

SERVED: September 26, 2008

NTSB Order No. EA-5407

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 24th day of September, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18000
v.)	
)	
ALLEN WAYNE LACKEY,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued March 4, 2008.¹ By that decision, the law judge affirmed the Administrator's complaint and ordered a 90-day suspension of

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

respondent's commercial pilot certificate, based on violations of 14 C.F.R. §§ 91.129(i),² 91.129(c)(2)(i),³ 91.155(a),⁴ and 91.13(a).⁵ We deny respondent's appeal.

The Administrator issued the suspension order, which became the complaint in this case, on March 9, 2007. The complaint alleged that respondent operated a Bell 206B helicopter on August 26, 2006, on a passenger-carrying visual flight rules (VFR) flight from Napa County Airport in Napa, California, which

² The pertinent portion of section 91.129(i) provides that, "[n]o person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC."

³ Section 91.129(c)(2)(i) requires each person operating an aircraft in Class D airspace to, upon departure, "establish and maintain two-way radio communications with the control tower, and thereafter as instructed by ATC while operating in the Class D airspace area."

⁴ The pertinent portion of section 91.155(a) provides that, "[n]o person may operate an aircraft under VFR [visual flight rules] when the flight visibility is less, or at a distance from clouds that is less, than that prescribed for the corresponding altitude and class of airspace in the following table." The table referenced provides the following requirement for Class D airspace:

Airspace	Flight visibility	Distance from clouds
Class D	3 statute miles	500 feet below. 1,000 feet above. 2,000 feet horizontal.

⁵ Section 91.13(a) states that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

is an airport that is within Class D airspace. The complaint further alleged that respondent neither obtained takeoff or departure clearances from the air traffic control (ATC) tower at Napa County Airport, nor established and maintained two-way radio communications with the control tower, for the flight. The complaint asserted that, at the time of respondent's departure, the Napa County Airport had determined that, "weather condition for the cloud ceiling was 800 feet overcast," and that respondent operated the aircraft under VFR conditions "below the basic VFR weather minimums" that 14 C.F.R. § 91.155 requires. Compl. at ¶ 6. As a result, the complaint charged respondent with violations of the regulations listed above, and alleged that respondent's conduct was therefore careless or reckless. The complaint ordered a suspension period of 90 days.

At the hearing, the Administrator provided the testimony of Mr. Shane Patrick Shannon, who has been a certified professional controller at the FAA since 2003, and an air traffic controller since 2000. Tr. at 17. Mr. Shannon testified at length concerning the events of August 26, 2006, because he was working both Ground and Local Control at the time of the events at issue. Tr. at 18. Mr. Shannon testified that all frequencies in the ATC tower were on, so that he could monitor the positions of all aircraft. Tr. at 18-19. Mr. Shannon also testified that the Automatic Terminal Information System (ATIS) indicated that

the cloud ceiling was 800 feet, and that this was below VFR conditions. Tr. at 26. Mr. Shannon stated that he verified that the cloud ceiling was 800 feet by his own observations. Tr. at 33-34. As a result of these conditions, Mr. Shannon testified that the rotating beacon at the airport was on, and that he observed the rotating beacon. Tr. at 52, 107-108. Mr. Shannon also testified that respondent did not request a special clearance from him, and did not communicate with ATC after initially identifying himself. Tr. at 55, 57. In support of this testimony, the Administrator introduced Exhibit C-1 into the record, which consists of a recording of ATC communications at the Napa County Airport ATC tower on the day at issue. Tr. at 20. The law judge allowed the Administrator to play the recording at the hearing, and Mr. Shannon testified that the recording accurately reflected his communications with respondent. See Tr. at 20-21, 65-66. The recording includes a lengthy period of silence, and a brief period in which respondent identified himself to ATC. Exh. C-1. Mr. Shannon testified that the period of silence was the time period in which he was attempting to obtain a release for a Learjet that was waiting to take off. Tr. at 43. Mr. Shannon also testified that he observed respondent take off in the absence of a special clearance for takeoff.

The Administrator also provided the testimony of Aviation Safety Inspector Richard Jean Michel Conte, who has worked at the Sacramento Flight Standards District Office as an inspector for 18 years, and who serves as respondent's Principal Operations Inspector. Tr. at 68-69. Inspector Conte testified that he investigated respondent's alleged deviation after his office received a report of it, and that he determined that respondent did not establish radio communication with the ATC tower, as required. Tr. at 70, 77.

In response to the Administrator's case, respondent testified that the ATC recording in evidence does not accurately reflect the communications that he had with ATC on the day in question. Tr. at 83. Respondent testified that he recalled saying that his aircraft, which he called "Cabernet 1," had the ATIS information indicating the weather conditions, and that he requested "a special Code Blue 33 VFR departure out of Napa Tower." Tr. at 85. Respondent testified that he "absolutely" did not depart from the Napa County Airport without first receiving a clearance. Tr. at 86. In rebuttal of respondent's case, the Administrator again called Mr. Shannon, who testified that the digital audio recording equipment has audio and visual alarms that indicate if the equipment is not working, and that no alarms indicated such on the day in question. Tr. at 97. Mr. Shannon also testified that he had never heard of a special

