

SERVED: September 29, 2009

NTSB Order No. EA-5481

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 23rd day of September, 2009

_____)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17846RM
v.)	
)	
MELISSA ANDRZEJEWSKI,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

On remand from the United States Court of Appeals for the Ninth Circuit, we revisit the Administrator’s appeal of the oral initial decision¹ of Chief Administrative Law Judge William E. Fowler, Jr., dismissing the Administrator’s emergency order revoking respondent’s commercial pilot certificate for alleged

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

violations of 14 C.F.R. §§ 91.9(a), 91.13(a), 91.119(c), 91.126, and 91.303(e) of the Federal Aviation Regulations (FAR).²

The complaint, in amended form, alleged:

* * *

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 ... your operation of the aircraft included maneuvers ... involving abrupt changes in the aircraft's attitude ... abnormal attitude ... [and] abnormal acceleration ... not necessary for normal flight.
4. For example, these maneuvers included ... pitching upward and downward ... rolling the

² Title 14 C.F.R. §§ 91.9(a), 91.13(a), 91.119(c), 91.126, and 91.303(e) prohibit, in relevant part, the following:

91.9(a)—operating an aircraft without complying with the operating limitations specified in the approved Flight Manual, markings, and placards;

91.13(a)—operating an aircraft in a careless or reckless manner so as to endanger the life or property of another;

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;

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

91.303(e)—operating an aircraft in aerobatic flight below an altitude of 1,500 feet above the surface.

left wing and ... 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 landing.

5. During the flight ... 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 ... 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.

At the hearing, two of the Administrator's witnesses, both experienced in flying operations, described a takeoff that included an aggressive pitch up and very steep climb, followed by a right turn, a steep left turn back towards the runway, and a low pass over the runway, with airshow smoke on. Respondent,

an experienced aerobatic pilot, argued that her aircraft's speed, its pitch during takeoff and descent, and the clearing turns she executed on climbing out, though unusual for other aircraft, were within the normal operating parameters of the Edge 540.

In our previous opinion and order, Administrator v. Andrzejewski, NTSB Order No. EA-5263 (2006), we granted the Administrator's appeal and reversed the law judge's decision dismissing the emergency order of revocation. While acknowledging the deference due to the law judge's credibility findings, we held that, "credibility of witnesses is not controlling here; the weight of relevant and material evidence is the critical determination that was improperly applied below." Id. at 11.

The circuit court disagreed, holding that, "the ALJ made an implicit credibility finding when he determined that Andrzejewski's witnesses gave a more accurate version of events than the version given by the FAA's witnesses." Andrzejewski v. FAA, 548 F.3d 1257, 1260 (9th Cir. 2009). Because we had "not yet addressed whether there is a 'compelling reason' to reverse the ALJ's credibility finding or whether the finding was 'clearly erroneous,'" the court remanded the case so that we might make these determinations. Id. at 1261.

It is well-established Board precedent that resolution of a credibility determination, unless made in an arbitrary or capricious manner or unless clearly erroneous, is within the exclusive province of the law judge. Administrator v. Schwandt, NTSB Order No. EA-5226 at 5 (2006) (citing Administrator v. Smith, 5 NTSB 1560, 1563 (1987)). On occasion, the Board has rejected testimony, accepted by the law judge, which is found to be inherently incredible or inconsistent with the overwhelming weight of the evidence. See, e.g., Administrator v. Windwalker, NTSB Order No. EA-4638 (1998); Administrator v. Blossom, 7 NTSB 76 (1990); Administrator v. Chirino, 849 F.2d 1525 (1988). Nevertheless, the Board will not withhold deference to a law judge's credibility findings simply because other evidence in the record could have been given greater weight. Administrator v. Swaters, NTSB Order No. EA-5400 at n.8 (2008) (citing Administrator v. Crocker, NTSB Order No. EA-4565 at 6 (1997)); see also Administrator v. Klock, 6 NTSB 1530, 1531 (1989).

The Ninth Circuit determined that witness credibility was the deciding factor in this case because critical testimony was at odds. The Administrator's two percipient witnesses, Mr. Pierce, an FAA inspector, and Mr. Hayden, an ATP-rated pilot, claimed that respondent's maneuvers were aerobatic and "inappropriate." Mr. Hayden testified that respondent's aircraft pitched up approximately 45 degrees on takeoff before

making a shallow bank to the right and then initiated a very steep bank to the left before returning to fly over Runway 8. Likewise, using an aircraft model as a demonstrative tool, Inspector Pierce 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, consistent with Mr. Hayden, that respondent made several steep turns to the left to return to approach Runway 8. They both testified that respondent's aircraft pitched down toward the approach end of Runway 8 and appeared to approach the runway with excessive speed and a steep angle of descent before leveling and flying down the runway with power and 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, claimed her maneuvers were neither inappropriate nor aerobatic. She testified that during 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, which results in a pitch angle of approximately 25½ 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. She said that, "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 aircraft's poor glide characteristics.

