

SERVED: May 3, 2011

NTSB Order No. EA-5580

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 2nd day of May, 2011

J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18908
v.)	
)	
LEE MIZE,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on December 1, 2010.¹ By that decision, the law judge granted the Administrator's motion for directed verdict, thereby affirming

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

the Administrator's order of suspension of respondent's private pilot certificate, based on findings respondent violated 14 C.F.R. §§ 91.103,² 91.13(a),³ 61.51(i)(1)(i),⁴ 61.56(c),⁵ and 91.417(c).⁶ The law judge affirmed the 180-day suspension of respondent's private pilot certificate. We deny respondent's appeal.

On October 29, 2009, respondent attempted to take off from Angwin-Parrett Field Airport in Angwin, California, in his Piper PA-28-140 aircraft, but departed the runway and came to rest

² Section 91.103 states, "[e]ach pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight."

³ Section 91.13(a) states, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

⁴ Section 61.51(i)(1)(i) states, "[p]ersons must present their pilot certificate, medical certificate, logbook, or any other record required by this part for inspection upon a reasonable request by [t]he Administrator."

⁵ Section 61.56(c) states, in relevant part:

no person may act as pilot in command of an aircraft unless, since the beginning of the 24th calendar month before the month in which that pilot acts as pilot in command, that person has—

(1) [a]ccomplished a flight review given in an aircraft for which that pilot is rated by an authorized instructor and

(2) [a] logbook endorsed by an authorized instructor who gave the review certifying that the person has satisfactorily completed the review.

⁶ Section 91.417(c) states, "[t]he owner or operator shall make all maintenance records required to be kept in this section available for inspection by the Administrator."

entangled in a fence approximately 200 feet off the runway. Respondent's wife was a passenger in the aircraft.

Chief Avery Browne, Angwin Volunteer Fire Department, was one of the first responders on the scene of the accident. Chief Browne testified that about an hour and a half after the accident, he escorted respondent back to the aircraft to retrieve some of respondent's personal belongings. Since it was nighttime, Chief Browne held his flashlight inside the aircraft to assist respondent. Chief Browne witnessed respondent take some papers, flight charts, and a logbook⁷ from the aircraft. Later that evening, Chief Browne again escorted respondent to the aircraft. On the second trip, respondent removed additional personal items from the aircraft. Chief Browne then ensured no personal items were left in the aircraft and secured it for the evening. At no time did Chief Browne see a briefcase in the aircraft, nor did he see respondent remove a briefcase.

Deputy James Baumgartner, Napa County Sheriff's Department, also was among the first responders on the scene. As part of his investigation that evening, Deputy Baumgartner interviewed respondent. Exh. A-3. Respondent told the deputy it was very dark and, in order to turn on the runway lights at the airport,

⁷ Chief Browne recognized the book as a logbook from his experience in ground school training in the military, during which he also was responsible for transferring flight time from general aviation logbooks to military logs.

a pilot had to tune the radio to a particular frequency. Respondent tuned his radio to 122.8 and clicked his microphone to turn the runway lights on, but the lights failed to illuminate. Tr. 36. As respondent had flown into the airport on one occasion, 10 years earlier, he believed the runway continued in the same direction as the hangers, so he decided to take off in the dark. Id. He informed Deputy Baumgartner that he cleared the hangers and proceeded to accelerate to 70 miles per hour. He suddenly realized he had departed the runway and was in a field, but felt confident he could take off and continued accelerating until the aircraft struck a fence. Tr. 36-37.

In addition to interviewing respondent, Deputy Baumgartner also interviewed respondent's wife. Mrs. Mize confirmed respondent's story. She also stated that, when she realized they were in a field, she yelled at respondent to stop and closed her eyes, and respondent said, "I'm taking off, anyways [sic]." Tr. 37.

The morning following the accident, Inspector Norbert Schuchbauer, from the FAA's Sacramento Flight Standards District Office (FSDO), was assigned to investigate respondent's aircraft accident. Inspector Schuchbauer called respondent on the telephone on the morning of October 30, 2009. During their conversation, respondent told Inspector Schuchbauer he attempted

to activate the runway lights using frequency 122.8. Tr. 49-50. This comment concerned the inspector, as he knew the proper frequency at the airport was 123.0. Tr. 50.

