

SERVED: December 4, 2006

NTSB Order No. EA-5263

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 4th day of December, 2006

_____)	
MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17846
v.)	
)	
MELISSA ANDRZEJEWSKI,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued in this emergency revocation proceeding on October 20, 2006.¹ By that decision, the law judge dismissed the Administrator's revocation order against respondent's commercial pilot certificate for insufficient evidence of the alleged violations of sections

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

91.9(a), 91.13(a), 91.119(c), 91.126, and 91.303(e) of the Federal Aviation Regulations (FARs).² We grant the appeal.

The Administrator's September 28, 2006 Emergency Order of Revocation, filed as the complaint in this proceeding, alleged, in amended form, the following:

1. You are the holder of Commercial Pilot Certificate Number 2709432.
2. On or about May 22, 2006, you operated an Edge 540 aircraft, identification number N540SG, at Butler County Airport, Butler, Pennsylvania.
3. During the flight described above, your operation of the aircraft included maneuvers ... involving abrupt changes in the aircraft's attitude ... abnormal attitude ... abnormal acceleration ... and not necessary for normal flight.
4. For example, these maneuvers included ... pitching upward and downward ... rolling the left wing and rolling the right wing ... turning rapidly and/or in an abnormal attitude ... accelerating and diving toward the runway surface ... [and] flying at approximately 50 feet above the runway surface although not taking off or

² FAR sections 91.9, 91.13, 91.119, 91.126, and 91.303, 14 C.F.R. Part 91, prohibit, in relevant part, the following: (1) 91.9(a) -- except as otherwise provided, operating a civil aircraft without complying with the operating limitations specified in the approved Flight Manual, markings, and placards; (2) 91.13(a) -- operating an aircraft in a careless or reckless manner so as to endanger the life or property of another; (3) 91.119(c) -- operating an aircraft below 500 feet above the surface, unless over sparsely populated areas in which case the aircraft must not be operated closer than 500 feet to any person, vessel, vehicle or structure; (4) 91.126 -- operating an aircraft contrary to the requirement that when approaching to land at an airport without an operating control tower in Class G airspace all turns must be made to the left unless the airport displays signals or markings indicating that turns should be made to the right; and (5) 91.303(e) -- operating an aircraft in aerobatic flight below an altitude of 1,500 feet above the surface.

landing.

5. During the flight described above, you operated the aircraft in aerobatic flight ... below an altitude of 1,500 feet above the surface ... when it was not necessary for normal flight ... [and] while the wing tanks were not empty, which was not in compliance with the aircraft operating limitations.
6. Further, you performed right-hand turns contrary to the requirements of FAR section 91.126 in that all your turns in the traffic pattern were not made to the left.
7. Further, you operated on Runway 26 in a direction opposite to the traffic flow at the airport.
8. As a result of your actions as described above, you operated an aircraft in a careless or reckless manner, endangering the lives and property of others.

* * * * *

12. Your actions as described herein demonstrate the lack of judgment, care, and responsibility required of a certificate holder with Commercial Pilot privileges, and demonstrate a disregard for safety and for regulatory requirements of which you are aware.

The parties attended an evidentiary hearing before the law judge in Pittsburgh on October 19-20, 2006. We will discuss some of the evidence in greater detail below; in brief, respondent is an aerobatics pilot who recently qualified for the U.S. Aerobatic Team and routinely performs at public airshows. This is the second time the Administrator has sought to revoke her pilot certificate. In May 2005, the Administrator revoked her pilot certificate for unauthorized, low-level aerobatics over a public

gathering.³

At the hearing, in support of her present charges, the Administrator offered percipient witness testimony from FAA Inspector Andrew Pierce⁴ and ATP-rated pilot Christopher Hayden.⁵

³ In this regard, the Administrator's complaint alleged:

9. In an Emergency Order of Revocation dated May 16, 2005, your airman certificate was revoked ... after you operated an aircraft on April 1, 2005 in passes and aerobatic stunts over a golf course, neighborhood and church where a wedding was being held, at an altitude of 200 feet or less above the ground, which resulted in violations of FAR sections 91.13(a), 91.303(a) through (e), 91.119(b) and (c).
10. Before the May 16, 2005 Emergency Order of Revocation, as a result of previous reports of similar flying by you, you had been strongly counseled by an FAA Aviation Safety Inspector about the hazards of flying low and performing aerobatic maneuvers at low altitude.
11. Nevertheless, despite prior counseling and enforcement action, you continue to pose a serious risk to people, structures, and property when you intentionally flew aerobatics in the manner ... described in paragraphs 2 through 7, above.

