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NTSB Order No. EA-5228

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 5th day of June, 2006

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17279
v.)	
)	
JOHN JOSEPH FURLINE,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent, appearing *pro se*, has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on August 3, 2005, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, finding that respondent had violated 14 C.F.R. 91.111(a), 91.113(b), 91.113(f), and 91.13(a) of the Federal Aviation Regulations.² We

¹ The initial decision, an excerpt from the hearing transcript, is attached.

² Section 91.111(a) provides that, "[n]o person may operate (continued...)

deny the appeal.³

On September 17, 2003, respondent was administering a biennial flight review to Nardo Berardinelli at Rostraver Airport, Rostraver, Pennsylvania.⁴ Mr. Berardinelli was in the left seat at the controls of respondent's Cessna 177 (Cardinal). At the time respondent was in the pattern downwind preparing to land, another aircraft was on final approach. In this aircraft, a Cessna 182, were Lucas Landau and Henrik Vejlstrup, the latter administering the initial checkride for a Certified Flight Instructor certificate. Mr. Vejlstrup is an FAA Aviation Safety Inspector, with approximately 20,500 flight hours.

The Cessna 182 was performing a soft field landing, in which the pilot is obliged to keep the pressure off the nose wheel for

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an aircraft so close to another aircraft as to create a collision hazard." Section 91.113((b) states:

General. When weather conditions permit, regardless of whether an operation is conducted under instrument flight rules or visual flight rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft. When a rule of this section gives another aircraft the right-of-way, the pilot shall give way to that aircraft and may not pass over, under, or ahead of it unless well clear.

Section 91.113(f), *Overtaking*, states that, "[e]ach aircraft that is being overtaken has the right-of-way and each pilot of an overtaking aircraft shall alter course to the right to pass well clear."

³ There is no error, as respondent contends, in the Administrator's modification of the wording of the complaint after the informal conference but before it was issued.

⁴ The complaint erroneously says that the event occurred in Monongahela, Pennsylvania. The difference is not material. There was no confusion as to the location of the event.

as long as possible, and to avoid using the brakes (to prevent, for example, allowing the nose wheel to dig into mud on the field, and flip). As a result, the aircraft uses more of the runway to land, and the Cessna 182 was unable to turn off the runway onto the first taxiway. Instead, the aircraft slowly taxied to the next taxiway, approximately 2400 feet down the 4000-foot runway, and turned right onto it.

The Cardinal was on final approach while the Cessna 182 was landing, having performed a longer downwind to allow the Cessna 182 to exit the runway. Because the Cessna 182 took longer than normal to do so, the possibility that the Cardinal would have to do a go-around grew. The Cardinal was across the threshold about 1000 feet from the other aircraft, in full flap position but, according to respondent, still coming in too fast. The Cessna 182 was still partially on the runway. Respondent announced to Mr. Berardinelli that he was taking the controls to do a go-around. He banked to the right and overflew the Cessna 182, which was then on the taxiway. He and his passenger testified that they were at approximately 100 feet at this point and climbing. Respondent noted that his aircraft had poor climbing performance.

Both occupants of the Cessna 182, testifying for the Administrator, stated their belief that respondent had deliberately "buzzed" their aircraft in retaliation for staying too long on the runway.⁵ Both Mr. Landau and Mr. Vejlstrup also

⁵ Mr. Vejlstrup testified that, in a conversation with respondent, respondent said that the Cessna 182 was dilly-

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testified that the two aircraft came within a wingspan (approximately 35 feet) of each other. Mr. Vejlstrup stated that, as the Cardinal banked to the right, the left wing tip was 10-15 feet in the air.⁶

Mr. Berardinelli, testifying for the Administrator, stated that he did not know why respondent took the controls. Transcript (Tr.) at 53. Mr. Berardinelli was an accomplished pilot. At the time, he said, the aircraft was at approximately 100 feet and rather than banking to the right he would have continued to go straight and then climb out. He testified that, on the turn and at their closest, the two aircraft were two to three wingspans (70-105 feet) apart. Tr. at 52.

Respondent had a very different explanation for what happened. He testified that he took the controls as a precautionary measure, to recover from a bad situation, and acted to avoid an accident. He explained that the Cardinal, at full flaps and then half flaps, could not climb quickly and that was the reason he came so close to the other aircraft, but that the distance between the aircraft was 100 feet and there was no danger. He believes that the law judge put words in Mr. Landau's mouth when the law judge asked him whether he was filled with

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dallying on the runway. Tr. at 83.

⁶ Mr. Vejlstrup must have misspoken. Assuming a total wingspan of 35 feet, if the left wing tip was 10-15 feet off the ground during a 30° right bank, it would result in the right wing being in the ground. Therefore, it seems clear that he meant to refer to the right wing tip rather than the left.

"fear and apprehension." Tr. at 20.⁷ Respondent also contends that the Cardinal was in an emergency situation, to which he reacted reasonably.

The only emergency we can see was of respondent's own making. There is no rebuttal in the record to Mr. Berardinelli's testimony that, at 100 feet, they could have done a straight climb out, and we agree. Respondent's choice to take over piloting the aircraft made him responsible for what then occurred. The complaint does not charge him with anything before that time.

Admittedly, there were contradictions in the testimony of the Administrator's witnesses and contradictions within Mr. Landau's testimony. However, when he reached his decision, the law judge took all the testimony into account and determined who to believe and how to resolve the inconsistencies.⁸ That

⁷ The phrase "fear and apprehension" is a catchphrase that the law judge uses frequently, and has also been used in Board opinions. See, e.g., Administrator v. Kachalsky, NTSB Order No. EA-4847 (2000) at 8. The record makes clear that Messrs. Landau and Vejlstrup considered respondent's action "scary" and "hazardous." Tr. at 20 and 84.

⁸ Mr. Landau was not clear regarding whether he heard radio communications from the Cardinal. Mr. Berardinelli continually changed his testimony and stated that the letter he wrote to the FAA supporting respondent's version of events was written by respondent. Tr. at 69.

Nor did the law judge put words in Mr. Landau's mouth; instead, the law judge was attempting to understand the witness's testimony and relate it to the alleged violation.

Respondent's challenges to Mr. Vejlstrup's testimony go not to inconsistencies but to the quality of his investigation. Respondent's cites to the record do not demonstrate lying, as he alleges.

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 (1987), and cases cited there. Administrator v. Klock, NTSB Order No. EA-3045 (1989) at 4 (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. Borgen, 5 NTSB 757, 760 (1985) (credibility determinations are not to be disturbed absent clear error).

Respondent violated section 91.111(a) in creating a collision hazard. Administrator v. Magnusson, NTSB Order No. EA-4780 (1999). He violated section 91.113(b) and (f) by failing to stay well clear of an aircraft that had the right of way and failing to see and avoid other aircraft.⁹ Assuming respondent's testimony is correct that he took the controls on final at approximately 100 feet altitude, respondent need not have banked to the right nor need he, as the law judge found, have continued to reduce his altitude and overfly another aircraft at an altitude that put the occupants of that aircraft in fear for their safety.

⁹ The section 91.13(a) charge is residual.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 180-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.¹⁰

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

¹⁰ 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).