Inspector Schuchbauer asked respondent to provide the FAA with copies of his logbook and maintenance records. Respondent informed the inspector the records were in his briefcase, which he had not been permitted to retrieve from the aircraft. Upon examining the aircraft, Inspector Schuchbauer did not find a briefcase. On November 2, 2009, Inspector Brook Stewart, from the Sacramento FSDO, sent respondent a letter requesting copies of his airman records. Exh. A-11. Respondent provided some records in response to the request, but failed to provide proof of his biannual flight review (BFR).⁸ On November 24, 2009, and again on February 24, 2010, Inspectors Schuchbauer and Stewart sent letters to respondent requesting proof of his BFR. Exhs. A-12, A-15.

Respondent submitted a written response to Inspector Schuchbauer on December 2, 2009. Exh. A-13. His letter contained remarkably different assertions from his previous interviews with Deputy Baumgartner and

⁸ To maintain currency for a private pilot certificate, 14 C.F.R. § 61.56 requires airmen have a BFR every 24 calendar months consisting of 1 hour of flight training and 1 hour of ground training with a certified flight instructor (CFI). Both the airman and the CFI must document the BFR in their flight logbooks.

Inspector Schuchbauer. Respondent claimed he tried to activate the runway lights using the correct frequency of 123.0, but when that frequency did not work, he attempted an old frequency of 122.8. Exh. A-13, Tr. 69. He stated he planned on using the ramp to extend the space available for takeoff because he heard a pack of coyotes howling nearby and was concerned some animals might be on the runway. Exh. A-13, Tr. 70. Finally, he claimed his wife commandeered the aircraft controls by locking her arms out on the yoke and pushing both pedals with her feet, causing them to crash into the fence. Id.

Respondent also informed the investigators he completed his BFR with a CFI named "Jim" in Auburn, California. He later said "Jim" was at Beale Air Force Base and was from Marysville, California. The inspectors tracked down two CFIs named "Jim" in the areas around Auburn, Sacramento, and Marysville, but both stated they had not conducted a BFR for respondent.

Additionally, respondent failed to provide a copy of the annual inspection for his aircraft. He told the FAA inspectors to contact Howard Mugleston regarding the inspection.

Inspector Schuchbauer contacted Mr. Mugleston, and testified that Mr. Mugleston recalled the aircraft was in good condition, but could not provide any receipts or invoices documenting any work he performed on the aircraft. Tr. 78.

As part of his investigation, Inspector Schuchbauer also contacted Kaye Varney, the airport director, regarding the runway lights. Ms. Varney was at the airport on the evening of October 29, 2009, and witnessed the airport runway lights turn on three times. Exh. A-14. On each occasion, the pilots activated the lights using the correct airport frequency of 123.0. Id.

At the conclusion of the hearing, the law judge granted the Administrator's motion for a directed verdict, and concluded the 180-day suspension of respondent's private pilot certificate was appropriate in this case. The law judge found the Administrator had a reasonable basis for requesting production of the logbook and the annual inspection, since respondent was involved in an aircraft accident. He further stated respondent failed to provide the requested documentation to the FAA. The law judge gave more weight to the statements respondent made to Deputy Baumgartner and Inspector Schuchbauer immediately following the accident than those statements respondent made in his letter to the FAA over a month after the accident. He held respondent failed to conduct a proper preflight to check the position of the runway or the airport frequency for activating the runway lights. The law judge found the evidence clearly established that if respondent had clicked the correct frequency, the runway lights would have illuminated. He

concluded respondent's deliberate decision to take off in the dark, without having completed a proper preflight with respect to the facilities, endangered the life and property of others, including the life of respondent's wife, and was a reckless operation of the aircraft.