Respondent conceded during her testimony that the Administrator was justified in her 2005 revocation of respondent's certificate. She and several witnesses testified to her contrition for that transgression and the fact that she wrote an article and spoke publicly about the experience to help others avoid her mistakes.

⁴ Mr. Pierce has worked for the FAA for the past three years as an aviation safety inspector for the Allegheny Flight Standards District Office. He has held a commercial license since 1975, and has added a flight instructor certificate and an advanced ground instructor certificate. He has about 5,100 hours of flight time.

⁵ Mr. Hayden holds a commercial Airline Transport Pilot type rated certificate, earning his first license in 1983. He is approaching 11,000 hours of flight time, and currently is a chief pilot for a Part 135 operator.

At the time of the alleged violations, Inspector Pierce was conducting a Part 135 checkride for Mr. Hayden, and, while standing on the ramp, they witnessed respondent's takeoff and subsequent maneuvers. According to Messrs. Hayden and Pierce, respondent's maneuvers were aggressive and not necessary for normal flight. Both were specific in the description of the flight path at the hearing; Mr. Pierce used a model plane to demonstrate the flight sequence. Generally, they described a takeoff on Runway 8 that included an aggressive pitch up and very steep climb, followed by a right turn, and then a steep left turn to return to fly over the runway at low altitude in the opposite direction with airshow smoke on.

Respondent testified in her defense, and she also offered percipient witness testimony from her mother, father, and aunt, and two other persons, who observed some or all of the flight at issue. Respondent's mother, father, and aunt have never held pilots' licenses nor flown aircraft. Respondent's mother had never seen this plane before, much less seen respondent flying it. The other two witnesses, an aircraft mechanic for Life Flight helicopters and a resident in the community that abuts the airport, watched the aircraft for 30 seconds or less. The aircraft mechanic did not know what kind of plane was flying, but looked up because of the noise.

Essentially, respondent testified that her aircraft was fully loaded with personal gear and fuel for her flight to Nashua, New Hampshire, and that she did not perform any

aerobatics or otherwise violate the regulations. She explained that her aircraft has a placard that reads, "WING TANKS MUST BE EMPTY FOR AEROBATIC FLIGHT," and she would not risk having her personal gear become dislodged and potentially interfere with control cables in the bottom of the aircraft. She claimed that her maneuvers might appear aggressive to persons not used to the high performance of the Edge 540, but that the angle of climb and clearing turns she did were normal for operating the Edge 540 aircraft. She testified that it was her intention to do a touch-and-go landing on Runway 8, and, at the request of her mother, to turn on the airshow smoke as she passed her ailing grandmother's house at the departure end of Runway 8. Respondent testified that after takeoff, she announced on the Unicom frequency that she was departing the pattern with a right turn, and, after exiting the pattern, subsequently announced that she was entering a left base for the opposite-direction Runway 8. She testified that although she had originally intended to do a touch-and-go, she elected not to do so and, instead, flew down the runway, performed a minor, non-aerobatic wing wag as she passed her grandmother's house, to say goodbye, and flew on to Nashua.⁶

⁶ Both parties also presented testimony by knowledgeable witnesses regarding the performance of aerobatic aircraft, generally, and how they should be flown. Respondent also offered several witnesses who testified as to her skills, character, and professionalism. The record contains numerous exhibits, including a large, detailed airport diagram that demonstrates the location and perspective the percipient witnesses would have. The record also contains photographs taken of respondent and her aircraft moments before she departed, but none of her aircraft in flight.

At the conclusion of the hearing, the law judge found that the preponderance of the evidence did not support the Administrator's charges. In reaching his decision, the law judge acknowledged that the two percipient witnesses called by the Administrator testified that respondent's maneuvers were aerobatic, but he also observed that the five percipient witnesses presented by respondent, including respondent herself, said that the flight was not aerobatic. He resolved this conflicting testimony in respondent's favor, explaining: "[T]aking into account the entire totality of the facts and circumstances, I'm going to give the Respondent in this proceeding the benefit of the doubt, and I'm not saying that the Administrator's witnesses didn't see what they saw, but perhaps they misunderstood what they saw." Hearing Transcript (Tr.) at 579.

On appeal, the Administrator argues that the law judge's findings were not supported by a preponderance of the evidence. She also argues that the law judge erred in concluding that respondent did not lack qualification to continue to hold a pilot certificate. Respondent, essentially, urges us to affirm the law judge's decision.

The critical factual issues in this case all pertain to how respondent maneuvered her aircraft, on May 22, 2006, upon departing Butler County Airport. The Administrator asserts that respondent's maneuvers were aerobatic and inappropriate under the circumstances. Respondent, on the other hand, claims her

maneuvers were neither inappropriate nor aerobatic.

