

SERVED: May 6, 2009

NTSB Order No. EA-5447

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 5<sup>th</sup> day of May, 2009

_____	)	
LYNNE A. OSMUS,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18532
v.	)	
	)	
DAVID KEITH MARTZ,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge William R. Mullins in this matter, issued following an evidentiary hearing held on April 7, 2009.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint and ordered the revocation of respondent's commercial

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

pilot certificate, based on a violation of 14 C.F.R. § 91.13(a).<sup>2</sup> The law judge found respondent had violated § 91.13(a) when he performed a sex act with a female passenger while airborne, while both the passenger and respondent had lap belts and shoulder harnesses unlatched, while respondent's clothing during the performance of the sex act risked interfering with the helicopter's controls, and while the passenger was in a position to interfere with the helicopter's controls, all of which occurred as respondent was operating the helicopter above a populated area. We deny respondent's appeal.

The Administrator's March 10, 2009 amended emergency order,<sup>3</sup> which served as the complaint before the law judge, alleged that, at some time between May 2005 and July 2007, respondent was pilot-in-command of a Bell model 206B helicopter on a passenger-carrying flight in the vicinity of San Diego, California, and that, during the flight, a passenger leaned over the collective pitch control in the aircraft to perform a sex act on respondent. As a result, the order alleged that respondent's access to the collective pitch control was

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<sup>2</sup> Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another.

<sup>3</sup> This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52-821.57.

restricted during the commission of the sex act and that the manner in which the encounter was conducted risked loss of control of the aircraft. Based on these allegations, the order stated that respondent had operated the helicopter in a careless or reckless manner. The order further alleged that respondent's commercial pilot certificate had been revoked in 2004 and suspended in 2006, and that respondent's private pilot certificate was revoked in 1986.

At the hearing, the Administrator submitted into evidence a video recording that depicted respondent engaging in the sexual encounter with the passenger while respondent operated the aircraft on the flight in question. Exh. A-2. In addition, the Administrator called John Goldfluss, an aviation safety inspector with the FAA Western Pacific Regional Headquarters, to testify, and the law judge accepted him as an expert concerning helicopter operations. Inspector Goldfluss reviewed the video recording with the court and opined that it depicted reckless conduct. Tr. at 20. He noted that video entered into evidence in this case shows a flight over a populated area. Tr. at 40. He described, in detail, the means of operation of helicopters, and explained the importance of a helicopter pilot not becoming distracted during flight. In addition, Inspector Goldfluss described the three primary sets of helicopter controls (the collective, the cyclic, and the tail rotor anti-torque pedals),

and stated that, had respondent needed to perform an emergency maneuver such as an autorotation of the helicopter in the event of an engine failure or power loss, he would have needed to manipulate these controls immediately, without any interference from his own clothing, while properly secured in the seat so as to resist any unusual G forces, and without interference from the unsecured passenger's body. Tr. at 23, 28-29, 31-32.

Inspector Goldfluss also stated that the audio portion of Exhibit A-2 indicates that respondent had unfastened his lap belt and shoulder harness during the flight. Tr. at 31-32. He explained in detail that sudden maneuvering of the aircraft would likely have thrown either the passenger or the pilot, or even both, against the aircraft controls, possibly causing immediate loss of controlled flight. Inspector Goldfluss thus concluded that respondent's operation of the aircraft was reckless because his access to the controls was restricted, and control of the aircraft jeopardized, by the location of respondent's clothing and the position of the passenger's body.

In response to the Administrator's case, respondent called three witnesses who all opined that respondent was a skilled helicopter pilot who did not lack the care, judgment, or responsibility to fly a helicopter. On cross-examination, however, these witnesses stated that they would not fly with respondent while respondent was engaged in a sex act with an

unrestrained passenger, as videotaped in this instance. In conclusion, respondent testified on his own behalf, and stated that his certificate had been suspended for operating an unairworthy aircraft shortly after the flight at issue here, and that he had learned his lesson from that incident and the suspension that followed. Tr. at 91. Respondent further testified that he makes decisions differently now than he did in 2005, when the incident at issue occurred, and that he believes that he has the qualifications necessary to hold an airman certificate. Tr. at 95.