Respondent subsequently appealed the law judge's decision. On appeal, respondent raises several issues. He alleges the FAA should have consolidated all three cases into one, but instead divided the cases up in order to sanction him twice and permanently take away his private pilot certificate.⁹ He contends the sanction is unduly harsh because he has over 40 years of flying experience and over 3,700 hours of flight time, without any prior violations. He asserts his 180-day sanction is actually indefinite because he cannot meet the requirement to get his certificate back, as he cannot produce his BFR.¹⁰ He states the process was unfair because the

⁹ We note the FAA only has two cases against respondent. In his brief, respondent references this case, SE-18908, and two other cases, SE-18994 and SE-18907. The Administrator withdrew SE-18907, without prejudice, and reissued that complaint as an emergency proceeding in SE-18994. The law judge heard this case and SE-18994 on the same day. Respondent appealed both decisions to the Board.

¹⁰ This issue is related to respondent's other proceeding, SE-18994, which proceeds pursuant to the Administrator's authority to take emergency action against a certificate holder. The sanction in that emergency proceeding was indefinite suspension pending the FAA's receipt of respondent's BFR entry in his logbook.

Administrator had two attorneys and he had none, and contends he was not permitted to put on evidence in his own defense.

Finally, as in his other case, respondent challenges the impartiality of the law judge. The Administrator contests each of these arguments.

The Board's common practice is to consolidate cases pertaining to the same airman which are ripe for hearing at the same time.¹¹ In this case, the law judge consolidated respondent's original cases, SE-18907 and SE-18908, on August 27, 2010, upon motion of the Administrator. When the Administrator learned respondent had obtained a medical certificate, the Administrator withdrew SE-18907 and reissued the complaint as an emergency order in SE-18994. On November 22, 2010, the Administrator asked for consolidation of the cases. On that same day, the law judge ruled he would consolidate the cases but would issue separate decisions. We find the Administrator did not issue two separate complaints in an attempt to multiply the sanction. Because of the nature of this case, the law judge needed to address the two sanctions: one for the emergency indefinite suspension for respondent's failure to produce his logbook for inspection, and one for the 180-day suspension resulting from the violations leading up to

¹¹ See Administrator v. Mitchell, 2 NTSB 2205, 2208 (1977); Administrator v. Staffney, 2 NTSB 1815 (1975).

the accident.

Respondent claims the hearing was unfair because the Administrator had two counsel and he had none. At no time during the hearing did he raise this issue with the law judge. At the hearing, he elected to proceed pro se, and we note it is not uncommon for respondents to proceed pro se in pursuit of their appeals. We have previously held a respondent has no right to counsel.¹²

We also have long held law judges have significant discretion in overseeing testimony and evidence at hearings, and we typically review our law judges' evidentiary rulings under an abuse of discretion standard, after a party can show that such a ruling prejudiced him or her.¹³ In the instant case, respondent has neither established that the law judge abused his

¹² See generally Administrator v. Bakhit, NTSB Order No. EA-5489 (2009); Administrator v. Nadal, NTSB Order No. EA-5308 (2007). See also Administrator v. Adcock, NTSB Order No. EA-4507 (1996); Administrator v. Olsen and Nelson, NTSB Order No. EA-3949 (1993).

¹³ See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). We will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001); Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010). Cf. Administrator v. Ferguson, 352 Fed. Appx. 192, 2009 WL 3747426 (9th Cir. 2009) (holding that law judge erred in curtailing cross-examination of FAA witness, because witness was central to Administrator's case and ruling was therefore prejudicial).

discretion, nor demonstrated that the law judge's alleged errors resulted in prejudice. Likewise, we have held, in order to disqualify a law judge for bias or prejudice, "the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case."¹⁴ We have rejected contentions that a law judge decided a case or issued certain evidentiary rulings based on bias when the party alleging such bias presents nothing more than conjecture in support of the assertion.¹⁵

Respondent's arguments in this regard appear to result from his inability to submit certain documents into evidence at the hearing. The law judge repeatedly explained to respondent that he needed to lay a foundation for his exhibits in order to introduce them, but respondent replied on numerous occasions he did not know how to do so. Tr. 92, 95, 96, 99-100, 103-04, 106, 110-11. The law judge told respondent, "[i]f you can lay the

¹⁴ Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008), aff'd Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010). See also Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985).

