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NTSB Order No. EA-4319

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 19th day of January, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. STEVEN R. EGGER, Respondent.	Docket SE-13329

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held in this case on February 16, 1994.[1] In that decision, the law judge affirmed the Administrator's complaint insofar as it alleged that respondent's landing of a helicopter in the parking lot of a supermarket

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

created an undue hazard and was careless, in violation of 14 C.F.R. 91.119(a) and 91.13(a).[2] However, he modified the sanction from a 180-day suspension of respondent's airline transport pilot certificate, as sought by the Administrator, to a 60-day suspension.[3] For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed.

The record in this case establishes that on September 13, 1992, respondent landed an AS-350 helicopter in a parking lot next to a convenience store in a commercialized area of Waipahu, Hawaii. Respondent testified at the hearing that his purpose in landing there was to buy ice for isolated residents of Kauai who apparently were without electricity in the wake of hurricane Iniki (which had struck some two days earlier), and needed ice to cool their medicines. According to respondent, he was searching the area for places to buy ice because emergency supplies were

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[2] **§ 91.119 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 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] The Administrator has not appealed from the reduction in sanction.

sold out at locations closer to the Honolulu airport (where he had spent the previous night after transporting photographers from Kauai to Hawaii).

Although respondent claimed there were no cars in the parking lot where he landed,[4] other witnesses recalled seeing between one and three cars in that lot. In any event, photographs admitted into evidence reveal that there are several other businesses and parking lots in the surrounding area. There were 20-25 people in the immediate vicinity at the time of the landing, including a group of children (8-9 years old) participating in a car wash. According to the Administrator's witnesses, there was some minor damage to nearby cars from debris blown up by the helicopter's rotor wash.

Upon landing, respondent and his passenger disembarked and went into the convenience store where they bought some soft drinks. Although the convenience store carried ice, there were no coolers available. They then went to a larger supermarket across the street, where they purchased several coolers and ice, and some other items, including beer. The police, who had by that time been summoned to the scene, secured the area before allowing respondent to depart.

The FAA's investigating inspector (Wendel Meier), himself an experienced helicopter pilot, testified that respondent's operation into the parking lot was hazardous for several reasons.

[4] The subject parking lot measured 79 feet long, by 59 feet (on one end) and 74 feet (on the other) wide.

He noted there was no crowd control, and that -- despite respondent's claim (not substantiated by the Administrator's eyewitnesses) that his passenger disembarked immediately upon landing to keep onlookers from approaching -- there was nothing to prevent people from approaching the helicopter as it landed, and being injured by the rotors or the down-wash. He also cited the lack of suitable landing spots in the event of an engine failure upon approaching the parking lot. Although respondent claimed he could have landed in the median strip of a nearby highway (if engine failure had occurred at 200 feet), or in the convenience store parking lot where he ultimately did land (if the failure had occurred at 100 feet or below), Inspector Meier concluded that, in light of the number of people in the area, respondent could not have made a safe emergency landing regardless of whether he used a standard approach or -- as respondent claimed -- a steep low-power approach.

After hearing the evidence, the law judge agreed with respondent that the testimony of one of the Administrator's eyewitnesses (who claimed her car was extensively damaged by the helicopter's rotor-wash) was not credible. Specifically, he stated that "a great deal of her testimony has to be discredited," and expressed disbelief that her car had been damaged to the extent she claimed. However, despite his rejection of that witness' testimony, he concluded that it would be "reasonable to expect some potential for damaging a vehicle" as a result of respondent's operation into the parking lot and

concluded that her car probably sustained some damage. (Initial decision at 5-6.) The law judge implicitly accepted the Administrator's expert testimony as to the overall safety of respondent's operation, finding that respondent's landing site was inappropriate in that there was a potential for endangerment, and that his operation was careless. Accordingly, he affirmed the alleged regulatory violations of 14 C.F.R. 91.119(a) and 91.13(a).

