

SERVED: September 30, 2013

NTSB Order No. EA-5679

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 27th day of September, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-19269
)	
DAVID S. HAEG,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent, who proceeds *pro se*, appeals the oral initial decision Administrative Law Judge William R. Mullins issued on January 30, 2013.¹ By that decision, the law judge ordered a 40-day suspension of respondent’s commercial pilot certificate, based on respondent’s alleged

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

violation of 14 C.F.R. §§ 91.119(c)² and 91.13(a).³ We deny respondent's appeal.

A. *Facts*

Respondent owns and operates a Piper P-18 Super Cub, which he utilizes for personal trips and for his Alaskan hunting guide business. On May 29, 2011, respondent and his wife, Jackie Haeg, took off from the airstrip on their property near Browns Lake, Alaska, for a leisure trip in the area of Homer, Ninilchik, Anchor Point, and Seldovia, Alaska. The weather on May 29, 2011 was favorable to flying, and the beach at Anchor Point, which is in Cook Inlet and popular with fishermen, was crowded, given the good weather and the fact that May 29 was the Sunday of Memorial Day weekend. Respondent and his wife "did some touch and go's" on the beach not far from Homer.⁴ They landed near Halibut Cove to pick up seashells, and then returned to the aircraft to proceed to Seldovia, where they landed at the Seldovia airport and walked around Seldovia. After 1:30 pm, they proceeded in the aircraft to Anchor Point, where a "boat launch" is located to tow boats into the water from the beach.

On March 2, 2012, the Administrator issued an order suspending respondent's commercial pilot certificate for a period of 75 days. The Administrator charged respondent with

² Section 91.119 provides as follows:

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

...

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

³ Section 91.13(a) prohibits careless or reckless aircraft operations so as to endanger the life or property of another.

⁴ Tr. 213 (testimony of Jackie Haeg).

violations of §§ 91.13(a) and 91.119(b)⁵ and (c), based on respondent's alleged low-flight over people and property at Anchor Point. The case proceeded to hearing before the law judge on January 29 and 30, 2013.

Alicia and Justin Clark were the owners of the boat launch located at Anchor Point. Prior to the January 2013 hearing for this case, they testified via video deposition that, on May 29, 2011, respondent flew less than 50 feet above the temporary office structure for their boat launch business. Both Mr. and Mrs. Clark stated they were concerned when the aircraft flew over them, because it was so low. They provided detailed testimony concerning their recollections of how crowded the beach at Anchor Point was on May 29, 2011, and how it was one of the busiest days of the year for their business. Mrs. Clark described respondent's aircraft as white, with dark red or maroon stripes.

Kasey Mayhew, an enforcement officer with the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Services, Office for Law Enforcement, corroborated the Clarks' testimonies concerning the extremely low flight over the beach and the boat launch. Mrs. Clark stated, at the time the aircraft flew low over the boat launch building, she was talking to Officer Mayhew. Officer Mayhew, who previously served as a "calvary scout," in the United States Army, for which he underwent reconnaissance training and specialized courses in identifying aircraft,⁶ worked for the state of Alaska's Department of Public Safety, and then took a job with NOAA. Officer Mayhew was at Anchor Point on May 29, 2011, to ensure fishermen who were fishing for halibut had the proper licenses and were abiding by the

⁵ Section 91.119(b) prohibits operation of an aircraft "[o]ver any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft." The law judge did not find a violation of § 91.119(b), and the Administrator did not appeal this determination.

⁶ Tr. 84-85.

applicable Federal regulations.⁷ Officer Mayhew testified with a great deal of specificity concerning the events occurring on May 29, 2011. He arrived at the boat launch around 12:00 pm to 12:30 pm, and the tide was approximately 16 to 17 feet. Officer Mayhew heard respondent's aircraft before he saw it, at 1:35 pm, and observed the aircraft fly at an altitude approximately 25 feet above the beach. Officer Mayhew provided detailed testimony of his observations, stating as follows:

But as it was coming over the shed I had started watching for the tail number and was gauging it and traveling at, you know, 70 miles an hour, I'm just guessing, trying to, you know, stay with it to identify the number on it, and it was pretty big, pretty bold, and was able to pick up that it looked to appear to be, you know, either your Super Cub or your Piper. It had four distinct 1-inch lines in red marking and I was able to depict -- it was so big that I was able to depict that there was an S on the end and a 5 prior to it, as well as, you know, the entire N number being N2025S as in Sierra. And that was probably only about 10 feet above this structure here, the Anchor Point structure.⁸

Later in his testimony, Officer Mayhew stated he was "absolutely 100 percent" confident the registration number on the aircraft was N2025S, because as soon as he saw the aircraft fly by, he wrote down the number in his notebook.⁹ Officer Mayhew then obtained a phone book from Mr. Clark and called the FAA to report the low flight. Officer Mayhew also described the size of the registration number painted on the aircraft, and, on cross-examination, provided a detailed description of the aircraft's appearance.¹⁰

⁷ Officer Mayhew testified halibut is a type of species the Federal government regulates, and NOAA enforces the applicable regulations concerning fishing for halibut. Tr. 81.

⁸ Tr. 103.

⁹ Tr. 106-107.

¹⁰ Tr. 132-33. Officer Mayhew stated as follows:

In the report it states that I had -- I believe it had red horizontal trim on the side of the plane with a big line near the nose. It was approximately 1 foot tall. As the trim passed the nose section it broke into four evenly spaced lines, still only a foot

Respondent, in rebuttal to the Administrator's case, testified he flew over Anchor Point, but did not fly too low. Respondent asserted that the Clarks and Officer Mayhew must have mistook his aircraft for another in the area on May 29, 2011. In support of this theory, respondent called as witnesses Vincent Staregowski, Jr., who spends "almost every weekend" at Anchor Point each summer fishing,¹¹ and Mitch Wyatt, a student who worked at the Anchor Point boat launch during the summer of 2011. Both Messrs. Staregowski and Wyatt stated they observed an aircraft on May 29, 2011, but that it did not fly at a low altitude over Anchor Point. Mr. Wyatt recalled a red aircraft landing nearby, but did not confirm the date.¹² Mr. Wyatt also described his work schedule at the boat launch as consisting of long days, beginning at 4:00 am and ending around 10:00 pm, during which he occasionally napped in his car. Mr. Staregowski recalled seeing an aircraft on May 29, 2011, but stated the aircraft was too far away for him to confirm the color or provide a description. Neither Mr. Wyatt nor Mr. Staregowski could confirm the time they saw the aircraft they described.

Similarly, respondent provided the deposition testimony of Kirk Cortez, which respondent read into the record at the hearing. Mr. Cortez also worked at the Anchor Point boat launch on May 29, 2011, and did not recall seeing any low-flying aircraft over Anchor Point that day. Mr. Cortez saw an aircraft parked at the campground nearby, but did not see it land on the

(..continued)

tall, going to the end of the aircraft near the tail of the craft. There was a space within the horizontal red trim where the N2025-Sierra was painted in the same color of red as the trim on the side of the plane.

Tr. 132.

¹¹ Tr. 55.

