UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: March 25, 1993

FAA Order No. 93-10

In the Matter of: MICHAEL JOHN COSTELLO	Docket No. CP89WP0351

DECISION AND ORDER

Respondent Michael John Costello has appealed from the written initial decision of Administrative Law Judge Edward C. Burch of July 1, 1992,[1/] finding that Respondent violated Sections 91.29, 91.167, and 91.165, and Part 43 of the Federal Aviation Regulations (FAR) when he flew his aircraft in an unairworthy condition after damaging it during a gear-up landing.[2/] Respondent has presented numerous procedural arguments on appeal. After examining the briefs and the administrative record for this case, the Administrator denies Respondent's appeal.

A brief review of the procedural history is necessary. Respondent and Complainant reached a settlement agreement

---

1/ A copy of the law judge's decision is attached.

2/ It was alleged in the complaint that Respondent violated 14 C.F.R. §§ 91.29(a) and (b), 91.167(a)(1) and (2), 91.165, 43.3, and 43.9(a). The text of these regulations is found in the appendix to this decision.

during the hearing. The agency attorney summarized the settlement on the record before the law judge, and Respondent stated that he agreed with that summary. Later, however, when the order assessing civil penalty was issued, Respondent claimed he never admitted that he committed the alleged violations. Respondent said he did not understand the sentence, "The violations are to remain the same," used by the agency attorney when she summarized the settlement agreement. When the law judge rejected Respondent's claim, Respondent appealed to the Administrator.

The Administrator found that Respondent may not have understood the agency attorney's statement, "The violations are to remain the same," and, therefore, remanded the case to the law judge for further proceedings. In the Matter of Costello, FAA Order No. 92-1 (January 9, 1992).

After a hearing held on June 25, 1992, the law judge found that Respondent violated Sections 91.29, 91.165, and 91.167, and Part 43 of the Federal Aviation Regulations (FAR) by flying his aircraft in an unairworthy condition after damaging it during a gear-up landing.[3/] Specifically, the law judge found that after Respondent damaged his Cessna aircraft in Mexico, he flew it in an unairworthy condition to several locations in the United States. At one point, the law judge found, an FAA

3/ See the appendix to this decision for the text of the pertinent regulations.

inspector tagged the aircraft with a notice indicating that operation of the aircraft was dangerous, but Respondent disregarded the notice and flew the aircraft to another location where it was finally repaired. The law judge found that Respondent's actions could have resulted in extensive loss of life and property. Nonetheless, the law judge reduced the civil penalty sought by Complainant from $8,000 to $6,000 without any explanation. Complainant does not challenge the law judge's reduction of the sanction.

On appeal, Respondent requests a new hearing and the discovery he claims he was unfairly denied. He also claims financial hardship and asks that the civil penalty be reduced even further to $1,000.

Respondent claims that the following procedural errors and misconduct deprived him of a fair hearing:

> (1) the law judge and agency attorney engaged in improper ex parte communications before the first hearing;
>
> (2) the agency attorney improperly "slipped in" the statement "the violations are to remain the same" during the first hearing;
>
> (3) the law judge and the agency attorney improperly denied Respondent the discovery he needed to prepare adequately for his hearings;
>
> (4) the agency attorney failed to comply with Respondent's Freedom of Information Act (FOIA) request; and
>
> (5) the agency attorney failed to send Respondent a copy of a "written pleading" that she filed with the law judge at the end of the second hearing.

Respondent's fair hearing claim is moot to the extent that it involves matters that occurred before the Administrator remanded this case for a second hearing.[4/] Complainant is correct in asserting that when the Administrator remanded this case,[5/] "the slate," in effect, "was wiped clean." Even assuming that Respondent's allegations of pre-remand error and misconduct are true, any harm or prejudice was removed when the Administrator remanded the case for a new hearing.

Nonetheless, the Administrator does not take lightly allegations of misconduct on the part of law judges and agency attorneys. Having closely examined the record, however, the Administrator is unconvinced that any misconduct occurred. Respondent has presented no compelling evidence indicating that ex parte communications occurred. Both the law judge and the agency attorney denied that any ex parte communications occurred. The mere fact that the law judge, without explanation, stamped Respondent's discovery request "DENIED"

4/ The allegations that fall within this category are:

(1) the agency attorney improperly slipped in the sentence, "The violations are to remain the same" during the first hearing;

(2) the law judge and agency attorney engaged in improper ex parte communications (before the first hearing); and

(3) the law judge and agency attorney improperly denied Respondent discovery he needed to prepare adequately for the first hearing.