Code Blue 33 departure. Id. Mr. Shannon clarified that the recording of the ATC communications, at Exhibit C-1, contained only the local control frequency, and did not include all frequencies. Tr. at 100.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he found that the conditions on the day at issue required respondent to obtain a special VFR clearance before taking off. Initial Decision at 124. The law judge also determined that the recording of the ATC communications, at Exhibit C-1, was accurate, as Mr. Shannon verified its accuracy, and respondent provided no evidence that the ATC recording was inaccurate. Id. at 129. The law judge also determined that Mr. Shannon's testimony, which directly contradicts respondent's testimony, was more credible, and that Mr. Shannon had no motivation to testify falsely. Id. The law judge concluded that respondent never established two-way communication with ATC, and never obtained a clearance from ATC for departure; therefore, the law judge determined that respondent violated §§ 91.129(i) and (c)(2)(i), as well as 91.155(a), as alleged. Id. at 130-32. As a result of these violations, the law judge also determined that respondent had violated § 91.13(a). Id. at 132-33.

On appeal, respondent argues that the law judge erred with regard to numerous evidentiary rulings at the hearing. In

particular, respondent argues that the law judge should not have allowed Exhibit C-1 into evidence, that the law judge inappropriately cut off respondent's counsel's cross-examination of Mr. Shannon concerning Exhibit C-1 and the cloud measuring equipment that Mr. Shannon used, that the law judge issued a decision that was contrary to the weight of the evidence, and that the law judge was biased and acted as an advocate for the Administrator. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

We have long held that law judges have significant discretion in overseeing administrative hearings and admitting evidence into the record. Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, 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)). When resolving issues involving the admission of evidence, the Board is not bound by the Federal Rules of Evidence, but considers them to be "non-binding guidance." Administrator v. Ferguson, NTSB Order No. EA-5360 at 10 (2008) (citing Petition of Cary A. Neihans, NTSB Order No. EA-5166 at 9

n.9 (2005)). In this regard, the Board is not bound by evidentiary or procedural rules that apply in other courts.

With regard to credibility determinations, we have long held that such determinations are generally within the exclusive province of the law judge, and the Board will not disturb these determinations unless they are arbitrary, capricious, contrary to law, or must be disregarded for some other compelling reason. See, e.g., Administrator v. Swaters, NTSB Order No. EA-5400 at 9 (2008); Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

Finally, with regard to allegations of prejudice, we have held that, 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." Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985). We have long 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. 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. Wheeler, NTSB Order No. EA-5208 at 9 (2006).

We have carefully reviewed the evidence in light of each of respondent's arguments, and determined that his arguments are without merit. First, with regard to the law judge's admission of Exhibit C-1 into evidence, we find that the law judge did not err in either admitting the exhibit into evidence or in considering it in his decision. The law judge correctly determined that respondent did not provide any evidence to indicate that Exhibit C-1 was an inaccurate or incomplete recording of the ATC communications at issue. Respondent asserts, for example, that it is improbable that the ATC tape would contain no communications between ATC and the pilot of the Learjet who was also at Napa County Airport during the time at issue. Respondent, however, provides no evidence to show that the crew of the Learjet engaged in any additional communications with ATC. Moreover, respondent does not show that the law judge's admission of Exhibit C-1 was an abuse of discretion, and likely cannot make such a showing, because Mr. Shannon's testimony would still demonstrate that respondent did not establish and maintain two-way communications with ATC, and that respondent did not receive a special clearance prior to taking off. Therefore, even if the law judge had excluded Exhibit C-1 from evidence, respondent does not show how this would have altered the outcome of the case.

Respondent also contends that the law judge erred in preventing respondent from pursuing lines of inquiry on cross-examination concerning Exhibit C-1 and the meteorological equipment. With regard to Exhibit C-1, respondent cites the Federal Rules of Evidence and the California Evidence Code in support of his argument that the law judge should have permitted him "to establish - if at all possible - that the tape was neither reliable nor trustworthy and that no weight should be given to it." Resp. Br. at 8. We note that the law judge discussed respondent's request to reduce the probative weight of Exhibit C-1 with respondent's counsel, and that the law judge informed respondent's counsel that he had erred in not questioning the integrity of the evidence in a voir dire line of inquiry, rather than after the law judge had admitted the exhibit and allowed testimony on it. Tr. at 41-42. Respondent does not demonstrate how the law judge abused his discretion in determining that respondent's counsel's assertion, that no sufficient foundation existed for the evidence, was untimely; if respondent's counsel sought to challenge the foundation for the exhibit, he should have done so when challenging the admissibility of it. Respondent also does not assert how inquiring about this issue on voir dire would have been impractical or inappropriate. We also note that the law judge subsequently allowed respondent's counsel to ask certain

questions that would assert that the law judge should not afford a large amount of probative weight to the recording, such as inquiries about what frequency the recording covered, and whether Mr. Shannon or any other FAA employee could manually stop the recording. Tr. at 42, 47. Overall, respondent has not established that the law judge abused his discretion in not allowing respondent's counsel's inquiries concerning the foundation for Exhibit C-1.

