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NTSB Order No. EA-3617

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 1st day of July, 1992

_____)	
BARRY LAMBERT HARRIS,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10190
v.)	
)	
ARNOLD DEL RIO,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, rendered at the conclusion of an evidentiary hearing on March 15, 1990.¹ The law judge affirmed, in part, an order of the Administrator charging respondent with violations of sections 91.13, 91.79(a), and 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R.

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

Part 91).² He then reduced the suspension of respondent's commercial pilot certificate from 120 to 60 days.³

The occurrence that prompted the Administrator's complaint took place on August 16, 1988, in Carmel-by-the-Sea (Carmel), California. Respondent, as pilot-in-command of a Hughes Model 369 helicopter, circled several times over a portion of the city.

He was attempting to find a suitable place to land and pick up a film crew awaiting his arrival in Carmel. The plan was for respondent to locate the crewmembers' tour bus and have it follow

²The complaint additionally alleged that respondent violated FAR section 91.79(d). The law judge found that the Administrator did not prove respondent created an actual hazard by his actions; the Administrator did not appeal.

FAR sections 91.79(a), 91.13, and 91.9 (now 91.119(a), 91.15, and 91.13, respectively) at the time of the incident, read in pertinent part:

"§ 91.79 Minimum safe altitudes; general.

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

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

§ 91.13 Dropping objects.

No pilot in command of a civil aircraft may allow any object to be dropped from that aircraft in flight that creates a hazard to persons or property. However, this section does not prohibit the dropping of any object if reasonable precautions are taken to avoid injury or damage to persons or property.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

³The Administrator did not appeal the reduction in sanction. Therefore, we need not address the issue.

him to an acceptable landing site. It is undisputed that while respondent was searching for the bus, a seat-back cushion accidentally fell from the helicopter onto the roof of a church below.⁴

The complaint alleged that respondent operated the aircraft at low altitudes over a congested area of the city, sometimes at slow speeds, including hovering. The helicopter allegedly entered the "dead man's curve," a zone of the height-velocity diagram where operation is not recommended due to the virtual impossibility of successfully completing an autorotation in the event of a power failure. Based on this assertion, the Administrator claimed that the flight posed a danger to persons and property on the ground. The complaint also charged that respondent allowed an object to be dropped from the aircraft. Respondent maintained that 1) at no time did he enter the dead man's curve or hover, and 2) the seat cushion fell by accident.

The law judge believed that the loss of the seat cushion was inadvertent and therefore, though he found a violation of FAR section 91.13, imposed no sanction. He also made a finding of fact, based on the testimony of several eyewitnesses, that the helicopter hovered at least twice at altitudes of 150 to 250 feet above ground level (AGL). Not only did this action severely reduce the probability of successful autorotation in an emergency, he concluded, but it evidenced an inadequate exercise

⁴Respondent was operating the helicopter with the doors removed, which was permissible.

of judgment by respondent, and thus created an unacceptable level of risk.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's complaint, as modified by the law judge. We adopt as our own the law judge's findings of fact, as they are sufficiently supported by the evidence.

Respondent challenges the law judge's decision, claiming that the factual findings are not supported by a preponderance of the evidence. We disagree. The Administrator produced five eyewitnesses to the incident, as well as a height-velocity diagram for the aircraft that illustrates the area within which operation is dangerous and not recommended. Although the law judge stated that two of the witnesses were too far away to estimate accurately the helicopter's altitude, he determined that the testimony of the other three witnesses was sufficiently credible and reliable to resolve the issues of altitude and hovering. Notwithstanding the fact that respondent and his passenger (an airman who accompanied respondent as a "safety pilot") testified that the helicopter neither hovered nor entered the dead man's curve, the law judge, in making a credibility determination, elected to believe the Administrator's witnesses. As we have stated on countless occasions, the law judge was in the best position to assess the credibility and demeanor of the witnesses. Absent a showing that his evaluations were arbitrary

or inherently incredible, they are entitled to our deference.

Administrator v. Jones, 3 NTSB 3649, 3651 (1981).

In his appeal brief, respondent asserts that he "went to great lengths to comply with every regulation he could think of," including calling the Carmel Police Department to ascertain whether it was permissible for him to land in the city; having a qualified helicopter flight instructor accompany him as a safety pilot; and keeping his log passes to a minimum. These actions were not a substitute, however, for the continual exercise of good judgment expected of a reasonable, prudent pilot. See Administrator v. Reynolds, 4 NTSB 240 (1982).⁵

The law judge found, as a factual matter, that respondent operated the helicopter within the dead man's curve and thereby created an unreasonable risk. It is undisputed that respondent flew over a congested business and residential area. Yet, he claimed to have maintained sufficient altitude to insure a safe landing in a nearby park if an emergency had, in fact, occurred.

Other witness testimony, however, citing physical obstacles such as trees and buildings, as well as the number of people that frequent the park, revealed that the park was not a suitable landing place. We believe that the law judge had ample basis

⁵In Reynolds, another case involving a low-flying helicopter, we stated that in order to prove a section 91.9 violation, the Administrator must show the potential harm that could have resulted, and "either that the likelihood of such an occurrence was unacceptably high, or that the pilot's exercise of judgment in the matter was clearly deficient." Id. at 242. In the instant case, the law judge found, and we agree, that respondent exercised poor judgment.

upon which to conclude that respondent operated an aircraft in a manner proscribed by FAR section 91.79(a), in that he did not maintain sufficient altitude to allow for an emergency landing without creating an undue hazard to persons or property below.⁶

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, is affirmed; and
3. The 60-day suspension of respondent's airman certificate shall begin 30 days after service of this order.⁷

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶See Administrator v. Michelson, 3 NTSB 3111 (1980), Aff'd, Michelson v. N.T.S.B., 679 F.2d 900 (9th Cir. 1982), a case involving a low helicopter pass over a resort. We stated that "[U]ndue hazard' [as found in FAR section 91.79(a),]... embraces a situation in which a pilot's cruising altitude would not likely permit the aircraft to land without striking, or passing dangerously close to, people or property on the surface. ... To prove a violation of section 91.79(a), the Administrator did not have to show that it would have been impossible for respondent to have made an emergency landing without injury or damage to persons on the surface in the event his engine had failed at some point along his low pass over the resort. The Administrator had to show only that an emergency landing from the altitude respondent passed through presented an unreasonable risk of such harm." Id. at 3113-14. See also Administrator v. Colvig, 4 NTSB 202 (1982).

⁷For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).