¹² Tr. 32; see also tr. 34 (stating, "I know for sure on May -- on the 29th that I did see that plane fly over the shoreline, but I don't know about -- I don't remember any other plane for sure that day. I possibly could have seen that other plane land that day, but I don't remember.").

beach. He described the aircraft as “mostly red with white accents and white numbers” with “bigger tires.”¹³

Mrs. Haeg testified respondent did not fly at a low altitude over Anchor Point. Mrs. Haeg speculated they flew over Anchor Point between 1:30 pm and 2:30 pm, and she saw an aircraft parked on the beach. Mrs. Haeg distinguished her description of respondent’s Super Cub from the description Officer Mayhew provided, as follows:

Our plane is – it’s got – it’s red. It -- I mean it’s red and white, but it has a big red stripe down the – it’s more solid red and the top part of the tail is red. And when - - if you were to bank, the wings are white on top, but the tail is red. So you would see that and then the nose of the plane is painted black. So when you tilt like that you would have been a black nose, white wings, and then the red back end of the tail and the -- both the flaps are red also. So that would have all been red.¹⁴

In questioning Mrs. Haeg, respondent also emphasized FAA inspector Robert Griffin, an aviation safety inspector at the Anchorage Flight Standards District Office (FSDO), did not contact her for an interview when investigating the allegations.¹⁵

Respondent, who also testified, stated he did not fly too low over Anchor Point. Respondent admitted he flew the aircraft low, but not at the busy points. Respondent described this portion of the flight as follows: “[w]hen we got there, descended down and just started, you know, bee bopping along the beach again. Got to Anchor Point.”¹⁶ Respondent further stated:

[A]t the major points, like Anchor Point, Deep Creek, Ninilchik and Kasilof River, there we went farther out over the water and got higher than what we’d

¹³ Tr. 190-91.

¹⁴ Tr. 234.

¹⁵ Respondent called Inspector Griffin as a witness to question him about his investigation into the allegations, but the testimony was brief, given the limitations of permissible testimony consistent with the Federal Rules of Evidence, and the law judge’s instruction to respondent that respondent could obtain the same information directly from Mrs. Haeg.

¹⁶ Tr. 242.

normally do for a single person or whatever, and we would stay out there until there was no, you know, no further signs of activity.¹⁷

Near Anchor Point, respondent recalled he heard a female pilot on the radio “announcing her intentions of landing and taking off at the Anchor Point beach.”¹⁸ Respondent did not elaborate on this recollection, and did not state he saw an aircraft parked on the beach. Respondent recalled, while they were over Anchor Point beach, Mrs. Haeg pointed out a trooper vehicle driving on the beach. Respondent introduced a brochure from his business into evidence, which contains two small photographs of N202S5.¹⁹ Both photographs show a white aircraft with two red stripes and registration number N202S5, painted in red. Respondent concluded his testimony with the recollection that he flew “very close to 2,000 feet from the beach at Anchor Point.”²⁰

B. Law Judge’s Oral Initial Decision

At the conclusion of the hearing on January 30, 2013, the law judge issued an oral initial decision, in which he found respondent violated 14 C.F.R. §§ 91.119(c) and 91.13(a). As a result, the law judge suspended respondent’s commercial pilot certificate for 40 days.²¹ After a detailed discussion of his factual findings based upon a review of the evidence, the law judge made credibility determinations adverse to respondent and his witnesses. Specific to the

¹⁷ Id.

¹⁸ Id.

¹⁹ Exh. R-11. The brochure also contains photographs of other aircraft, but only two photographs show the registration number N202S5. Id. at 8, 10.

²⁰ Tr. 253.

²¹ The Administrator did not appeal the law judge’s determination that the Administrator failed to prove a violation of § 91.119(b), nor did the Administrator appeal the law judge’s reduction in sanction.

witnesses' credibility, the law judge stated, "the testimony of the Clarks and Officer Mayhew was simply more credible than that of the Haegs."²² The law judge stated respondent and Mrs. Haeg had an interest in the outcome of the case; conversely, he found the Clarks and Officer Mayhew did not have a motive to provide inaccurate testimony. Based on these credibility determinations, the law judge found the Administrator established by a preponderance of the evidence that respondent violated § 91.119(c) by operating his aircraft less than 500 feet from a person, vehicle or structure. The law judge indicated this violation occurred when the aircraft flew over the Clarks' boat launch building. Based on his determination that respondent violated § 91.119(c), the law judge found respondent acted in a careless and reckless manner, in violation of § 91.13(a).

C. Respondent's Issues on Appeal

Respondent appealed the law judge's decision, and raises numerous issues. Respondent argues he was not afforded his constitutional right to examine, cross-examine, and/or impeach the witnesses for and against him, and was not afforded his constitutional right to admit exhibits in his favor or that would impeach the witnesses against him. In this regard, respondent also contends the law judge erred in applying the Federal Rules of Evidence, which preclude the admission of hearsay testimony and evidence unless an exception applies, to this case, because the Administrator issued the suspension order that is the subject of this case prior to the enactment of the Pilot's Bill of Rights.²³ Respondent also contends the law judge's decision was based on "conflicting evidence and overwhelming evidence to the contrary," and the Administrator engaged in "prosecutorial misconduct." Respondent states he was prevented from

²² Initial Decision at 278.

²³ Pub. L. No. 112-153, 126 Stat. 1159, § 2(a) (2012).

arguing the law and precedent supporting his defense, and the law judge did not proceed in a fair, impartial, and unbiased manner.²⁴

2. *Decision*

While we give deference to our law judge's rulings on certain issues, such as credibility determinations²⁵ or evidentiary rulings,²⁶ we review the case, as a whole, under *de novo* review.²⁷

A. *Evidentiary Rulings*

Consistent with our precedent, we afford our law judges wide latitude in conducting hearings. In this regard, we will only overturn a law judge's evidentiary ruling when the appealing party can show the law judge's ruling amounted to an abuse of discretion, and the ruling resulted in prejudice to the party.²⁸

Respondent contends the law judge erred in not allowing respondent to question Officer Mayhew concerning respondent's telephone calls to Officer Mayhew once respondent discovered Officer Mayhew had contacted the FAA concerning the low flight. Specifically, respondent contends Officer Mayhew called the Alaska state police to report respondent had

²⁴ Respondent also requests oral argument. We decline to hold oral argument under 49 C.F.R. § 821.48(e) for this case, as the parties have fully briefed the issues.

²⁵ See Administrator v. Porco, NTSB Order No. EA-5591 (2011), aff'd Porco v. FAA, 472 Fed. App'x 2 (D.C. Cir. 2012) (per curiam) (reviewing a law judge's credibility findings under an arbitrary and capricious standard of review).

²⁶ See Administrator v. Ledwell, NTSB Order No. EA-5582 (2011) (reviewing a law judge's evidentiary rulings under an abuse of discretion standard of review).

²⁷ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972).

²⁸ See, e.g., Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)); 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); see also Lackey v. FAA, 386 Fed. App'x 689, 2010 WL 2781583 (9th Cir. 2010).

called and threatened him. Respondent's argument concerning the relevancy of this testimony is not persuasive. In general, it appears respondent contends whether respondent threatened Officer Mayhew is relevant to Officer Mayhew's credibility. In an attempt to show this, respondent's appeal brief contains the following text:

Some of the questions I wished to ask while Officer Mayhew was under oath:
 Did I threaten you or your family?
 (If Mayhew answers yes) Your honor, may I admit the tape recording proving this is false?
 (If Mayhew answers no) Your honor, may I admit Exhibit R-1 proving this is false?
 Your honor, will you order the arrest of Officer Mayhew for perjury?²⁹

The law judge did not err in excluding such questions on the basis of relevancy. Whether Officer Mayhew ever told anyone respondent had threatened him is irrelevant to what Officer Mayhew observed on May 29, 2011. In addition, based on the text quoted above, respondent does not identify which answer to the question was correct, but instead appears to believe he could establish Officer Mayhew's untruthfulness, no matter his answer. This is a logical fallacy, because both the hypothetical answers contradict one another.

In addition, we do not find the issue of whether Officer Mayhew reported respondent's phone call helpful to respondent's defense. Respondent did not offer evidence to dispute the Clarks' testimony, which was very specific concerning respondent's low flight on May 29, 2011. Respondent does not deny flying over Anchor Point at the time in question. Respondent also did not offer supporting evidence for his theory that Officer Mayhew and the Clarks mistook another red and white aircraft for his aircraft. Respondent has offered no theory as to how Officer Mayhew correctly identified his aircraft's registration number at the time respondent admits he was flying over Anchor Beach. Respondent does not deny that he and Officer

²⁹ Appeal Br. at 6.