Respondent's argument that the law judge erred in not allowing questions on cross-examination of Mr. Shannon concerning the meteorological equipment is similarly unavailing. Respondent argues that Mr. Shannon's testimony about the height of the cloud ceiling lacked credibility because Mr. Shannon did not know the accuracy of the Automatic Surface Observation System (ASOS), which provides cloud ceiling measurements. Moreover, respondent contends that the law judge inappropriately cut off respondent's counsel's inquiries concerning how accurate Mr. Shannon's visual observations of the cloud ceiling were. With regard to this argument, respondent has not established that the law judge erred. After allowing several questions concerning the assessment of the height of the cloud ceiling on the day in question, the law judge clarified, and indicated that he understood, that Mr. Shannon's assessment that the cloud ceiling was 800 feet was only an "estimate." Tr. at 52.

Furthermore, respondent provides no basis for his assertion that the ASOS measurement and Mr. Shannon's estimate were both inaccurate, nor does he provide any case law or arguments to support his apparent implication that pilots should determine cloud ceiling measurements, rather than the Administrator.

Respondent's final two arguments, that evidence does not support the law judge's conclusion, and that the law judge was biased, are also without merit. Much of the law judge's determination with regard to respondent's failure to establish two-way communications and to obtain a special clearance was based upon a determination that Mr. Shannon was more credible than respondent. Respondent did not provide any evidence at the hearing to impeach Mr. Shannon's credibility, nor does he establish on appeal that the law judge's credibility determination was arbitrary, capricious, or against the weight of the evidence. We also note that the law judge did not entirely base his decision on Exhibit C-1; even if we excluded Exhibit C-1 from the record, sufficient evidence still exists to show that respondent did not meet the regulatory requirements applicable to the airspace in which he operated on the day in question. Finally, respondent's argument that the law judge was biased and favored the Administrator is unpersuasive; the law judge ruled against the Administrator's counsel on multiple occasions at the hearing (Tr. at 7-8, 34, 36, 39, 70-71, 84, 86,

87, 93, 102), and discussed the evidence that supported his conclusion in detail in his initial decision (Initial Decision at 123-28).

Based on the record before us, we find that respondent violated 14 C.F.R. §§ 91.129(i) and (c)(2)(i), 91.155(a), and 91.13(a), and we affirm the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 90-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.⁶

ROSENKER, Acting Chairman, and SUMWALT, HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁶ 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).

SERVED: September 26, 2008

NTSB Order No. EA-5407

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
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Code Blue 33 departure. Id. Mr. Shannon clarified that the recording of the ATC communications, at Exhibit C-1, contained only the local control frequency, and did not include all frequencies. Tr. at 100.

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On appeal, respondent argues that the law judge erred with regard to numerous evidentiary rulings at the hearing. In

particular, respondent argues that the law judge should not have allowed Exhibit C-1 into evidence, that the law judge inappropriately cut off respondent's counsel's cross-examination of Mr. Shannon concerning Exhibit C-1 and the cloud measuring equipment that Mr. Shannon used, that the law judge issued a decision that was contrary to the weight of the evidence, and that the law judge was biased and acted as an advocate for the Administrator. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

We have long held that law judges have significant discretion in overseeing administrative hearings and admitting evidence into the record. Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, 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)). When resolving issues involving the admission of evidence, the Board is not bound by the Federal Rules of Evidence, but considers them to be "non-binding guidance." Administrator v. Ferguson, NTSB Order No. EA-5360 at 10 (2008) (citing Petition of Cary A. Neihans, NTSB Order No. EA-5166 at 9

n.9 (2005)). In this regard, the Board is not bound by evidentiary or procedural rules that apply in other courts.

With regard to credibility determinations, we have long held that such determinations are generally within the exclusive province of the law judge, and the Board will not disturb these determinations unless they are arbitrary, capricious, contrary to law, or must be disregarded for some other compelling reason. See, e.g., Administrator v. Swaters, NTSB Order No. EA-5400 at 9 (2008); Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

Finally, with regard to allegations of prejudice, we have held that, 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." Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985). We have long 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. 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. Wheeler, NTSB Order No. EA-5208 at 9 (2006).

We have carefully reviewed the evidence in light of each of respondent's arguments, and determined that his arguments are without merit. First, with regard to the law judge's admission of Exhibit C-1 into evidence, we find that the law judge did not err in either admitting the exhibit into evidence or in considering it in his decision. The law judge correctly determined that respondent did not provide any evidence to indicate that Exhibit C-1 was an inaccurate or incomplete recording of the ATC communications at issue. Respondent asserts, for example, that it is improbable that the ATC tape would contain no communications between ATC and the pilot of the Learjet who was also at Napa County Airport during the time at issue. Respondent, however, provides no evidence to show that the crew of the Learjet engaged in any additional communications with ATC. Moreover, respondent does not show that the law judge's admission of Exhibit C-1 was an abuse of discretion, and likely cannot make such a showing, because Mr. Shannon's testimony would still demonstrate that respondent did not establish and maintain two-way communications with ATC, and that respondent did not receive a special clearance prior to taking off. Therefore, even if the law judge had excluded Exhibit C-1 from evidence, respondent does not show how this would have altered the outcome of the case.

