

SERVED: May 15, 2009

NTSB Order No. EA-5449

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 14th day of May, 2009

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| LYNNE A. OSMUS, | |) | |
| Acting Administrator, | |) | |
| Federal Aviation Administration, | |) | |
| | |) | |
| | Complainant, |) | |
| | |) | Docket No. SE-18541 |
| | v. |) | |
| | |) | |
| PETER A. POLAND, | |) | |
| | |) | |
| | Respondent. |) | |
| | |) | |
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OPINION AND ORDER

The Administrator appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty in this matter, issued following an evidentiary hearing held on April 15, 2009.¹ By that decision, the law judge affirmed the majority of the Administrator's complaint and ordered the suspension of

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

respondent's airline transport pilot (ATP), commercial pilot, and flight instructor certificates for a period of 270 days, based on a violation of 14 C.F.R. §§ 91.303(c) and (e),² and 91.13(a).³ The law judge found that the Administrator did not prove that respondent violated 14 C.F.R. § 91.119(b)⁴ as charged, and reduced the sanction from revocation to a suspension. The Administrator appeals the law judge's reduction in sanction. We grant the Administrator's appeal.

The Administrator's March 17, 2009 emergency order,⁵ which served as the complaint before the law judge, alleged that, on or about August 17, 2008, respondent acted as pilot-in-command of an Extra 300 aircraft over and in the vicinity of Camarillo

² Section 91.303(c) and (e) prohibit any person from operating 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;" and "(e) Below an altitude of 1,500 feet above the surface."

³ Section 91.13(a) prohibits careless or reckless operation so as to endanger the life or property of another.

⁴ Section 91.119(b) states that, except when necessary for takeoff or landing, no person may operate an aircraft over any congested area of a city, town, or settlement, or over any open air assembly of persons, below an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

⁵ 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.

Airport in Camarillo, California, which consists of Class D airspace. The complaint further stated that, during the flight, respondent operated the aircraft at less than 100 feet above ground level on at least two passes while flying within a 2,000-foot radius horizontally of persons and structures in a congested area, and that neither pass was for the purpose of taking off or landing. The complaint also alleged that respondent flew aerobatic maneuvers during the flight in the same airspace, at an altitude below 500 feet. The complaint included a reference to a previous FAA case against respondent, whereby the Administrator had previously suspended respondent's ATP certificate for operating an aircraft over congested areas while performing aerobatic maneuvers at an altitude below 500 feet without properly packed parachutes. The complaint also cited two instances in which the Administrator had assessed civil penalties against respondent for operating a Maudry CAP 10B aircraft over both an open air assembly of persons, and over an "other than congested area" at the Camarillo Airport when respondent could not have completed an emergency landing without undue hazard to persons or property on the surface. The complaint alleged that respondent lacked the qualifications necessary to hold any and all of his airman certificates, and ordered immediate revocation of the certificates.

At the hearing, the Administrator called three aviation safety inspectors to testify. Inspector Michael Hoffman, who works at the Flight Standards District Office (FSDO) in Van Nuys, California, stated that he observed respondent flying the Extra 300 just prior to the commencement of the 2008 Camarillo Air Expo on August 17.⁶ Inspector Hoffman testified that he observed the aircraft about 100 feet above ground, flying at a high rate of speed, and that he was approximately 1,000 feet away from the aircraft when he saw it. Inspector Hoffman identified a waiver that the FAA had issued to air show participants to allow them to fly at low altitudes, as well as an agenda for the air show that lists the planned sequence and the pilots for each flight; respondent's name does not appear on the waiver or the agenda. Inspector Hoffman testified that one to two thousand people were in attendance at the airport for the show. Tr. at 26. Inspector Hoffman stated that respondent had smoke on for portions of the flight, banked the aircraft at a 50- to 60-degree angle, and was moving at a speed of 120 to 140 knots. Tr. at 32, 34-35. Inspector Hoffman testified that this operation of the aircraft lasted 56 seconds, and that, after the flight, he discussed the flight with respondent. According to

⁶ Inspector Hoffman testified that the event was not an "air show," because it did not include aerobatic schedules. Tr. at 18. However, the testimony and exhibits reference the event as an "air show," and we will identify it as such in this opinion.