On appeal, respondent challenges the findings of violation, arguing that there is insufficient evidence to support the law judge's finding that his landing site was inappropriate, and that his operation was careless. We disagree. Even assuming, as respondent insists, that Inspector Meier's opinion was based on performance characteristics of a different model helicopter,[5] we do not think this detracts significantly from his testimony that respondent's operation and landing in the parking lot was hazardous and unsafe, as that opinion was based primarily on the characteristics of the landing area (no crowd control, cars and children present, and lack of alternate emergency landing areas), not the characteristics of this particular helicopter.

Respondent also asserts that a violation of section 91.13(a) cannot be supported in a helicopter case without proof of an

[5] Respondent testified at the hearing that the helicopter he was using was an Astar AS-350 BA, rather than a B (as Inspector Meier assumed, based on records on file at the FAA's aircraft registry). According to respondent, the BA rotor blades are wider and shorter than the B, and result in a higher level of performance.

unacceptably high likelihood of harm or clearly deficient judgment, and notes that there was no finding in this case of actual endangerment. While it is true that a higher measure of proof is required to establish an independent violation of section 91.13(a) by a helicopter pilot, our case law makes clear that no additional proof is required to establish a residual violation of section 91.13(a) (one which flows solely from the violation of another, independent, operational regulatory violation), even in a helicopter case.[6] See Administrator v. Tur, NTSB Order No. EA-3490 at 9, n. 12 (1992), and Administrator v. Frost, NTSB Order No. EA-3856 at 8 (1993).

Respondent also challenges the severity of the sanction in this case, arguing that the 60-day suspension imposed by the law judge is too harsh in light of the fact he was acting as a "good samaritan," and cites other cases in which he believes more egregious violations resulted in lesser suspensions. Although we have held that a respondent's humanitarian purpose and nonpecuniary motivation can be an extenuating circumstance justifying mitigation of sanction (see Administrator v. Sorenson, NTSB Order No. EA-4191 at 17-18 (1994)), we are not persuaded that the same rationale should be applied in this case. Despite

[6] Although the Administrator argues in his reply brief that there is sufficient evidence to support an independent violation of section 91.13(a), it is unclear from the record whether the law judge found the violation to be independent or residual. We need not decide the issue, however, as we think the 60-day suspension ordered by the law judge is justified under the circumstances of this case, regardless of whether the 91.13(a) violation is considered independent or residual.

respondent's stated desire to obtain ice for hurricane victims, it is clear from the record that he could have pursued other, safer, avenues for obtaining the needed ice.[7]

In our judgment, a 60-day suspension is warranted under the circumstances of this case (especially the fact that numerous children were present at the landing site), and is not inconsistent with precedent. See Essery v. DOT et. al., 857 F.2d 1286 (9th Cir. 1988) (reinstating 120-day suspension imposed by law judge for two low flight violations, including a helicopter drop at a downtown intersection to which law judge had allocated a 60-day suspension).[8]

Respondent also makes a procedural argument, asserting that he was not given a proper opportunity for an informal conference in connection with these charges, as required by statute,[9] and he

[7] Although emergency supplies, including ice, were apparently depleted in the immediate vicinity of the hotel where he had spent the night, respondent conceded that he had a car available to him there. (Tr. 251, 276-79.) Moreover, a police officer who was called to the scene of respondent's landing testified that if respondent had only asked, the police would have assisted him in locating ice, in finding a safer place to land his helicopter, or in securing his landing area. (Tr. 151-52.)

[8] Respondent cites Administrator v. Chason, NTSB Order No. EA-3528 (1992) (45-day suspension imposed for respondent's landing in a parking lot on roof of hospital), and Administrator v. D'Attilio, NTSB Order No. EA-3738 (1992) (20-day suspension imposed for respondent's landing in a campground, in violation of section 91.13(a)), as support for his position that a lesser sanction should be imposed in this case. However, in neither of those cases was sanction an issue on appeal. Moreover, we explicitly noted that we considered the 45-day suspension imposed for the violations in Chason to be "minimal," and D'Attilio did not involve the regulatory violation here at issue (91.119(a)).

