SERVED: May 21, 2012

NTSB Order No. EA-5629

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 18th day of May, 2012

MICHAEL P. HUERTA, Acting Administrator, Federal Aviation Administration, Complainant, v. BRUCE MICHAEL ARMSTRONG, Respondent.	)	Docket SE-19132

OPINION AND ORDER

1. ***Background***

Respondent appeals the oral initial decision of Administrative Law Judge William R. Mullins issued on September 27, 2011.[1] By that decision, the law judge affirmed the Administrator's revocation of respondent's air transport pilot (ATP) certificate, based on

[1] A copy of the oral initial decision is attached.

respondent's alleged violation of 14 C.F.R. § 61.15(d).[2] We grant respondent's appeal.

A. *Facts*

On July 30, 2008, the state of New Hampshire, Department of Safety, Division of Motor Vehicles, suspended respondent's motor vehicle driving privileges for a violation of the state's implied consent law.[3] On January 20, 2009, respondent's driving privileges were suspended a second time for a violation of New Hampshire's implied consent law. Respondent timely reported both driving suspensions to the Federal Aviation Administration (FAA) in accordance with 14 C.F.R. § 61.15(e).[4] See Exhs. R-H and R-I. In 2009, the FAA brought an enforcement action against respondent under § 61.15(d) for the two driving suspensions. As a result of that action, the FAA suspended respondent's ATP certificate for 30 days.[5] Tr. at 35.

Respondent applied for a medical certificate in August 2010. He properly disclosed both motor vehicle actions on his medical application. Pursuant to policy, the FAA ran respondent's

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[2] Section 61.15(d) provides:

> Except for a motor vehicle action that results from the same incident or arises out of the same factual circumstances, a motor vehicle action occurring within 3 years of a previous motor vehicle action is grounds for:
>
> > (1) Denial of an application for any certificate, rating, or authorization issued under this part for a period of up to 1 year after the date of the last motor vehicle action; or
> >
> > (2) Suspension or revocation of any certificate, rating, or authorization issued under this part

[3] Under state driver licensing laws, a licensed driver has given his implied consent to a field sobriety test and/or a Breathalyzer or similar manner of determining blood alcohol concentration. In most states, the police must have reasonable grounds for administering a sobriety test. If the driver refuses to comply with the police, the driver is in violation of the implied consent law for motor vehicles.

[4] The pertinent portion of § 61.15(e) states, "[e]ach person holding a certificate issued under this part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division … not later than 60 days after the motor vehicle action."

[5] Respondent did not appeal the 2009 FAA enforcement action to the NTSB.

name through the National Driving Register (NDR) database as part of the medical application process. The FAA received a "hit" back from the NDR on respondent's name. A hit from the NDR does not include specific information about the type of incident, the number of incidents, or the date of the incident(s), but only provides the name of the individual, his or her date of birth, and the state in which the incident occurred. Subsequent to receiving the NDR hit, in September 2010, Christopher Marks, an FAA investigator, had his staff contact New Hampshire to request copies of respondent's driving record.

On December 20, 2010, respondent's driving privileges were suspended a third time for yet another violation of New Hampshire's implied consent law. On February 14, 2011, the FAA received a copy of respondent's driving record from New Hampshire, which showed the December 20, 2010 suspension and included a copy of the police report from the November 20, 2010 arrest leading to the suspension. Upon reviewing the record, Mr. Marks noted this incident was respondent's third implied consent-related driving suspension in a three-year period and opened a new investigation into another § 61.15(d) violation. On February 18, 2011, respondent, through counsel, timely reported this third driving suspension to the FAA under 14 C.F.R. § 61.15(e).

On July 6, 2011, the Administrator issued an emergency order revoking respondent's ATP certificate, based on a lack of qualification due to respondent's three implied consent violations within a three-year period. As permitted by 49 C.F.R. §§ 821.31(b) and 831.52(d), respondent subsequently waived the procedures applicable to emergency cases[6] and the case proceeded to hearing before the law judge on September 27, 2011.

[6] Respondent waived the emergency provisions after the chief administrative law judge denied respondent's petition for review of the FAA's emergency determination.