Inspector Hoffman, respondent indicated that he was aware that the air show could not include aerobatic maneuvers, but that he still wanted to put on a show for the crowd. Tr. at 39-40. Respondent also called Inspector Hoffman to testify on his behalf, in order to admit an exhibit depicting an aerial view of the airport; during respondent's case, Inspector Hoffman further testified that no portion of respondent's flight that day was normal. Tr. at 119.

In addition, the Administrator called Norman Robinson, an aviation safety inspector at the Van Nuys FSDO, to testify as an expert in aerobatic operations. Inspector Robinson testified that operation of an Extra 300 or 300L is the same as any general aviation aircraft, such as a Cessna 172. Tr. at 60. Inspector Robinson further stated that respondent's operation of the aircraft, as described above, was unusual for normal flight, because 90 knots is the normal airspeed for a climb in an Extra 300, and abrupt maneuvers are not generally required.

Inspector John Goldfluss, an aviation safety inspector and technical staff specialist and the Western Pacific Regional Air Show Coordinator for the FAA, also testified. He opined that respondent's maneuvers were "grossly reckless," as the FAA had specifically prohibited these types of maneuvers in which a pilot descended toward the crowd of onlookers. Tr. at 76-77. Inspector Goldfluss opined that revocation of respondent's

airman certificates as the sanction for respondent's conduct was appropriate.

In response to the Administrator's case, respondent testified on his own behalf. Respondent stated that almost all of his experience in the Extra 300 was in aerobatics, and that a 50- to 60-degree turn in the aircraft would not be an aerobatic maneuver. Respondent testified that he believed it was safer to climb at a steep angle in the aircraft, that a 45-degree bank during downwind was not unusual, nor was his rate of climb. He stated that, at the time of his flight, Camarillo Airport was under the control of the air traffic control (ATC) tower, rather than the air boss for the air show, and that he specifically requested a right-hand turn from ATC, in order to avoid spectators. Respondent further testified that he made no abrupt maneuvers, that his pitch-up was not abrupt, and that ATC approved him for a low pass.

At the conclusion of the hearing, the law judge issued a bench decision, in which he determined that the Administrator proved that respondent violated § 91.303(c) and (e) because the evidence established that respondent conducted aerobatic maneuvers in the aircraft, as alleged. The law judge stated that respondent had acknowledged that he was at the airport to entertain people, and that Inspector Goldfluss had testified that some of respondent's maneuvers would not even have been

permissible in an air show. The law judge stated, however, that the Administrator did not prove that respondent violated § 91.119(b) because the Administrator provided no evidence that respondent had operated the aircraft over a congested area or open-air assembly of persons. The law judge acknowledged respondent's past violation history. The law judge then determined that deference to the Administrator's choice of sanction was not required in this case because the Administrator did not prove the entire complaint. Initial Decision at 152. As such, the law judge stated that a suspension of respondent's certificates for a period of 270 days was the appropriate sanction. Id. at 153.

The Administrator appeals the law judge's decision with regard to the reduction in sanction.⁷ The Administrator argues that revocation is appropriate in this case because the Board must defer to the Administrator's choice of sanction, and because respondent's conduct indicates that he lacks the qualifications necessary to hold an airman certificate. In support of the argument that respondent lacks qualifications, the Administrator contends that a lack of qualifications is evident by either establishing a continuing pattern of conduct,

⁷ We note that the Administrator does not appeal the law judge's finding that the Administrator did not meet the burden of proof with regard to the alleged § 91.119(b) violation, but only appeals the law judge's reduction of sanction.

or by showing that an airman's conduct in one incident is particularly egregious. The Administrator asserts that, in this case, respondent's conduct was deliberate and reckless, and that such conduct indicates a lack of qualifications, but that the law judge did not address this argument. The Administrator also emphasizes that respondent has had other enforcement actions for similar conduct, and that these actions obviously did not have a remedial effect because respondent violated the regulations as described above. Respondent opposes each of the Administrator's arguments, and urges us to uphold the law judge's choice of sanction.

Regarding sanction, the FAA Civil Penalty Administrative Assessment Act (the Act)⁸ states that the Board is bound by written agency guidance available to the public relating to sanctions to be imposed, unless the Board finds that any such interpretation or case sanction guidance is arbitrary, capricious, or otherwise not in accordance with law.⁹ It is the Administrator's burden under the Act to clearly articulate the sanction sought, and to ask the Board to defer to that determination, supporting the request with evidence showing that the sanction has not been selected arbitrarily, capriciously, or

⁸ 49 U.S.C. §§ 44709(d) and 46301(d).