[9] Section 609(a) of the Federal Aviation Act, 49 App. U.S.C.

suggests the case should therefore be dismissed. In support, respondent cites Oceanair v. NTSB, 888 F.2d 767 (11th Cir. 1989), where the court vacated our affirmance of an order of revocation because it found our decision was based in part on charges which had been added to the complaint after the case was appealed to the Board and, therefore, had not been the subject of an opportunity for an informal conference.

Respondent's claim that he was not given a reasonable opportunity for an informal conference is based on several perceived deficiencies in the printed information sheet he received from the FAA detailing his options for responding to the Notice of Proposed Certificate Action (NOPCA) in this case.[10] The form lists the following options: 1) surrender the certificate and accept final issuance of the order as proposed; 2) request issuance of an order so an appeal can be filed with the Board; 3) submit written information to be considered in response to allegations in the NOPCA; or 4) "request the opportunity to discuss this matter informally with a [FAA] attorney located at 15000 Aviation Boulevard, Lawndale, California 90261. (Telephone No. 310-297-[remainder of phone

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1429(a) (now recodified at 49 U.S.C. 44709), requires the Administrator to provide a certificate holder with "an opportunity to answer any charges and be heard," prior to taking action against the certificate.

[10] Although respondent claims the NOPCA was mailed to an incorrect address which was not his residence, he does not dispute that he received the notice and responded to it. Moreover, while he refers to some delay and suggests that the complaint was stale, he does not develop or pursue these claims. Therefore, we deem the issues waived.

number blank]." (Exhibit C-10, p. 3.) Respondent returned the form with the third option checked off, and attached written statements from himself and his passenger on the flight.

The law judge expressed the opinion that offering an opportunity for an informal conference in California, when respondent lives in Kauai, does not constitute a reasonable opportunity for an informal conference. He also noted that "the telephone number where [respondent] could call and . . . complain about it being unreasonable was not filled in," and suggested that the FAA had not met the statutory requirement for offering a reasonable opportunity for an informal conference in this case. Nonetheless, he declined to rule on the issue, leaving it for us to resolve on appeal. (Tr. 342-43.) We hold that respondent received the required opportunity for an informal conference in this case, although he chose not to avail himself of it.

Respondent claims that the form is fatally defective because it implies that appeal rights to the Board are forfeited if the certificate-holder chooses an informal conference, and it fails to inform him of his "right" to have an informal conference held in his home state of Hawaii, rather than in California. We disagree. Even assuming that respondent interpreted the form to indicate that he would loose his appeal rights if he chose an informal conference (and we note that there is no support in the record for concluding that he entertained such a belief),[11] such

[11] At the hearing, respondent's counsel stated that others have told him "that they think, if they check informal conference, they don't get to appeal," but conceded that he did

an interpretation is clearly unreasonable in light of the statutory language and implementing regulations (specifically, 14 C.F.R 13.19(c)) guaranteeing the right to a Board hearing.

Further, even assuming respondent had a "right" to have an informal conference held in Hawaii (an issue we need not resolve in this case), there is no indication in the record that this could not have been arranged if he had asked. As we read the form, it does not require conferences to be held in California, but merely indicates that FAA attorneys with whom informal conferences may be scheduled are located at the California address given. In any event, respondent cannot claim he was denied something (a conference in Hawaii) that he never requested. As for the incomplete telephone number, we do not believe this renders the FAA's offer of an informal conference invalid. There is nothing in the record to suggest that respondent could not easily have obtained the FAA's telephone number from another source, such as a telephone book.

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not know whether that was true in this case. (Tr. 268.) Respondent, who was on the stand at the time, was never asked about his interpretation of the form in this regard.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 60-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.[12]

HALL, Chairman, HAMMERSCHMIDT and FRANCIS, Members of the Board, concurred in the above opinion and order.

[12] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).