In evaluating law judges' opinions on whether a respondent violated a regulation as the Administrator has alleged, the Board conducts a de novo review. See, e.g., Administrator v. Frohmuth & Dworak, NTSB Order No. EA-3816 at 1 n.5 (1993); see also Application of Gordon, NTSB Order No. EA-4446 at 3 (1996); 49 C.F.R. § 821.49. While parties often focus on a law judge's credibility findings, we have previously exercised care with regard to recognizing when an issue rests on the greater weight or preponderance of the evidence, rather than exclusively on credibility findings. Frohmuth & Dworak, supra, at 1 n.5 (stating that, "[c]ontrary to respondents' suggestion in reply, answering [the question at issue] does not involve issues of witness credibility ... [t]he issue is not whether respondents' version of events is truthful or whether they believe it to be," and recognizing that a law judge's findings of facts "are susceptible of de novo review").⁷

Mr. Hayden and Inspector Pierce were standing on the north side of runway 2-6, about three-quarters from the departure end. Tr. at 27. Mr. Hayden testified that respondent pitched up her

⁷ See also Administrator v. Yialamas, NTSB Order No. 5111 at 8 (2004) (stating that, despite the parties' arguments with regard to the law judge's credibility findings, "this case does not appear to rest on credibility"); Administrator v. Wolf, NTSB Order No. EA-3450 (1991) (stating that the Board may reverse a law judge's decision if the Board cannot reconcile the law judge's findings with the evidence); Administrator v. Schneider, 1 NTSB 1550 (1972) (stating that, "[i]t should be emphasized that in assigning weight to conflicting expert testimony and making factual findings, the Board is not bound by the examiner's findings").

aircraft approximately 45 degrees, before making a shallow bank to the right, and then initiated a very steep bank to the left to return to fly over Runway 8. Inspector Pierce also estimated the pitch angle of the initial climb to be approximately 45 degrees, but, contrary to Mr. Hayden, testified that respondent initiated a "very hard turn to the right," and then, consistent with Mr. Hayden, that respondent made several steep turns to the left to return to approach Runway 8. Tr. at 65. Messrs. Hayden and Pierce both testified that respondent pitched down toward the approach end of Runway 8, and appeared to approach the runway with excess speed and angle of descent before leveling and flying down the runway with airmoke on. Inspector Pierce also testified that during respondent's climbout from both Runway 26, and subsequently, Runway 8, respondent aggressively banked left and right.

Respondent, on the other hand, testified that during her takeoff she flew her aircraft within normal parameters for the Edge 540, becoming airborne at approximately 67 knots and accelerating to 85 knots, the speed to achieve the aircraft's maximum rate of climb and which results in a pitch angle of approximately $25\frac{1}{2}$ degrees. She testified that the high wing loading of the Edge 540 gives it poor gliding performance, so it is imperative to climb quickly so as to be prepared in the event of an engine failure; likewise, clearing turns are important to ensure the airspace ahead of the aircraft is clear because the pitch angle necessary to climb efficiently prevents the pilot

from being able to see ahead of the aircraft. "So, someone who is not familiar with the maneuver, I can understand it appearing unusual, but for the use of this plane, it's very normal." Tr. at 449. Respondent testified that her normal approach angle when landing is approximately 20 degrees, and that she shallows her descent during the final moments of landing; she attributed this to the poor glide characteristics of the aircraft.

Respondent claimed that her turns after takeoff to maneuver her aircraft to approach Runway 8 were "normal ... the same turns that I make in the pattern any time I'm in it ... anywhere between say 20 and 30 degrees." Tr. at 495-96. Respondent testified that even experienced aerobatic judges have difficulty with accurately judging aircraft bank angles and maneuvers.

The testimony of respondent's mother and aunt was very general: "[s]he took off, went up, went way up. I asked her to show me the smoke. She went up, she turned the smoke on... She came back down, come around, came right in from of my mom's house on the runway, it looked like almost a touch and go. And did a little wiggle, goodbye, and off she went and flew straight out and was gone." Tr. at 332. Similarly, respondent's father testified, "I don't speak pilot..." Tr. at 374. The law judge inquired about respondent's approximate altitude when she was over the runway when she returned to the airport, and her father answered, "about 50 feet... She hit 50

feet about where ... the Life Flight hanger [sic] [is located], and then continued and went off from there." Tr. at 359. Respondent's mother and aunt were at the south end of the runway; her father was at the north end. A photograph that her mother took of respondent's aircraft taxiing for departure from Runway 26 reveals that it is difficult to see the aircraft. Respondent's father took photographs of Butler County Airport, and marked each witness's location. From these photos, it seems that all witnesses faced some disadvantage in seeing the entire flight path. See Hearing Exhibits R-5F, R-7, and R-8.