⁹ Administrator v. Hewitt, NTSB Order No. EA-4892 at 2 (2001).

contrary to law.¹⁰ Even when the Administrator has not introduced the Sanction Guidance Table into the record and requested such deference, we have still ordered a serious sanction when the respondent's conduct indicates that the respondent acted in a deliberate manner that demonstrates an unwillingness to comply with the regulations.¹¹

In the case at hand, the law judge based his reduction in sanction on his determination that the Administrator did not prove all charges in the complaint. In general, such a failure may result in a reduction in sanction, as our deference to the Administrator's choice of sanction is neither unlimited nor appropriate in every circumstance. In this case, however, the Administrator also established that respondent committed prior violations, which resulted in a 2005 suspension and two assessments of civil penalties in 2001 for similar conduct at the same airport.

¹⁰ Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997); see also Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (Administrator introduced no evidence regarding applicable or relevant sanction guidance).

¹¹ Administrator v. Armstrong, NTSB Order No. EA-5320 at 24–25 (2007) (citing, for the proposition that the Board imposes serious sanctions for a disposition that indicates a lack of compliance, the following: Administrator v. Bigger, NTSB Order No. EA-4856 at 3 (2000); Administrator v. Bennett, NTSB Order No. EA-4762 at 3 (1999); and Administrator v. Basulto, NTSB Order No. EA-4474 at 10 (1996)).

In Administrator v. Frost, NTSB Order No. EA-3856 at 8–9 (1993), we stated that whether the Administrator has demonstrated that an airman lacks the qualifications to hold a certificate is “an extremely fact-bound inquiry,” and that facts establishing that a respondent had repeatedly operated an aircraft at a low altitude showed that the respondent lacked the level of care and judgment expected from an airman. More recently, in Administrator v. Giannola, NTSB Order No. EA-5426 (2009), we recognized that the Administrator may establish that a respondent lacks the qualifications necessary to hold a certificate by establishing that the respondent engaged in a continuing pattern of conduct showing disregard for the regulations, or that the respondent’s conduct in one event was particularly egregious. Id. at 8 (citing Frost, supra, and Administrator v. Wingo, 4 NTSB 1304, 1305–1306 (1984)). The facts here indicate that respondent acted in a deliberate manner, once again committing violations similar to those in the not-too-distant past. We conclude that revocation is the appropriate sanction, because of respondent’s demonstrated unwillingness to comply with the Federal Aviation Regulations, which, based on our precedent, indicates that he lacks the qualifications to hold an airman certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator’s appeal is granted;

2. The law judge's decision is reversed with regard to sanction; and

3. The Administrator's emergency revocation of respondent's ATP, commercial pilot, and flight instructor certificates is affirmed.

ROSENKER, Acting Chairman, and HIGGINS and SUMWALT, Members of the Board, concurred in the above opinion and order. HERSMAN, Member, did not concur, and submitted the following dissenting statement.

Member Hersman, Dissenting

I dissent, based on the Board's reversal of the law judge's assessment of sanction in this case.

The law judge who heard the evidence and issued a decision in this case reduced the sanction to a lengthy suspension, rather than the revocation sought by the Administrator. Under long-established precedent, the law judge may adjust a sanction when the Administrator fails to fully prove the case as charged. The law judge exercised his discretion to adjust the sanction in this case because he determined that the Administrator did not prove that the respondent violated 14 C.F.R. 91.119(b) by operating the aircraft over a congested area. While the law limits the authority of the law judges and the Board to modify the sanction sought by the Administrator, I fully support the Board's precedent that allows law judges, under specific circumstances, the discretion to impose a sanction they determine to be more fitting for a case that is not fully proven by the Administrator. This discretion is appropriate because law judges offer considerable experience in reviewing these cases and are in a suitable position to evaluate what sanction would best deter future violations.

Under the particular facts of this case, I find insufficient grounds to alter the law judge's well-reasoned assessment of final sanction.

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1 ORAL INITIAL DECISION

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a
3 proceeding before the National Transportation Safety Board on the
4 Appeal of Peter A. Poland, herein Respondent, from an Emergency
5 Order of Revocation which seeks to revoke on an emergency basis
6 his Airline Transport Pilot Certificate, Commercial Pilot
7 Certificate and Flight Instructor Certificate, and any other
8 Airman Pilot Certificates held by him. The Emergency Order of
9 Revocation serves herein as the Complaint and was filed on behalf
10 of the Administrator, Federal Aviation Administration, herein, the
11 Complainant.