Respondent also 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. She testified that even experienced aerobatic judges have difficulty accurately judging aircraft bank angles and maneuvers.

The law judge resolved the contradictory testimony in respondent's favor, explaining: "taking into account the entire totality of the facts and circumstances, I'm going to give the Respondent ... 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." Initial Decision at 579.

Upon reevaluation of this record in light of the Court's remand and the Court's interpretation of the Board's precedent, we are compelled to find insufficient basis to reverse the law judge's decision, based upon what the Ninth Circuit characterizes as exclusively credibility-based evidence. Although it is certainly possible that respondent, amidst the excitement of her family's sendoff at Butler County Airport, aggressively maneuvered her high-performance aircraft in the manner of a "mini-airshow," as one witness put it, "we do not withhold the deference customarily afforded a law judge's credibility assessments simply because other evidence, of whatever description, arguably could have been given greater weight." Administrator v. Crocker, NTSB Order No. EA-4565 at 6 (1997). Moreover, the Administrator has not demonstrated on appeal that the law judge's credibility determinations were, consistent with our prior case law and the Ninth Circuit's opinion, arbitrary and capricious or clearly erroneous. Accordingly, on the record now before us, we must accept the law judge's conclusion that the Administrator failed to prove—either in the case in chief or through rebuttal—that respondent lacks the qualifications to hold an airman certificate or that she violated the regulations, as charged.

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's decision, dismissing the Administrator's emergency order of revocation, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

MARION C. BLAKEY, *

Administrator, *

Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-17846

* JUDGE FOWLER

MELISSA ANDRZEJEWSKI, *

Respondent. *

* * * * *

Moorhead Federal Building
Courtroom 1112
1000 Liberty Avenue
Pittsburgh, Pennsylvania

Thursday,
October 19, 2006 and
October 20, 2006

The above-entitled matter came on for hearing,
pursuant to Notice, at 10:12 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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22 ORAL INITIAL DECISION AND ORDER

23 ADMINISTRATIVE LAW JUDGE FOWLER: This has been a
24 proceeding before the National Transportation Safety Board held
25 pursuant to the provisions of the Federal Aviation Act of 1958,

1 as that Act was subsequently amended, and the Board's rules of
2 practice in air safety proceedings on the appeal of Ms. Melissa
3 Andrzejewski from an Emergency Order of Revocation dated
4 September 28, 2006, which seeks to revoke Respondent
5 Andrzejewski's commercial pilot's certificate number 2709432.

6 The Administrator's Emergency Order of Revocation, as
7 provided by the Board's rules of practice, has been duly
8 promulgated and served herein as the complaint in this
9 proceeding, and was issued by Regional Counsel, Eastern Region
10 of the Federal Aviation Administration.

11 This proceeding has been heard before this
12 United States Administrative Law Judge and as is provided by
13 the Board's rules of practice, specifically, Section 821.56 of
14 those rules, it is mandatory that, as the Judge in this
15 proceeding, I issue an Oral Initial Decision forthwith at this
16 time.

17 Following notice to the parties, this matter came on
18 for trial on October 19th and 20th in Pittsburgh, Pennsylvania.
19 The Respondent was present at all times and was very ably
20 represented by Kathleen Yodice, Esquire, and assisted by
21 Ms. Kirk, Esquire.

22 Both parties have been afforded the opportunity to
23 call, examine, and cross-examine witnesses. In addition, the
24 parties were afforded the opportunity to make argument in
25 support of their respective positions.

1 This case has some unusual aspects and angles to it,
2 because we're not dealing here, as in so many other cases that
3 I've had the pleasure and privilege of hearing, with the normal
4 long experienced pilot and a conventional aircraft. We're
5 dealing here with a very high-powered, aerobatic aircraft
6 which, where the general population is concerned, is seldom
7 seen, except, of course, in air shows.

8 During the course of this proceeding, the
9 Administrator has adduced three witnesses, Hayden, Pierce, and
10 Karish. If my count is correct, the Respondent has adduced ten
11 witnesses, including the Respondent herself. The Administrator
12 has had five exhibits duly admitted into the record as it's
13 presently constituted. The Respondent has had 16 exhibits
14 admitted.