Respondent also contends that the law judge erred in preventing respondent from pursuing lines of inquiry on cross-examination concerning Exhibit C-1 and the meteorological equipment. With regard to Exhibit C-1, respondent cites the Federal Rules of Evidence and the California Evidence Code in support of his argument that the law judge should have permitted him "to establish - if at all possible - that the tape was neither reliable nor trustworthy and that no weight should be given to it." Resp. Br. at 8. We note that the law judge discussed respondent's request to reduce the probative weight of Exhibit C-1 with respondent's counsel, and that the law judge informed respondent's counsel that he had erred in not questioning the integrity of the evidence in a voir dire line of inquiry, rather than after the law judge had admitted the exhibit and allowed testimony on it. Tr. at 41-42. Respondent does not demonstrate how the law judge abused his discretion in determining that respondent's counsel's assertion, that no sufficient foundation existed for the evidence, was untimely; if respondent's counsel sought to challenge the foundation for the exhibit, he should have done so when challenging the admissibility of it. Respondent also does not assert how inquiring about this issue on voir dire would have been impractical or inappropriate. We also note that the law judge subsequently allowed respondent's counsel to ask certain

questions that would assert that the law judge should not afford a large amount of probative weight to the recording, such as inquiries about what frequency the recording covered, and whether Mr. Shannon or any other FAA employee could manually stop the recording. Tr. at 42, 47. Overall, respondent has not established that the law judge abused his discretion in not allowing respondent's counsel's inquiries concerning the foundation for Exhibit C-1.

Respondent's argument that the law judge erred in not allowing questions on cross-examination of Mr. Shannon concerning the meteorological equipment is similarly unavailing. Respondent argues that Mr. Shannon's testimony about the height of the cloud ceiling lacked credibility because Mr. Shannon did not know the accuracy of the Automatic Surface Observation System (ASOS), which provides cloud ceiling measurements. Moreover, respondent contends that the law judge inappropriately cut off respondent's counsel's inquiries concerning how accurate Mr. Shannon's visual observations of the cloud ceiling were. With regard to this argument, respondent has not established that the law judge erred. After allowing several questions concerning the assessment of the height of the cloud ceiling on the day in question, the law judge clarified, and indicated that he understood, that Mr. Shannon's assessment that the cloud ceiling was 800 feet was only an "estimate." Tr. at 52.

Furthermore, respondent provides no basis for his assertion that the ASOS measurement and Mr. Shannon's estimate were both inaccurate, nor does he provide any case law or arguments to support his apparent implication that pilots should determine cloud ceiling measurements, rather than the Administrator.

Respondent's final two arguments, that evidence does not support the law judge's conclusion, and that the law judge was biased, are also without merit. Much of the law judge's determination with regard to respondent's failure to establish two-way communications and to obtain a special clearance was based upon a determination that Mr. Shannon was more credible than respondent. Respondent did not provide any evidence at the hearing to impeach Mr. Shannon's credibility, nor does he establish on appeal that the law judge's credibility determination was arbitrary, capricious, or against the weight of the evidence. We also note that the law judge did not entirely base his decision on Exhibit C-1; even if we excluded Exhibit C-1 from the record, sufficient evidence still exists to show that respondent did not meet the regulatory requirements applicable to the airspace in which he operated on the day in question. Finally, respondent's argument that the law judge was biased and favored the Administrator is unpersuasive; the law judge ruled against the Administrator's counsel on multiple occasions at the hearing (Tr. at 7-8, 34, 36, 39, 70-71, 84, 86,

87, 93, 102), and discussed the evidence that supported his conclusion in detail in his initial decision (Initial Decision at 123-28).

Based on the record before us, we find that respondent violated 14 C.F.R. §§ 91.129(i) and (c)(2)(i), 91.155(a), and 91.13(a), and we affirm the law judge's decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The 90-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.⁶

ROSENKER, Acting Chairman, and SUMWALT, HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁶ 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: *

ROBERT A. STURGELL, *
Acting Administrator, *
Federal Aviation Administration, *

Complainant, *

Docket No.: SE-18000
JUDGE GERAGHTY

v. *

ALLEN WAYNE LACKEY, *

Respondent. *

* * * * *

Phillip Burton Building
450 Golden Gate Avenue
U.S. Tax Court
Courtroom 2-1350
San Francisco, California 94102

Tuesday,
March 4, 2008

The above-entitled matter came on for hearing,
pursuant to notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

LISA TOSCANO, ESQ.
Federal Aviation Administration
Office of the Regional Counsel
P.O. Box 92007
Los Angeles, California 90009-2007

On behalf of the Respondent:

PHILLIP L. JOHNSON, ESQ.
Shaw, Terhar & LaMontagne, LLP
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Los Angeles, California 90017
(213) 614-0400

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board on the appeal of Allen Wayne Lackey, herein Respondent, from an Order of Suspension which seeks to suspend his Commercial Pilot Certificate for a period of 90 days. The Order of Suspension, as provided by Board rules, serves herein as a Complaint, and was filed on behalf of the Acting Administrator, Federal Aviation Administration, the Complainant. The matter has been heard before this Law Judge, and as provided by the Board's Rules, I am issuing a bench decision on the proceeding.