Mayhew are not acquainted, and had never met prior to the investigation into the May 29, 2011 flight.³⁰ We find no evidence that the law judge's evidentiary rulings prejudiced respondent, because they do not alter the conclusion that respondent violated §§ 91.119(c) and 91.13(a).

Similarly, in his appeal brief, respondent asserts the law judge erred in not admitting into evidence transcriptions of telephone calls respondent placed to the Clarks. Respondent's brief includes portions of such transcriptions. Respondent contends the Clarks incorrectly stated respondent did not identify himself in the telephone calls, that his transcriptions prove he did state his name, and are therefore relevant to the credibility of the Clarks' testimonies. Once again, we do not find the law judge erred, because the transcriptions do not serve to disprove the Clarks' testimonies concerning their observance of the low-flying aircraft on May 29, 2011.

In addition, we do not find the law judge erred in excluding the hearsay testimony respondent attempted to introduce at the hearing. The law judge was correct in applying the Federal Rules of Evidence to the proceeding, as the applicability of the Federal Rules to all NTSB appeals cases began on August 3, 2012. On August 7, 2012, NTSB Chief Administrative Law Judge Alfonso J. Montañó issued an order applicable to all pending cases, which explained the significance of the Pilot's Bill of Rights and stated the NTSB would begin applying the provisions of the new statute immediately. The Chief Judge's order specifically stated the Federal Rules of Evidence would be applicable to all NTSB appeals cases, and said, "[t]his will substantively affect both how evidence can be presented by the parties and admitted into the record by this office's judges." Respondent's contention that the Pilot's Bill of Rights should not apply to the case at hand is not persuasive, given the statute's enactment date of August 3, 2012, the Chief Judge's order dated August 7, 2012, and the NTSB's issuance of an immediately

³⁰ Tr. 123-24.

effective interim final rule altering provisions of 49 C.F.R. part 821 to make the Board's Rules of Practice consistent with the requirements of the Pilot's Bill of Rights.³¹ The hearing in the case *sub judice* occurred January 29 and 30, 2013. Respondent's expectation that the law judge would not apply the requirements of the Pilot's Bill of Rights to his case almost six months after its enactment is unreasonable, and does not satisfy the standard of showing an abuse of discretion occurred concerning any of the law judge's evidentiary rulings.

B. Evidence Establishing Respondent's Violations

Respondent contends the law judge's decision was contrary to evidence in the record. In his appeal brief, respondent argues Officer Mayhew's description of the paint scheme on N202S5 is inaccurate. Respondent contends Officer Mayhew described the aircraft as having four red stripes, when it only has one. Respondent further argues Officer Mayhew incorrectly described the aircraft as having a white top; respondent states the top of the aircraft is red. Respondent relies on his wife's testimony, in which she described the aircraft as mostly red. In addition, respondent argues the Clarks incorrectly described respondent's aircraft as maroon and white, rather than red and white.

Exhibit R-11, which is respondent's brochure promoting his business, includes two photographs of N202S5. Both photographs depict the aircraft from the side view. The aircraft has a long stripe, which its registration number interrupts midway through the extension of the stripe. The aircraft's top may be completely red, but from the side view, the top of the aircraft appears to have a larger red stripe. In addition, at the rear of the aircraft, the top of the horizontal stabilizers and elevators are painted red. A person observing the aircraft while it is moving, rather than viewing a photograph of it, might describe it as having four stripes.

³¹ 77 Fed. Reg. 63242 (Oct. 16, 2012).

Furthermore, we defer to the credibility findings of our law judges in the absence of a showing such findings are arbitrary and capricious.³² The law judge's resolution of the issues in this case required him to assess the credibility of the witnesses, and the law judge made credibility findings adverse to respondent and his witnesses. We find the law judge's credibility determinations in this case were not arbitrary and capricious. The law judge summarized the evidence both parties submitted, and determined respondent's interest in the outcome of the case reduced his credibility compared to that of the other witnesses.

The uncontroverted facts in the record support this finding. For example, in his appeal brief, respondent theorizes Officer Mayhew saw his aircraft from afar and recorded its registration number, and then saw another red and white aircraft that flew too low, and assumed the aircraft was respondent's. Officer Mayhew, however, testified N202S5 was the only aircraft he saw near Anchor Point on May 29, 2011.³³ In addition, respondent has not provided any evidence in support of this theory. None of respondent's witnesses—Messrs. Wyatt, Staregowski, and Cortez—testified they observed an aircraft flying low over Anchor Point.³⁴ Therefore, the theory that Officer Mayhew must have mistaken another red and white aircraft for respondent's is unsupported.

In addition, respondent attempts to impeach the credibility of the Clarks' testimonies by asserting none of the Clarks' employees recalled hearing the Clarks discuss a low-flying aircraft.

³² Administrator v. Porco, NTSB Order No. EA-5591 at 20 (2011); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

³³ Tr. 128-29.

³⁴ Although respondent called Mr. Staregowski to testify at the hearing, respondent's appeal brief includes a paragraph in which he impeaches Mr. Staregowski's testimony. Respondent argues Mr. Staregowski originally told the FAA he had not seen an aircraft over Anchor Point on May 29, 2011, but then testified he did see a red and white aircraft, and that it did not fly too low. Appeal Br. at 15.

Respondent does not deny, however, that May 29, 2011 was one of the busiest days of the year for the Anchor Point boat launch, and when the Clarks' employees were not transporting boats into Cook Inlet, they were likely taking naps in their cars. Respondent also contends Mrs. Clark's testimony contradicted the testimonies of Mr. Clark and Officer Mayhew, because Mrs. Clark stated the aircraft flew once overhead, very low, and then flew in a loop around Cook Inlet. Officer Mayhew and Mr. Clark, however, did not describe such a loop. This testimony can be reconciled, because Officer Mayhew immediately proceeded to the boat launch business building, to obtain a phone book from Mr. Clark.³⁵ Overall, respondent has not persuaded us that the law judge's decision was contrary to the evidence in the record.

C. Prosecutorial Misconduct

Respondent contends the Administrator engaged in "prosecutorial misconduct." In this regard, respondent focuses on the conduct of Inspector Griffin in investigating the events of respondent's May 29, 2011 flight. Respondent takes issue with the fact that Inspector Griffin did not interview respondent's wife in his investigation, nor did Inspector Griffin contact Messrs. Wyatt and Cortez. Respondent also alleges the Administrator destroyed radio communications respondent had with the FAA flight service station in Homer and on the Seldovia Common Traffic Advisory Frequency. Respondent stated he discovered the FAA destroys such communications after 15 days, and because respondent did not discover the Administrator was investigating a case against him until "nearly a month" after May 29, 2011, he could not present recordings of the communications in his defense.

At the outset, we note we do not review the Administrator's decisions in determining

³⁵ Tr. 114.

how to investigate or pursue charges against a respondent.³⁶ Inspector Griffin's decision not to interview Mrs. Haeg, Mr. Wyatt, or Mr. Cortez was within the Administrator's discretion regarding how to complete the investigation. The Board does not direct the Administrator concerning which witnesses to interview. If a party believes a witness's testimony would be probative or helpful, the party should pursue such testimony in discovery and call the witness to testify, as respondent did in this case.

Respondent's argument concerning the destroyed communications at Homer and Seldovia is also not persuasive. First, respondent does not state how discovery of the communications would disprove his low flight over Anchor Point. Respondent and his wife both testified they were flying in the vicinity of Homer, Seldovia, and Anchor Point for a lengthy period of time on May 29, 2011. Therefore, we acknowledge radio communications likely existed at the Homer flight service station, as well as in Seldovia. The existence of such communications, however, does not invalidate or contradict the probative eyewitness testimony the Administrator provided at the hearing, establishing respondent's low flight over Anchor Point. In addition, respondent fails to show how the destruction of the communications, which occurred on a pre-established schedule, was intended to prevent respondent from proving a defense.