¹⁵ See, e.g., Administrator v. Nickl, NTSB Order No. EA-5287 at 7-8 (2007) (rejecting motion to disqualify law judge based on unsupported contention that law judge was biased). See also Administrator v. Steel, 5 NTSB 239, 243 (1985) (finding no bias warranting disqualification where the law judge repeatedly, during the hearing, yelled and banged her fist, ridiculed respondent and addressed him contemptuously and sarcastically).

foundation for your testimony, I'll receive every single piece of paper you have." Tr. 115. The law judge suggested respondent could ask the Administrator's counsel to stipulate to the admission of his documents. Tr. 96. The law judge also repeatedly informed respondent that he could testify in his own defense. Tr. 101, 104, 107, 108, 109, 113, 114. We find the law judge attempted to provide guidance and assistance to respondent to the extent the law judge is permitted to do so under the Board's Rules of Practice.

Furthermore, in his brief, respondent asserts prejudice because he "was never able to bring facts of the accident to the court room, that [his] wife had commandeered [sic] the controls on the airplane." Appeal Br. at 3. We find respondent elected not to present these facts to the law judge when repeatedly offered the opportunity to take the stand and testify. Additionally, we note this evidence was, in fact, before the law judge. The Administrator introduced respondent's letter to Inspector Schuchbauer in which he alleged his wife commandeered control of the aircraft, causing the accident. Exh. A-13. The law judge, in his decision, simply found respondent's statements made contemporaneously with the accident and corroborated by his wife's statements to Deputy Baumgartner more credible than respondent's claims 1 month after the accident that his wife commandeered the aircraft. Based on the foregoing, we conclude

respondent has not shown that the law judge's evidentiary rulings were an abuse of discretion, or that such rulings resulted in prejudice.

We acknowledge from the record that the judge conducted the hearing in a brisk and direct manner; however, the record also reflects that the judge treated both parties in this manner. See e.g. tr. 29, 74, 82. While the law judge did not conduct the hearing in the most professional manner, we find no prejudice to respondent. The overwhelming weight of evidence in this case favored the Administrator. Chief Browne testified not only that respondent removed his logbook from the aircraft, but also that Chief Browne checked the aircraft to ensure all personal belongings were removed before securing the aircraft. This testimony directly countered respondent's assertions that he had not been permitted to remove items from the aircraft and, as a result, his logbook was stolen. Ms. Varney's affidavit stated the runway lights were functioning on frequency 123.0. Respondent, himself, provided the most damaging evidence through his admissions to Deputy Baumgartner and Inspector Schuchbauer: he used frequency 122.8; he decided to take off in the dark; he assumed the runway ran parallel to the buildings at the airport; and, when he realized he was in the field, he continued accelerating in an attempt to take off. Mrs. Mize's statements to Deputy Baumgartner corroborated respondent's admissions. All

this evidence greatly outweighs respondent's subsequent claims that his wife commandeered the aircraft, causing the accident.

Given the deliberateness of respondent's actions leading up to and, ultimately, causing the accident, we do not find the Administrator's choice of sanction arbitrary, capricious, or contrary to law. The FAA Civil Penalty Administrative Assessment Act (the Act)¹⁶ states the Board is bound by written agency guidance available to the public relating to sanctions to be imposed, unless the Board finds any such interpretation or sanction guidance is arbitrary, capricious, or otherwise not in accordance with law.¹⁷ It is the Administrator's burden under the Act to articulate clearly the sanction sought, and to ask the Board to defer to that determination, supporting the request with evidence showing the sanction has not been selected arbitrarily, capriciously, or in a manner contrary to law.¹⁸ The Administrator's counsel fulfilled this standard with the evidence she presented at the hearing, which included relevant excerpts from the Sanction Guidance Table. Moreover, we do not find persuasive respondent's argument that his 40-year

¹⁶ 49 U.S.C. §§ 44709(d) and 46301(d).

¹⁷ Administrator v. Hart, NTSB Order No. EA-5536 at 11 (2010); Administrator v. Hewitt, NTSB Order No. EA-4892 at 2 (2001).