Pursuant to notice, this matter came on for trial on March 4, 2008, in San Francisco, California. The Complainant was represented by one of his Staff Counsel, Lisa Toscano, Esq., of the Western Pacific Region. The Respondent was present at all times and was represented by his Counsel, Phillip L. Johnson, Esq., of Los Angeles, California. Parties were afforded the opportunity to call, examine, and cross-examine witnesses, and to make

1 argument in support of their respective positions.

2 I have considered the evidence, both oral and
3 documentary, and evidence which I do not specifically mention in
4 my discussion, as viewed by me as essentially corroborative or not
5 materially affecting the outcome of my determination.

6 By pleading, it was agreed there was no dispute to the
7 allegations contained in Paragraph Nos. 1, 2, and 3 of the
8 Complaint. Accordingly, the matters set forth in those numbered
9 paragraphs of the Complaint are deemed established for purposes of
10 this decision.

11 It is charged and admitted that the Respondent, on
12 August 26th, 2006, was operating as Pilot in Command of a Bell
13 Helicopter, N62HF, which is identified in radio communications as
14 Cabernet 1, while on a departure on that date from Napa County
15 Airport in Napa, California. It is also established by agreement
16 that at the time of the Respondent's operation that the Napa
17 County Airport did have an operating control tower and was within
18 Class D airspace as defined under the Federal Aviation Regulations.

19 It is charged by the Administrator that the Respondent
20 has operated in violation of the following operational regulations
21 of the Federal Aviation Administration: Section 91.129(i),
22 91.129(c)(2)(i), and 91.155(a).

23 Without stating the exact wording of those Regulations,
24 it is clear from the allegations in the Complaint, and also the
25 Regulations alleged, as having been violated by the Respondent on

1 the date of the operation, that there are three main facts to be
2 determined, predicated upon the charged violations; that is, was
3 there a takeoff from Napa County Airport without a clearance for
4 that operation, did the Respondent, as required in Class D
5 airspace, establish and maintain two-way radio communication; and
6 lastly, if the weather was below VFR minimums, did the Respondent
7 obtain a clearance to depart in less than VFR conditions?

8 In this case, the evidence is that there was no VFR
9 clearance, that is for operation in IMC, but rather we would be
10 talking about a special VFR, which would allow you to operate less
11 than a thousand feet, but operate clear of clouds. So we're
12 talking about special VFR; that is, to me, are the three main
13 factors.

14 The Complainant's case is made through the testimony of
15 two witnesses, the first of which was Mr. Shannon; he is an air
16 traffic controller. He had eight years with the United States
17 Navy as a controller prior to coming with the FAA, and has been
18 with the FAA as a controller since January of 2000. He has been
19 at Napa County Airport since October of 2003, and is certified, on
20 his testimony, in all controller positions at that particular
21 facility.

22 On the date in question he was on duty in the Tower cab,
23 and he was operating both the Ground and Local Control combined
24 positions. There was another controller on duty, but that
25 controller apparently was on break, and although Mr. Shannon was

1 working combined Ground and Local Control, on his testimony he
2 stated he could listen to both frequencies in that combined
3 position, and that he was also able to monitor all positions, that
4 is any communications that would have taken place on any other
5 frequencies, which would have been clearance delivery, or any
6 other communication that might have been coming in on another
7 frequency, and he also apparently had a shout-out line or landline
8 to Oakland Center, which was the ATC Center that was controlling
9 IFR traffic at that time.

10 We listened to C-1, which is a re-recording of the
11 essential tape, and here I combined some of the rebuttal testimony
12 of Mr. Shannon. He states that there is both an oral alarm and a
13 visual alarm system to advise Controllers of any malfunctions in
14 the equipment in the Tower, and he testified that on that date
15 there were no malfunctions recorded or alerted to him.

16 As to the recording itself, it is true that listening to
17 the recording for the first six minutes, an extended period of
18 time, the tape only has static; there are no communications, and
19 then the communications are between Mr. Shannon in his position.
20 There is communication from the Respondent, and there's a
21 communication with the pilot of a jet, which was identified as a
22 Learjet.

23 Testimony from Mr. Shannon is that the certifier of the
24 tape edited the tape to only those portions that dealt with the
25 alleged incident, that is, any communications that didn't have

1 anything to do with what the Respondent did or did not do were
2 excluded from the tape. There's a certification on the tape, and
3 there's no evidence to dispute the certification given by the
4 individual certifying the tape; I think that was a Mr. Ferrer,
5 who is the manager.

6 So I have the certified tape, and I also have the
7 testimony of Mr. Shannon that he has listened to the tape, and
8 that the tape is a true and accurate representation of what took
9 place on that date. Listening to the tape, it is clear there is
10 an initial call-up, "Cabernet 1 to Napa Tower." There is a delay,
11 and then a response from Napa Tower back to Cabernet 1. However,
12 there is no reply from the Respondent back to the Tower. In fact,
13 there's a break in there. The tower replies, and then there's no
14 response.

15 Later, there is another call from the Tower advising
16 that there is a possible pilot deviation. There is also a warning
17 heard on there to the Learjet that the helicopter is operating
18 without a clearance, and that he was going to have to be held, and
19 Mr. Shannon talks about having to delay the aircraft to wait until
20 the helicopter clears the Class D airspace.

