or any corresponding similar ruling or regulation).

(4) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to prevent the Administrator from releasing to an individual subject to an investigation described in subsection (b)(1)—

(A) information in addition to the information included in the releasable portion of the investigative report; or

(B) a copy of the investigative report before the Administrator issues a complaint.

SEC. 3. [49 U.S.C. 44701 note] NOTICES TO AIRMEN.

(a) IN GENERAL.—

(1) DEFINITION.—In this section, the term "NOTAM" means Notices to Airmen.

(2) IMPROVEMENTS.—Not later than 180 days after the date of the enactment of the Fairness for Pilots Act, the Administrator of the Federal Aviation Administration shall complete the implementation of a Notice to Airmen Improvement Program (in this section referred to as the "NOTAM Improvement Program")—

(A) to improve the system of providing airmen with pertinent and timely information regarding the national airspace system;

(B) to continue developing and modernizing the NOTAM repository, in a public central location, to maintain and archive all NOTAMs, including the original content and form of the notices, the original date of publication, and any amendments to such notices with the date of each amendment, in a manner that is Internet-accessible, machine-readable, and searchable;

(C) to apply filters so that pilots can prioritize critical flight safety information from other airspace system information; and

(D) to specify the times during which temporary flight restrictions are in effect and the duration of a designation of special use airspace in a specific area.

(b) GOALS OF PROGRAM.—The goals of the NOTAM Improvement Program are—

(1) to decrease the overwhelming volume of NOTAMs an airman receives when retrieving airman information prior to a flight in the national airspace system;

(2) make the NOTAMs more specific and relevant to the airman's route and in a format that is more useable to the airman;

(3) to provide a full set of NOTAM results in addition to specific information requested by airmen;

(4) to provide a document that is easily searchable; and

(5) to provide a filtering mechanism similar to that provided by the Department of Defense Notices to Airmen.

(c) ADVICE FROM PRIVATE SECTOR GROUPS.—The Administrator shall establish a NOTAM Improvement Panel, which shall be comprised of representatives of relevant nonprofit and not-for-profit general aviation pilot groups, to advise the Administrator in carrying out the goals of the NOTAM Improvement Program under this section.

(d) DESIGNATION OF REPOSITORY AS SOLE SOURCE FOR NOTAMS.—

(1) IN GENERAL.—The Administrator—

(A) shall consider the repository for NOTAMs under subsection (a)(2)(B) to be the sole location for airmen to check for NOTAMs; and

(B) may not consider a NOTAM to be announced or published until the NOTAM is included in the repository for NOTAMs under subsection (a)(2)(B).

(2) PROHIBITION ON TAKING ACTION FOR VIOLATIONS OF NOTAMS NOT IN REPOSITORY.—

(A) IN GENERAL.—Except as provided in subparagraph (B), beginning on the date that the repository under subsection (a)(2)(B) is final and published, the Administrator may not take any enforcement action against an airman for a violation of a NOTAM during a flight if—

(i) that NOTAM is not available through the repository before the commencement of the flight; and

(ii) that NOTAM is not reasonably accessible and identifiable to the airman.

(B) EXCEPTION FOR NATIONAL SECURITY.—Subparagraph (A) shall not apply in the case of an enforcement action for a violation of a NOTAM that directly relates to national security.

SEC. 4. [49 U.S.C. 44703 note] MEDICAL CERTIFICATION.

(a) ASSESSMENT.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Comptroller General of the United States shall initiate an assessment of the Federal Aviation Administration's medical certification process and the associated medical standards and forms.

(2) REPORT.—The Comptroller General shall submit a report to Congress based on the assessment required under paragraph (1) that examines—

(A) revisions to the medical application form that would provide greater clarity and guidance to applicants;

(B) the alignment of medical qualification policies with present-day qualified medical judgment and practices, as applied to an individual's medically relevant circumstances; and

(C) steps that could be taken to promote the public's understanding of the medical requirements that determine an airman's medical certificate eligibility.

(b) GOALS OF THE FEDERAL AVIATION ADMINISTRATION'S MEDICAL CERTIFICATION PROCESS.—The goals of the Federal Aviation Administration's medical certification process are—

(1) to provide questions in the medical application form that—

(A) are appropriate without being overly broad;

(B) are subject to a minimum amount of misinterpretation and mistaken responses;

(C) allow for consistent treatment and responses during the medical application process; and

(D) avoid unnecessary allegations that an individual has intentionally falsified answers on the form;

(2) to provide questions that elicit information that is relevant to making a determination of an individual's medical qualifications within the standards identified in the Administrator's regulations;

(3) to give medical standards greater meaning by ensuring the information requested aligns with present-day medical judgment and practices; and

(4) to ensure that—

(A) the application of such medical standards provides an appropriate and fair evaluation of an individual's qualifications; and

(B) the individual understands the basis for determining medical qualifications.

(c) ADVICE FROM PRIVATE SECTOR GROUPS.—The Administrator shall establish a panel, which shall be comprised of representatives of relevant nonprofit and not-for-profit general aviation pilot groups, aviation medical examiners, and other qualified medical experts, to advise the Administrator in carrying out the goals of the assessment required under this section.