B. *Law Judge's Oral Initial Decision*

At the commencement of the hearing, respondent made a motion to dismiss the complaint under the Board's stale complaint rule. See 49 C.F.R. § 821.33. The stale complaint rule permits a respondent to move to dismiss allegations in a complaint which occurred more than six months prior to the Administrator advising the respondent as to reasons for the proposed action. At the hearing, respondent contended more than six months passed between his driving suspension on December 20, 2010 and the FAA's emergency order on July 6, 2011. The law judge deferred ruling on the motion until his oral initial decision. Tr. at 8. He ultimately denied the motion, finding the FAA did not possess all the evidence necessary to prosecute the offense until around March 1, 2011, and therefore, less than six months passed between March 1 and July 6, 2011. See Oral Initial Decision at 104, 107.

The law judge found respondent violated 14 C.F.R. § 61.15(d). As a result, the law judge deferred to the Administrator's choice of sanction, which was revocation of respondent's ATP certificate. In his oral initial decision, the law judge found the issues before him were whether these implied consent violations amounted to "motor vehicle actions" under the regulation and whether the Administrator had proven a lack of qualification on the part of respondent. As to the lack of qualification, the law judge noted, "it's the Administrator's policy that any revocation is a lack of qualification." Oral Initial Decision at 103. The law judge found "there's not a lack of qualification shown by a preponderance of the evidence...but I am obligated to find that there was a violation, as alleged, of the regulation FAR 61.15(d), in that there were three motor vehicle actions." Id. at 107. As to the sanction, the law judge concluded, "I have to give deference to the sanction sought by the Administrator would be one of revocation." Id. at 108.

C. *Respondent's Issues on Appeal*

Respondent appealed the law judge's decision. Respondent contends the law judge erred in denying respondent's motion to dismiss under the stale complaint rule. In particular, respondent argues the law judge determined the Administrator failed to prove respondent lacked the qualification to hold a certificate, and therefore, the stale complaint rule applied to preclude the Administrator's pursuit of the case. He also asserts the law judge's findings were arbitrary, capricious, and contrary to precedent and evidence when the law judge found respondent violated § 61.15(d) and deferred to the Administrator's sanction.

2. *Decision*

The Board's stale complaint rule states,

> Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c) [regarding FAA notice to certificate holders of a proposal to amend, modify, suspend, or revoke a certificate], the respondent may move to dismiss such allegations as stale pursuant to the following provisions:
>
> > (a) In those cases where the complaint does not allege lack of qualification of the respondent:
> >
> > > (1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.
> > >
> > > (2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.
> >
> > (b) In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an

> issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section.

49 C.F.R. § 821.33 (Rule 33).

In this case, respondent's third implied consent-related driving suspension occurred on December 20, 2010. Under Rule 33, the date of the offense is the date we use for calculating the start of the six-month timeframe. The Administrator issued the emergency complaint on July 6, 2011. For purposes of the stale complaint rule, the complaint was issued 6 months and 16 days after the date of the offense. To the extent the law judge appears to use March 1, 2011—the date which the law judge determined was when the FAA possessed all the evidence needed for the enforcement action—to start the clock on the six-month timeframe, we find such analysis erroneous. Rule 33 clearly states the six-month timeframe commences on the date of the *offense* not the date when the FAA possessed all the necessary evidence to prosecute the violation. Our long-standing jurisprudence also reflects the same.[7]

a. *49 C.F.R. § 821.33(b)—Alleged Lack of Qualification*

In this complaint, the Administrator alleged a lack of qualification on the part of respondent. Thus, our starting point for analyzing the stale complaint rule in this case is under § 821.33(b). Although the Administrator alleged a lack of qualification, the law judge found the Administrator failed to prove a lack of qualification by a preponderance of the evidence, and the Administrator did not appeal this determination. Under § 821.33(b), when the law judge finds no lack of qualification, the analysis of the stale complaint issue then shifts to the analysis contained in subparagraph (a) of the rule.

[7] Administrator v. Zanlunghi, 3 NTSB 3696, 3697 (1981); Administrator v. Marshall, 4 NTSB 1079, 1080 (1983); see also Ramaprakash v. F.A.A., 346 F.3d 1121 (D.C. Cir. 2003).