21 There is also a question from Mr. Shannon, in his
22 position in the Tower, to apparently the Learjet, asking whether
23 the pilot in the Learjet had heard all the transmissions. And, as
24 Mr. Shannon testified on rebuttal, this is on a common frequency
25 so that what he was inquiring was that anyone that was on the

1 frequency would have heard all communications from any other pilot,
2 you know, even if there had been three other airplanes operating
3 at Napa at the time, and each one of those pilots, in addition to
4 these two, so say five them, have been communicating at various
5 times. The pilot sitting in a Cessna, if he's listening along
6 those frequencies to the Tower, would hear the communications from
7 the Learjet, from the Respondent, and from the pilots of the other
8 two aircraft. It's a common frequency.

9 Nowhere on the tape is there any indication of a request
10 for takeoff clearance by the Respondent, nor is there any
11 indication of any issuance by the controller, Mr. Shannon, to the
12 Respondent of a takeoff clearance, or anything that would be
13 interpreted as a clearance, or departure, under special VFR. And
14 in fact, in rebuttal, Mr. Shannon specifically testified that he
15 had never issued to the Respondent a special VFR clearance,
16 indicating that, in his direct testimony, no clearance had ever
17 been issued to the Respondent.

18 As to the weather, that is also recorded on the tape,
19 and that's a recording of the ATIS, and there's no indication or
20 evidence offered that the weather on the ATIS, I think it was
21 Information Mike, was in any way inaccurate. It showed the
22 weather as winds from 270 at 7 knots, a visibility 10, 800
23 overcast, temperature/dew point 14/12. Mr. Shannon also testified
24 that all the people in the Tower are certified as weather
25 observers and that they have various tell marks around the airport

1 for use by them in determining visibility range and ceilings.
2 Without discussing all of those, it's suffice to state that, based
3 upon his observation, that he confirmed that the ceiling was about
4 800 overcast because he couldn't see a barn on a hill, which was
5 one of their tell marks.

6 He also testified that the field was in operation with
7 the Tower at 7:00, and that the rotating beacon was on, and all
8 pilots, from student pilots on, are pretty well-aware that the
9 rotating beacon means below VFR minimums, and you need a clearance
10 of some sort to depart from that airport. Suffice it to state,
11 then, based upon his testimony as to the beacon and the ATIS, the
12 only way that the aircraft could depart without an IFR clearance
13 would be to depart with a special VFR clearance, which again he
14 testified he had never issued to the Respondent.

15 On cross-examination, he again just confirmed that he
16 had operated all positions. But, he reiterated also that he,
17 Mr. Shannon, had not issued a clearance for takeoff to the
18 Respondent. And as I've stated, on his testimony, on both direct
19 and cross, he again affirmed that the rotating beacon was
20 operating and that it was because he observed it. He also
21 indicated that he knew Mr. Lackey, had heard his voice many times
22 on the radio, and apparently has also met him at one or two
23 functions.

24 As to the communications themselves, Mr. Shannon's
25 testimony was, on cross, that the communications between

1 Cabernet 1 and the Tower on that morning, to the extent that there
2 were communications, were not a condition of lost communications.
3 Those communications had never been established. You can't lose
4 something that's never established.

5 As to Mrs. Bamford, the only testimony is that
6 Mr. Shannon had heard the name, I believe, from Complainant's
7 Counsel, probably in preparation for this hearing. But, he denied
8 that he had any knowledge of who the person was, or any
9 interaction between the Respondent and Mrs. Bamford.

10 Mr. Conte is an Aviation Safety Inspector and holds
11 multiple ratings. He was the Investigating Safety Inspector for
12 the Complainant in this instance. He's also the Principal
13 Operations Inspector, POI, for Wine County Helicopters, which is
14 the organization that the Respondent owns and operates under Part
15 135 as a single pilot operation.

16 Mr. Conte, essentially, based upon his listening to the
17 testimony and his investigation, rendered opinions as to the
18 viability of the regulatory charges contained in the Complaint.
19 And I view his testimony simply as that, as an opinion from an
20 individual with a strong background in aviation, shall I term it,
21 11,000 hours and all the ratings, expressing his opinion as to
22 whether the incident was in fact in violation of the charged
23 Regulations; although, that final determination is, of course,
24 reserved for me.

25 Respondent testified on his own behalf. As I indicated,

1 he's the owner and operator of Wine County Helicopters, which was
2 identified on the tapes here as Cabernet 1. Respondent testifies
3 he's flown in and out of Napa Valley. He's based there, so
4 obviously he's flown out numerous times. And he also indicated he
5 knew what special VFR was, and, of course, one would certainly
6 assume that from the holder of a Commercial Pilot certificate and
7 an Air Carrier certificate.

8 He stated that on the morning in question, that after he
9 went through his usual procedure, that is, he got the aircraft
10 turning up, loaded apparently for passengers, it was to be a 7:15
11 departure to a golf course. He knew the Tower was in operation
12 from 7:00 in the morning until 8:00 p.m. at night. However, he
13 testified that, upon listening to the tape, and also Mr. Shannon's
14 testimony, that neither the tape nor Mr. Shannon's testimony
15 reflects all of the communications that he had with Napa Tower and
16 Mr. Shannon on the date in question.