Respondent raises several other arguments in an attempt to show Inspector Griffin mishandled the case. None of these arguments, however, serve to invalidate or dispute the testimony of the Clarks and Officer Mayhew.³⁷

³⁶ Administrator v. McCullough, NTSB Order No. EA-4592 (1997); Administrator v. Nixon, EA-4249 (1994); Administrator v. Hunt, 5 NTSB 2314 (1987).

³⁷ Respondent contends Inspector Griffin was dishonest in stating respondent did not inform him that respondent had seen an aircraft parked on the beach at the time of respondent's flight. Respondent, however, argues he played a tape recording of his conversation with

D. Law Judge's Conduct at the Hearing

Respondent asserts the law judge did not allow him to present “the law,” in the form of citations to previous Board cases, at the hearing. Specifically, respondent refers to the following dialogue:

Law Judge: What would Homer Flight Service Station have on their recordings that would assist you in your case?

Respondent: The times that we were flying, our locations, what we were doing. I've read --

Law Judge: There's been no evidence that you ever contacted any flight service station.

Respondent: Okay. Well, that's because we haven't testified yet and I guess that's part of the problem. And I --

Law Judge: Okay.

Respondent: -- I apologize for that.

Law Judge: Okay.

Respondent: And I guess, you know, just part of it was I read a case that I think I gave to the Court to use as precedence in this and it was important that there was communication with -- or they refused to communicate with --

Law Judge: You never gave me a case.

Respondent: Well, I did the prior judge, so. I -- and I -- and maybe I was wrong. Am I supposed to reissue that to you when you took over the case?

Law Judge: Yep.

Respondent: Well, I messed up there.

Law Judge: Well, but, you know, that's something for closing argument. That's not --

Respondent: Okay.³⁸

The law judge did not refuse to consider prior Board cases regarding a respondent's contact with a flight service station, and what such contact might prove. Respondent did not

(..continued)

Inspector Griffin, who later told respondent he did not know “how this could be.” Appeal Br. at 19-20. Like the other arguments respondent presents concerning the alleged “prosecutorial misconduct,” this argument is not persuasive, because Inspector Griffin was not integral to the outcome of the case. Similarly, respondent contends FAA staff ignored or changed Mr. Staregowski's testimony, because they told respondent Mr. Staregowski had not seen any aircraft on May 29, 2011; at the hearing, however, Mr. Staregowski testified he saw an aircraft from afar. Respondent has not presented any evidence to prove this assertion.

³⁸ Tr. 181-82.

bring prior Board cases with him to the hearing, and was therefore left to testify on his own behalf that he had contacted a flight service station, and subsequently argue, in his closing argument, how such contact establishes he was not near Anchor Point at 1:35 pm on May 29, 2011. The law judge did not err in explaining this to respondent, nor did he err in expecting respondent to have a copy of the prior Board case that respondent believed was persuasive.

Respondent also contends the law judge was biased because he excluded certain testimony respondent attempted to provide. Respondent includes a lengthy list in his appeal brief of citations to the transcript wherein the law judge determined the testimony respondent sought to present was irrelevant. We carefully have reviewed the transcript and believe the law judge did not err. As mentioned above, respondent sought to inquire about Inspector Griffin's choice to refrain from interviewing Mrs. Haeg and other witnesses. In addition, respondent sought to present evidence concerning respondent's correspondence with Officer Mayhew, and Officer Mayhew's report to the Alaska state police concerning such correspondence. We find the law judge did not err in excluding such evidence as irrelevant.

Moreover, a review of the transcript indicates the law judge attempted to assist respondent concerning the exclusion of hearsay evidence, and how to question a witness at the hearing, because respondent proceeded *pro se*.³⁹ Such assistance contradicts respondent's assertion the law judge was biased.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

³⁹ Tr. 9, 12, 21-22, 152, 157, 162, 171, 226.

2. The law judge's oral initial decision is affirmed; and
3. The 40-day suspension of respondent's commercial pilot certificate is affirmed.

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

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

* * * * *

MICHAEL P. HUERTA,	*	
ADMINISTRATOR,	*	
FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Complainant,	*	
v.	*	DOCKET NO. SE-19269
	*	JUDGE MULLINS
DAVID HAEG,	*	
	*	
Respondent.	*	
	*	

* * * * *

Federal Building and U.S. Courthouse
Grand Jury Courtroom
222 West 7th Avenue, #9
Anchorage, Alaska 99513

Wednesday,
January 30, 2013

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

BEFORE: William R. Mullins
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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10 ORAL INITIAL DECISION AND ORDER

11 ADMINISTRATIVE LAW JUDGE MULLINS: This has been a
12 proceeding before the National Transportation Safety Board held
13 under the provisions of Section 44709 of the Federal Aviation Act
14 as amended, on the appeal of David S. Haeg, who I'll refer to as
15 the Respondent, from an Order of Suspension that seeks to suspend
16 his airman certificate for a period of 75 days.

17 The Order of Suspension serves as the complaint in these
18 proceedings and was filed on behalf of the Administrator of the
19 Federal Aviation Administration through regional counsel of the
20 Alaska Region. This matter has been heard before me, William R.
21 Mullins. I'm an Administrative Law Judge for the National
22 Transportation Safety Board and as is provided by the Board's
23 Rules I will issue a decision at this time.

24 The matter came on for hearing pursuant to notice to the
25 parties and was called for trial on the 29th day of January of

1 Paragraph 1. You hold, and all times mentioned herein,
2 held commercial pilot certificate number (omitted), and Respondent
3 has admitted that.

4 Paragraph 2, on May 29th, 2011, you served as pilot in
5 command of civil aircraft November-2025-Sierra, a Piper PA-18-150
6 airplane (the aircraft) flying from Browns Lake near Sterling
7 Alaska, south to Seldovia, Alaska (the flight).

8 The balance of the paragraphs, 3 through 9, were all
9 denied by the Respondent. Respondent did admit paragraph 2.

10 Paragraph 3. During the flight at approximately 1:35
11 p.m. you flew over the beach at Anchor Point, Alaska.
12 Specifically, you flew directly over the beach, the recreational
13 vehicle campground at the beach, the launch ramp, the launch ramp
14 office building and an adjacent related parking area (collectively
15 Anchor Point beach).

16 Paragraph 4. At the time you flew over Anchor Point
17 beach approximately 300 to 500 people and numerous vehicles were
18 on or in the vicinity of Anchor Point beach.

19 Paragraph 5. In passing over the Anchor Point beach you
20 flew the aircraft less than 500 feet above the ground level.

21 Paragraph 6. In passing over the Anchor Point beach you
22 flew the aircraft within 500 feet of people, vehicles and
23 structures on the ground.

24 Paragraph 7. In passing over the Anchor Point beach you
25 flew the aircraft less than 1,000 feet above the height of the

1 beach's adjacent cliffs and cliffs that were less than 2,000 feet
2 horizontal from the aircraft.

3 Paragraph 8. Your altitude as the aircraft passed over
4 Anchor Point beach was not necessary for purposes of takeoff or
5 landing.

6 Paragraph 9. Your operation of the aircraft as it
7 passed over Anchor Point beach was careless or reckless and
8 endangered the life or property of another.

9 By reason of the foregoing facts and circumstances it
10 appears that you violated the following Federal Aviation
11 Regulations, Title 14, Code of Federal Regulations:

12 (a) Section 91.13(a) in that you operated an aircraft
13 in a careless or reckless manner that endangered the life or
14 property of another.

15 (b) Section 91.119(b) in that you operated an aircraft
16 over an open air assembly of persons at an altitude less than
17 1,000 feet above the highest obstacle within a horizontal radius
18 of 2,000 feet of the aircraft, and Section 91.119(c) in that you
19 operated an aircraft less than 500 feet from a person, vehicle or
20 structure.