The Administrator's reply brief asserts the law judge's "finding that respondent did not lack qualification was not in accordance with law, precedent, and policy." Admin. Reply at 5. While our Rules of Practice permit either party to appeal a law judge's oral initial decision, the Administrator failed to file a notice of appeal in this case. See 49 C.F.R. § 821.47(a). Rule 48(b), defining the form content of an appeal brief, specifically notes "[a]ny error contained in the initial decision which is not objected to in the appeal brief may be deemed waived." See 49 C.F.R. § 821.48(b)(3).[8] Since the Administrator failed to file a notice of appeal in this case, we decline to consider the Administrator's untimely filed issue challenging the law judge's finding of fact as to lack of qualification and deem the issue waived under our Rules.[9]

b. *49 C.F.R. § 821.33(a)—Good Cause and Public Interest*

In analyzing this stale complaint issue under § 821.33(a), we must determine whether the FAA showed good cause existed for the delay or showed the imposition of a sanction was warranted in the public interest, notwithstanding the delay. On the issue of good cause, the Court of Appeals for the District of Columbia Circuit noted in Ramaprakash v. FAA,

> Zanlunghi, Brea, and Dill speak of *potentially* actionable conduct, of *possible* violations, of conduct that *may* have violated the FAR, or of acts or omissions that *may indicate* a violation. None of the cases suggests that the FAA can wait until it has confirmation of a violation before beginning to work diligently on issuing a [Notice of Proposed Certificate Action]. This choice of language makes sense: if diligence is required, it should begin as soon as the ball is in the FAA's court. It would make little sense to apply a requirement of diligence to only part of the period during which a case demanded nothing other than FAA attention. The Board in these cases quite reasonably recognized that in some situations the FAA may be completely ignorant of a potential violation for some time, but insisted

[8] See also Administrator v. Ledwell, NTSB Order No. EA-5582 at 11 (2011).

[9] While we stated "a lack of qualification is a factual finding that does not command deference" in Administrator v. Millennium Propeller Sys., Inc., NTSB Order No. EA-5218 (2006), since the Administrator failed to file a notice of appeal to attempt to challenge this finding by the law judge, we consider the issue waived.

> that once the FAA is tipped off to a potential violation, it must act diligently if it intends to show good cause for the overall delay.[10]

In this case, the FAA received a hit from the NDR on September 2, 2010. See Exh. R-A. The FAA initially sent a written request to New Hampshire for respondent's driving record based upon the NDR hit on September 7, 2010. See Exh. R-B. At the date of this request, respondent's third implied consent-related driving suspension had not yet occurred. On January 5, 2011, the FAA sent a second request to New Hampshire for respondent's driving record.[11] Id. This second request occurred several weeks after the December 20th driving suspension. On February 14, 2011, the FAA received respondent's driving record from New Hampshire and, as a result, became aware of respondent's potential third motor vehicle violation. This driving record included a copy of the police report from the November 2010 arrest, which led to the December 20, 2010 driver's license suspension.

Despite these actions on the part of the FAA, we question whether the Administrator acted diligently in pursuing this case from January 5th to February 14th. Mr. Marks did not testify as to why it took so long to retrieve the driving record from New Hampshire. In fact, the search date on Exhibit A-1 indicated the state of New Hampshire ran the report on January 12, 2012—eight days after the FAA's request. Exh A-1 at 1. The record contains no testimony or explanation for the gap in time from January 12th to February 14th—the date the FAA stamped the report as received. Furthermore, the record contains no evidence Mr. Marks attempted to

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[10] 346 F.3d 1121, 1128 (D.C. Cir. 2003) (citing Administrator v. Zanlunghi, 3 NTSB 3696, 3697 (1981), Administrator v. Brea, NTSB Order No. EA-3657 at 3-4 (1992) and Administrator v. Dill, NTSB Order No. EA-EA-4099 at 10-11 (1994)).

[11] Mr. Marks does not expressly address why the FAA sent a second request for the driving record on January 5, 2011. Presumably it was because the state of New Hampshire never responded to the FAA's September 2010 inquiry; however, we note an entry in respondent's driving record, dated September 23, 2010, which states, "CERTIFIED COPY SENT TO: FEDERAL AVIATION ADMIN." Exh. A-1 at 1.

expedite this request in any manner. Since the burden of showing good cause rests with the Administrator, the Administrator should have provided such evidence through testimony or documents at the hearing in order to meet the burden of proof to withstand a stale complaint challenge by showing good cause.