17 According to the Respondent on his testimony that he
18 established two-way communications, since he did indicate that he
19 did receive a clearance, that he called the Tower, the Tower
20 replied, and he distinctly had told the controller that he had the
21 Respondent receive the ATIS information and was requesting a
22 special VFR departure, indicating a Code Blue 33, and denies
23 specifically that he departed from Napa without clearance from ATC
24 to do so.

25 He also indicates, although he returned to the airport

1 about 3:00 in the afternoon, he never got a call to or advice that
2 he should contact the Tower to discuss this deviation, and didn't
3 learn about any such alleged deviation until about four weeks
4 later when he got in contact with Mr. Conte.

5 As to departure itself, Respondent disputed the flight
6 path as described by Mr. Shannon, as to crossing both the end of
7 Runway 36 Left, and the departure end of Runway 24, acknowledging
8 only that he in fact, the Respondent, did cross 36 Left.

9 In sum, then, as to the evidence offered by the
10 Complainant, the Respondent simply stated that he did not believe
11 that the tape accurately reflects the communications on the date
12 in question.

13 Summing up the rebuttal testimony of Mr. Shannon, he
14 testified there were never any malfunctions in the recording
15 equipment that day, that he, Mr. Shannon, in his time at the Napa
16 County Airport, has never heard of anything called Code Blue 33,
17 or any other type of Code Blues, however they might be numbered,
18 and denied specifically that he had ever issued a special VFR to
19 the Respondent.

20 As to communications with the Learjet, Mr. Shannon
21 testified that at the time of the interaction with the Respondent
22 on his departure from the South Ramp area of the airport, the
23 Learjet was already down in the run-up area preparing for its
24 departure and waiting for its IFR clearance at the departure end
25 of the runway. And I comment on that here, because this goes to

1 my evaluation of the tape.

2 If the Learjet is already down at the run-up area
3 awaiting his IFR clearance and going through its takeoff checklist,
4 it would be clear that the Learjet had, quite some time previously,
5 received its -- or had made the request for the IFR clearance, and
6 it also received taxi instructions so that it would taxi from
7 wherever it was on the ramp down to the run-up area. So there
8 would be no communications necessary between the Learjet and the
9 Tower once the clearance to taxi had been issued until such time
10 as takeoff clearance to the Learjet was issued. So it's not
11 unreasonable not to hear anything.

12 Turning to evaluation of the case, the burden of proof,
13 of course, rests with the Complainant, and in doing that I also
14 have to evaluate the credibility of the testimony given by the
15 witnesses in the case, as supported or not supported by any other
16 evidence that's offered, documentary or audio.

17 As I've already indicated I've closely listened to the
18 tape and made some conclusions. I've already discussed them. I
19 also indicate it's not, in my view, unusual for an audiotape to be
20 edited to include only those sections that are pertinent to an
21 alleged deviation. There is no reason to listen to communications
22 that would be occurring with other aircraft that have nothing to
23 do with the charged violation. In any event, there is no evidence
24 offered in front of me, other than the Respondent's belief that
25 the tape is not accurate, to dispute the certification by

1 Mr. Ferrrear on the tape, that it is a true and accurate copy.

2 In addition to that I have Mr. Shannon's testimony,
3 subject to cross-examination, that he listened to the tape and
4 that the tape accurately reflects those communications at issue
5 here, that is, communications between himself, as they exist or
6 did not exist, and the Respondent, on the date in question. To
7 overcome the direct testimony of the Complainant, it has to be
8 more than "I don't believe." There's no showing to establish that
9 something is not accurate or has in some way been altered. It
10 puts the burden on the individual making that claim. There is
11 nothing here other than an assertion. In the face of what I have
12 on the tape, reasonable inference to be drawn from where the
13 position of the Learjet is and the testimony in open session of
14 the controller.

15 I find, therefore, that on evaluation of the testimony
16 of the witnesses, and listening to the tape, and reasonable
17 inferences, and the fact that there has been no showing of any
18 bias on the part of Mr. Shannon towards the Respondent, or from
19 Mr. Ferrrear, who has to indicate why they would in some way be
20 subject to some undue influence to alter their testimony or alter
21 a tape, there's just nothing there. So my evaluation of it is
22 that I find the testimony offered by the Complainant to be even
23 more reasonable and credible on the issues presented to me in this
24 proceeding.

25 Turning then to the three factors that I said were

1 presented by the charges, was there an establishment and
2 maintaining of two-way radio communications? On the evidence in
3 front of me, the testimony of the controller, and the tape, there
4 was never established two-way communications. "Established two-
5 way" means that communications are going both ways; it's not just
6 a call from one party and a response back. There has to be a
7 third step to complete the communication. To establish means that
8 it is a fact that the two people are talking to one-another.
9 That's not what we have here.

10 What we have is a call-up from Cabernet 1, which is to
11 call the Tower, and with an identifier. "Cabernet 1 is the one
12 that's calling you, and I'm trying to reach you." This is the
13 same as to differentiate from another aircraft, e.g. "26 Lima", -
14 this is Cabernet 1." The Controller responds, "Napa Tower" back
15 to Cabernet 1. But then there's no third step, there's nothing
16 coming back. So all we have is a communication from the aircraft
17 towards the Tower and a communication from the Tower towards the
18 aircraft, but there's never any showing that there's a joining or
19 meeting of the minds. So nothing was ever established, in my view.
20 And of course, ergo if it's not established, it can't be
21 maintained.

