SERVED: March 3, 1998

NTSB Order No. EA-4639

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 12th day of February, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, DENNIS G. LEAVER, Respondent.	Docket No. SE-14706

OPINION AND ORDER

The respondent has appealed from the oral initial decision issued by Chief Administrative Law Judge William E. Fowler, Jr., at the conclusion of an evidentiary hearing held on March 19, 1997.[1] By that decision, the law judge affirmed the Administrator's order, suspending respondent's commercial pilot certificate for 180 days on allegations of violations of Sections 91.13(a), 91.119(d), 91.303(b), and 91.303(e), of the Federal

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

Aviation Regulations (FAR), 14 C.F.R. Part 91, as a result of a low-flying incident that occurred on March 17, 1996.[2]

Respondent raises numerous issues on appeal. He contends that the finding of a low altitude operation in violation of Section 91.119(d) should be reversed, because the evidence is insufficient to show that he caused actual hazard to the people and property below his helicopter. He asserts that the finding that he performed an aerobatic maneuver in violation of Section

(..continued)

[2]FAR §§ 91.13(a), 91.119(d), 91.303(b) and 91.303(e) provide in pertinent part as follows:

> **§ 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.
>
> **§ 91.119 Minimum safe altitudes: General.**
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes....
> (d) *Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface....
>
> **§ 91.303 Aerobatic flight.**
>
> No person may operate an aircraft in aerobatic flight....
> (b) Over an open air assembly of persons....
> (e) Below an altitude of 1,500 feet above the surface....
>
> 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.

91.303 should be set aside, because the law judge considered prior consistent statements of percipient witnesses, even though they testified in court. Respondent also attacks the expert opinion expressed by FAA Inspector Anthony Winton, arguing that his opinion that respondent performed aerobatic maneuvers is flawed because it was based on lay witness descriptions of such maneuvers. Respondent also suggests that Inspector Winton's testimony should be rejected because he is biased against him. Respondent also argues that the testimony of the percipient witnesses should have been excluded because the Administrator did not facilitate respondent's counsel's interviews of them before the hearing. Finally, respondent contends, the law judge erroneously considered judgment as an element critical to the initial decision, even though respondent's qualifications were not in issue.[3] For the reasons that follow, respondent's appeal is denied.

The Administrator alleges that on March 17, 1996, respondent "buzzed" a privately-owned ranch that stables horses for the public. According to witnesses, respondent operated his helicopter at tree-top level, at an altitude of approximately 100 to 200 feet above-the-ground (AGL), over at least 20 riders and horses. The witnesses claim respondent then made another pass over the area, and performed some sort of unusual maneuvers which they described variously as, flying up "nose first," or at "a 90

[3]The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision.

degree angle," and then appearing to flip over, "as if on its side." The witnesses testified that they believed the helicopter was about to crash. They claim that they feared for their safety, and that their horses were "spooked" by the low-flying helicopter. One witness testified that as a result of respondent's operation, she was bumped into the side of a barn when she could not control the horse on which she was mounted. The day after this incident, the stable manager asked a number of witnesses if they wished to join him in writing complaints to the FAA. He testified that he had noted the helicopter's registration number when it flew over him. The witnesses subsequently learned that the pilot was respondent, and that he is the brother of the owner of the ranch where they stable their horses.

FAA Aviation Safety Inspector Winton testified as the Administrator's expert witness. He is a highly experienced helicopter and fixed-wing pilot, having gained his experience flying both commercially and in the military. Inspector Winton was present during the testimony of the witnesses. He opined that based on their testimony, and based on the written statements the witnesses made the day following the incident, respondent performed an aerobatic maneuver similar to a military maneuver known as an "RTT" [return to target].

Inspector Winton also testified that at one time he served as the principal operations inspector for Del Helicopters, a FAR Part 135 operation owned by respondent. Respondent is,

apparently, well-known in the local Flight Standards District Office (FSDO). Inspector Winton testified that he is familiar with respondent's reputation in the aviation community, and he described it in less than favorable terms. Inspector Winton further testified that he has spoken with respondent on more than one occasion about complaints he has received about respondent's flying, and that respondent had been warned that "the next time" he would be subjected to an enforcement action. Copies of portions of respondent's airman records corroborating this testimony were admitted into evidence.