The initial decision provides little insight into the law judge's assessment of the Administrator's case. As described above, we have mere conclusory statements regarding the evidence. See Tr. at 579. Having abandoned any detailed assessment of the evidence in the case as it relates to his findings, the law judge has forced the issue upon this body in conducting its de novo review.

In support of the law judge's decision, respondent argues that it is a long-standing policy of the Board that the law judge determines the credibility of the witnesses, and that decision is not disturbed unless it is arbitrary, capricious, or clearly erroneous. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). But credibility of witnesses is not controlling here; the weight of relevant and material evidence is the critical determination that was improperly applied below. Had the law judge pointed out

in his initial decision inconsistencies in the Administrator's witnesses' testimony, or that the testimony was not logical or practical, then further analysis might not be necessary. But to the contrary, the law judge states that two of the Administrator's three witnesses were particularly helpful to his understanding of the case.⁸

The Administrator's first witness, Mr. Hayden, is the chief pilot for a Part 135 operator based at the Butler airport. Mr. Hayden holds an Airline Transport Pilot certificate and has nearly 11,000 flight hours. The second witness was Inspector Andrew Pierce, a flight instructor and check airman. He has approximately 5,100 hours of flight time. Mr. Hayden was about to take a check ride with Mr. Pierce when they noted, by sound first, the Edge 540 proceeding down the runway. They stopped and watched the entire flight. They did not discuss the flight, except that after the Edge proceeded to its destination, Mr. Pierce asked Mr. Hayden what he saw. But for some minor disagreements in the degree ranges of banks and flight angles, the testimony of these gentlemen was strikingly detailed and consistent. Mr. Pierce used a model airplane to demonstrate the flight path,⁹ and acknowledged that there were times that he

⁸ The law judge recognized the input of Win Karish, a 36-year employee with the FAA, and the regional air show coordinator for the Eastern Region. Mr. Karish is responsible for waivers for aerobatic flight, and following an air show, which occurred in June 2006, Mr. Karish interviewed respondent and flight instructor/formation flyer Robert Holland about the incident on May 22, 2006, in Butler.

⁹ We note, in this regard, that the witnesses' apparent use of a model aircraft, and other exhibits or objects in the

could not see clearly to estimate in numbers the angle of the plane, but instead he described the parts of the plane that he could see. (On one of the turns, for example, he could see the entire top of the aircraft.) Both witnesses agreed that the flight was a significant departure from what was authorized at that uncontrolled airport.

Despite the obvious experience and detailed accounts of these two pilots, the law judge held that "perhaps they misunderstood what they saw." Tr. at 597. Nothing in the transcript or initial decision, however, indicates that these witnesses should not be believed, or are biased or prejudiced in any way.

In comparison, respondent offered five witnesses who saw some part of the flight. However, none of these witnesses have the breadth of knowledge or basis for understanding the flight path as the Administrator's witnesses, and two saw only a small segment of the flight. Of the two witnesses with aircraft experience, one is an aircraft mechanic who focuses on helicopters. He looked outside the hangar where he was working because of the noise, and saw the plane as it was departing the

(..continued)

courtroom, for demonstrative purposes, without, in some cases, a clear description of what was being demonstrated, hampers our ability to review the totality of the evidence presented to the law judge. While we do not think this circumstance had a deleterious effect upon our ability to review the record and the law judge's decision in this case, we caution the Administrator and counsel to be mindful of the need to ensure a clear and complete record for any subsequent appellate proceedings.

airfield. He watched the flight for about thirty seconds before he returned to work. Similarly, one of the residents who also lived on the south end of the runway was working outside of his home when he heard the noise of the plane. He watched the flight for about 20 seconds, and saw it on the final pass over the airport. He disagreed with the Administrator's claim of the bank angles during the time of the flight that he observed. None of the remaining three witnesses who viewed the flight have pilot licenses or knowledge of aircraft. As respondent's mother stated, "I don't know how she was slanted." Tr. at 336. Their descriptions were limited and vague. They did not describe views of the aircraft, such as the amount of wing surface visible to them, as Inspector Pierce did in his testimony. All three are related to respondent, two being her parents. Her parents also sponsor respondent, and her father manages her aerobatic career.