At the conclusion of the hearing, the law judge issued a bench decision, in which he reviewed the evidence. The law judge acknowledged that respondent admitted that he engaged in a sex act with a female passenger during the flight at issue, and specifically, as the video demonstrated, while the female passenger was unfastened from her lap belt and shoulder harness, while she leaned across the cockpit and certain aircraft controls, as she placed her head across his lap, and after he himself had unlatched his lap belt and shoulder harness. Initial Decision at 113. The law judge noted that the only portion of the complaint that respondent denied was whether his operation of the helicopter during the act was careless or reckless. The law judge stated that the Administrator had proven that respondent's access to the helicopter controls was

at risk and that both cockpit occupants were unrestrained. As a result, the law judge unequivocally concluded that respondent's behavior was reckless and thus a serious violation. The law judge further noted that respondent's certificate had previously been subject to enforcement actions, and that revocation of respondent's certificate here was the appropriate sanction under the Administrator's Sanction Guidance Table. Id. at 113-14.

On appeal, respondent raises four issues: whether the evidence supports the law judge's finding that respondent's conduct during the operation of the helicopter amounted to "gross recklessness"; whether the law judge improperly admitted medical testimony; whether the Sanction Guidance Table provides for revocation in this case; and whether respondent lacks the qualifications necessary to hold an airman certificate. The Administrator contests each of respondent's arguments, and urges us to uphold the law judge's decision.

With regard to respondent's contention that the evidence does not support the law judge's finding that respondent's conduct was grossly reckless, we reject respondent's argument. The Administrator provided direct evidence to indicate that respondent engaged in a sex act during the flight at issue. Exh. A-2. Even after conceding the accuracy of the video evidence, respondent appears to focus exclusively on the misguided contention that his access to the aircraft's controls

was not restricted, and accordingly, he had no difficulty maintaining control of the aircraft. This assertion, however, seems to ignore the import of key facts in the case: the passenger was leaning across one of the essential aircraft controls, the collective. Her head was occupying a space very near the cyclic control, another critical aircraft control. Her body was unrestrained and vulnerable to G forces, including negative G forces, from any sudden aircraft maneuvers in flight. Respondent's argument also does not obviate the undisputed fact that respondent unfastened his own lap belt and shoulder harness that secured him in place, thus subjecting his own unrestrained body to G forces and the risk of being thrown about the cockpit during that portion of the flight. Respondent's argument that his aircraft was not in danger of hitting the ground or another aircraft, or going out of control, therefore seems to ignore not only the risks he took on the flight in question, but ignores the laws of physics as well. In the aggregate, these events convince us that respondent's attention was not devoted sufficiently to the act of flying the aircraft. Instead, during substantial portions of the flight in question, it appears to this Board that the flight was but a single misstep from disaster.

Beginning at the point in the videotape before the passengers actually boarded the helicopter, the female passenger

exhibited not only an innocence to the ways of flight and the intricacies of helicopter operations by partially disrobing and allowing the respondent to hover the helicopter practically overhead and just feet from her body, but also displayed the typical passenger's willingness to entrust one's safety and well being to the judgment and skill of the pilot. This is often the case in the relationship between a non-flyer passenger and a pilot. Unfortunately, on this flight, that trust was rewarded by respondent's demonstrated careless disregard for the welfare of that female passenger, the camera operator filming the enterprise, and the many, many people in the city below unaware of the reckless behavior transpiring overhead.