¹⁸ Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (Administrator introduced no evidence regarding applicable or relevant sanction guidance).

violation-free history should lead us to reduce the sanction. As we previously have held, we view a violation-free history as status quo, rather than a mitigating circumstance.¹⁹ In addition, we find the evidence establishing respondent's careless behavior on the flight at issue greatly outweighs respondent's violation-free history. The evidence unequivocally establishes respondent deliberately attempted to take off, at night, on a dark runway, without completing a proper preflight, and continued to accelerate the aircraft in an unlit field after realizing he had departed the runway. The Administrator's selected sanction was in the mid-range of the Sanction Guidance Table and was not arbitrary, capricious, or contrary to law.²⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 180-day suspension of respondent's private pilot certificate shall begin 30 days after the service date indicated

¹⁹ See Administrator v. Hart, supra; Administrator v. Rezendes, NTSB Order No. EA-5127 (2004); Administrator v. Thompson, 7 NTSB 714 (1991).

²⁰ To the extent respondent argues the sanction in this case is not a 180-day suspension but is actually indefinite in length, we find his argument without merit, as the indefinite suspension was the sanction respondent received in SE-18994.

on this opinion and order.²¹

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

²¹ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, *

v. * Docket No. SE-18908

LEE MIZE, * JUDGE GERAGHTY

Respondent. *

* * * * *

U.S. Tax Court
Courtroom 2-1350, 2nd Floor
450 Golden Gate Avenue
San Francisco, California 94102

Wednesday,
December 1, 2010

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:00 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

LINDSAY NAKAMURA, Esq.
NAOMI TSUDA, Esq.
Federal Aviation Administration
Office of the Regional Counsel
Western-Pacific Region
P.O. Box 92007
Los Angeles, California 90009-2007
(310) 725-7138
(310) 725-6816 (Fax)
lindsay.nakamura@faa.gov

On behalf of the Respondent:

LEE MIZE, Pro se
7947 Twin Rocks Road
Granite Bay, California 95746-8131
(916) 6791-0809

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUMMARY JUDGEMENT AND ORDER

DISCUSSION

In the response to the Order of Suspension, the Complaint herein, the allegations in Paragraphs 1 and 2, 8, 9, and 11 were admitted. Therefore, those matters, of course, are

1 established.

2 The first witness was Chief Browne. He testified that
3 he spoke with the Respondent at the scene and directed the
4 Respondent and his wife over to the medical. Later, about one and
5 a half hours after Chief Browne had been at the scene, the
6 Respondent asked to recover personal property from the aircraft.
7 He indicated the crew was already -- the fire crew was already
8 working on suppressing the fire, and, therefore, Chief Brown, in
9 protective clothing, escorted the Respondent over to the aircraft
10 so that the Respondent could retrieve whatever personal property
11 was in there.

12 His testimony as to suppression of the fuel on the wing
13 and showing that, Exhibit A-2, was received, showing Chief Browne
14 holding a flashlight, shining it into the aircraft and that is
15 consistent with his testimony as to what he did to assist the
16 Respondent to remove the items.

17 He testified that he observed the Respondent to remove
18 various papers, flight charts, maps, and a logbook and also a
19 three-ring type binder. That was on the first trip.

20 There was then a second trip, according to Chief Browne,
21 back to the aircraft again by the Respondent to obtain some
22 additional items, and at which time the first items had been
23 removed from the right front seat and the pilot seat, and the
24 second time he observed the Respondent to be removing items from
25 the back seats or behind the front seat backs in the aircraft.

1 Chief Browne also stated that later that he was on the
2 scene at least an hour and a half or so after everybody -- the
3 Respondent and his wife and the Respondent's brother -- had left
4 the scene, and that Chief Browne went back to look into the
5 aircraft to be sure there were no other items left in the
6 interior, because if there were any items of value, they had to be
7 inventoried. And when he went back and looked in the aircraft,
8 there were no items of any type left in the aircraft.

9 None of that testimony was contradicted or contested on
10 cross-examination. There was no cross.

11 Mr. Baumgartner is a Deputy Sheriff with Napa County
12 Sheriff's Department. As with Chief Browne, neither one of these
13 individuals on the evidence in front of me, had any prior
14 association with the Respondent and there is no indication that
15 either one of these two have any bias or preconceived ideas as to
16 the Respondent. On the evidence in front of me, they never knew
17 the Respondent until this incident on October 29th.

18 The Deputy responded from a dispatch received over his
19 car radio. When he got to the scene, he stated that he did talk
20 to the Respondent. Deputy Baumgartner indicated that he
21 introduced himself to the Respondent and told the Respondent that
22 he needed to get some information. The Deputy prepared a report
23 and that was received as Exhibit A-3.

