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NTSB Order No. EA-4632

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 5th day of February, 1998

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JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket No. SE-14191
)	
HOWARD SALTEN,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Both the Administrator and the respondent have appealed from the oral initial decision issued by Administrative Law Judge William A. Pope, II, on December 17, 1996.¹ By that decision, the law judge modified the Administrator's amended order by affirming one of three allegations of violations of the Federal Aviation Regulations (FAR), and by reducing sanction to a 15-day suspension of respondent's private pilot certificate instead of the 30-day suspension ordered by the Administrator.

¹An excerpt from the hearing transcript containing the

The Administrator's amended order, which was filed as the complaint in this matter, alleged that on November 30, 1993, respondent violated FAR §§ 91.13(a), 91.123(b), and 91.129(i), by taxiing onto the departure end of an active runway, without first receiving an appropriate air traffic control (ATC) clearance.² The Administrator appeals the law judge's conclusion that the air traffic controller's instruction to respondent was deficient. Further, the Administrator contends, the instruction was not the precipitating cause of respondent's mistake, and the law judge erred by dismissing the FAR §§ 91.123 and 91.129 allegations

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initial decision is attached.

²FAR §§ 91.13, 91.123, and 91.129 provided at the time of the incident in pertinent part as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another....

§ 91.123 Compliance with ATC clearances and instructions....

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

§ 91.129 Operations in Class D airspace....

(i) *Takeoff, landing, taxi clearance.* No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway, or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway....

based on that rationale. The Administrator urges the Board to reverse the law judge's initial decision and reinstate all of the violations and the 30-day suspension. Respondent, on the other hand, contends that the law judge should have dismissed the entire complaint. For the reasons that follow, the Administrator's appeal is granted, in part, and respondent's appeal is denied.

On the day in question, respondent had filed an instrument flight rules (IFR) flight plan with ATC for clearance to depart later that day from New Hanover County Airport, in Wilmington, North Carolina. At the time of respondent's planned departure, air traffic controller Bigelow was operating the combined positions of ground control and local control from her location in the airport control tower.³ The combination of ground control and local control functions is normal at this airport, according to Bigelow.

Respondent, who is familiar with this airport, testified that he knew there was only one controller manning both the ground control and local control positions at the time of his departure, because he recognized that the voice on both frequencies was the same. Respondent explained that his aircraft is equipped with two radios. He set one radio to the ground control frequency, and the other to the local control frequency,

³Ground control is the ATC position that issues taxi instructions and is typically combined with clearance delivery. Local control authorizes an aircraft to position itself on an active runway and issues takeoff clearances. Each position has its own radio frequency for communications.

but he could hear transmissions from both frequencies on his headset. Controller Bigelow testified that she was also transmitting simultaneously over both frequencies.

Controller Bigelow testified that she first observed respondent's aircraft as it taxied from the ramp of the fixed-base operator at the airport. She noticed that respondent had crossed the ILS [instrument landing system] threshold, which was not in effect at the time of his departure because the weather was clear. She knew that respondent had filed an IFR flight plan and she anticipated that he would soon request its delivery. Bigelow observed respondent continue to taxi across Taxiway Echo. According to Bigelow, it is customary for pilots to obtain a taxi clearance from ground control before crossing the ILS hold position, but she did not question respondent's movement on the controlled portion of the airport even though he had not as yet obtained taxi instructions. TR-151.

Shortly thereafter, respondent radioed "Wilmington clearance" for his IFR clearance. See Joint Exhibit 1 (J-1), transcript of communications between respondent and ATC, at 1843:32. Bigelow issued the clearance, instructed respondent that the departure frequency was three five point seven five, and advised him of his assigned transponder code. Respondent read back the clearance and Bigelow then turned her attention to other traffic. A Navy aircraft had just landed, and a Cessna 152 was in the traffic pattern on approach for a touch-and-go landing.

Respondent contacted ATC a few minutes later, stating,

"Wilmington ground. Cardinal 20358 with [Papa] at ISO. Ready to depart." See J-1 at 1844:31. According to Controller Bigelow, because respondent had not contacted the tower frequency, because he had told her that he had the ATIS [automated terminal information system], and because he had not completely reached the hold short line, she thought that he was now requesting taxi instructions. TR-156, 166. At 1844:35, she replied, "Cardinal three five eight. Taxi runway three five." Respondent read back his call sign. Moments later, Bigelow realized that respondent had positioned his aircraft on the active runway. She instructed him to immediately exit the runway, but received no reply. Bigelow warned the Cessna in the traffic pattern to prepare for a go-around, and she again contacted respondent. This time respondent replied that he was "Holding at three five." Bigelow instructed respondent to get off the runway, which he did. A go-around for the Cessna was unnecessary.⁴

Respondent argues that he should not be held accountable under the FAR for this incident because his conduct was precipitated by the controller's deficient instruction to "taxi runway thirty five." Respondent asserts that the instruction he should have received was, "taxi to runway thirty five," as suggested in the ATC Handbook, FAA Order 7110.65H, para. 3-81b. The law judge agreed, ruling that the air traffic controller's choice of words resulted in the issuance of a deficient