Regardless, as we have previously held, the Administrator need not establish actual danger, a flight suddenly in peril, in order to prevail in proving that a respondent has operated an aircraft in a careless or reckless manner. In Administrator v. Lorenz, NTSB Order No. EA-5205 at 2-3 (2006), we recognized that a showing of potential endangerment is sufficient to prove a violation of § 91.13(a), and cited several cases holding that proof of actual danger is unnecessary for a § 91.13(a) charge.<sup>4</sup>

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<sup>4</sup> See, e.g., Roach v. Nat'l Transp. Safety Bd., 804 F.2d 1147, 1157 (10<sup>th</sup> Cir. 1986) (finding that it is not necessary to prove actual endangerment in order to sustain a carelessness charge); Haines v. Dep't of Transp., 449 F.2d 1073, 1076 n.10 (D.C. Cir. 1971) (quoting regulation and stating that, "[t]he wording of the regulation does not support a requirement of actual danger.

Here, the Administrator has provided sufficient evidence to establish that respondent's operation of the aircraft was careless or reckless, in violation of § 91.13(a).

Respondent's argument concerning the law judge's ruling on "medical testimony" is also without merit. First, we note that we have long held that we review law judges' evidentiary rulings under an abuse of discretion standard,<sup>5</sup> and that we allow law judges significant discretion in overseeing hearings.<sup>6</sup> Overall, we have held that we will only entertain evidentiary questions when they amount to prejudicial error.<sup>7</sup> Given this precedent, we will review arguments regarding evidentiary rulings to determine

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(..continued)

Instead it prohibits the "[operation of] an aircraft in a careless ... manner so as to endanger life or property"; Administrator v. Szabo, NTSB Order No. EA-4265 at 4 (1994) (stating that, "innumerable Board cases make clear that no more than potential endangerment is required" in order to find a violation of § 91.13(a)).

<sup>5</sup> See, e.g., Administrator v. Raab, NTSB Order No. EA-5300 at 9-10 (2007); Administrator v. Zink, NTSB Order No. EA-5262 at 7-8 (2006); Administrator v. Seyb, NTSB Order No. EA-5024 at 5-6 (2003); Administrator v. Van Dyke, NTSB Order No. EA-4883 at 5 (2001).

<sup>6</sup> See, e.g., Administrator v. Simmons, NTSB Order No. EA-5275 at 9-10 (2007) (citing 49 C.F.R. § 821.35(b)); Administrator v. Kachalsky, NTSB Order No. EA-4847 at n.4 (2000); and Administrator v. Reese, NTSB Order No. EA-4896 at n.4 (2001)).

<sup>7</sup> See generally Administrator v. Blair, NTSB Order No. EA-4253 at 7 n.10 (1994) (stating that the law judge had improperly excluded evidence, but that the error was harmless). Moreover, an error is considered *prejudicial* when it "actually [affects] the outcome of the proceedings." United States v. Hastings, 134 F.3d 235, 240 (4<sup>th</sup> Cir. 1998).

whether the law judge has abused his broad discretion, and whether the alleged error resulted in prejudice against the party that allegedly suffered harm as a result of the ruling. Respondent's contention that the law judge erred in allowing Inspector Goldfluss to testify that respondent would have been distracted or could have incorrectly manipulated the controls of the aircraft in the event of a "biological reaction" to the activities during the flight is unpersuasive. Respondent has not established how this testimony was prejudicial; even without Inspector Goldfluss's opinion on this topic, we would expect our judges to be able to assess the evidence on videotape and apply judgment, common sense, and their understanding of common events to the circumstances. Respondent's brief does not contain any explanation of how the law judge abused his discretion in allowing the inspector's opinion in this regard. In this instance, the evidence indisputably establishes that respondent engaged in reckless conduct while operating the aircraft.

Respondent's argument that the Sanction Guidance Table does not provide for revocation in a situation such as this one is also not persuasive. Chapter 7, ¶ 2(b)(2) of the Sanction Guidance Table states that revocation is permissible for violations involving grossly careless or reckless conduct, among

other types of behavior.<sup>8</sup> We do not believe the law judge erred in finding that respondent's conduct during the flight in question amounted to gross recklessness; we, too, conclude that the conduct meets the standard of "grossly careless or reckless," as the Sanction Guidance Table states.

