SERVED: August 29, 1997

NTSB Order No. EA-4581

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 August, 1997

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. ROBERT R. KRALEY, Respondent.	Docket SE-14530

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on October 31, 1996, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 120 days, on finding that respondent had violated 14 C.F.R. 61.15(d).[2] We

[1] The initial decision, an excerpt from the transcript, is attached.

[2] Section 61.15(d) provides:

(continued…)

deny the appeal.

The central question is relatively simple.[3] Respondent had a January 1992 conviction for driving under the influence. In June 1994, after having two or three beers (Tr. at 116), respondent was stopped by the police for allegedly erratic driving. He refused the breathalyzer test. Under Ohio law, that refusal resulted in a 1-year suspension of his driver's license.

(continued…)

> (d) Except in the case of 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
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> (1) Denial of an application for any certificate or rating 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 or rating issued under this part.

[3] Respondent preliminarily argues that the FAA's promulgation and enforcement of the rule was arbitrary, capricious, and an abuse of discretion. As to the FAA's promulgation of the rule, as well as respondent's related arguments that the rule exceeds the FAA's jurisdiction and is unconstitutional, counsel for respondent acknowledges that precedent is uniformly to the contrary. The Board has no jurisdiction to ignore FAA rules due to perceived inadequacies in its rulemaking process, its rulemaking authority, or the constitutionality of resulting rules. See, e.g., Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972) (Board has no authority to review constitutionality of FAA regulations); and Administrator v. Ewing, 1 NTSB 1192, 1194 (1971) ("[I]t is well settled that the Board does not have authority to pass on the reasonableness or validity of FAA regulations, but rather is limited to reviewing the Administrator's findings of fact and actions thereunder."). And, although respondent alleges that the FAA's **enforcement** of the rule was arbitrary, he does not expand on that argument so as to allow us to address it. All we can note, in the absence of any argument, is that selective prosecution is also not a proper issue before us. Administrator v. Kaolian, 5 NTSB 2193, 2194 (1987).

The question framed by the parties is whether this suspension is a "motor vehicle action." If so, the conditions of § 61.15(d) have been met: two "motor vehicle actions" within 3 years.[4]

Motor vehicle actions are defined in § 61.15(c) as:

> (1) A conviction after November 29, 1990, for the violation of any Federal or state statute relating to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug;
>
> (2) 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 alcohol or a drug, or while under the influence of alcohol or a drug; or
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> (3) The denial after November 29, 1990, of an application for a license to operate a motor vehicle by a state for a cause related to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug.

The Administrator argues that the administrative suspension of respondent's license is a motor vehicle action under paragraph (2). Although we may be sympathetic to the argument that refusal to take a breathalyzer test is not proof of actual drug or alcohol involvement and the refusal may be on another basis entirely, we are compelled in this case to defer to the FAA's interpretation.

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[4] In addition to the administrative suspension of his license, respondent was also convicted of "reckless operation" and "physical control." The Administrator's witness stated, without contradiction from respondent, that "physical control" meant control of the auto while under the influence, but the Administrator did not argue before the law judge, and does not argue here, that either of these convictions is a "motor vehicle action."

In Administrator v. Miller, NTSB Order EA-3581 (1992), we addressed the question of whether the Administrator's interpretation of a regulation could be developed and enforced in an adjudication (rather than a rulemaking). We relied on Martin v. OSHRC, ___U.S.___, 111 S.Ct. 1171, 1176 (1991), which cited Northern Indiana Pub. Serv. Co. v. Porter County Izaak Walton League, 423 U.S. 12, 15 (1975), for the proposition that the agency could do so, and that the interpretation of the promulgating agency takes precedence so long as it "sensibly conforms to the purpose and wording of the regulations." See also Administrator v. Bowen, NTSB Order EA-3351 (1991). That case involved difficult notice issues, because the interpretation offered by the Administrator was a new one. As a result, although we determined that the Administrator's interpretation was reasonable, we declined to enforce it against the respondent as there had been no notice to him or the aviation community that his conduct was prohibited.

In this case, we find the Administrator's interpretation to be a reasonable interpretation of the words of the rule and is an approach to an intransigent problem that has been adopted by many states. As the FAA points out in its reply brief (at 11-12), the public was put on notice of its interpretation via the FAA's Federal Register Notice of Proposed Rulemaking for the rule itself. Accordingly, the administrative suspension of respondent's driving license for refusal to take a breathalyzer test is a motor vehicle action under § 61.15(c)(2).

Respondent also contests the law judge's admission of certain evidence and the exclusion of other evidence. We see no error in his rulings. The law judge has considerable discretion in this matter, which he has not abused. Evidence regarding respondent's other alcohol-related driving convictions, both prior to 1992 and after 1994 may be irrelevant to the factual finding required by § 61.15(d), but it is not irrelevant to the issue of compliance disposition, which influences the sanction determination. Similarly, the law judge did not abuse his discretion in declining to admit a brief letter of extremely limited evidentiary value from a physician regarding respondent's medical condition and history as it was irrelevant to the underlying charge and of extremely limited, if any, value in the sanction analysis.

Finally, respondent argues that the FAA improperly relied on unpublished material in proposing a 120-day suspension -- a period the law judge adopted. Respondent's arguments paint with too broad a brush. Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993), provides that the Board may not rely solely on FAA sanction policy of which the public had no notice. In this case, the law judge clearly considered many factors in setting the sanction. As the Administrator points out, the law judge questioned respondent extensively regarding his behavior, his background, and other factors that influence sanction. We will not assume that the law judge did so to no purpose. Furthermore, in light of the severity of respondent's conduct and its clear

relevance to safety in the air, it is our view that a 120-day suspension is at the low end of the appropriate range of sanction.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 120-day suspension of respondent's certificate shall begin 30 days from service of this order.[5]

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

[5] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).