Notwithstanding this questionable timeframe from January 5th to February 14th, we conclusively find the Administrator failed to act with diligence in pursuing this prosecution from March 1, 2011, until issuance of the emergency complaint on July 6, 2011.[12] Mr. Marks attempted to justify the FAA's four-month period of apparent inactivity by stating he needed to request copies of respondent's 2008 and 2009 police reports relating to the driving suspensions from New Hampshire. However, he later conceded the FAA already possessed these certified records as part of the 2009 enforcement action against respondent.[13] Other than this redundant

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[12] The law judge considered the date of March 1, 2011, as the date when the Administrator had all the evidence necessary to prosecute the violation. While it appears to us this date was actually February 14, 2011, we reach the same conclusion whether we use the date of March 1st or February 14th so any error on the part of the law judge on this finding of fact is inconsequential.

[13] On cross-examination, the following exchange occurred between respondent's counsel and Mr. Marks:

> Q. So your office was already in possession of all the evidence it needed to bring an enforcement action predicated on the 2008 and the 2009 [Administrative License Suspensions], correct?
>
> A. Yes.
>
> Q. And your office did so, correct?
>
> A. Yes.
>
> Q. So as of March 1, 2011, your office was in possession of all the documentation you needed in order to make a determination whether you had a 61.15(b) offense predicated on three events within 3 years, consistent with your 2150 enforcement order [FAA Order 2150.3B, Sanction Guidance for Violations of Drug and Alcohol Testing Regulations], and to proceed with legal to bring that action, true?
>
> A. It's our practice to obtain --

request, the record is devoid of any reason for the delay. Because the FAA had all the necessary evidence in its possession on February 14, 2011, Mr. Marks's rationale falls short of providing good cause for failing to issue the complaint in this case until July 6, 2011. Additionally, we note the certified copy of respondent's driving record from the state of New Hampshire contains five entries between the dates of August 29, 2008 and September 23, 2010, indicating, "CERTIFIED COPY SENT TO: FEDERAL AVIATION ADMIN."[14] These repeated requests from the FAA for certified copies of the same records further weaken the Administrator's argument in this regard. We find the Administrator's justification fails to provide good cause for the delay in issuing the complaint in this case.

Likewise, the Administrator failed to present evidence at the hearing to show the imposition of a sanction was warranted in the public interest, notwithstanding the delay. While the stale complaint rule requires us to examine public interest, we consistently have stated public

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(..continued)

> Q. Sir, true or false, and then you can explain.
>
> A. No.
>
> Q. It's not?
>
> A. We require certified documents for each enforcement action sent down to legal. So although the prior enforcement action had those certified documents, it's my job to obtain new certified records to make sure that they are accurate.
>
> Q. So you already possessed certified documents from the Division of Motor Vehicles for the years of 2008, 2009, and 2010. You had those in your possession on March 1, 2011. You've already testified to that. That's correct, is it not?
>
> A. Yes.

Tr. at 48.

[14] Exhibit A-1 shows certified copies of respondent's driving record were sent to the FAA on September 23, 2010 (Exh. A-1 at 1), September 9, 2009 (id.), March 31, 2009 (id. at 2), October 21, 2008 (id. at 3), and August 29, 2008 (id.).

interest includes a respondent's due process right that the Administrator pursue serious violations with diligence. The D.C. Circuit summarized our jurisprudence in this regard, stating,

> [i]ndeed, the Board in the past has found the seriousness of a violation to be a reason to be less, rather than more, lenient in finding good cause for delay. The Board noted in Administrator v. Dill that the stale complaint rule stems from the fact that "unsafe conditions require speedy remedy" and that the rule "is meant to advance, not retard, safety enforcement."[15]

The Board readily acknowledges three implied consent-related driving suspensions within a three-year period constitute a serious violation. However, the Administrator failed to give these alleged unsafe conditions the speedy remedy demanded by our caselaw. Thus, under these circumstances, the Administrator failed to carry his burden to survive a motion to dismiss for stale complaint in this case.

Given our resolution of this appeal based upon Rule 33, we need not reach respondent's other issue.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;

2. The law judge's order denying the motion to dismiss the complaint as stale is reversed; and

3. The Administrator's order of revocation is dismissed with prejudice under the stale complaint rule.

HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order. HERSMAN, Chairman, did not concur.