12 The matter has been heard before this judge and, as
13 required by the Board's Rules of Practice for Emergency
14 Proceedings, I am issuing a bench decision in the proceeding.

15 Pursuant to notice, this matter came on for trial on
16 April 15, 2009 in Gardena, California. The Complainant was
17 represented by Staff Counsel from the Western Pacific Region, Los
18 Angeles, California. The Respondent was present at all times and
19 was represented by his Counsel, Arthur Wasserman, Esquire, of Van
20 Nuys, California.

21 The parties were afforded the opportunity to call,
22 examine, and cross-examine witnesses, and to make argument in
23 support of their respective positions.

24 I have considered all of the evidence, both oral and
25 documentary, and in reviewing the evidence, I restrict myself just

1 to the highlights, which support the conclusion I have reached
2 herein. That evidence, which I do not specifically mention is
3 viewed by me as either being essentially corroborative of that
4 which I do mention, or as not materially affecting the outcome of
5 the decision.

6 AGREEMENT

7 By pleading and stipulation in Court session, it was
8 agreed there was no dispute as to the following numbered
9 paragraphs of the Complaint: Paragraphs 1 through 3, and
10 Paragraphs 8 through 10. Accordingly, the matters stated
11 factually in those allegations of the Complaint are deemed as
12 having been established for purposes of this decision.

13 DISCUSSION

14 As noted, the Administrator, the Complainant, seeks
15 revocation of Respondent's pilot certificates, and that is based
16 upon allegations pertaining to a flight operation he conducted
17 admittedly as pilot in command on August 17, 2008, in the morning
18 hours about 11:30 a.m. in a flight in the vicinity of the
19 Camarillo Airport, Camarillo, California. It is alleged that in
20 the conduct of that flight, the Respondent so operated his
21 aircraft as to be in regulatory violation of Sections 91.119(b);
22 91.301(c); 91.303(e) and 91.13(a) of the Federal Aviation
23 Regulations. The specific provisions of those cited Regulations
24 will be referred to subsequently as necessary herein.

25 The Complainant's case is made through the testimony of

1 several witnesses and three Exhibits offered and received during
2 the course of the proceeding. First of the witnesses was
3 Mr. Michael Hoffman, who was an Aviation Safety Inspector with the
4 Van Nuys Flight Service District Office, FSDO. He holds an ATP
5 and Commercial certificates. He's a CFII, has about 3,000 hours.
6 And he also has been experienced with air shows. He's attended
7 them as a trainer that is in a training capacity for others and he
8 has been an inspector in charge on two air shows. So he does have
9 experience with that.

10 Exhibit A-1 was a diagram of Camarillo Airport, which
11 was offered through his testimony, and as described on it, a
12 flight path which the witness testified that he observed, and his
13 location on the airport at the time of his observations, which
14 were about 11:30 a.m. on the date as referenced above.

15 The witness stated that he had just come out of a
16 briefing that was being held for pilots that were going to
17 participate in an air show that was being conducted on this
18 airport on the dates of August 16 and 17. And that as he came out
19 he observed a red and white aircraft about 100 feet AGL, above
20 ground level, at a high speed going from his right to left. That
21 is, from east to west, and he was about 1,000 feet away from the
22 aircraft. And with reference to Exhibit A-2, page 12 thereof, the
23 diagram thereon does show that from his X mark, which is on a
24 taxiway, taxiway F, it is 1,000 feet from the edge of that taxiway
25 to the edge of runway 26. There is a long displaced threshold for

1 26, and 26 proceeds down to the far end.

2 Mr. Hoffman indicated that in the location where he was
3 that the crowd control barrier line continued to extend past where
4 he was, that on the taxiway there were, in fact, static displays,
5 or aircraft that did have people around them, mechanics and other
6 observers who were simply looking at the aircraft prior to the
7 time of the actual airshow. In that vicinity, there were about
8 100 people with him, including pilots, mechanics and just general
9 people observing the various aircraft.