We further note that, in general, we will defer to the Administrator's choice of sanction when the Administrator includes the Sanction Guidance Table in the record.<sup>9</sup> Here, the law judge took judicial notice of the Sanction Guidance Table, which provides for revocation in this instance. Furthermore, we have repeatedly upheld revocation where the respondent's non-compliance disposition is demonstrated.<sup>10</sup> We have also held that

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<sup>8</sup> Revocation is appropriate whenever a certificate holder "demonstrates a lack of willingness or ability to comply consistently with statutory or regulatory requirements. A lack of willingness or ability to comply may be demonstrated by such things as repeated or deliberate violations or by violations that involve grossly careless or reckless conduct." Exh. A-3 at 7-2.

<sup>9</sup> Garvey v. NTSB, 190 F.3d 571, 581 (D.C. Cir. 1999) (directing the Board to defer to the Administrator with regard to sanction, when the Board had reduced the sanction on the basis that the pilot had acted "responsibly and prudently"); Administrator v. Law, NTSB Order No. EA-5221 at 4 (2006) (deferring to the Administrator's choice of sanction); see also Go Leasing v. NTSB, 800 F.2d 1514, 1518 (9th Cir. 1986) (finding that the Federal Aviation Act authorizes Administrator to issue orders suspending, revoking, amending, or modifying aviation certificates in interests of safety, and that the Administrator may decide which certificate action is appropriate).

<sup>10</sup> Administrator v. Bigger, NTSB Order No. EA-4856 at 3 (2000), citing Administrator v. Bennett, NTSB Order No. EA-4762 at 3

an airman displaying a negative compliance disposition lacks the care, judgment, and responsibility required of a certificate holder because the likelihood of his adherence to regulatory requirements adopted to promote air safety cannot be predicted with any degree of confidence.<sup>11</sup> With regard to the case at hand, respondent's conduct was egregious and exhibited a disregard for safety; as such, we agree with the law judge that revocation is the appropriate sanction.

Finally, respondent's argument that his conduct did not "bear on his qualifications to hold an airman certificate" is neither persuasive nor helpful to his case. Respondent cites Administrator v. Stewart, NTSB Order No. EA-4479 (1996), for the notion that a significant temporal gap between the conduct and the enforcement action can overcome a lack of qualifications, because a respondent who, at the time of the conduct, might have lacked the qualifications to hold an airman certificate may now possess the requisite care, judgment, and responsibility. The law judge correctly noted that Stewart is easily distinguishable from respondent's case, as Stewart involved a gap of 17 years between the time of the conduct and the enforcement action.

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(..continued)

(1999); Administrator v. Basulto, NTSB Order No. EA-4474 at 10 (1996) (imposing revocation for intentional conduct that demonstrated lack of compliance disposition).

<sup>11</sup> Administrator v. McKinley, 7 NTSB 798 (1991).

Respondent, however, recklessly operated the helicopter in May 2005, and, shortly after this conduct, respondent's certificate was suspended for his operation of an unairworthy aircraft, during which he struck a wire with his helicopter. Administrator v. Martz, NTSB Order No. EA-5352 (2008). This matter subsequently came to the attention of the Administrator, and enforcement action promptly ensued. Respondent has not convinced this Board that he possesses the care, judgment, and responsibility to hold an airman certificate, in 2005 or today. As discussed above, respondent's conduct demonstrates that he lacks the qualifications to hold an airman certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's emergency revocation of respondent's commercial pilot certificate is affirmed.