5/ In the Matter of Costello, FAA Order No. 92-1 (January 9, 1992).

does not suggest that any ex parte communications occurred. As for the agency attorney's statement, "The violations are to remain the same," this statement, contrary to Respondent's suggestion, does not appear to be in any way devious or underhanded. The parties may have had a misunderstanding about the terms of the settlement, but it cannot be found, based on this record, that any misconduct occurred.

Turning now to errors and misconduct that allegedly occurred after the Administrator remanded this case for a second hearing, the first of Respondent's allegations is that he was denied the discovery he needed to prepare adequately for hearing. Respondent asserts that, after the agency attorney answered his discovery questions only in part, the law judge erred in denying his motion to compel. Respondent also claims that the law judge improperly denied his motion for additional time to interview witnesses and write interrogatories.

Respondent has failed to show how he was unfairly prejudiced by the denial of his motion to compel. Furthermore, most of the requests and interrogatories to which Complainant objected were for information that had nothing to do with Respondent's case. For example, Respondent requested:

> (1) a list of all other "flyers" prosecuted for similar violations in the past 5 years;
>
> (2) a list of all suits or countersuits against the FAA during the past 7 years for arbitrary or capricious conduct;
>
> (3) a copy of all FAA mechanic reports;

(4) a copy of all FAA inspector reports; and

(5) a list of all other individuals prosecuted for the same violation during the 5 years preceding Respondent's citation.

Whether a safety rule is enforced against someone else is not relevant in determining whether Respondent violated the same rule. In the Matter of Sutton-Sautter, FAA Order No. 92-46 at 4 (July 22, 1992). Moreover, an agency's decision not to prosecute is a matter of prosecutorial discretion and is presumptively immune from review. In the Matter of Airport Operator, FAA Order No. 91-41 at 7 (October 31, 1991), citing Heckler v. Chaney, 470 U.S. 821, 832-32 (1984). In addition, most of the requests and interrogatories were overbroad and unduly burdensome.

Nor can it be said that the law judge erred in denying Respondent's June 1, 1992, motion for 6 months' additional time for discovery. The Administrator remanded this case to the law judge for a new hearing on January 9, 1992. By order served on February 10, 1992, the law judge informed Respondent that a hearing was scheduled for April 30, 1992. Then, by order served March 16, 1992, the law judge postponed the hearing until June 25, 1992, due to the unavailability of Complainant's witnesses. Despite these notices of an impending hearing, Respondent failed to submit any request for discovery until May 17, 1992. Respondent waited more than 4 months from the

date of the remand, and more than 3 months from the time the first hearing was scheduled, to file his discovery request.[6/]

It was well within the law judge's discretion to deny additional time for discovery when Respondent had failed to justify any further delay, particularly an extended delay of 6 months. Respondent had sufficient time and opportunity for discovery. He availed himself of the opportunity to conduct discovery and admits that he found Complainant's responses to be "of help."[7/] No error concerning discovery that would justify a new hearing has been shown.

Respondent also alleges that the agency attorney acted "with wanton disregard" for his rights when she:

> failed to send Respondant (sic) a copy of her written pleading filed with Judge Burch at the end of the second hearing, even though the Judge requested her to do so.

6/ Complainant timely responded to Respondent's discovery request on June 1 and 6, 1992.

7/ Respondent makes the broad claim on appeal that with more time, he would have been better prepared to cross-examine witnesses. However, his only specific claim of prejudice is that if he had had more time, he would have been able to show that FAA witness Borenstein lied in testifying that he notified the co-owners of Respondent's aircraft that an aircraft condition notice had been placed on the aircraft. Assuming arguendo that the other co-owners of Respondent's aircraft were not notified about its unairworthy condition, Respondent has failed to show how this would have changed the outcome in his case. The issue in Respondent's case was not what his co-owners knew, but what Respondent knew. It might be a different matter if Respondent were claiming that he could have shown that he was not piloting the aircraft, or that the aircraft was actually airworthy.

Respondent's Appeal Brief, ¶ 10. (Emphasis added.) The transcript shows that at the close of the evidence, the agency attorney asked to amend the complaint to include a violation that had been inadvertently omitted. Tr. 158-160. The law judge denied the request on the ground that it was too late to seek to amend the complaint. There was no need for the agency attorney to send Respondent a copy of an amended complaint that the law judge had refused to accept.

Respondent also argues that the agency attorney failed to honor his request for information under the Freedom of Information Act (FOIA).[8/] Respondent admits that he was attempting to use a FOIA request to get the same information the law judge had denied him in discovery.

A civil penalty proceeding is not the proper forum for FOIA disputes. The procedures for resolving FOIA disputes are distinct from those for civil penalty actions. FOIA procedures are described in the FOIA itself, 5 U.S.C. § 552, and in the Department of Transportation's implementing regulations, 49 C.F.R. Part 7.

