

sanction from a 180-day suspension to a 90-day suspension of respondent's airline transport pilot certificate.³ We deny the appeal.

The violations were charged in connection with a flight over the St. Charles Municipal Airport, St Charles, Missouri. The Administrator's sole witness, Air Safety Investigator Robert Linenweber, was driving by the airport, on a road parallel to the runway, when he saw respondent's aircraft approaching the airport. According to his testimony, while he did not remember

(continued...)

[e]xcept 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.

Section 91.303(c), (d), and (e) provide:

No person may operate an aircraft in aerobatic flight -

* * * * *

(c) Within the lateral boundaries of the surface areas of Class B, Class C, Class D, or Class E airspace designated for an airport;

(d) Within 4 nautical miles of the center line of any Federal Airway; and

(e) Below an altitude of 1,500 feet above the surface[.]

Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another. In this case, this section is alleged as a residual violation, as opposed to an independent one. Administrator v. Pritchett, NTSB Order No. EA-3271 (1991) at n.17, and cases cited there (a violation of an operational FAR regulation is sufficient to support a finding of a "residual" or "derivative" carelessness or recklessness violation). Thus, as the law judge found, it is not considered when calculating sanction.

³ The Administrator withdrew her notice of appeal.

all of the maneuvers, and did not see the aircraft when it was very close to the ground (due to trees and structures in the way), he did see respondent make a 60° pitch approach and then pull up at a 60° angle and make a 90° "knife edge" bank. (The aircraft then came around in the flight pattern and landed.) Although he was on his way somewhere else, he detoured to the aircraft and talked to respondent. According to Mr. Linenweber, respondent acknowledged that the maneuvers he had performed were not necessary for normal flight. According to Mr. Linenweber, respondent stated: "it's been a long, wet spring and this is our chance to get out and fly." Transcript (Tr.) at 23. When he started to ask respondent about his knowledge of the regulations, Mr. Linenweber testified that respondent "began to get vague and mumble." Id.

Respondent, on the other hand, testified that he flew down the runway somewhat north of the centerline at approximately 500 feet and then climbed to the north. At no point, he testified, did he fly at more than a 20° angle of bank or more than a 30° pitch. Tr. at 89-102. Nor, he argues, did he tell Mr. Linenweber that his actions were not necessary to normal flight. Tr. at 103.⁴

On appeal, respondent argues (as he did before the law judge), that although he flew an "unusual" pattern (Brief at 1),

⁴ However, respondent did testify, somewhat contradictorily, that he acknowledged that his actions were not "standard procedure." Id.

he had no knowledge that Mr. Linenweber would testify to the specific maneuvers of a 90° bank and 60° pitch. Mr. Linenweber also failed to obtain any supporting testimony from other potential, percipient witnesses. Respondent claims that these facts should be considered when assessing Mr. Linenweber's credibility and weighing the Administrator's case.

On the merits, respondent argues that Mr. Linenweber either misperceived the attitudes of the aircraft or misrepresented them. Respondent also claims that he did not make the admission claimed by Mr. Linenweber.

Neither respondent's procedural nor substantive allegations have merit. Respondent admits that "a well framed discovery request" would have revealed Mr. Linenweber's intended testimony. Respondent's own failure to make such a request should not then form the basis for his appeal of an unfavorable decision. Nor is the lack of any other percipient witnesses a ground to overturn the law judge. It is the Administrator's choice in her discretion as to how she chooses to prosecute the case; and it is our role to determine, reviewing the evidence she presents, whether she has met her burden of proof. In this case, the law judge found that she had, and that finding is the subject of respondent's other objections.

We reject respondent's claim that the Administrator failed to establish that respondent performed "aerobatic" flight. Aerobatic flight was defined by Mr. Linenweber as maneuvers not necessary for normal flight. Section 91.303 states that

aerobatic flight means an intentional maneuver involving an abrupt change in attitude, an abnormal attitude, or abnormal acceleration not necessary for normal flight. Mr. Linenweber's testimony, if credited, clearly proves the violation.⁵

The crux of respondent's remaining argument is that the law judge should not have believed Mr. Linenweber's testimony over his. However, it is well established that resolution of credibility issues, unless made in an arbitrary or capricious manner or clearly erroneous, is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1986), and cases cited there; Administrator v. Klock, NTSB Order No. EA-3045 at p. 4 (1989) (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth...."); Administrator v. Bargaen, 5 NTSB 757, 760 (1985) (credibility determinations are not to be disturbed absent clear error). Respondent offers no reason to reverse the law judge on this basis.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 90-day suspension of respondent's certificate shall

⁵ The law judge dismissed the § 91.119(c) charge, finding that it was duplicative of § 91.303(e). The two sections are actually different, albeit with some overlap for operations below 500 feet. But, even if they were not, the Board has no authority to disregard or dismiss the Administrator's charges even were they to be duplicative. The way to address such circumstances is in the sanction analysis.

begin 30 days after the service date indicated on this opinion and order.⁶

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, 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).