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

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

\* \* \* \* \*  
In the matter of: \*  
\*  
LYNN OSMUS, \*  
Acting Administrator, \*  
Federal Aviation Administration, \*  
\*  
Complainant, \*  
v. \*  
DAVID KEITH MARTZ, \*  
\*  
Respondent. \*

Docket No.: SE-18532  
JUDGE MULLINS

1515 West 190th Street  
Courtroom 555  
Gardena, California

Tuesday,  
April 7, 2009

The above-entitled matter came on for hearing, pursuant  
to Notice, at 9:00 a.m.

BEFORE: WILLIAM R. MULLINS  
Administrative Law Judge

## APPEARANCES:

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ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE MULLINS: This has been a proceeding before the National Transportation Safety Board held under provisions of Section 44709 of the Federal Aviation Act of 1958, as amended, on the appeal of David Keith Martz, who I will refer to as the Respondent, from an Emergency Order of Revocation that has revoked his airman's certificate. The Emergency Order of Revocation was filed on behalf of the Administrator of the Federal Aviation Administration, through Regional Counsel of the Western Pacific Region.

The matter has been heard before me, William R. Mullins. I'm the administrative law judge for the National Transportation Safety Board. And pursuant to Board's Rules, I'll issue a bench decision at this time.

The matter came on for hearing here in Gardena, California this 7th day of April 2009. And the Administrator was present throughout these proceedings and represented by Counsel, Ms. Lierre Green, Esquire, and Mr. Carey W. Terasaki, Esquire, of the of the Regional Counsel's Office.



1 night, at least late evening. That portion of video that I saw  
2 that was presented today was at night.

3 And during this flight, Respondent received an oral sex  
4 act by a partially nude young lady. I say young lady; it appeared  
5 to be a young lady. Those things become relative, as I get older,  
6 but it appeared to be a young lady who was in the left seat of the  
7 helicopter and it was being videoed by someone unidentified, who  
8 was in the backseat. And the young lady was never identified  
9 either.

10 And this occurred and the evidence indicated today that  
11 it occurred on the evening of May 29th of 2005, almost four years  
12 ago. And as results of that videotape, the Administrator has  
13 alleged a careless/reckless act and has revoked Respondent's  
14 airman certificate on an emergency basis.

15 Interestingly for me, the Respondent admitted all of  
16 these things. The only portion of the complaint that Respondent  
17 has denied was that it was a careless and reckless act. And he  
18 denied -- and as a result of that denial, he believes that the  
19 sanction is inappropriate, that of revocation.

20 Mr. Goldfluss testified, and he's an aviation safety  
21 inspector at the FAA Western Pacific Region, Regional  
22 Headquarters, and apparently, as he testified, he serves as a  
23 consultant on enforcement cases and reviews them and presents his  
24 reviews, okays them from standpoint of the investigative report,  
25 the enforcement investigative report, EIR.

1           In this particular case, Mr. Goldfluss testified and he  
2 had identified this videotape that we observed in camera. And  
3 there were several aspects of it that he pointed out. Among them  
4 was that the Respondent had unbuckled his seatbelt, his shoulder  
5 harness was obviously loose, as depicted in that. His trousers,  
6 jeans, were down almost to his knees and appeared to be up against  
7 the cyclic. And the young lady was leaning over the collective.  
8 I'm not a helicopter pilot; I hope I get those controls right.  
9 But the up and down control, she was over that.

10           And as Mr. Goldfluss pointed out, any number of things  
11 could've gone wrong at that moment and the helicopter would've  
12 been, probably in a catastrophic situation for whatever reason, if  
13 control had been lost, if there'd been turbulence, if there'd been  
14 an engine out, or some other human factors that might've been  
15 involved. But in any event, none of them represented a good  
16 scenario.

17           And on cross-examination, he did agree with Counsel for  
18 Respondent that none of those things occurred that evening.  
19 However, I think his testimony was that they were here for the  
20 potential of that.

21           In any event, he testified that it was his opinion that  
22 this was a serious enough violation based on the prior history.  
23 Respondent had been revoked twice prior to this incident and  
24 suspended on a couple of other occasions, and in fact, was  
25 suspended, subsequent to the date of this incident that night that

1 was shown in the videotape. And it was Mr. Goldfluss' opinion  
2 that this would justify under the new Sanction Guidance Table  
3 revocation of the certificate.