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[15] Ramaprakash v. F.A.A., 346 F.3d 1121, 1126 (D.C. Cir. 2003) (citations omitted).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	
J. RANDOLPH BABBITT Administrator Federal Aviation Administration, Complainant, v. BRUCE MICHAEL ARMSTRONG, Respondent.	Docket No.: SE-19132 JUDGE MULLINS

Robert M. Viles Building
University of New Hampshire
School of Law Campus
2 White Street
Concord, NH 03301

Tuesday,
September 27, 2011

The above-entitled matter came on for hearing, pursuant to Notice, at 8:47 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board held here in Concord, New Hampshire, and it was held pursuant to an Emergency Order of Revocation that has revoked this Respondent's air transport pilot certificate and any other certificate he holds pursuant to Section 61 of the Federal Aviation Regulations, and that would be all airman certificates, but it would not be a medical certificate; is that correct?

MR. WEBSTER: That's correct.

MR. KALLED: That's correct.

ADMINISTRATIVE LAW JUDGE MULLINS: I want to make that clear.

Okay. The order of revocation serves as a complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through the Aeronautical Center Counsel's Office, the Mike Monroney Aeronautical Center in Oklahoma City.

This matter has been heard before me, William R. Mullins. I'm an Administrative Law Judge for the National Transportation Safety Board, and pursuant to Board's Rules, I will issue a decision today.

As I said, the matter came on pursuant to notice that

was given to the parties, and we had one continuance that was based, at least in part, on the hurricane that came through or at least was coming through the Northeast 3 or 4 weeks ago which disrupted air travel. But in any event, the matter came on then for hearing today.

The Administrator was represented by counsel, Mr. James M. Webster, Esquire, of the Aeronautical Center Counsel's Office. The Respondent was present at all times and represented by his attorney, Mr. John Kalled, Esquire, of Ossippe, New Hampshire.

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

DISCUSSION

First, before I even address the -- and talk about the witnesses and the exhibits, I think it's important on a couple of levels.

First of all, this is not a medical case, and it certainly would appear, based on my experience hearing these cases over the years, and particularly my experience hearing district court cases in Oklahoma, that this should be a medical case. I mean, this is an issue of the medical qualifications of this airman. It's not an issue of his airman qualifications; it's an issue of his medical qualification. And there seems to be some feeling like if he needs to be taken out of the air, we need to

take his pilot certificate away from him, when, in effect, the revocation of a medical certificate is supposed to render the same effect. I understand, under the circumstances of this case, that's sort of clouded by the fact that the Respondent has driven his automobile apparently when he didn't have a driver's license, and so what's to preclude him from flying an airplane if he didn't have a medical and/or a pilot's license.

But the second level -- and this is a concern that comes about in some of our cases; fortunately, not all of them -- but the issues here -- and there are really two issues: one, were these motor vehicle actions; and then, two, is there shown a lack of airman qualifications on the part of this Respondent? But what makes it difficult in this case and in some of our cases is the mission of the FAA and the mission of the National Transportation Safety Board is to try to regulate and dictate safety in air commerce and safety in air transportation, and when you get a case like this where there is a dichotomy between whether it should be an airman case or a medical case, that sort of disappears in this consideration of, well, I think it would be safe if he shouldn't be flying.

Well, like I said, if you revoke his medical, he's not supposed to be flying without a medical; same with the airman certificate. And I think that there were some legal issues here that transcend this safety in air commerce and -- I'm getting ahead of myself -- that's an issue in this particular case, and

like I said, in some of our cases.

The members of the National Transportation Safety Board spend probably 90, over 95 percent of their life determining safety issues in air transportation and other modes of transportation, but they're concerned with the safety issues, and when it comes to their legal responsibility to act as an appellate body, I hope that in the interest of what they're supposed to be doing or what I understand they're supposed to be doing, they can separate where it's necessary a safety issue from a legal issue.

There were two witnesses called today, one by each side. Mr. Christopher Marks was called for the Administrator, and he identified the Administrator's five exhibits. And the first exhibit was A-1, which was the State of New Hampshire driving record for the Respondent, and A-2 was also a State of New Hampshire driving record which was also related to that.

And I think, as an aside, as I understood it, Exhibit 2 was introduced not to show that there were these implied consent refusals but to show some background material, which seems to raise an issue -- and I can see this going down the road in the future, if Mr. Kalled had a case, he might want to be retried everything that went on out there. The statement of these officers -- they're not even notarized statements -- are, ultimately, in hearsay and have really nothing to do with the fact that there was an implied consent refusal, except the Administrator trying to show this alcohol use. Well -- and that's

kind of an issue.