10 With respect to his observation of the flight maneuvers,
11 which are admittedly conducted by the Respondent, Mr. Hoffman
12 described it as a high speed flyby with a pitch up to at least 45-
13 degree angle at the end of runway 26, with a climb to about 900 to
14 1,000 feet, and then a sharp right bank. He indicated at least a
15 50 to 60-degree angle of bank, proceeding from that crosswind down
16 to the downwind with a right base on the increase of speed to the
17 point where he was going to do his base. And again, a 60-degree
18 turn to line up with runway 26, continuing down, and that during
19 the process of this maneuver that the aircraft was laying down
20 smoke from smoke canisters on the aircraft, and that the pass was
21 then continued down the runway. And he indicated somewhere
22 between 120 to 140 knots. And then at the far end of the runway
23 again another pitch up of 45 degrees or more with a departure then
24 from the immediate area to the northwest.

25 There was then testimony that a letter of investigation

1 was sent to the Respondent. The Respondent opted to have a face-
2 to-face meeting with Mr. Hoffman and another ASI, apparently at
3 the FSDO. It was testified to by Mr. Hoffman that during this
4 conversation that Mr. Hoffman inquired as to whether the
5 Respondent had been flying and Respondent indicated he had.
6 Hoffman told the Respondent that what he had observed was not
7 necessary for normal flight and that in response, the Respondent
8 indicated that he had been targeting 60-degree angles of banks as
9 he wanted to put on a show for the people as there had been no
10 aerobatics scheduled for that particular day. And apparently,
11 that is the testimony from all of the witnesses that there were
12 not any specific aerobatic maneuvers scheduled, but there were
13 supposed to be aerobatic flybys.

14 The testimony of Mr. Hoffman as to the conversation of
15 the Respondent, particularly with respect to the targeting 60-
16 degree angles of banks because he wanted to put on a show was
17 never contradicted by the Respondent. So it stands as non-
18 contested.

19 On cross-examination, again, Mr. Hoffman reiterated that
20 what he observed was pitchups of angles of 45 degrees or more.

21 Mr. Robinson is an Aviation Safety Inspector. He holds
22 an ATP, has over 20,000 hours, has competed in aerobatics, did so
23 for about four years, 12 contests, has about 300 hours of
24 aerobatic time and is a member of the International Aerobatic
25 Club. So he is well-qualified to express opinions and was

1 accepted in that capacity. He has not flown the exact same
2 airplane as the Respondent was flying on the date in question,
3 which is identified as an Extra 300L. However, Mr. Robinson
4 indicated he has flown with the Extra 300 and that, on his
5 testimony, there are essentially no real differences, a bit more
6 fuel in the L, a low wing for the L, maybe a couple of knots more
7 speed required for approaches. But on his testimony, which wasn't
8 really contradicted is that for traffic pattern work, the 300L
9 flies essentially like the Cessna 172. So essentially, a normal
10 GA, general aviation, type aircraft other than being certified for
11 aerobatic type maneuvers.

12 Mr. Robinson opined that based upon his discussion with
13 Mr. Hoffman and listening to the testimony that it was
14 Mr. Robinson's opinion that the maneuvers that were performed by
15 the Respondent were not necessary for normal flight, and that they
16 were in fact aerobatic maneuvers. Within a traffic pattern, 60
17 degree angles of bank are not normally required for normal flight
18 operations. Normally, one would expect standard turns such as 30-
19 degree angles of bank.

20 Mr. John Goldfluss is also with the Federal Aviation
21 Administration, been with them 20 years. He's a Technical Staff
22 Specialist. He has also given on-the-job training to other
23 aviation safety inspectors to qualify them to be inspectors in
24 charge at airshows. He, himself, of course has been a coordinator
25 at air shows and been a training instructor, as I've already

1 mentioned. He holds an Airline Transport Pilot Certificate and
2 additional certifications up through Ground Instructor and over
3 11,000 hours.

4 He testified with respect to the waiver and that the
5 waiver was in effect from 1300 hours to 1600 hours on the two
6 dates in question. Operations before those times, even by pilots
7 that were listed in the waiver would not have been covered by the
8 waiver because it did not take effect until the times designated
9 in the authorization. On the evidence in front of me, the
10 Respondent was not part of the certificate of waiver
11 authorization. He's not listed on the list pilots, which is
12 Exhibit A-3, and there's no claim that the Respondent was part of
13 any of the airshow being conducted on those two dates.