15 Mr. Hayden and Inspector Pierce are the two
16 percipient witnesses of the Administrator as to what occurred
17 with this flight by the Edge 540 aircraft on May 22, 2006, in
18 the vicinity of the Butler County Airport, Butler,
19 Pennsylvania.

20 Respondent, if my count is correct, has come forth
21 with five percipient witnesses where this flight is concerned.
22 Many of those witnesses of the Respondent are either related to
23 Respondent or could be deemed to be friends of long standing of
24 the Respondent. I've taken that into consideration in weighing
25 and evaluating the totality of the evidence here.

1 There is absolutely no question that the Respondent
2 in this proceeding, as a pilot, that she has exceptional
3 aerobatic talent. That has been stated by so many of the
4 witnesses here that we've heard testify under oath. She has
5 come up through the ranks of aerobatic competition
6 exceptionally, rapidly. To be her youthful age of 21, even
7 makes this more prominent in my opinion.

8 Now, being the Judge in this case, I have to weigh,
9 sift, and evaluate all of the evidence.

10 You may remember Mr. Hayden and Inspector Pierce were
11 startled by what they saw of this flight of this Edge 540
12 aircraft. By and large, that's why we've been here for two
13 days.

14 Respondent's percipient witnesses, those who saw the
15 flight, have testified unequivocally and forthrightly,
16 relatives and non-relatives, that there was nothing special,
17 nothing aerobic about this flight, a very special occasion,
18 yes, which the Respondent was reluctant to concede and admit,
19 but finally did, that it was a very special occasion. You have
20 this many family members and some friends and relatives out to
21 see, as the photographs and exhibits in this hearing record
22 show, the extremely attractive aircraft and the occupant
23 therein, before she was taking off on this flight of May 22,
24 2006, from the Butler Airport.

25 Now, we've had a lot of expert testimony, I deem to

1 be expert testimony, in this proceeding on both sides of the
2 case, even though some of the witnesses may not be deemed under
3 oath as experts before they testify. Part of that evidence is
4 that the Edge 540 aircraft, and the performance of the Edge
5 aircraft, is much greater than the normal general aviation
6 aircraft. That is particularly apropos with the innumerable
7 turns the Respondent made during this flight. There's
8 testimony on Respondent's side of the case that high
9 performance aircraft like an Edge 540 climb or took a high nose
10 attitude that is necessary to make small turns back and forth
11 to clear the area ahead, so that the pilot can be fully
12 cognizant of either traffic or non-traffic in the area.
13 Fortunately, that was done here by the Respondent, even though
14 there was no other traffic in the area.

15 We've had a wealth of testimony in this proceeding.
16 I was particularly impressed by witnesses, Jansen and Holland,
17 Pierce, and Inspector Karish. This Inspector said Respondent's
18 actions were reckless. A very strong charge. A charge that I
19 haven't heard in quite a while in cases that I have heard.

20 As I stated earlier, we're here because of what
21 Mr. Hayden and Mr. Pierce saw where this flight was concerned.
22 Taking into account the totality of the circumstances without
23 overly belaboring the facts, we've been here for two days.
24 We've heard time and time again what took place, why it took
25 place, what the Respondent did, and what she said, what her

1 story was, as Witness Jansen said, he's heard it three times
2 what the Respondent's statement was about this incident and it
3 was always the same. It never changed. We're dealing with a
4 very special, and to use a common term, a rare breed of
5 aircraft, the Edge 540, which, it's been testified to by
6 Mr. Holland, who certainly is an expert in aerobatic aircraft
7 and aerobatic maneuvers, and he said from when he found out and
8 what he learned about this flight of May 22, 2006, that there
9 was nothing unusual about it. This type of aircraft always
10 operates at high speed, making turns as Ms. Andrzejewski did,
11 to see clearly if there are any other aircraft in the area.
12 And a term we've heard several times, he said speed can
13 sometimes be a safety factor, in fact, it could be a lifesaving
14 factor.