But I am concerned that we've gone there today when we shouldn't have. I'm only here on the implied consent refusal because that's the only thing that was alleged in the pleadings and responded to in the answer. But those were the first two exhibits.

Exhibit 3 was a sanction guidance table which provides that a violation of 61.15, the third offense -- under 61.15(d), it says three motor vehicle actions arising from separate incidents within 3 years, the certificate action is revocation of all Part 61 certificates, which is what's being sought here today, with the further indication of some policy that's been announced here that it's the Administrator's policy that any revocation is a lack of qualification.

Exhibit A-4 and A-5 were comments out of the *Federal Register* relating to these alcohol-related offenses. And Mr. Marks identified all those. He did testify that the last thing he had received from the National Driver Register -- and that's interesting, and that's reflected in his statement which is Respondent's Exhibit A -- his statement was that September 2nd of 2010, they got this hit back from the National Driver Register, while the actual suspension of the certificate alleged in the complaint and under the evidence came about in December of 2010. So I'm not sure what help that particular statement is, but that was his testimony. And his testimony was that sometime around the

1st of March was when he had the information required to go forward with this particular certificate action.

I thought it was interesting that he said that even though he had -- on cross-examination, he indicated that even though he had the information that they had used in a previous certificate action on the 2008 and 2009 suspensions, that he needed to get that again for this case. That would be -- and I would suggest to you, Mr. Marks, that wouldn't be a qualifying statement to eliminate the stale complaint rule, if it was in effect. That's something that you're doing after you became aware of this latest incident, which under the evidence would be 1st of March here.

The Respondent testified and identified and there was admitted Respondent's Exhibits A through N, and I'll just run through those real briefly.

As I said, A, Respondent's Exhibit A was a statement of Inspector Marks about the National Driver Register.

Exhibits B, C, D, and E all relate to letters going back and forth between Mr. Marks and the Department of New Hampshire concerning Respondent's driving record, Department of Safety, Division of Motor Vehicles, New Hampshire.

Exhibits F, G, H, I, and J all relate to notices that Mr. Armstrong has given to the Administrator pursuant to the reporting requirement of these motor vehicle actions, and as I said, there are five of them there, starting back in 1992, another

one in 2002, and then the last three which are 2008, '09, and '10.

Exhibits K, L, M, and N are all medical applications over the years filed by this Respondent, and those he shows that he has reported these motor vehicle actions on each of his medicals.

Exhibit O, which was not allowed, relates to an opinion about his alcoholism, or lack thereof, which was not allowed. Whether or not -- and I'll say this just in passing -- whether or not Mr. Armstrong is an alcoholic is not even a consideration in this case, although I would tell you that if this were a medical case and I had this long list of implied consent refusals, you know, that's going to be a major hurdle, and one doctor who does one examination, his statement is going to be hard to overcome that presumption, that I know that all of the doctors relating to this issue that are employed by the Administrator would take a very strong stand that this is a showing of alcoholism. But that's not the issue before me today, so I move on.

But those are the witnesses and the exhibits. And let me talk just a little bit more about this. As I said, I hear these cases all the time, even, when I talked earlier about this distinction, if you will, between the legal issues that come before us from time to time and how we resolve that in view of the Board's overall obligation to air safety. But one of the issues here is whether or not this is a motor vehicle action, and the specific regulation under 61.15 would be under (c), subparagraph

(2), and it says -- opening paragraph says a motor vehicle action is, and subparagraph (2) says, "The cancellation, suspension or revocation of a license to operate a motor vehicle after November 29, 1990, for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by an alcohol or drug, or while under the influence of an alcohol or drug."

There's no evidence that a motor vehicle was being operated under the influence or impairment or whatever here, except for this failure to take this breathalyzer and this implied consent refusal. But I do note in Judge Fowler's order denying the petition for emergency determination, he makes the statement that, "Ensuring that flight operations are conducted in an alcohol- and drug-free environment clearly corresponds with that duty and Respondent's alleged recent history of multiple alcohol-related motor vehicle actions." Judge Fowler says it's an alcohol-related motor vehicle action, but there's not been any showing other than the implied consent, and I don't know of any specific Board case that said that.