21 And based on the foregoing the Administrator has
22 determined that safety in air commerce or air transportation in
23 the public interest require the suspension of your commercial
24 pilot certificate, and it goes on to indicate that that would be
25 75 days.

1 The Administrator had three witnesses and a number of
2 exhibits. I'll mention the exhibits right now and I may or may
3 not refer to them as I talk about the witness testimony. Exhibits
4 69 and 70, which are part -- well, two of the witnesses,
5 Mrs. Alicia Clark and Mr. Justin Clark, testified by video
6 deposition, and A-69 and 70 were Google maps that were attached to
7 and discussed during the testimony of Mrs. Clark's deposition
8 which show and depict the area of Anchor Point beach.

9 Exhibit A-67 is an e-mail and was generated, I think,
10 from the FAA to the Clarks, and A-56 was a letter that both of the
11 Clarks authored and sent to the FAA concerning this incident.

12 A-71 and A-72 were exhibits that were admitted and they
13 were a Google map of Anchor Point beach that were attached to
14 Mr. Clark's deposition.

15 A-73 and A-74 were charts, hang-up charts on a display
16 here in the courtroom and on those charts Officer Mayhew made some
17 indications.

18 Also the Administrator offered photographs A-2, 3, 4, 6,
19 7, 9, 13, 20, 21, 34, 35 and 41, all color photographs that were
20 made on or about July -- some date in July 6 weeks or so after the
21 incident. But it was a clear day and it shows the Anchor Point
22 Enterprises hut where the Clarks operated their business of a boat
23 launch business there at Anchor Point beach. And then these other
24 photographs are of that beach area.

25 Exhibit A-1 was the report of Officer Mayhew that he

1 prepared and submitted to the FAA.

2 There were three Joint exhibits: 1 and 2 were the
3 written copies of the depositions which were videotaped and
4 presented here in the courtroom by videotape of Mrs. Alicia Clark
5 and Mr. Justin Clark; and J-3 was a DVD of both of those video
6 depositions.

7 Respondent had two exhibits. R-4 were some 12 aerial
8 photographs that he and his wife made from their aircraft exactly
9 1 year after the date of this incident on the Sunday of Memorial
10 Day weekend of 2012, and some of the witnesses have talked about
11 some of those pictures.

12 And R-11 was admitted and is a brochure of the
13 Respondent's business, which includes some photographs of the
14 aircraft in question.

15 The first witness called by the Administrator was
16 Ms. Alicia Clark by video deposition and she testified that the
17 Sunday of Memorial Day weekend, which was May 29th, 2011, was
18 probably the busiest day that they'd had in the 3 years that they
19 had operated their business. She testified that she thought there
20 were 300 people within sight of the boat launch facility. She
21 testified that this aircraft went over -- that she was in the
22 parking lot. She wasn't in the building. She was in the parking
23 lot talking to Officer Mayhew and the aircraft went over.

24 She said it was a taildragger, had the little wheel in
25 the back and the two main wheels up under the wings, and it was

1 white with a red stripe. She said the aircraft came from the
2 north going south and was 15 to 20 feet above the ground and just
3 a few feet above the building. And the building as depicted in
4 the photograph of A-2 shows the antenna, and she said the aircraft
5 was, I think, 5 feet or so above that antenna. She said in the 10
6 years that she'd been coming to the beach and the 3 years that
7 they had been operating this business, that she had never seen an
8 aircraft come that close to the building or to that area. She did
9 not see a tail number of the aircraft.

10 And generally I would say that that's not unusual.
11 Unless someone has an aviation background or is looking for a
12 specific aircraft number, if an airplane came over that low
13 it's -- I think it was interesting that she even noticed that it
14 was a taildragger -- she did notice it was a taildragger but she
15 did not get the November number.

16 The second witness called by the Administrator, and this
17 is not -- the Respondent had a couple of witnesses out of time,
18 but I'll talk about those witnesses when I come to Respondent's
19 case in chief. But the second witness was Mr. Justin Clark and he
20 testified that this aircraft came right over the top of their
21 little building there, said he cleared it by about 10 feet and
22 that he was some 60 feet away from the building, that he ran this
23 boat launch business -- let me digress.

24 Mrs. Clark testified that after this aircraft came over
25 she watched it and then it made a turn back to the north and then

1 turned back to the south and then came down over the beach real
2 low over the boat ramp -- I mean over the boat ramp launching area
3 and over the boat trailers that were sitting out there. But
4 again, she did not get a tail number, but she said she watched
5 this aircraft go all the way around.

6 Mr. Clark said that he was 60 feet away from the
7 building when he saw the aircraft. He had never seen an aircraft
8 that low before. He also testified that it was white with a red
9 stripe, but he did not see it go around. He said immediately
10 after he finished -- after he saw it, he went back to launching
11 the boats and this business he was involved in. And he did
12 testify that this was the second busiest day that they'd had in
13 3 years and was particularly busy at that time of day because of
14 boats launching or recovering or whatever.

15 The third witness called was Officer Mayhew who's an
16 officer with the National Oceanographic and Atmospheric
17 Administration. He was at the beach that day to -- apparently
18 part of their responsibilities is checking halibut fishing because
19 halibut fishing is governed federally and as a federal official he
20 was there doing his job.

21 He testified that he arrived there between 12:00 and
22 12:30, that he saw the aircraft go over the house at 1:35, and he
23 testified that he believed that when the aircraft went over the
24 house that the wing, and I assume that would be the left wing, was
25 over the house, but the fuselage was immediately on the west side

1 of the house over the grassy area, which also was depicted in
2 Exhibit A-02, A-2.

3 He said he had his notebook in hand. He saw clearly the
4 aircraft November number. He wrote it down in his notebook and
5 the aircraft November number was N2025S, Sierra, which is the
6 aircraft registered to the Respondent, Mr. Haeg. He did testify
7 that he did not see the aircraft do a loop and return, that
8 immediately upon seeing the aircraft he went inside and started
9 looking -- well, I think Mrs. Clark testified that she provided
10 him a phonebook. When he got the phonebook, looked up the FAA,
11 called the FAA, was told that someone would call him back and they
12 did. And then he testified that he wrote the report which is in
13 Exhibit A-1.

14 He did testify about some of the pictures there and his
15 testimony was and I think -- and this was critical for me. He
16 testified on Exhibit A-13, which shows this marshy grassy area to
17 the north of the boat launch parking lot and it shows this camping
18 area that he said the aircraft came right over the camping area
19 and proceeded toward him and then went over the building, which
20 would have been on the left looking from this picture.

21 Those were the witnesses offered by the Administrator.

22 Respondent had two witnesses called out of time. The
23 first was Mr. Mitch Wyatt and he testified -- and I'm not sure, I
24 -- and I'll talk about these three people that were called to
25 testify that were there that day on the beach. But Mr. Wyatt was

1 working for the Clarks and their business, boat launch business.
2 I think he was a -- I don't know, I've forgotten the name that
3 they called him, but water boy or something like that. But he
4 testified that he did 17-hour shifts, came to work at 4 a.m. and
5 got off at 8 or 9 or something that evening, long days.

6 He said that through the day from time to time the guys
7 that were working there would go out to their cars and take naps.
8 He testified that he probably did that once or twice that day. He
9 didn't think it was for more than just a few minutes. But he
10 never saw an aircraft go over the building. He did see -- said he
11 saw one aircraft go by at what he determined was usual altitude.
12 And he also testified that he didn't see any law enforcement
13 people that day, but he did testify on cross-examination by
14 Mr. Black that the aircraft that he did see only had one person on
15 board.

16 The second witness called out of time was -- and
17 Mr. Wyatt was called by telephone. He's going to school down in
18 the lower 48 somewhere.

