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THE NTSB WILL PERMIT THE FILING OF AFFIDAVITS IN DISPOSING OF AN EMERGENCY CHALLENGE PETITION

The case involved an airman who was alleged to have persuaded an aviation safety inspector to reinstate his flight instructor's certificate, allegedly, without one hour of ground examination and one hour of a flight examination. On information and belief, the aircraft employed in the checkride was, in fact, flown on



the date of the checkride. It was further alleged that this airman endorsed an FAA Form 8710-1 to allow another airman to obtain his flight instructor's certificate with multi-engine and instrument ratings at a time when the endorsing instructor had not been properly certificated as a flight instructor.

Apparently, the FAA's concern relates to a claim that the airman in question and his student took the checkride in the same aircraft, sequentially, without terminating the first examination to allow for the completion of the paperwork re-certifying the Respondent as an instructor before his student was recommended for his checkride. Other cases pursued by the FAA have involved allegations of improperly administered checkrides when one aircraft on a single flight was employed by multiple applicants sequentially during the same flight. While

the FAA disapproves of this practice, it does not appear to be prohibited by the FARs. These actions were alleged to have taken place in August of 2001. The airman in question discussed this matter with FAA personnel on November 26, 2001, and gave a deposition that was concluded in the middle of January of 2002. The airman believed that the matter was closed. However, eleven months after he gave his deposition testimony, the FAA brought an emergency action revoking his airline transport pilot certificate claiming he had engaged in a conspiracy to falsify government documents.

The majority of the cases handled by the FAA are not "emergency" cases. This means that as long as the airman appeals any order of suspension or order of revocation to the NTSB, he or she can continue to exercise the privileges of his/her airman's certificate. However, if the FAA designates the matter as one involving an "emergency," then the pilot cannot fly until the case is concluded. Emergency cases are re-



quired to be disposed of within sixty days after the emergency order is issued. 49 U.S.C. § 44709(e)(4).

Many years ago, when the FAA claimed an emergency existed and the pilot disputed that claim, the only mechanism available to contest

the "emergency" designation was to file a petition for review with an appropriate United States Court of Appeals. However, in Public Law 106-181 enacted April 5, 2000, a new procedure has taken effect whereby a pilot may contest an "emergency" designation, not by filing a petition with a United States Court of Appeals, but by filing an "emergency challenge petition" with the NTSB. This procedure is now codified in 49 U.S.C. § 44709(e)(3). The emergency challenge petition must be filed within forty-eight hours after the airman receives the emergency order, and the NTSB must dispose of the emergency challenge pe-



tion within five days after the date on which it is filed. It is not uncommon for an emergency challenge petition to be filed via facsimile transmission.

In the underlying case, the FAA filed a response to the airman's emergency challenge petition by way of an affidavit. The affidavit recited that while the airman had given his deposition in January of 2002, two other individuals involved in the alleged conspiracy also had to be deposed, and the last individual was not deposed until October 28, 2002, slightly less than two months before the emergency order of revocation served December 13, 2002.

The airman filed a motion to strike the affidavit filed by the FAA claiming it was improper. Chief Judge Fowler declared in an order denying the airman's motion to strike and also denying the airman's emergency challenge petition that the filing of an affidavit would be permitted. The Chief Judge wrote:

"The Board's Rules of Practice do not bar the submission of exhibits that accompany either a certificate holder's emergency challenge petition or the Administrator's reply thereto, and it

is the practice of the undersigned to review such exhibits and consider them insofar as they shed light on the issue of whether the Administrator abused her discretion in exercising her emergency authority in any given matter. As, for the reasons noted above, the affidavit attached to the Administrator's reply herein is relevant to this issue, it will not be stricken. Respondent's motion to strike is, therefore, denied."

It now appears that both the airman and the FAA may file affidavits when an airman files an emergency challenge petition under 49 U.S.C. § 44709(e)(3). The airman in this matter was represented by Mark T. McDermott, Esq., and the FAA was represented by Brendan A. Kelly, Esq.

Marion C. Blakey, Administrator v. Lenny G. Alava, NTSB Docket No. SE-16755 (Order Denying Respondent's Petition Challenging Administrator's Emergency Determination, December 24, 2002).

EIGHTH CIRCUIT TO HEAR ORAL ARGUMENT CONCERNING FAA/DOT TEST FOR ADULTERANTS

Volume 119 of Flightwatch (April 2002) discussed claims brought by an aviation mechanic in which he asserted that FAA/DOT testing standards adopting Department of Health and Human Services guidelines were in violation of the Administrative Procedure Act. Oral argument in this case is scheduled before the United States Circuit Court of Appeals for the Eighth Circuit in St. Louis on February 14, 2003. The mechanic is represented by Christopher Byrd, Esq. of Feldhausen & Byrd, P.C. with offices in Kansas City, Missouri.

Barry M. Cornish v. Jane Garvey, et al., United States Court of Appeals for the Eighth Circuit, Case No. 02-2912.



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