The two cases that I have before me are *Kraley* and *Bennett*, and both of those involved implied consent refusals, but they also involved convictions as a result of whatever the request was for those implied consent refusals. So this is an area that's particularly perplexing to me. And then Judge Fowler puts in his footnote to that very statement, "Such a history also raises a

question of whether Respondent is qualified for an airman medical certification."

Again, as I said, this really is a medical case and I'm not sure why the medical folks are not here today, and I suspect they will be back. But in that regard, let me say this. On the issue of lack of qualification, the evidence is quite clear that on each one of these implied consent refusals, the Respondent reported it to the FAA within the 60 days required of that reporting requirement to aviation security. It's also shown that he has reported this on his medical application on each one of the incidences. So if there's a lack of qualification issue, it has to relate to the medical, but he certainly shows a compliant attitude by sharing all of these incidences with the FAA.

So I'm finding in the specific facts of this case that there's not a lack of qualification shown by a preponderance of the evidence. However, I still think there's an issue before the Board, but I am obligated to find that there was a violation, as alleged, of the regulation FAR 61.15(d), in that there were three motor vehicle actions. And I think that's still an issue that the Board is going to have to consider sometime, because the only evidence here is a refusal of an implied consent, which was allowed under state law, and the exercise of the rights under state law certainly don't show any lack of qualification to fly an airplane.

I think there's enough an issue here that I am precluded

from making any other finding except that there was a violation of the regulation, as alleged, and the time frame between the 1st of March and the 6th of July is within the 6 months of the stale complaint rule. So the motion to dismiss the stale complaint will be overruled, and my finding of the regulatory violation of sanction, and I have to give deference to the sanction sought by the Administrator would be one of revocation.

ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's order of revocation, as issued, and specifically I find that there has not been shown by a preponderance of the reliable and probative evidence the alleged lack of qualifications herein, but I do find that the regulatory violation of FAR 61.15(d) has been established and that the appropriate sanction under the sanction guidance table, as alleged, would be one of revocation of the Respondent's air transport pilot certificate and any other Part 61 certificates he might hold. And it is so ordered.

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WILLIAM R. MULLINS

Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE MULLINS: Mr. Kalled and Mr. Armstrong, you have the right to appeal this order today, and you may do so by filing a Notice of Appeal within 10 days of this date. Now, since the emergency was waived, the regular appellate rights and time frame go with this decision, and it would require a Notice of Appeal to be filed with the National Transportation Safety Board, Office of Administrative Law Judges, at Room 4704, 490 L'Enfant Plaza East, S.W., Washington, D.C. And that Notice of Appeal needs to be filed within 10 days of this date, and then within 50 days of this date, you need to file your appeal [sic] in support of that.

The appeal goes to the same street address, but to Room 6401, which is the Office of General Counsel. And it's really important that you meet all of these time specifications if you're going to perfect your appeal; otherwise, the Board will dismiss it if you miss any of those times.

And I would ask, Mr. Kalled, if you'll step up here, I'll hand you a written copy, and I'd like the record to reflect that I have handed Respondent's counsel a written copy of their rights to appeal with those addresses and so forth on there.

MR. KALLED: Thank you, Your Honor.

ADMINISTRATIVE LAW JUDGE MULLINS: The Administrator has the same right to appeal, and I assume you know all those addresses. You probably have a file on those addresses. But I

will give you a copy, if you'd like.

MR. WEBSTER: No, sir, I'm aware of them.

ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Is there any question about the decision, Mr. Kalled?

MR. KALLED: Did the Court make a ruling on the emergency or nonemergency of it?

ADMINISTRATIVE LAW JUDGE MULLINS: No. That's already passed.

MR. KALLED: Okay.

ADMINISTRATIVE LAW JUDGE MULLINS: No. Any other questions? The issue of the emergency is dealt with by the Chief Judge and, you know, any appeal from that goes to the Board, not to me.

Do you have any questions about the order?

MR. WEBSTER: No, sir.

ADMINISTRATIVE LAW JUDGE MULLINS: All right. Thank you, gentlemen. It was well tried. We stand in recess.

(Whereupon, at 12:44 p.m., the hearing in the above-entitled matter was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Bruce Michael Armstrong

DOCKET NUMBER: SE-19132

PLACE: Concord, New Hampshire

DATE: September 27, 2011

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

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Judy L. O'Shea
Official Reporter