19 The second witness was Mr. Vincent Staregowski, and
20 interestingly, and there was never any questioning about this, but
21 he was identified in Officer Mayhew's report as a Vincent Francis
22 and Officer Mayhew testified that that was the name that was on
23 his fishing license. And I never did understand how that all
24 transpired. But in any event, he has a summer home or residence
25 in the area of Anchor Point and he was down there that day. He

1 talked about -- he didn't remember what time he went out or what
2 time they came back in, but he did remember being checked by this
3 NOAA officer, and that would have been Officer Mayhew, and said
4 all the years that he'd been fishing there that he'd never been
5 checked by a NOAA officer before. And he said when they got back
6 in and had recovered their boat and had gone up to his house,
7 which is somewhere on up the road from the beach where they
8 cleaned the fish, they were discussing the fact that this was a
9 NOAA officer and they'd not ever seen an individual from NOAA on
10 the beach before.

11 But in any event, then he testified that when he was
12 returning from cleaning the fish with these fish guts that they
13 threw out onto the beach or into the water, he saw an aircraft
14 that was going from south to north and he said it was out over the
15 water and he didn't see a tail number. He didn't identify -- I
16 think he did say it was a red airplane. Maybe it was a green one.
17 There was one -- one of the witnesses talked about a green
18 taildragger and another one talked about a red one and I have
19 mixed those up, but that's not important.

20 But in any event, at the time he came back from cleaning
21 the fish he didn't see any aircraft go low over this building. He
22 did testify that there were more people there in 2011 than there
23 were in 2012 and a lot more people in the parking area, but since
24 he didn't see the aircraft go over the building I don't know
25 whether he was talking about people in that parking area when he

1 launched his boat or when he came back from fishing or when he
2 brought the fish guts back down to the beach. That wasn't clear
3 in the testimony, and obviously if he didn't see the aircraft go
4 low over the building it was at different times than when the
5 aircraft went over.

6 And I think certainly that was important to me because
7 he's the only one that identified a number of people in this
8 parking lot. Mrs. Clark said there was 300 people up and down
9 this beach, but this beach is 2 or 3 miles from -- if you look at
10 these pictures, appears to be 2 or 3 miles in length and that's
11 lots of folks up and down -- or, I mean, that's a lot of beach for
12 the Administrator to arrive at a conclusion that it was an open
13 air assemblage of people.

14 Mr. Cortez testified that he saw an aircraft parked on
15 the beach. It was an aircraft that belonged to the boss of one of
16 his buddies, but he didn't know who that person was. And then he
17 also testified that he saw three planes flying over that day, but
18 nothing unusual. Again, he was an employee of the Clarks. He
19 testified that he went out, would take up to an hour and a half
20 naps in his car. Said he didn't take one that long that day, but
21 probably he would have taken a nap that was an hour long.

22 The next witness called by the Respondent -- actually
23 Mr. Griffin was called before Mr. Cortez. But he called Robert
24 Griffin and he wanted to know why the Administrator took 3 weeks
25 to notify him, or I think the testimony he was notified in the

1 third week of June of this thing. And the answer from Mr. Griffin
2 was that he did when he was assigned the case. And then there was
3 -- Mr. Haeg asked some questions about some conversation with
4 Mr. Black, the attorney for the Administrator, and Mr. Griffin.
5 The Administrator had no cross-examination of Mr. Griffin and he
6 was one of the shorter witnesses. And Mr. Griffin did identify
7 himself as the FAA inspector who completed this investigation, but
8 he was not called by the Administrator.

9 Then Mrs. Haeg was the next witness and Mr. Haeg was the
10 last witness and they both testified that they had left their
11 home, and apparently they live up -- I think the estimate was 60
12 miles to the north. But they have their own little airstrip.
13 They took off that morning and they were going down to Homer for
14 lunch and they proceeded past Anchor Point to the south. When
15 they got to Homer they called flight service station to see about
16 landing on the sandbar there and was advised by flight service
17 that they could not land there, that that wasn't available for
18 aircraft landing anymore. Apparently it was in the past.

19 And so they proceeded on somewhere south from Homer
20 across the water there to an area where they landed on the beach
21 and walked around for an hour or so. Then took off, went down and
22 flew over a little native village to the south of Seldovia and
23 returned to Seldovia where they landed and had lunch. They talked
24 about going across the bridge from the airport over to downtown
25 area of Seldovia and people were fishing for king salmon off of

1 that bridge and they could see the salmon down in the water.

2 In any event, after lunch they got back in the aircraft
3 and the testimony was it was around 1:00. And interestingly, that
4 would have put them back over Anchor Point probably about the same
5 time that these witnesses saw, and certainly Officer Mayhew said
6 he saw this aircraft low flight at 1:35 in the afternoon.

7 Mr. Haeg and Mrs. Haeg said they never made the low
8 flight. In fact, Mrs. Haeg talked about that as they came south
9 they had travelled from their home which was at Browns Lake or
10 Browns Point or something like that, straight west over to the
11 beach and then proceeded south some 60 or 80 miles. And the
12 testimony of Mr. Haeg was that they flew along the beach at an
13 extremely low altitude and said all the way up and down there it
14 was like a deserted beach and they could land their aircraft
15 anywhere along there. And he said he, in the past he had landed
16 there and had also done touch and go's.

17 And Mrs. Haeg talked about the fact that every once in a
18 while he would turn the aircraft out over the water and climb and
19 her testimony was she thought he was being anal, but it turned out
20 as he explained it to her, that he was moving out over the water
21 to not fly low over somebody who might have been on the beach or
22 persons and/or vehicles that were along on the beach. But they
23 both testified that they did not do this low flight over the
24 Anchor Point area.

25 Now let me make some -- those are the witnesses and

1 those are the exhibits. Let me make some general comments.
2 First, this case is not about Officer Mayhew's complaint that he
3 may or may not have made to the highway patrol -- I think that was
4 the allegation -- about the phone calls that the Respondent was
5 making to his home after this incident. It has nothing to do with
6 the facts of the case. This case is not about the FAA taking
7 until middle -- third week of June to notify this Respondent about
8 this incident on May 29th, some 3 weeks before. And the case is
9 not about the fact that the FAA didn't interview all 300 people
10 that were on the beach that day. Those are just concerns of the
11 Respondent, but they're not concerns of this Judge and they don't
12 relate at all to the incident that occurred that day, and that was
13 this low flight.

14 Also, it's clear that the three witnesses, and I think
15 they were grouped by Mr. Black in his closing, but Mr. Wyatt,
16 Mr. Cortez and Mr. Staregowski, the aircraft that they said that
17 they saw obviously was not the aircraft that Mr. and Mrs. Clark
18 and Officer Mayhew saw. Or if it was, it wasn't at the time of
19 the incident complained of in this complaint.

20 Officer Mayhew, who is a trained police officer -- and
21 there was also some issue about Respondent was advised that law
22 enforcement folks have more credibility in cases. Well, I -- you
23 know, I think that's standard fare. At the get-go somebody that's
24 trained in vehicle identification, that's trained in measurement
25 of accidents, that's trained in law enforcement, and certainly

1 someone who's standing out there in a law enforcement capacity in
2 uniform with a notebook in hand and sees an airplane go over,
3 they're just going to have more credibility, period. And that's,
4 you know, that's not what this case is about.

5 The FAA is fortunate because if the Clarks had been out
6 there when this happened no one would have gotten a tail number.
7 And I, like I said, I don't think that's unusual, particularly in
8 this area of Alaska, probably any area -- remote area or rural
9 area of Alaska. There's a lot of aircraft up here and I'm not
10 unaware of that. I've been coming up here a number of years
11 hearing cases. So for an aircraft to go low and no one to get the
12 tail number is just not unusual. It would have to be someone
13 either in law enforcement or someone who has an aviation
14 background or an interest in aviation that would be curious enough
15 to take note of this when it happens, because it happens very
16 quickly when an aircraft comes over like that.