24 And on page 3 of that Report, which is consistent with
25 the Deputy's testimony in session, the Deputy stated that when he

1 was talking to the Respondent, that the Respondent -- when he
2 asked him, because it was dark as to what happened, the Respondent
3 indicated that the lights would not work and that he had attempted
4 to turn the lights on using a frequency, Channel 122.8, and that
5 at that time the lights would not come on. That is the same as
6 the Deputy places in his report.

7 And I give weight to these statements, as these are
8 contemporary statements made to the Deputy at the scene on the
9 night of the occurrence by the Respondent at that time; that is,
10 not with afterthought.

11 The Deputy also testified that he spoke with the wife
12 and at that time, Mrs. Mize stated -- as the Deputy said, simply
13 confirmed the version of the incident as stated by the Respondent
14 to the Deputy. There was no indication to the Deputy Sheriff, nor
15 is there any indication in this statement, concerning what
16 Mrs. Mize stated, other than saying, "I talked to Pat" -- and I
17 assume that's Mrs. Mize -- "she confirmed Lee's story." When she
18 realized they were in the field, she yelled at Lee to stop, but he
19 didn't. She closed her eyes and waited for the airplane to stop.
20 When it stopped spinning, they both got out of the airplane.
21 There's no indication about the wife threatening controls or
22 anything else.

23 The Deputy indicated he also spoke to the airport
24 manager at Angwin Airport as to whether or not the runway lights
25 were working, since the Deputy, on his testimony, when he arrived,

1 the runway lights were, in fact, on. And according to the
2 Deputy's testimony, he was informed that the runway lights were
3 working and it was on frequency 123.0. And that as far as they
4 knew, there had never been any indication that the lights would
5 not be operative. And there is a sworn affidavit to that effect
6 received into evidence from the airport manager. And I attach
7 significant weight to that, which is Exhibit A-14, which is a
8 Declaration of Kaye Varney, which states, in part, the airport
9 runway lights are pilot-activated on frequency 123.0. That on the
10 night of October 29th between 7:50 and 9:50 p.m., that Varney
11 witnessed the lights being turned on three times and that to the
12 best of her knowledge -- or his knowledge, I'm not sure male or
13 female -- that the runway lights were not disabled on the date in
14 question and they had never been disabled. And as I indicate,
15 this is an affidavit under oath. So it's entitled to significant
16 weight.

17 The only cross-examination dealt with an estimate that
18 the Deputy Sheriff gave as to the distance from the scene of
19 the -- where the aircraft came to rest from the runway, which the
20 Deputy estimated as 300 feet. He concedes he did not measure it.
21 And he also indicated that he had no knowledge of where the
22 Respondent had commenced his take-off, so he had no estimate as to
23 any distance traveled. Again, this was only estimates.

24 Mr. Schuchbauer, who is with the Federal Aviation
25 Administration, testified that he spoke with the Respondent in

1 telephone conversations and there is a record of the telephone
2 conversation. And, again, I attach weight to this because they're
3 contemporaneous, October 30th, the very next day. And in the
4 testimony from this witness and in Exhibit A-5, which is the
5 memorandum of the phone conversation, it is indicated he, being
6 the Respondent, said there were hangars on both sides. The
7 Respondent said that he hit frequency 122.8 several times to get
8 runway lights activated, but they never came on. He said he hit
9 the switch five times. He, the Respondent, stated he later
10 learned he was supposed to use, or tune to 123.0.

11 Respondent, he, stated he had aligned his aircraft with
12 the hangars, but it turned out they were not aligned with the
13 runway.

14 Again, I attach significant weight to this since this is
15 contemporaneous with the incident itself as to what frequencies
16 were being used.

17 And there's testimony from this witness as to the
18 availability of information to the Respondent. There's a
19 facilities directory which would list all of the information
20 concerning Angwin Airport. There's also frequencies listed on any
21 current VFR sectional chart as to the correct common traffic
22 frequency and what frequency should be used to turn on the lights.
23 So the information is available.

