SERVED: February 18, 1994

NTSB Order No. EA-4095

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 February, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. PAUL LINDSAY, Respondent.	Docket SE-13416

OPINION AND ORDER

The Administrator and the respondent have both appealed from the oral initial decision Administrative Law Judge William A. Pope, Jr. rendered in this proceeding on January 18, 1994, at the conclusion of a two-day evidentiary hearing.[1] By that decision, the law judge reversed an emergency order of the Administrator revoking respondent's Airline Transport Pilot certificate (No.

[1]An excerpt from the hearing transcript containing the initial decision is attached.

263657224), and any other airman certificate held by him (including Private Pilot certificate No. 267682370), for his alleged violations of sections 91.17(a)(1), (2), and (4), and 91.13(a) of the Federal Aviation Regulations, "FAR," 14 CFR Part 91.[2] For the reasons that follow we have decided to grant the Administrator's appeal and deny the respondent's.[3]

The Administrator's December 7, 1993 Emergency Order of Revocation alleged, in relevant part, that respondent on October 17, 1993 operated as pilot in command a Cessna Model 182 aircraft (N2681G) within 8 hours after consuming, and while he was under the influence of, alcohol.[4] In his appeal from that order the

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[2]FAR sections 91.17(a)(1), (2), and (4), and 91.13(a) provide as follows:

"§ 91.17 **Alcohol or drugs.**

(a) No person may act or attempt to act as a crewmember of a civil aircraft--
(1) Within 8 hours after the consumption of any alcoholic beverage;
(2) While under the influence of alcohol;
* * * * *
(4) While having .04 percent by weight or more alcohol in the blood.

"§ 91.13 **Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The parties have filed reply briefs opposing each other's appeals.

[4]Counsel for the Administrator at the hearing withdrew the section 91.17(a)(4) charge.

respondent did not deny that at the relevant time, that is, during the period within which the flight must have occurred, he was in fact intoxicated. He maintained, however, that he had not made the flight from Leesburg Municipal Airport, Leesburg, Florida to Umatilla Airport, Umatilla, Florida which is the subject of the revocation order. We think the Administrator produced enough evidence to establish that he did make that flight.

Because the law judge has so thoroughly, and, we believe, accurately, recounted the evidence in his decision, a brief summary of the case will be sufficient to illustrate the basis for our belief that the law judge applied an erroneous standard of proof in reaching his decision. The flight at issue in this matter was the second one made in the Cessna identified in the complaint (revocation order) during the early morning hours of October 17.[5] As to the first, the respondent concedes that he and three others, another man, also a pilot and the owner of the aircraft, and two women, took a flight in the vicinity of Leesburg that ended with the pilot, a Mr. Phillip C. Smith, being arrested on landing at the Leesburg airport for, in effect, flying while drunk.[6] The charges against the respondent involve

[5]The record reflects that a Leesburg-Umatilla flight would take about ten minutes in the Cessna.

[6]According to Mr. Smith, the foursome were at a bar when respondent suggested that it "would be a nice night to take a flight" (Transcript at 56). He also testified that after leaving the bar around 1:30 a.m. they purchased beer on the way to the airport and respondent offered to do the flying, but Mr. Smith told him that he would fly. It is not entirely clear from the

the movement of the aircraft from Leesburg to Umatilla an hour or two later.

The record reflects, without contradiction, that following Mr. Smith's arrest, respondent was belligerent and uncooperative with the police in their efforts to identify the occupants of the aircraft and investigate the matter. Apparently because of this unexplained hostility, his girlfriend, a Ms. Sandra Sprincis, told police that respondent lived with her and gave them her address, a trailer near the airport at Umatilla, as respondent's as well. Although offered a ride by Mr. Smith's girlfriend, Debra Hall, back to Ms. Sprincis' car where it had been left at a local bar, respondent would not leave.[7] He eventually, with the assistance of the police, obtained Mr. Smith's permission to stay with the aircraft. The police then departed, but kept the airport under surveillance from a nearby location for a half hour or so. When they returned to seize the aircraft after about a twenty minute period during which the airport was not being watched, the Cessna was gone. It was located shortly thereafter at the Umatilla airport, not far from Ms. Sprincis' trailer.

At the close of the Administrator's case the respondent

(..continued)
record, but some or all of those on the flight were in various states of undress, having left their clothes scattered on the ground near Mr. Smith's girlfriend's car at the airport. Mr. Smith was subsequently found to have a .17 blood alcohol level.