17 Officer Mayhew, and I was concerned about his testimony
18 when he started because one of the first comments he made was
19 that's not relevant. Well, there's nothing that'll get the
20 attention of a judge faster than have a witness trying to tell
21 somebody that's asking him questions what they can do or not do.
22 So I immediately took issue with some -- what he was getting ready
23 to testify about and I paid real close attention. I suspect based
24 on that comment that Officer Mayhew hasn't had a lot of
25 opportunity to testify in court and if he has he's never been to a

1 class. It's usually taught by district attorneys' offices and/or
2 other law enforcement officers on how to testify.

3 But he was out there that day doing his job. I think he
4 may have had some anxiety about testifying here because,
5 apparently, from everything I understood about this case, that he
6 did make some complaint to somebody about Respondent calling him
7 at home. But in any event, he was out there that day doing his
8 job. He had the notebook, he saw the aircraft go over this
9 building and the testimony by the three witnesses who saw this
10 aircraft that have testified here said that it was within 10 feet
11 of the building and he wrote down that tail number and it was the
12 Respondent's aircraft.

13 Now the Clarks -- and I sit here and it's rare and it
14 was a nice thing about a video deposition because a judge rarely
15 gets to look at a witness head on when they're testifying. I did
16 get to see the Clarks testifying head on because they were on this
17 large screen over here and I was impressed by their credibility.
18 I mean, these are hardworking folks that are out there doing 17-
19 hour days. They've had this business that they're trying to get
20 going and I don't -- Mr. Clark testified that he did heavy
21 equipment operation in the off season. But those are long days.
22 Those are folks who are out there. They've probably seen a lot of
23 airplanes, but they've never seen one go 10 foot over their
24 building and that got their attention that day. So I thought
25 their testimony was very credible.

1 Now they both testified that when Respondent called them
2 at home to try to -- and I'm not sure what he was trying to do.
3 Certainly their testimony, if he wanted to relate it would have
4 been hearsay. And -- but they were very credible witnesses. They
5 did say that he never identified them. He testified that he did
6 identify himself. Of course, they didn't know him; they said they
7 didn't know him. Officer Mayhew said he didn't know who
8 Mr. or Mrs. Haeg was until after all of this came to light.

9 But in any event, the testimony of the Clarks and
10 Officer Mayhew was simply more credible than that of the Haegs.
11 The Haegs have a dog in this hunt, if you'll share -- let me share
12 an Oklahoma expression with you. But Mr. Haeg has this business.
13 He relies on his aircraft in the business and even though this is
14 just a suspension, which is minor compared to many of the other
15 cases that we've had, he has an interest in the outcome and that
16 diminishes his credibility compared to these folks who have never
17 met him before. So therefore, I find that this was a low flight
18 and it was Respondent and his aircraft that made the low flight.

19 Now let me talk about the allegations. If you look at
20 Exhibit A-13 where Officer Mayhew said this aircraft came over
21 that campground where those campers were. Now Mrs. Clark said
22 that everyone was out on the beach; there was nobody in that
23 campground. There was a lot of vehicles there. That's not an
24 open air assemblage of people.

25 He said this aircraft proceeded from that point straight

1 on down to where this picture was taken, just immediately to the
2 left and went over the building. Mrs. Clark, who never identified
3 the aircraft other than just some color scheme, testified coming
4 back she saw it low over the boat trailers. You know, there's
5 just -- and I'm not satisfied that the Administrator has
6 established by a preponderance of the evidence that this was an
7 open air assemblage of people, one; and two, if it was, why have
8 this dual for one flight, a dual allegation. It seems like the
9 Administrator may have been stacking the allegations. So I don't
10 find that there was shown by a preponderance of the evidence
11 regulatory violation of FAR .119(b) which is the open air
12 assemblage of people.

13 I do find that there was established by a preponderance
14 of the evidence regulatory violation of FAR 91.119(c) in that the
15 aircraft was operated less than 500 feet from a person, vehicle or
16 structure. That's when the aircraft went over that building. And
17 as a residual finding I find that there was shown regulatory
18 violation of FAR 91.13(a), the careless and reckless allegation.

19 Now, based on those findings I find that an appropriate
20 sanction here would be -- oh, let me talk about sanction. There
21 was no evidence presented at all about sanction. The
22 Administrator mentioned briefly in closing argument that the Board
23 is somehow obligated to give deference to their choice of
24 sanction. I think that's an issue that's going to have to --
25 particularly given the recent enactment of this Pilot's Bill of

1 Rights. And I'll say this, this Pilot's Bill of Rights has really
2 seriously impacted this pilot's rights and these proceedings
3 because of the Federal Rules of Evidence. And I think the Pilot's
4 Bill of Rights is a misnomer. I think it's the pilot's lawyer's
5 bill of rights, and I'm comfortable with the Federal Rules of
6 Evidence because I've used them for years in the state courts and
7 in the military courts. But I do believe that there has to be
8 some evidence about sanction. I don't carry a sanction guidance
9 table with me. Counsel has attested that.

10 I do find given that there has not been established to
11 my satisfaction the regulatory violation of FAR .119(b) that the
12 sanction sought should be reduced and I find an appropriate
13 sanction in this case would be one of a 40-day suspension of
14 Respondent's airman certificate and it will be so ordered.

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ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's Order of Suspension as issued. Specifically I find that there was not established by a preponderance of the evidence this open air assemblage and the travel of the aircraft over that.

But I do find that there was established by a preponderance of the evidence the low flight alleged under Section 91.119(c) and that there was a residual violation therein of FAR 91.13(a) and that an appropriate sanction would be a 40-day suspension of Respondent's airman certificate, and it will be so ordered.

EDITED ON
FEBRUARY 20, 2013

WILLIAM R. MULLINS
Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE MULLINS: Now, Mr. Haeg, you have the right to appeal this order today and you may file your Notice of Appeal within 10 days of this date.

MR. HAEG: Okay. And --

ADMINISTRATIVE LAW JUDGE MULLINS: The Notice of Appeal goes to the National Transportation Safety Board, Office of

1 Administrative Law Judges -- I'll give you a copy of this.

2 MR. HAEG: Okay.

3 ADMINISTRATIVE LAW JUDGE MULLINS: Office of
4 Administrative Law Judges, Room 4704, at 490 L'Enfant Plaza East,
5 S.W., Washington, D.C. 20594. If you file your Notice of Appeal
6 within 10 days of this date then the -- then you must file an
7 appeal to perfect -- a brief to perfect that appeal and your brief
8 would have to be filed 50 days from this date. And it goes to
9 that same street address, but it goes to Room 6401, which is the
10 Office of General Counsel of the National Transportation Safety
11 Board.

12 And I would suggest to you, Mr. Haeg, that these times
13 that I've just shared with you are critical and if you file your
14 appeal 11 days from today it will be summarily dismissed by the
15 Board or if you file your brief 51 days from today it'll be
16 summarily dismissed by the Board, so timing is critical.

17 You will be provided -- if you choose to appeal you'll
18 be provided a transcript of these proceedings at no cost to you
19 and you could expect to get that probably 20 to 30 days from now.
20 So it would still give you -- if you wish to appeal and you wish
21 to use this transcript it'll give you plenty of time to review
22 that before this 50 days is up.

23 MR. HAEG: Okay.

24 ADMINISTRATIVE LAW JUDGE MULLINS: But don't miss those
25 times. And I would ask you to come forward and I'd like the

1 record to reflect that I've handed a copy of these rights to
2 appeal to the Respondent. Now, the -- go ahead and have a seat.

3 Now the Administrator has the right to appeal this order
4 today and the Administrator has the same rights that the
5 Respondent has and I can give you a copy of that, although I --

6 MR. BLACK: Not necessary, Your Honor. Thank you.

7 ADMINISTRATIVE LAW JUDGE MULLINS: -- I suspect you have
8 a whole file of those up in your office. But if you'd like a
9 copy.