24 The witness also testified with respect to A-6, showing
25 the tire marks through the grass that the aircraft, in fact, had

1 departed the asphalt surface and proceeded over the grass. There
2 are three tire marks and, as the witness indicated, he couldn't
3 tell from where the aircraft actually started on the tarmac
4 because there's no tire marks on the asphalt, only in the grass
5 where the grass is beaten down. But it does show that the
6 aircraft proceeded over the grassy area.

7 A-13 was the response, finally, on December 2nd to a
8 letter of investigation from the FAA, and in that the Respondent
9 now talks about coyotes and that he, in fact, was using frequency
10 123.0, and that later switched to 122.8. Again, this is contrary
11 to the statements that he made on the evening in question to the
12 Deputy Sheriff and also the very next day when he was on the
13 telephone with Mr. Schuchbauer. And also contrary to the sworn
14 testimony of Mr. or Ms. Varney as to the lights being operative,
15 in fact, on the night in question -- the Deputy Sheriff also said
16 the runway lights were on -- and that there's never been any
17 problem. So, in my view, the evidence clearly establishes that if
18 the correct frequency, 123.0, had been used, clicked the requisite
19 five or seven times for intensity, that the runway lights would,
20 in fact, have come on. And that the reason that there were no
21 lights is that the Respondent, in fact, was not using the correct
22 frequency.

23 Exhibits A-7, 8, 9, and 10 were all received. The
24 evidence is that there was a request for production of the
25 logbooks, for an annual, also the pilot logbook to show a biennial

1 flight review.

2 A-12 is a letter of investigation which specifically
3 requests the Respondent to produce evidence of a current and valid
4 biennial flight review. On the evidence here, it has not, in
5 fact, been produced. And on Board precedent, it is the
6 Respondent's responsibility to produce that evidence, not the
7 FAA's. The Respondent is in the best position to know when, where
8 and with whom he took his biennial flight review.

9 The testimony here is that the FAA did, in fact, try to
10 find this flight instructor, whose name was given as "Jim" by the
11 Respondent. And there's no indication that anybody by that name
12 is operating as a Certificated Flight Instructor either in the
13 Marysville or the Auburn community of flight instructors.

14 This witness also pointed out that the statement given
15 by the Respondent on December 2nd is different from his earlier
16 statement, both with respect to the frequencies I've already
17 mentioned and also now that he mentions that his wife's actions of
18 taking the controls was never mentioned either to the Deputy
19 Sheriff or to him -- meaning Mr. Schuchbauer -- in his earlier
20 telephone communications with the Respondent.

21 Lastly, this witness expresses his opinion and it was
22 received as he was an Aviation Safety Inspector. He holds an ATP.
23 He's a Certificated Flight Instructor of 3,000-plus hours. He
24 gives check rides. He's flown in and out of this airport. In his
25 opinion, a reasonable and prudent pilot would not have acted to

1 take off this aircraft at the time and place that the Respondent
2 elected to do. There was no -- according to his opinion, there
3 was not a proper preflight. There was, apparently, a failure to
4 ascertain the correct frequency, which was available, as I've
5 indicated, either on sectional charts or in a facilities
6 directory, or, frankly, you can call it up on the internet through
7 DUWATTS or through other entities that supply information, such as
8 Skyvector.com. These are all available. You can print the charts
9 out free.

10 Looking at Exhibit A-1, it appears that from this that
11 the take-off commenced from the ramp area. It didn't even
12 commence from the extension of the runway. Respondent attempted
13 this take-off, according to the flight path depicted on A-1, when
14 he was never aligned on a runway, in the dark. If there were
15 coyotes down at the other end -- if I accept that -- then the
16 take-off shouldn't have been attempted without ascertaining the
17 coyotes were not there or, as Mr. Schuchbauer testified, you could
18 possibly do a short-field take-off or an obstacle clearance take-
19 off and get off the ground and get some altitude and gain as much
20 altitude as possible; fly VX or VY, whatever one you want to pick,
21 and get off the ground.