Unlike the testimony of the Administrator's witnesses, the respondent's testimony seemed, at times, incredulous. When asked to explain her low flight over the runway, respondent stated that she was planning to do a touch-and-go landing, but realized it was not safe to land so she performed a "go around" for safety. Messrs. Hayden and Pierce testified that respondent had air show smoke and power on, and dove at a high rate of speed toward the runway. This flight pattern was inconsistent with the intent to land her aircraft.

Although we would not question a law judge's determination that less weight should be afforded to interested witnesses'

testimony, we have also held previously that there should not be "a mechanical standard under which the testimony of the least interested observer is automatically given the most weight regardless of its objective worth, as this is a formula under which respondents, however truthful, could rarely succeed."

Administrator v. Schmidt, NTSB Order No. EA-4025 at n.4 (1994).

Nonetheless, in this case, we find that the decision of the law judge is inconsistent with the overwhelming weight of the evidence. In this case, Messrs. Hayden and Pierce are experienced pilots and are familiar with a variety of aircraft and aviation operations. As their descriptions demonstrate, they could comprehend what they saw, and thus, their testimony should be weighted accordingly. The Administrator has demonstrated that the law judge committed reversible error in his assessment of the proper weight to be afforded the conflicting evidence.

Accordingly, in the case at hand, we find that the evidence on the record indicates that respondent's operation of the aircraft was aerobatic, as defined at FAR § 91.303, which provides:

For purposes of this section, aerobatic flight means an intentional maneuver involving an abrupt change in an aircraft's attitude, an abnormal attitude, or abnormal acceleration, not necessary for normal flight.

The Administrator charged respondent with a violation of FAR § 91.303, which explicitly prohibits aerobatic flight. We have previously summarized FAR § 91.303 as a general prohibition on maneuvers that are not necessary for normal flight.

Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006).¹⁰

Based on the evidence, respondent's operation of the aircraft was aerobatic, given the percipient testimony of Messrs. Hayden and Pierce, both of whom hold airman certificates and have countless hours of flight experience, and based on respondent's own concession that she flew low enough to consider performing a touch-and-go landing and "wiggled" the aircraft, all with a smoke machine on.

Given our finding that respondent violated FAR § 91.303, we must hold that respondent's aerobatic operation of the aircraft was also careless and reckless, and therefore in violation of FAR § 91.13(a). Schwandt, EA-5226 at 2 n.2; Administrator v. Bjork, NTSB Order No. EA-4784 at 3 (1999) (stating that "a pilot must apply a reasonableness standard in determining what maneuvers would have been permissible," and holding that respondent Bjork's determination regarding maneuvers and bank angles in the range of 60 degrees was not reasonable, and therefore finding a violation of both FAR §§ 91.303 and 91.13(a)).

Where the law judge's factual findings are contrary to the overwhelming weight of the evidence, we will overturn the law judge's decision. See, e.g., Administrator v. Blossom, 7 NTSB 76, 77 (1990). The weight of the evidence in this case compels us to reverse the law judge's decision with regard to FAR §§

¹⁰ In addition, we have recognized that the Administrator often charges operators with a violation of FAR § 91.13(a) (prohibiting careless and reckless operation of an aircraft) in conjunction with a charge of violation of FAR § 91.303. Schwandt, EA-5226 at 2 n.2. In the case at hand, as stated above, the Administrator's

91.303 and 91.13(a). Moreover, our precedent establishes that violations of these regulations are revocable offenses. See, e.g., Administrator v. Oliveira & Morais, NTSB Order No. EA-4995 at 4 (2002). As such, we find it unnecessary to examine the Administrator's charges of violations of FAR §§ 91.9(a), 91.119(c), or 91.126. Overall, we hold that, given the violations of §§ 91.303 and 91.13(a), and the Administrator's previous actions against respondent's certificate, aviation safety demands revocation of respondent's Commercial Pilot Certificate.

Finally, we note that the law judge did not articulate any of the elements of any regulation with which the Administrator charged a violation against respondent. In addition, the law judge did not analyze the evidence in the context of any of the aforementioned regulations. Given these shortcomings, combined with the Board's de novo review of the evidence in the context of the analytical framework of the applicable regulations, we find that revocation is appropriate. In summary, the evidence does not support the law judge's factual findings by a preponderance of the reliable, probative, and substantial evidence, which we may consider in appeals from law judge's decisions, pursuant to 49 C.F.R. § 821.49(a)(1).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

(..continued)

complaint includes charges of both FAR §§ 91.303 and 91.13(a).

2. The law judge's decision, dismissing the Administrator's emergency order of revocation, is reversed; and

3. The Administrator's emergency order of revocation is affirmed.¹¹

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

¹¹ For the purposes of this order, respondent must physically surrender her certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(g).