14 Mr. Goldfluss expressed the opinion that the maneuvers
15 as described to him on the testimony of the Complainant's
16 witnesses were grossly reckless maneuvers in relationship to the
17 people on the surface, that they were in fact aerobatic maneuvers,
18 and that flight path at least on the approach to landing, the turn
19 from downwind back onto the runway for the flyby low pass, the
20 flight path was directed towards people on the surface, which as
21 indicated Mr. Hoffman testified to, the people and aircraft on
22 taxiway F. And he indicated that even in a regular airshow with
23 participants that flights towards areas where a crowd or people
24 are located are not allowed as part of an airshow because the
25 chance that something would happen and parts of an aircraft, or

1 otherwise, could therefore impact people on ground.

2 Lastly, he opined that air traffic controllers are not
3 authorized nor could they issue a waiver to any pilot for
4 operation outside a Federal Aviation Regulation, other than 91.3
5 if a pilot is declaring emergency, of course then he can operate
6 outside the requirements of a particular part. But on the
7 testimony in front of me and by Board precedent, I simply observe
8 that air traffic controllers cannot on their own issue waivers of
9 any Federal Aviation Regulation to a pilot.

10 Respondent testified on his own behalf. He was a pilot
11 for Western Airlines, then with Delta when Delta took that over.
12 He retired from that type of air carrier operations in about 2001.
13 He holds an Airline Transport Pilot Certificate, single engine
14 land, Commercial, he's a CFI and also holds a Flight Engineer
15 Certificate. I would also observe here that the Administrator's,
16 the Complainant's, Complaint does not encompass any penalty
17 against the Respondent's Flight Engineer Certificate since it is
18 not considered a pilot certificate.

19 He testified that he is familiar with the Extra 300L.
20 He bought it in about 2003 and has about 500 hours in it, and is
21 familiar with the manual on aerobatics. He indicated that in the
22 manual such things as Chandelles, loops, and wingovers or lazy
23 eights are not considered aerobatic maneuvers. And that would be
24 normal for even any general aviation aircraft that could perform
25 those types of maneuvers. However, this aircraft is apparently

1 also rated for specific maneuvers that would be classified as
2 aerobatic. And I would also observe here that what is governing
3 in this case is not the pilot operating handbook or manual, but is
4 the Federal Aviation Regulations. The manual is directions to the
5 pilot as to the safe operation of that particular aircraft. But
6 the manner in how the aircraft is to be operated must also be in
7 compliance with the FAR's. And if the manual says something
8 that's contrary to the FAR, the FAR is what governs.

9 In the Respondent's testimony, he spoke to the ground
10 controller air boss for taxi instructions and also requesting for
11 a flyby. And that was with air show ground. He indicates that
12 subsequently, he also talked with ATC tower personnel and made the
13 request for right hand traffic patterns and a low pass, which was
14 given to him by ATC. And there's no contrary testimony to the
15 expression by the Respondent that in fact ATC controllers at
16 Camarillo Airport on the date in question did authorize low pass
17 by the Respondent. However, again, that was for low pass.
18 There's no indication that he requested authorization to do any
19 type of aerobatic maneuvers or any type extreme maneuvers, simply
20 a flyby, a low pass flyby. And of course, the controller can
21 authorize that if it is able to be conducted safely, simply a low
22 pass.

23 As to the Respondent on his direct testimony, he stated
24 that on his downwind legs, crosswind, downwind and turning into
25 final that he never exceeded approximately 45 degrees of angle of

1 bank and that he denied at anytime he made any abrupt maneuvers
2 that could be considered as aerobatic maneuvers. On his takeoff
3 originally and on his completion of his low pass flyby that his
4 pitch up was somewhere around 12 degrees so he would achieve best
5 rate of climb so he'd get the most altitude for safe operation of
6 the aircraft.

7 However, on cross-examination, he indicated that when
8 he talked to ATC that his authorization was for a flyby. There
9 was no statement as to altitude and when he was performing these
10 maneuvers that he was trailing smoke. And on his testimony, it is
11 clear that the maneuvers that he performed on that date in
12 question were for purposes of entertaining the people, the crowd
13 that was there for the air show to be held on that date. If
14 you're going to do something with a crowd, you're going to
15 entertain them. Simply flying normal traffic patterns is not
16 going to draw the crowd's attention, regardless of whether you're
17 emitting smoke.