[7]Ms. Sprincis attempted to persuade respondent to accept Ms. Hall's offer. Respondent rebuffed these efforts and, in the words of one of the police officers, told Ms. Sprincis to go with Ms. Hall and "he would beat her home anyway." Transcript at 47.

moved to dismiss, arguing that the Administrator had not established a prima facie case. The law judge disagreed and denied that motion. On appeal here the respondent challenges that determination. However, since respondent put on evidence in defense of the charges after the rejection of his motion to dismiss, we think he effectively waived his right to object to the law judge's ruling, for once the case is appealed to us, the issue becomes not the correctness of the law judge's view that the burden of going forward with evidence had shifted to the respondent, but, rather, the sufficiency of the evidence in the record, viewed as a whole. Consequently, respondent's appeal will be denied.

To rebut the Administrator's circumstantial evidence in support of the charge that he had flown the aircraft to Umatilla while inebriated, the respondent testified that as soon as the police had left the Leesburg airport at around 4 a.m., he had called a friend, a Mr. Keith Jordan, to come and get him and Ms. Sprincis, so that they could spend the rest of the night at his apartment in Leesburg. Mr. Jordan confirmed that account and further testified that he had brought with him to the airport another individual, a Mr. Edward Carter. Mr. Carter, a low-time private pilot, testified that he flew the aircraft to Umatilla after Mr. Jordan left to drive respondent and Ms. Sprincis back to Jordan's residence.

The law judge's reversal of the Administrator's order is not, as we read his decision, predicated on any belief that the

respondent and his alibi witnesses had testified truthfully.[8] On the contrary, the law judge, as to each of them, essentially either made a negative credibility assessment or questioned their forthrightness,[9] while concluding that the police officers and an FAA inspector who testified for the Administrator were entirely credible witnesses.[10] Nevertheless, the law judge, apparently because the testimony given by respondent and his witnesses was not totally implausible and the testimony of one of them was perceived as being not in his own best interests, concluded that respondent's witnesses had raised enough doubt as to whether respondent had flown the aircraft to Umatilla as to preclude a conclusion that the Administrator had met his burden of proof in the case. We agree with the Administrator that the law judge appears to have applied a standard more stringent than the preponderance of the evidence test he should have employed.

Assessing credibility is largely a matter of instinct, not logic, and, precisely because it embraces perceptual information about a witness' demeanor and deportment that only the law judge

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[8]In fact, the law judge specifically stated that he was not finding that "the respondent did not commit the alleged violations" (I.D. at 214).

[9]Debra Hall--not a credible witness, p. 206; Keith Jordan and Sandra Sprincis--obvious bias and interest in outcome, some degree of lack of candor (Sprincis), p. 207; Edward Carter--not a credible witness, p. 211; respondent--not a candid witness, p. 213.

[10]One of the Administrator's inspector witnesses had testified that Debra Hall had told him that respondent had made the subject flight. The law judge believed the inspector, but concluded that Ms. Hall's statement, the content of which she later recanted, was not entitled to any weight.

can obtain, the Board has time and again resisted the temptation to secondguess credibility judgments that did not readily or necessarily square with the probative weight to which other bits of evidence seemed to be entitled. Our deference in this area cannot be justified if our law judges do not make unequivocal credibilty determinations, for our ability to fairly and fully consider an appeal is dependent upon the clarity with which the law judge explains his view of evidence we cannot ourselves adequately evaluate on a cold record.

This is not a complicated case. The respondent either made the flight the Administrator believes he made or he did not. The law judge's task was to decide that issue one way or the other, in light of his sense of who was telling the truth. While the law judge failed to state clearly that he did not believe the respondent's testimony that he had not flown the Cessna from Leesburg to Umatilla, he found that the respondent was not a candid witness. We think that that finding, if it has any meaning at all, has to be equated to a belief on the law judge's part that respondent did make the flight, despite his testimony to the contrary. Similarly, we find that, notwithstanding the law judge's painstaking effort to assess the likelihood that events had occurred as the respondent's witnesses testified, and his acknowledgement that not all of them appeared to him to be dissembling, he was not persuaded that an alibi defense had been established, for if he had been he would have found that respondent had not made the flight, not that the Administrator

had not advanced sufficient proof that he did. In other words, the law judge appears to have unwittingly given evidentiary weight to the testimony of witnesses he obviously disbelieved. This was error.

In sum, we conclude that the Administrator's strong circumstantial case was not weakened by the testimony of witnesses the law judge ultimately did not credit.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;

2. The Administrator's appeal is granted;

3. The initial decision is reversed; and

4. The emergency order of revocation is affirmed.

COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order. VOGT, Chairman, did not concur and submitted the following dissenting statement.

Notation 6280 Administrator v. Lindsay
Chairman Vogt's dissenting opinion.

I disagree with the majority's conclusion that the law judge applied the wrong standard of proof, as he clearly applied the preponderance of evidence standard. There is no basis for overturning the law judge's fact findings.

C.W.V.