⁴The Administrator incorrectly states in the complaint that a go-around was required.

instruction, and, therefore, neither the FAR § 91.123 charge nor the FAR § 91.129 charge should be upheld. However, the law judge concluded, respondent was nonetheless unreasonable in interpreting the controller's instruction as a takeoff clearance, and his conduct independently supported the finding of a FAR § 91.13(a) violation, and a 15-day suspension. The law judge based this determination on such factors as respondent's lengthy experience as a pilot; his failure to request clarification of an instruction that he should have recognized was non-standard; his failure to read back the instruction;⁵ and the fact that the clearance he had received was in response to his contact with ground control, and he should have known that only local control could issue a takeoff clearance.⁶

The Administrator argues that the law judge erred in finding that the controller's failure to use the word "to" made the instruction deficient, and that in any event, the controller's words cannot exonerate respondent because she did not induce his carelessness.⁷ We agree.⁸

⁵We disagree with the Administrator's contention that, even if there is clear ATC error that induces a deviation from a clearance or instruction, a pilot who fails to fully read back that clearance or instruction should be held strictly liable. In this case it likely would not have alerted ATC that something was amiss.

⁶We also note that respondent had not been instructed by ground control to switch to the local control frequency, although he claims that he already had switched frequencies.

⁷We do not rely on the various cases cited by the parties. This case is factually distinguishable from other situations that we have reviewed.

In the case before us, the use of non-standard phraseology, albeit creating the potential for misunderstanding, did not make this particular instruction so deficient that a reasonable and prudent pilot would be misled into believing that he had been cleared onto an active runway.⁹ Indeed, respondent's reliance on the ATC Handbook cuts both ways. Controller Bigelow did not clear respondent to taxi onto the runway, see FAA Order 7110.65H para. 3-81a. She did not clear him to taxi into position and hold, *id.* para. 3-103. Nor did she tell respondent that he was cleared for takeoff, *id.* para. 3-108. Her instruction simply could not have reasonably precipitated respondent's movement onto an active runway, and the violation of FAR § 91.129(i) must be reinstated.

As to the FAR § 91.123(b) allegation, we do not believe that it can be fairly said that respondent acted contrary to an ATC instruction, when that instruction contained non-standard phraseology. It is important to view this incident in context. The distance between the ramp and the active runway was minimal, and Bigelow knew that respondent had already taxied into a

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⁸However, we do not agree with the Administrator to the extent that she appears to condone her controller's use of non-standard phraseology, however commonplace such imprecise instructions may be. Nor do we agree that the controller's conduct is entirely irrelevant to our evaluation of respondent's conduct, as we discuss infra.

⁹Despite this conclusion, we urge the Administrator to encourage all controllers to adhere strictly to the standard phraseology provided in the ATC Handbook.

controlled area without first obtaining taxi instructions, and that he was continuing his taxi towards the active runway when she issued her taxi instruction.¹⁰ Moreover, respondent said he was ready to depart. Under these circumstances, the controller could have taken steps that would have better insured the understanding of her instructions. For example, she could have utilized standard phraseology, and she could have issued the instruction over the ground control frequency only, instead of using both ground and local control frequencies. Accord Administrator v. Holstein, 6 NTSB 569, 571 (1988) (Respondent did not act contrary to an instruction to hold, where ATC failed to issue clear instruction in order to ensure takeoff clearance was received by the proper aircraft since ATC knew that two aircraft holding for takeoff clearances had similar call signs). We will therefore affirm the law judge's dismissal of that charge.

Finally, we agree with the law judge's conclusion that respondent was careless. Respondent taxied onto an active runway without a clearance, and we reject his assertion that his conduct did not create the potential for endangerment. The controller had to alert an incoming aircraft that it might have to abort its landing. The fact that the aircraft ultimately was

¹⁰The law judge found that the instruction was also deficient because it did not include a hold short instruction. Although we agree with the law judge that it would have been preferable had the controller issued a hold short instruction in conjunction with her taxi instruction, none was required since respondent did not have to cross another runway along the taxi route in order to reach the active runway. See FAR § 91.129 (i); FAA Order 7110.65H, para. 3-81c.

not required to go around was, in our view, merely fortuitous.¹¹ Therefore, the finding of a violation of FAR § 91.13(a) is affirmed.

In light of the dismissal of the FAR § 91.123(b) charge, and as a result of ATC's use of non-standard language, the law judge's determination that a 15-day suspension of respondent's airman certificate is appropriate, is affirmed. See Administrator v. Alvord, 1 NTSB 1657, 1660 (1972).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted to the extent that the finding of a violation of FAR § 91.129(i) is reinstated;
3. The law judge's initial decision, except as otherwise discussed in this opinion, is affirmed; and
4. The 15-day suspension of respondent's private pilot certificate shall begin 30 days after service of this order.¹²

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹¹We reject respondent's claim that the potential for endangerment was remote. While the controller agreed that, had respondent been prepared to take off immediately, she could have cleared him to take off before the Cessna had landed, the fact is that respondent was not ready to take off and he had to exit the runway in order to avoid a potential collision.

¹²For purposes of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).