4 Respondent had four witnesses, including himself, but  
5 the first witness was Mr. Ruben Campos. Mr. Campos is a  
6 commercial helicopter pilot that works for SoCal, which is  
7 Respondent's company. And I asked him, and Mr. Campos admitted,  
8 that he works for Respondent. But his testimony was that he  
9 thought that Mr. Martz had the care, judgment, and responsibility  
10 required to hold a certificate that he has. However, he agreed  
11 that the video perhaps showed an act that didn't demonstrate care,  
12 judgment, and responsibility.

13 Mr. Wayne Lewis, who's a friend of Respondent, who is a  
14 private helicopter pilot and was with Respondent during the search  
15 for the Fossett aircraft up in Nevada, testified. And he's flown  
16 with Respondent a number of times. And his testimony was that he  
17 felt comfortable flying with Respondent.

18 Tim Sears was called then, who's an ATP rated fixed and  
19 rotor wing pilot and a CFI. He said he's flown over 200 hours  
20 with the Respondent. I thought it was interesting, he said now  
21 that the Respondent has the care, judgment, and responsibility  
22 required of a pilot, although he felt there was a time several  
23 years ago when he didn't have that care, judgment, and  
24 responsibility.

25 And then Respondent testified almost to that same

1 thing, that he felt, particularly since the last period of  
2 suspension, which involved a wire strike, I think he said down in  
3 Mexico; but in any event, that he's become a better pilot and he  
4 now has the care, judgment, and responsibility. There was not any  
5 dispute about the film or the facts as they developed on the night  
6 of this flight.

7           Respondent's position is that he has since somehow been  
8 rehabilitated because of a period of suspension that he served  
9 subsequent to that time and believes that the matter of sanction  
10 is excessive.

11           The evidence clearly shows grossly reckless conduct on  
12 the part of the Respondent. Respondent has argued that the  
13 Stewart case, where there was a 17-year period between the acts  
14 complained of and the Order of Revocation sought by the  
15 Administrator had transpired.

16           And in that case, the Board said that the 17-year  
17 period, particularly where this American Airline captain had flown  
18 for American Airlines, had gone through all of their training and  
19 testing and everything over that 17-year period that that was just  
20 too long a period of time.

21           I find that case easily distinguishable today. Over  
22 the years, in fact, I think I was involved in the first case  
23 involving Mr. Stewart, Captain Stewart, which we had over in  
24 Phoenix for a week or ten days. But in any event, there was a  
25 period of time that the Administrator and I have seen this at

1 least in a couple of situations where the Administrator gets on a  
2 crusade about something. And at that particular time, and I think  
3 the Board referred to it in the Stewart case, they were on a  
4 crusade about these add-on type ratings.

5           And if you had received an add-on type rating or if you  
6 were an FAA inspector who was giving these add-on type ratings  
7 without the appropriate paperwork, the Administrator came after  
8 those individuals for revocation. That's clearly distinguished  
9 from the facts of this case.

10           The latest of those crusades that I've seen from the  
11 Administrator is the operational control issue. And the  
12 operational control issue, that generated because of a Challenger  
13 accident back in Teterboro about four years ago. And I've been  
14 involved in three or four of those cases since then where the  
15 Administrator, apparently, the only way they can get the  
16 operational control the way they want it is just to revoke a bunch  
17 of the operators. They certainly have gotten them suspended.  
18 They haven't gotten any revocations. But that's just one of those  
19 things.

20           But those are the kind of cases that are clearly  
21 distinguishable from this present case. As I said, the conduct  
22 that evening was grossly reckless and I'm surprised that the  
23 Administrator even put careless in the pleadings because careless  
24 shows some sort of negligent act. This was a deliberate act that  
25 was reckless clearly on its face.