(d) FEDERAL AVIATION ADMINISTRATION RESPONSE.—Not later than 1 year after the issuance of the report by the Comptroller General pursuant to subsection (a)(2), the Administrator shall take appropriate actions to respond to such report.

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart III. Safety (Refs & Annos)
Chapter 447. Safety Regulation (Refs & Annos)

49 U.S.C.A. § 44709

§ 44709. Amendments, modifications, suspensions, and revocations of certificates

Effective: December 12, 2003 to August 2, 2012

(a) Reinspection and reexamination.--The Administrator of the Federal Aviation Administration may reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under section 44703 of this title.

(b) Actions of the Administrator.--The Administrator may issue an order amending, modifying, suspending, or revoking--

(1) any part of a certificate issued under this chapter if--

(A) the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action; or

(B) the holder of the certificate has violated an aircraft noise or sonic boom standard or regulation prescribed under section 44715(a) of this title; and

(2) an airman certificate when the holder of the certificate is convicted of violating section 13(a) of the Fish and Wildlife Act of 1956 (16 U.S.C. 742j-1(a)).

(c) Advice to certificate holders and opportunity to answer.--Before acting under subsection (b) of this section, the Administrator shall advise the holder of the certificate of the charges or other reasons on which the Administrator relies for the proposed action. Except in an emergency, the Administrator shall provide the holder an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked.

(d) Appeals.--(1) A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board. After notice and an opportunity for a hearing, the Board may amend, modify, or reverse the order when the Board finds--

(A) if the order was issued under subsection (b)(1)(A) of this section, that safety in air commerce or air transportation and the public interest do not require affirmation of the order; or

(B) if the order was issued under subsection (b)(1)(B) of this section--

(i) that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require affirmation of the order; or

(ii) the order, as it is related to a violation of aircraft noise or sonic boom standards and regulations, is not consistent with safety in air commerce or air transportation.

(2) The Board may modify a suspension or revocation of a certificate to imposition of a civil penalty.

(3) When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but 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 related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

(e) Effectiveness of orders pending appeal.--

(1) In general.--When a person files an appeal with the Board under subsection (d), the order of the Administrator is stayed.

(2) Exception.--Notwithstanding paragraph (1), the order of the Administrator is effective immediately if the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the order to be effective immediately.

(3) Review of emergency order.--A person affected by the immediate effectiveness of the Administrator's order under paragraph (2) may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists. Any such review shall be requested not later than 48 hours after the order is received by the person. If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed, notwithstanding paragraph (2). The Board shall dispose of a review request under this paragraph not later than 5 days after the date on which the request is filed.

(4) Final disposition.--The Board shall make a final disposition of an appeal under subsection (d) not later than 60 days after the date on which the appeal is filed.

(f) Judicial review.--A person substantially affected by an order of the Board under this section, or the Administrator when the Administrator decides that an order of the Board under this section will have a significant adverse impact on carrying out this part, may obtain judicial review of the order under section 46110 of this title. The Administrator shall be made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1190; amended Pub.L. 106-181, Title VII, § 716, Apr. 5, 2000, 114 Stat. 162; Pub.L. 108-176, Title II, § 227(c), Dec. 12, 2003, 117 Stat. 2532.)

49 U.S.C.A. § 44709, 49 USCA § 44709
Current through P.L. 117-120. Some statute sections may be more current, see credits for details.

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Proposed Legislation

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart III. Safety (Refs & Annos)
Chapter 447. Safety Regulation (Refs & Annos)

49 U.S.C.A. § 44709

§ 44709. Amendments, modifications, suspensions, and revocations of certificates

Effective: October 5, 2018
Currentness

(a) Reinspection and reexamination.--

(1) In general.--The Administrator of the Federal Aviation Administration may reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, design organization, production certificate holder, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under section 44703 of this title.

(2) Notification of reexamination of airman.--Before taking any action to reexamine an airman under paragraph (1) the Administrator shall provide to the airman--

(A) a reasonable basis, described in detail, for requesting the reexamination; and

(B) any information gathered by the Federal Aviation Administration, that the Administrator determines is appropriate to provide, such as the scope and nature of the requested reexamination, that formed the basis for that justification.

(b) Actions of the Administrator.--The Administrator may issue an order amending, modifying, suspending, or revoking--

(1) any part of a certificate issued under this chapter if--

(A) the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action; or

(B) the holder of the certificate has violated an aircraft noise or sonic boom standard or regulation prescribed under section 44715(a) of this title; and

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(Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1190; Pub.L. 106-181, Title VII, § 716, Apr. 5, 2000, 114 Stat. 162; Pub.L. 108-176, Title II, § 227(c), Dec. 12, 2003, 117 Stat. 2532; Pub.L. 112-153, § 2(c)(2), Aug. 3, 2012, 126 Stat. 1161; Pub.L. 115-254, Div. B, Title III, § 393, Oct. 5, 2018, 132 Stat. 3325.)

Notes of Decisions (64)

49 U.S.C.A. § 44709, 49 USCA § 44709
Current through P.L. 117-120. Some statute sections may be more current, see credits for details.

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