Respondent admits that he operated his helicopter over the ranch on the day in question. He explained, however, that his sister is estranged from their family and he has flown over her ranch many times, so that she would know that he was thinking about her. On the day in question he admits that he slowed downed, circled twice, and then banked to the left so that his son, who was a passenger that day, could wave to his aunt. However, respondent claims, he was never below 1,500 feet AGL. Respondent also denies that he performed aerobatic maneuvers that day. He points out that he has never served in the military, and he does not know how to perform an "RTT" maneuver. He testified that, while he is capable of performing a maneuver he describes as an "ag turn," which is not, in his opinion, an aerobatic maneuver, he also did not perform an "ag turn" that day. According to respondent, his sister and her boyfriend, the stable manager, convinced the witnesses to fabricate their testimony.

Regarding Inspector Winton's testimony, respondent asserts that Inspector Winton has never counseled him, and he asserts that Inspector Winton has never criticized his flying skills.

In order to accept respondent's testimony, the law judge would had to have found that every witness who testified against respondent lied -- even those who have no personal relationship with his sister, and those who have no interest in the outcome of the case. The law judge determined otherwise. He heard and saw the witnesses, and he observed their demeanor. We have no reason to disturb these findings, which we adopt as our own.[4]

We find the many legal issues raised by respondent equally unpersuasive. For example, he asks the Board to strike the testimony of the Administrator's witnesses because his attorney could not interview them before the hearing. However, the Board's file in this case reveals that blame for any lack of preparation on the part of respondent's counsel which, we note, is not apparent in the hearing transcript, cannot be shifted to the Administrator. The Administrator gave respondent the witness statements in November 1996. We do not know whether respondent provided these statements to his attorney. In any event, on

[4]Respondent's arguments concerning the admission of the witnesses' out-of-court statements is without merit. Respondent's entire case attacks the credibility of these witnesses, thus making their prior consistent statements relevant to the judge's ultimate determination. Respondent's claim that the expert also should not have considered the written statements is frivolous. Written statements made only one day after the incident, when it was still fresh in their memories, likely contained even more details about what they observed. They had to be considered before the expert could form his opinion.

January 8, 1997, respondent's counsel served interrogatories on the Administrator and asked that the witnesses be identified. On March 13, 1997, another set of witness statements appear to have been provided directly to respondent's counsel. Nothing in the file indicates that during this period counsel sought the law judge's assistance to compel a response from the Administrator, as provided for in the Board's Rules of Practice, 49 C.F.R. § 821.19(d). Nor, is there evidence that respondent's counsel attempted to locate and interview all of the witnesses before the hearing. He apparently attempted on one occasion to interview the stable manager, who refused to cooperate. Respondent's counsel again could have sought the intervention of FAA counsel or the law judge. He did neither. In any event, respondent specifies no prejudice resulting from his counsel's failure to interview the witnesses beforehand, and we perceive none.[5] His demand that the testimony be stricken from the record is without merit.

Finally, respondent claims error because of the law judge's consideration of testimony concerning respondent's ability to exercise good judgment when operating a helicopter. Respondent

[5]Respondent also urges dismissal of the FAR § 91.119(d) charge, arguing that lay testimony describing the witnesses' observations and attesting to their subjective belief that the aircraft would crash, does not establish that he caused actual hazard to them. This argument fails to recognize that the finding of actual hazard is more than sufficiently supported by the testimony that the riders were forced to take control of their spooked horses, and that one of the horses caused its owner to bump into a barn, as a result of its reaction to the low-flying helicopter.

asserts that this issue was not pertinent here. We disagree. An evaluation of respondent's exercise of judgment on the day in question was necessary to the law judge's decision. As the Administrator points out in his reply brief, had respondent exercised appropriate judgment he would not have performed an aerobatic maneuver at such a low altitude over these riders and their horses. In other words, a reasonable and prudent pilot would not have operated his aircraft in so careless a manner.[6] We can perceive no harm in the law judge's consideration of evidence suggesting that respondent has similarly failed to exercise appropriate judgment on other occasions, when operating a helicopter.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision and the Administrator's order are affirmed; and

[6]Furthermore, respondent was charged with a violation of § 91.119(d), and as we noted in Administrator v. Reynolds, 4 NTSB 240, 242 (1982), § 91.119(d) [then § 91.79(d)] does not contain objective standards on the minimum permissible clearances applicable to helicopter operations near persons or property, and "a helicopter pilot must almost continually exercise what is essentially a subjective judgment...as to what measure of separation is necessary to ensure safe operation."

3. The 180-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[7]

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

[7]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).