10 MR. BLACK: No, thank you, Your Honor.

11 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Now Mr. Haeg,
12 do you have any question about the decision?

13 MR. HAEG: I guess not. I'm not satisfied with it and
14 it's -- but --

15 ADMINISTRATIVE LAW JUDGE MULLINS: Well, and I know
16 you're not and I don't blame you.

17 MR. HAEG: Yeah. I mean, I -- can I speak freely or not
18 or --

19 ADMINISTRATIVE LAW JUDGE MULLINS: You can say whatever
20 you'd like.

21 MR. HAEG: I just believe that it seems like law
22 enforcement is given far more credibility and if it's abused that
23 can hurt people to a great extent. And I --

24 ADMINISTRATIVE LAW JUDGE MULLINS: Well --

25 MR. HAEG: Just -- I mean, that's basically it.

1 ADMINISTRATIVE LAW JUDGE MULLINS: -- let me suggest
2 this to you. I -- if someone else had been out there and they
3 said, I saw this airplane and I think that tail number was, you
4 know, I wouldn't have believed him --

5 MR. HAEG: I'm not disputing the tail number.

6 ADMINISTRATIVE LAW JUDGE MULLINS: -- based on what you
7 presented.

8 MR. HAEG: You know, I just --

9 ADMINISTRATIVE LAW JUDGE MULLINS: But he's standing
10 there with a --

11 MR. HAEG: I understand.

12 ADMINISTRATIVE LAW JUDGE MULLINS: -- with the notebook.
13 But let me tell you this. He also has an obligation because he --
14 if he perjured himself he would be -- he wouldn't lose his job for
15 45 days, he would lose his job forever.

16 MR. HAEG: I understand.

17 ADMINISTRATIVE LAW JUDGE MULLINS: And --

18 MR. HAEG: And that's why I wanted to cross-examine him
19 to establish his credibility about what happened and the events
20 afterward and that is what I feel is the most -- you've been kind
21 of a strict judge, I'm just going to come right out, but you've
22 been fair at most times. But when the FAA told me that this thing
23 was going to turn on the credibility of the witnesses and everyone
24 gives law enforcement more credibility than my wife and I, and
25 after what occurred with the troopers and the complaint and that

1 he said I threatened a federal law enforcement officer, and I have
2 the tape recording proving that didn't happen, I'll just be
3 honest, my hackles just went up --

4 ADMINISTRATIVE LAW JUDGE MULLINS: I understand.

5 MR. HAEG: -- and I'm ready to fight. I'm ready to just
6 dig in and say we cannot have law enforcement officials with
7 their --

8 ADMINISTRATIVE LAW JUDGE MULLINS: Well --

9 MR. HAEG: -- guns and badges sitting on the stand
10 testifying falsely. And he didn't testify about the trooper
11 complaint, but there is an actual complaint and I have --

12 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

13 MR. HAEG: So anyway, that's just me.

14 ADMINISTRATIVE LAW JUDGE MULLINS: You have it if you
15 think that I'm wrong about excluding that.

16 MR. HAEG: I know.

17 ADMINISTRATIVE LAW JUDGE MULLINS: And this all took
18 place after this incident.

19 MR. HAEG: I understand.

20 ADMINISTRATIVE LAW JUDGE MULLINS: But if you think I'm
21 wrong you can appeal that to the Board and I would --

22 MR. HAEG: Yeah. I understand.

23 ADMINISTRATIVE LAW JUDGE MULLINS: -- I'd do that.

24 MR. HAEG: I understand.

25 ADMINISTRATIVE LAW JUDGE MULLINS: But let me suggest

1 this to you. You could probably take your certificate and give it
2 to Mr. Black today and they'd take it and you'd have it back in 40
3 days. If you appeal -- and this is not a threat. I'm just
4 telling you how these things work.

5 MR. HAEG: I understand, I understand.

6 ADMINISTRATIVE LAW JUDGE MULLINS: If you appeal and it
7 goes to the Board and he cross appeals and the Board finds in his
8 favor, then right in the middle of summer when it's probably your
9 busy season you're going to end up losing your license for 75
10 days. But even if you did -- he did not prevail and you did not
11 prevail, in the middle of summer you'd probably lose your license
12 for 40 days. Now might be a good time to give it up for 40 days.

13 MR. HAEG: It would be an excellent time, but I also --
14 I'm an American and I refuse to not do my duty when we have a --
15 our whole country is built with protections from law enforcement.
16 And I --

17 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. All right. I
18 understand that and you've argued that.

19 MR. HAEG: Okay. And I --

20 ADMINISTRATIVE LAW JUDGE MULLINS: You've argued that.
21 Now let me give it to you from my perspective. And there's an old
22 adage and this is kind of -- you fall in this category.

23 MR. HAEG: And I appreciate it.

24 ADMINISTRATIVE LAW JUDGE MULLINS: There's an old adage
25 in lawyers that if you go to court and you got the law on your

1 side you pound the law, and if you go to court and you got the
2 facts on your side you pound the facts.

3 MR. HAEG: And if you don't have anything you pound the
4 table.

5 ADMINISTRATIVE LAW JUDGE MULLINS: But if you don't have
6 either one you pound the table. And you've been doing a lot of
7 table pounding because the facts are what these folks testified
8 to. They saw an airplane go over. Now it may or may not have
9 been yours. I believe the testimony of the law enforcement guy
10 who's standing there with a notepad that sees those November
11 number. So anyway, you can -- now you can take it --

12 MR. HAEG: I understand. We have a difference of
13 opinion and -- yeah.

14 ADMINISTRATIVE LAW JUDGE MULLINS: -- now you can take
15 it to the full Board and --

16 MR. HAEG: Well, I'm just -- yeah. And --

17 ADMINISTRATIVE LAW JUDGE MULLINS: But the next time I
18 would read your rights to depose instead of calling people at
19 home.

20 MR. HAEG: I --

21 ADMINISTRATIVE LAW JUDGE MULLINS: You file -- I never
22 saw anything in here that you asked to depose Officer Mayhew.

23 MR. HAEG: I asked -- I didn't know and I should have
24 asked to depose --

25 ADMINISTRATIVE LAW JUDGE MULLINS: Yeah.

1 MR. HAEG: -- but every time I filed something it was
2 opposed by every -- you know, all my subpoenas were opposed that I
3 wanted to do. And in honesty, I thought it would be -- I do
4 believe this. This is, without any doubt I believe this, that the
5 FAA throughout all this said that he would be their main witness
6 in a proceeding like this and I thought I would be able to ask him
7 any questions that I wanted to establish his credibility or lack
8 thereof on any incidents. And that was my mistake that that
9 didn't happen, and so I thought for something as serious as
10 something that could, as you said, destroy a law enforcement
11 officer's career it should happen before someone like Your Honor
12 and not in some --

13 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

14 MR. HAEG: -- back hole room.

15 ADMINISTRATIVE LAW JUDGE MULLINS: Again --

16 MR. HAEG: Okay. And --

17 ADMINISTRATIVE LAW JUDGE MULLINS: -- my ruling simply
18 was there was no credibility issue on 5/21/2011 [sic] and that's
19 when he wrote down this tail number, period.

20 MR. HAEG: Yeah.

21 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Mr. Black, do
22 you have any questions?

23 MR. BLACK: Nothing further, Your Honor.

24 ADMINISTRATIVE LAW JUDGE MULLINS: All right. Folks,
25 that concludes the hearing. Thank you.

1 MR. HAEG: Thank you.

2 (Whereupon, at 2:22 p.m., the hearing in the above-
3 entitled matter was adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: David S. Haeg

DOCKET NUMBER: SE-19269

PLACE: Anchorage, Alaska

DATE: January 30, 2013

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Terrie Pinney
Official Reporter