15 I'm not going to belabor this, ladies and gentlemen.
16 I've come to the conclusion, even though the Respondent has a
17 previous violation, I think she learned tremendously from
18 that violation. As a matter of fact, there's an exhibit here,
19 and you heard it mentioned, published in a magazine, "Fallen,"
20 Respondent's Exhibit R-15, Respondent says, my own series of
21 unfortunate events let me down. Not only did she publish this,
22 but she has acted publicly in a very poignant and strong,
23 remedial fashion to help other pilots, particularly, as was
24 stated during the course of this proceeding, young pilots,
25 women pilots, like herself, who are in a minority in the United

1 States.

2 So as I started to say, two percipient witnesses of
3 the Administrator has said it was an aerobatic flight. Five
4 percipient witnesses of the Respondent have said it was not an
5 aerobatic flight. Some of them said, but for the smoke we
6 might not have been here two days, the smoke that was emitted
7 by the Respondent from her plane.

8 So, ladies and gentleman, I'm sure you probably
9 figured out by this time what the drift of my ultimate
10 determination will be. This has not been an uncomplicated
11 case. But taking into account the entire totality of the facts
12 and circumstances, I'm going to give the Respondent in this
13 proceeding the benefit of the doubt. I'm not saying that the
14 Administrator's witnesses didn't see what they saw, but perhaps
15 they misunderstood what they saw. With that determination, I'm
16 going to give Ms. Andrzejewski the benefit of the doubt, and I
17 will now make the following specific findings of fact and
18 conclusions of law:

19 One, the Respondent, Melissa Andrzejewski is the
20 holder of commercial pilot's certificate number 2709432 which
21 she has admitted.

22 Two, it is found and admitted by Respondent that on
23 or about May 22, 2006, the Respondent operated an Edge 540
24 aircraft, identification number 540SG, at Butler County
25 Airport, Butler, Pennsylvania.

1 Three, it is found that during the flight described
2 above, the operation of the aircraft allegedly included
3 maneuvers involving abrupt changes in the aircraft's attitude,
4 an alleged apparent abnormal attitude, an apparent abnormal
5 acceleration, all of which, according to the Administrator, was
6 not necessary for normal flight. These maneuvers, which the
7 Administrator has deemed as not normal, are the pitching up and
8 down, rolling the left wing and rolling the right wing, turning
9 rapidly, accelerating and diving toward the runway surface, and
10 flying at approximately 50 feet above the runway surface,
11 though it was not for takeoff and landing, but for possible
12 touch and go.

13 I have mentioned the testimony of percipient
14 witnesses, who I have deemed the testimony to be vital and
15 apropos, and it is my determination that this flight of May 22,
16 2006, was not, as such, an aerobatic flight.

17 The further allegations are that the Respondent
18 performed right hand turns contrary to the requirements of
19 Federal Aviation Regulation Section 91.126, and all
20 Respondent's turns in the traffic pattern were not made to the
21 left.

22 Let me just say without going further, based on my
23 review of the totality of the evidence here, as adduced during
24 the course of this proceeding, and I'm incorporating by
25 reference the Sections 91.119(c), 91.126, 91.13(a), 91.303(c),

1 91.303(e), and 91.9(a), incorporating all of those sections by
2 reference. It is my final and ultimate determination there was
3 no violations of any of these sections afforded by the flight
4 of May 22, 2006, by the Respondent.

5 Let me state further, as one of the findings here,
6 that it is in evidence and the Respondent admitted during the
7 course of this proceeding that during her flight history, that
8 there was an Emergency Order of Revocation dated May 16, 2005,
9 which she was charged with, and that she claimed in her
10 testimony that the Federal Aviation Administration was fully
11 justified in bringing that action against her. That she has
12 learned and evaluated much from it, and that is why she had
13 proceeded with all of the remedial and innumerable conduct to
14 not repeat that type of action again, as well as to afford that
15 knowledge to other pilots, particularly pilots who are
16 aerobatic pilots. It is my conclusion, taking into account, the
17 totality of the situations here, and the circumstances, that
18 the Respondent, Melissa Andrzejewski, does not lack the
19 judgment, care, and responsibility required of a certificate
20 holder with commercial pilot privileges and has demonstrated a
21 regard for safety as well as for the regulatory requirements of
22 the Federal Aviation Administration.

23 It is found by reason of the foregoing, the
24 Respondent has not violated the sections of the Federal
25 Aviation Regulations that I've incorporated by reference from

1 the complaint, and that this Judge finds that safety in air
2 commerce or air transportation and the public interest does not
3 require the affirmation of the Administrator's Emergency Order
4 of September 28, 2006.

5 ORDER

6 It is ordered, adjudged, and decreed the
7 Administrator's Emergency Order of Revocation dated
8 September 28, 2006 is reversed and dismissed and the order is
9 vacated.

10

11

12 EDITED & DATED ON

13 October 26, 2006

WILLIAM E. FOWLER, JR.

United States Administrative Law Judge