The law judge reduced the civil penalty from $8,000 to $6,000. Now, for the first time on appeal, Respondent claims financial hardship and asks that the civil penalty be reduced even further, from $6,000 to $1,000.

8/ Respondent's FOIA request was filed shortly after Respondent filed his first notice of appeal with the Administrator.

To support his claim of financial hardship, Respondent states in his appeal brief that: (1) he earns between $2,000 and $3,000 per month; (2) his mortgage payment is $2,522.44 per month; (3) to meet his living expenses, he was forced to sell his interest in his aircraft to his partners for $13,000; (4) he has had his 1982 Cadillac automobile on the market for 6 months without a buyer.

Financial hardship is a valid basis for reducing a civil penalty. In the Matter of Guiffrida, FAA Order No. 92-72 (December 21, 1992); In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991). It is not enough, however, merely to claim financial hardship. Financial hardship must be proven. Id. The person who claims financial hardship bears the burden of proof because the financial information at issue is within his or her exclusive control. Id.

Respondent has failed to provide any documentary evidence such as pay stubs, mortgage coupons, and tax returns to support his claim of financial hardship. There is no evidence in the record supporting his claim. Furthermore, Respondent failed to raise this issue at the hearing, when his testimony would have been under oath and Complainant would have had an opportunity to cross-examine him. Therefore, Respondent's claim of financial hardship is rejected as unsubstantiated.

For the foregoing reasons, the law judge's decision is affirmed, and a civil penalty of $6,000 is assessed.[9/]

JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 24th day of March, 1993.

9/ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).

APPENDIX
Pertinent Regulations[10/]

14 C.F.R. § 91.29(a) and (b) provide as follows:

(a) No person may operate a civil aircraft unless it is in an airworthy condition.
(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. He shall discontinue the flight when unairworthy mechanical or structural conditions occur.

14 C.F.R. § 91.167(a)(1) and (2) provide:

(a) No person may operate any aircraft that has undergone maintenance, preventive maintenance, rebuilding, or alteration unless--
(1) It has been approved for return to service by a person authorized under § 43.7 of this chapter; and
(2) The maintenance record entry required by § 43.9 or § 43.11, as applicable, of this chapter has been made.

14 C.F.R. § 91.165 provides:

Each owner or operator of an aircraft--
(a) Shall have that aircraft inspected as prescribed in Subpart C of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in Part 43 of this chapter;
(b) Shall ensure that maintenance personnel make appropriate entries in the airacraft maintenance records indicating the aircraft has been approved for return to service;
(c) Shall have any inoperative instrument or item of equipment, permitted to be inoperative by § 91.30(d)(2) of this part, repaired, replaced, removed, or inspected at the next required inspection; and
(d) When listed discrepancies include inoperative isntruments or equipment, shall ensure that a placard has been installed as required by § 43.11 of this chapter.

10/ At the hearing, the agency attorney informed the law judge that Respondent violated the following specific provisions: 14 C.F.R. §§ 91.29(a) and (b), 91.167(a)(1) and (2), 91.165, 43.3(a)-(d) and (f)-(h), and 43.9(a)(1)-(4). Tr. 166. Subparts (b)-(h) of Section 43.3 are not pertinent and will not be set forth here. The Part 91 regulations have since been redesignated as §§ 91.7(a) and (b), 91.407(a)(1) and (2), and 91.405, respectively.

14 C.F.R. § 43.3(a) provides:

(a) Except as provided in this section and § 43.17, no person may maintain, rebuild, alter, or perform preventive maintenance on an aircraft, airframe, aircraft engine, propeller, appliance, or component part to which this part applies. Those items, the performance of which is a major alteration, a major repair, or preventive maintenance, are listed in Appendix A.

14 C.F.R. § 43.9(a)(1)-(4) provide:

(a) Maintenance record entries. Except as provided in paragraphs (b) and (c) of this section, each person who maintains, performs preventive maintenance, rebuilds, or alters an aircraft, airframe, aircraft engine, propeller, appliance, or component part shall make an entry in the maintenance record of that equipment containing the following information:

(1) A description (or reference to data acceptable to the Administrator) of work performed.

(2) The date of completion of the work performed.

(3) The name of the person performing the work if other than the person specified in paragraph (a)(4) of this section.

(4) If the work performed on the aircraft, airframe, aircraft engine, propeller, appliance, or component part has been performed satisfactorily, the signature, certificate number, and kind of certificate held by the person approving the work. The signature constitutes the approval for return to service only for the work performed.

In addition to the entry required by this paragraph, major repairs and major alterations shall be entered on a form, and the form disposed of, in the manner prescribed in Appendix B, by the person performing the work.