18 In any event, he testified that for his low pass that
19 when he was abeam the numbers on runway 26, he commenced a turn
20 and described it as a 180-type turn, not a box type turn,
21 indicating that he never got far enough out on his turn that he
22 was flying directly towards that area on page 12 of Exhibit A-2,
23 which is show center and display area. However, he did concede
24 that on his turn that he would have at least been pointed at the
25 general area of the building designated on that exhibit as

1 Building CAF, which is where Mr. Hoffman was situated and where
2 Mr. Hoffman testified, uncontradicted, that there were aircraft
3 that the crowd control barrier extended down there and that there
4 were people, mechanics and aircraft along that area, I believe 100
5 people or more.

6 Significantly on this cross-examination when queried as
7 to how he did this 180-degree turn, a descending turn, that he was
8 performing somewhere between 50 and 60-degree angles of bank.

9 So, this testimony agrees with the testimony of
10 Mr. Hoffman, as I've already have referenced to it where
11 Mr. Hoffman indicates that he observed the Respondent to be
12 performing at least 60-degree angles of bank at the time that he
13 was lining up for his flyby or low pass down runway 26 while
14 emitting smoke. So there really is no dispute as to the angle of
15 bank.

16 That, to me, is the pertinent evidence in the case. Of
17 course, the burden of proof is on the Complaint, rests with the
18 Complainant at all times. Having reviewed the testimony,
19 realizing that I have Aviation Safety Inspectors, the
20 Complainant's employees testifying, and the Respondent testifying
21 on his own behalf, so there may be some interest obviously on the
22 part of each side, and I weigh that. I also take into account
23 that the fact that there really is not a whole lot of dispute as
24 to 60-degree angles of bank. The permission was for fly by, not
25 for anything else. So I would resolve that credibility issue in

1 favor of the Complaint based upon my consideration of all of the
2 evidence and the respective interests in the people.

3 I would also observe that based upon the certificate
4 waiver or authorization that the operation at Camarillo Airport is
5 within Class D airspace.

6 And lastly, there were numerous affirmative defenses,
7 12 of them in fact. And with respect to affirmative defenses, the
8 law is the burden of proof on an affirmative defense rests with
9 the individual here, the Respondent, who is proffering that
10 affirmative defense. And he must carry that burden that showing
11 on preponderance of the evidence the legal basis and the factual
12 basis for each specific affirmative defense. And I'll discuss
13 those separately subsequently herein.

14 I've also indicated and I've also interjected that air
15 traffic control cannot waive the requirements of the Federal
16 Aviation Regulations. I make that specific finding. On the
17 evidence in front of me, ATC granted permission to the Respondent
18 to do a fly by and that was it -- a fly by. And that can be
19 granted by a particular tower as long as there's no other conflict
20 with other air traffic and can be done safely. It is not
21 authorization to do aerobatic maneuvers, particularly in the
22 traffic pattern.

23 Turning then to what, if anything, constitutes an
24 aerobatic maneuver. That's covered in Section 91.303 and in
25 Paragraph (e) thereof, aerobatic maneuvers are not permitted below

1 an altitude of 1,500 feet AGL. The evidence here, of course, is
2 that all these maneuvers were done at traffic pattern or lower
3 altitude under 1,000 feet. So clearly 91.303(e) is applicable.
4 Aerobatic maneuvers are defined in 91.303, and for purposes of the
5 section of 91.303 aerobatic flight means intentional maneuvers.
6 And these maneuvers are intentional, the airplane didn't do it by
7 itself. These are all in the disjunctive, abrupt change in the
8 aircraft's attitude, an abnormal attitude or abnormal
9 acceleration. I don't really have abnormal acceleration here. It
10 was a high speed pass, 140, 120 knots, that does not concern me.
11 He was authorized for the fly by.

12 However, we do have testimony in front of me by a
13 preponderance of the evidence and admission of the Respondent that
14 he was doing 50 to 60-degree angles of bank at least on his 180
15 from the runway to line up for his final. And it was described by
16 Mr. Hoffman as almost a segmented performance, steep bank, a little
17 bit to wings level and then banking up again. But the Respondent
18 himself indicates that he was doing 50 to 60 degrees and
19 indicating 45-degree banks on other sections of the traffic
20 pattern. These are abnormal attitudes for traffic patterns. One
21 does not need to perform 50 to 60-degree angle of banks to fly a
22 normal traffic pattern.