22 But to take off in the dark -- and everybody has said it
23 was dark -- I think Mr. Schuchbauer, you know, testified it was
24 almost like a black hole. I think I would have to agree with the
25 testimony, that on the basis of the incident itself, and not even

1 getting aligned with the runway, and electing to take off without
2 having done the proper preflight with respect to the facilities,
3 not the preflight of the airplane, itself, that, in fact, there
4 was a reckless operation. And it potentially endangered the life
5 and property of others and it endangered the life of his wife, who
6 was in the airplane. It was lucky that the tank, it didn't
7 rupture -- it hit that boulder -- there could have been a
8 catastrophic fire. Also, the damage for the persons or property
9 that would have been in the vicinity of the aircraft where it
10 finally came to rest. So I do find that the evidence does support
11 the testimony that this was, in fact, a reckless operation since
12 it was deliberately attempted.

13 I find, therefore, that the evidence by a preponderance
14 of the evidence does establish the allegations in paragraphs 3, 4,
15 5, 6, and 7 of the Complaint. They are supported by the Exhibits
16 and the testimony of Deputy Sheriff, Mr. Schuchbauer, and by Chief
17 Browne.

18 With respect to the production of the documentation,
19 there have been reasonable requests made and there is a reasonable
20 basis for the request. The Respondent has failed to produce the
21 requested information, as he is required to do under the
22 regulations.

23 I, therefore, must find and conclude that the Respondent
24 did operate in regulatory violation of Section 91.103, in that he
25 did not become familiar with all of the available information,

1 that is, concerning the lights; that he operated in violation of
2 Section 61.51(f)(1)(i), since he has not produced his record for
3 inspection upon a reasonable request by the Administrator, that
4 is, his logbook.

5 He also has not produced, as required under Section
6 61.56(c), evidence that he has completed a biennial flight review,
7 that is, one hour of ground school and one hour of flight, and
8 that he was current under a BFR at the time of this incident. And
9 the request, again, is a reasonably-based and a reasonable
10 request.

11 And that he is not in compliance with Section 91.417(c),
12 in that he has not made available maintenance records. A
13 certificated mechanic is required to make record entries in the
14 maintenance records of a particular aircraft. And it's the
15 mechanic who as a certificated holder of an A&P Certificate is
16 also required to keep his own records of the work done, so he can
17 establish what he's done. None of these records have been made
18 available on the evidence in front of me.

19 Lastly, I find that the Respondent did operate in a
20 reckless manner, so as to at least potentially endanger life or
21 property of others and that there's a reasonable nexus between
22 them. And I also find that as required by Statute, deference is
23 to be shown to the choice of sanction by the Administrator,
24 absence a showing that the choice is either arbitrary, capricious,
25 or not in accord with precedent. That is a burden on the

1 Respondent to show. That has not been demonstrated here. And
2 considering the nature of the event and the violations that I
3 find, the 180 days is an appropriate sanction to satisfy the
4 public interest in air safety and to act as a deterrent.

5 That is my view of the evidence. However, there is also
6 a motion for a directed verdict in the absence of any affirmative
7 defense to contradict the prima facie case, which I have already
8 discussed. Therefore, I will grant the motion for a directed
9 verdict on the part of the Complainant.

10

11

12

ORDER

13

14

15

16

17

18

19

20

21

22

23

24

25

This matter came on for a hearing on December 1, 2010,
in San Francisco, California. The Complainant was represented by
his Counsel, Lindsay Nakamura, Esquire, and Naomi Tsuda, Esquire,
Counsel from the Federal Aviation Administration, Western Pacific
Region. The Respondent elected to represent himself and was
present at all times.

As discussed elsewhere in this record, and I incorporate
it herein by reference, the Complainant presented a prima facie
case, which has not been rebutted in any extent. The prima facie
case is well-supported by the documentary evidence and the
testimony of credible witnesses. I, therefore, find that at this
juncture the motion for a directed verdict is appropriate and
should be and will be granted.

1 The motion for directed verdict is, and the same hereby,
2 is granted. The Order of Suspension, the Complaint herein, is,
3 therefore, accordingly affirmed as issued and the Respondent's
4 Private Pilot Certificate ordered suspended for 180 days.

5 Entered this 1st day of December, 2010, in San
6 Francisco, California.

7

8

9 EDITED ON
10 December 10, 2010

PATRICK G. GERAGHTY
Administrative Law Judge