22 So on the preponderance of the reliable and probative
23 evidence in front of me, I do find that there was a regulatory
24 violation of Section 91.129(c)(2)(i) of the Regulations, and that
25 the Respondent, being a departing flight from Class D airspace,

1 failed to establish and maintain two-way radio communications
2 while operating in the Class D airspace.

3 On the evidence in front of me also, and my evaluation
4 of the credibility of that evidence, based upon what has been
5 presented, no clearance was ever issued to the Respondent for
6 departure. Respondent says he requested it; there is no
7 indication on the tape of any of that, and I've indicated that to
8 me the tape is reliable. The plain testimony of the controller in
9 session was that no special VFR was ever issued. The Respondent
10 is a commercial pilot; he could have observed the weather
11 conditions himself. He indicates he had ATIS Mike, which would
12 say 800 overcast. The rotating beacon was on, and the pilot on
13 the airport would be able to see the rotating light coming around
14 flashing across the field, even if he didn't look at the beacon
15 itself. But in any event, no clearance was ever, on the evidence
16 in front of me, extended to the Respondent.

17 I, therefore, find a violation of Section 91.129(i), and
18 that the Respondent did take off from the Napa County Airport on
19 the date in question without having obtained the appropriate
20 clearance from ATC.

21 And it follows also, therefore, that there is a
22 violation of Section 91.155(a), and that, on the testimony in
23 front of me, not disputed, is that the weather conditions were
24 less than VFR, 800 overcast, although the visibility apparently
25 was good, 10 miles. But it still was less than VFR. A special

1 VFR or IFR would have been required for departure. On the
2 evidence in front of me, in this Class D airspace, special VFR was
3 never issued to the Respondent, nor was an IFR clearance.
4 Therefore, he did operate in regulatory violation of this Section
5 of the Federal Aviation Regulations.

6 There was testimony as to whether or not the flight path
7 executed by the Respondent on his departure crossed both 36 Left
8 on the departure end, and the departure end of 24, or 36 Left on
9 its approach and the departure end of 24. The Respondent admits
10 that he crossed 36 Left, but disputes crossing 24, indicating that
11 he would be further north, since he was going to the golf course,
12 which apparently would cause a different flight path.

13 Crossing the runways is not charged in the Complaint.
14 It would really go, if anything, to the charge of operation under
15 91.13(a), which prohibits a careless or reckless operation to
16 endanger the life or property of others. The testimony of
17 Mr. Shannon is that the departure of the Learjet had to be delayed
18 because of the Respondent's unauthorized departure in his
19 helicopter. Although the evidence is that there were no other
20 aircraft on the islets at the time, there is no indication that
21 the Respondent had any knowledge of that.

22 Under this Section of the Regulations, as well
23 established by judicial review, potential endangerment reasonably
24 connected to the events are sufficient. You don't have to wait
25 until there is a catastrophic occurrence. Unauthorized takeoff in

1 less-than-VFR conditions without a special VFR clearance, crossing
2 one of the runways without knowing who or what else might be
3 occurring at the airport is at least potentially hazardous. It
4 was at least careless. So I do find that on the evidence, and the
5 appropriate precedent, that a violation of 91.13(a) is established.

6 Turning to the issue of sanction, the Complainant seeks
7 a suspension of 90 days. There is no issue in front of me of
8 influence by the Complainant of selective prosecution. The Board
9 does not go into it, we defer to the Administrator's choice of
10 which cases to prosecute and which ones not to. The only issue
11 for the Board to review is, what do the facts in the particular
12 case establish? Also required by Statute, to extend to the
13 Administrator's choice of sanction, deference, unless it is shown
14 that the choice is arbitrary, capricious, or otherwise not in
15 accord with law or precedent. That, again, is a burden upon the
16 Respondent, to show that the choice is arbitrary or capricious,
17 other than just alleging that it's selective prosecution.

18 The fact that the Respondent may have been in other
19 situations, vis-a-vis the regulatory actions of the Complainant,
20 is on the testimony of something that is true. It's there. He
21 has been in, shall we say, a dispute with the FAA previously.
22 However, there is no showing that the choice of sanction, looking
23 at the Sanction Guidance Table, is outside the range sought by the
24 Administrator in similar cases, looking at the regulatory charges
25 that are extant in this case. In my view, therefore, and under

1 the requirements of the statute requiring deference to the
2 Administrator, I will affirm the suspension sought by the
3 Complainant of 90 days and; therefore, I will affirm the Order of
4 Suspension, the Complaint herein, as issued.

5 ORDER

6 IT IS THEREFORE ADJUDGED AND ORDERED:

7 (1) The Order of Suspension, the Complaint herein, be,
8 and the same hereby is, affirmed as issued.

9 (2) The Respondent's Commercial Pilot Certificate be,
10 and the same hereby is, suspended for a period of 90 days.

11 Entered this 4th day of March 2008, at San Francisco,
12 California.

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14 EDITED & DATED ON
15 MARCH 28, 2008

PATRICK G. GERAGHTY
Administrative Law Judge

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