23 And also in the testimony of Mr. Hoffman with pitch up
24 to exceed 45-degree angles of bank, 45 to 50 degrees at the end of
25 the runway, again, that's not necessary for a normal departure.

1 And I also take into the account the rationale expressed by the
2 Respondent for his flight on that date in question. He was
3 performing it prior to the actual commencement of the airshow to
4 entertain the people that were there. That's why he was trailing
5 smoke. He was going to put on a show. And to me, if you're going
6 to put on a show, that's what he did. That's going to draw the
7 crowd's attention. So in my view, these were not necessary for
8 normal flight. It is established on the preponderance of the
9 evidence that the Respondent did operate in regulatory violation
10 of the provisions of Section 91.303(c) and (e) of the Federal
11 Aviation Regulations, and I so find.

12 Section 91.13(a) prohibits any person from operating an
13 aircraft in a careless or reckless manner so as to endanger the
14 life or property of others. Potential endangerment is sufficient.

15 On his turn, even as a 180 turn, he was aimed at the people,
16 aircraft located along the taxiway F in the vicinity of CAF
17 building, as shown on Exhibit A-2, page 12. And there's a
18 reasonable connection therefore between that and the possibility
19 of an occurrence. Potential endangerment is sufficient. We do
20 not have to wait until there's a catastrophic occurrence. This
21 was an intentional operation. It is therefore not careless, it
22 was just reckless. Recklessness means intentional. So I do find
23 that it is established that the Respondent operated his aircraft
24 in a reckless manner so as to potentially endanger the life or
25 property of others and I so hold.

1 The last section of the Regulations alleged violated by
2 the Respondent is that of the provision of Section 91.119(b) of
3 the Regulations, which prohibits an aircraft from being operated
4 except when necessary for takeoff or landing, to operate an
5 aircraft below the following altitudes, subparagraph (b): Over
6 any congested area of city, town or settlement or over any open
7 air assembly of persons at an altitude of 1,000 feet above the
8 highest obstacle within a horizontal radius of 2,000 feet of the
9 aircraft. I do not find that this Regulation has been violated by
10 the Respondent. There is no evidence in front of me that the
11 Respondent at anytime operated over any congested area or any open
12 air assembly of persons. The words of the Regulation are plain,
13 over means over. I believe the clear intention is exactly as
14 stated in 91.119(b). It prohibits the type of operations over
15 settlements, towns or cities or assemblies of persons. So it has
16 to be over those entities. And I believe that's also supported by
17 the language used in the Regulation in Subparagraph (c), which is
18 over other than congested areas. Therein, it requires an altitude
19 of 500 feet, you know, except open water and such. He's not
20 charged with a violation of 91.119(c). The evidence here does not
21 support the charge in the complaint, and therefore, I dismiss the
22 charge of regulatory violation of 91.119(b), as charged in the
23 Complaint.

24 I further do observe that based upon the admissions of
25 the parties that the Respondent does have a past regulatory

1 history of incidents at the Camarillo Airport, which are basically
2 the same as charged in this Complaint. So this would be the
3 fourth one. This goes to the Respondent's disposition to comply
4 with the Federal Aviation Regulations. And while deference is
5 required to be shown to the Administrator's choice of sanction, in
6 this case, the Administrator, the Complainant, has not sustained
7 the entire Complaint. And therefore, I do not believe deference
8 is required to the choice of sanction.

9 Rather that based upon my view of the evidence, the
10 past violation history, the deliberate nature of the commissions
11 that a substantial period of suspension would be appropriate to
12 satisfy the public interest in air commerce and air safety. And
13 therefore, while I affirm all the factual allegations in the
14 Complaint that were disputed, that is Paragraphs 4, 5, 6, and 7, I
15 do believe that the public interest in air safety and air commerce
16 would be satisfied by a reduction from that of revocation to a
17 period of suspension of 270 days. And with that modification, I
18 would affirm the emergency order of revocation, the Complaint
19 herein.

20 Lastly, I turn to the Affirmative Defenses. I do not
21 find that the Respondent has sustained any burden of proof with
22 respect to the Affirmative Defenses, either on a showing of law or
23 fact. And specifically, Affirmative Defenses 1, 2, 3, 4, I deny
24 those flat out. The fifth Affirmative Defense has not been
25 proven; sixth Affirmative Defense was not proven; seventh

1

2

3 EDITED ON

4 APRIL 24, 2009

Patrick G. Geraghty

Administrative Law Judge