

SERVED: January 22, 2010

NTSB Order No. EA-5503

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 21<sup>st</sup> day of January, 2010

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
	Complainant,	)	
		)	Docket SE-18472
	v.	)	
		)	
DOMINIC CHEMELLO,		)	
		)	
	Respondent.	)	
		)	
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**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty in this matter, issued following an evidentiary hearing held on June 10, 2009.<sup>1</sup> By that decision, the law judge affirmed the Administrator's complaint, which ordered a 90-day suspension of respondent's

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

airline transport pilot (ATP) certificate, based on violations of 14 C.F.R. §§ 91.119(b)<sup>2</sup> and 91.13(a).<sup>3</sup> Respondent appeals the law judge's determination that he violated both regulations. We deny respondent's appeal.

The Administrator's December 12, 2008 order of suspension, which served as the complaint before the law judge, alleged that, on or about April 25, 2008, respondent acted as pilot-in-command (PIC) of a hot air balloon on a passenger-carrying flight in the vicinity of Temecula, California. The complaint also alleged that, during the flight, respondent landed the balloon in a parking lot of Chaparral High School, which was a congested area. The complaint stated that the balloon landed between two rows of parked cars and approximately 50 yards from the school buildings. The complaint further alleged that, at the time of the landing at the high school, people were in and around the area, including students who were arriving at school. The complaint asserted that respondent operated the balloon at an altitude of less than 1,000 feet above the highest obstacles

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<sup>2</sup> 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.

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

within a horizontal distance of 2,000 feet of the aircraft, and that such operation was not necessary for takeoff or landing. Based on these allegations, the Administrator ordered suspension of respondent's ATP certificate for a period of 90 days.

At the hearing, the Administrator called two witnesses who observed respondent's hot air balloon over the staff parking lot at Chaparral High School, as well as a deputy sheriff in the city of Temecula, and an aviation safety inspector. The two percipient witnesses, Rosario Castaneda and Sharon Hawley, both campus supervisors at the high school, testified that classes for most students begin at 7:30 am, although some students are required to arrive earlier. Ms. Castaneda and Ms. Hawley also both testified that they observed respondent's balloon at approximately 7:20 am, and that this is the time of day when cars and pedestrians are present, given the school schedule. Ms. Castaneda testified that she observed the balloon from the second floor of one of the buildings on campus, and identified three photographs of the balloon landing, which she took with her cellular phone. Exhs. A-1 - A-3. Ms. Hawley testified that she observed the balloon while she was directing traffic for students entering the school grounds. Ms. Hawley stated that she was concerned with the balloon flying at such a low altitude and then landing in the staff parking lot, because it was a busy time of day and because the staff parking lot is adjacent to a

ramp that students with special needs utilize to enter the school.

The Administrator also called Timothy Mohr, a deputy sheriff in Riverside County, city of Temecula, to testify. Officer Mohr stated that he was in the vicinity of the school when he saw the balloon and heard a dispatch call for service for an "air emergency." Tr. at 52-53. Officer Mohr testified that, when he arrived at the staff parking lot of the high school, he saw respondent and two passengers, and asked respondent if there was anything wrong with his balloon. Officer Mohr stated that respondent replied that his balloon was fine, and that he believed the staff parking lot at the school was an appropriate landing site. Officer Mohr recalled that he saw moving cars and people in the vicinity. Tr. at 55. Officer Mohr stated that he told respondent to take off, and that respondent did so.

The Administrator concluded the case-in-chief with the testimony of Brad Howard, an FAA inspector in the Western Pacific Regional Office, Technical Standards Branch. Inspector Howard, who holds several certificates and a commercial balloon rating, testified that he investigated respondent's operation of the balloon, and determined that respondent had landed at an inappropriate landing site. Inspector Howard took photographs of the staff parking lot after the incident, and estimated that

the lamp posts in the parking lot are 50 feet in height, and 150 feet apart. Inspector Howard stated that he observed alternative landing sites not far from the high school that respondent could have used. Inspector Howard opined that the balloon was not "becalmed," or stationary while aloft, so he did not believe that it was necessary for respondent to land in the staff parking lot.

In rebuttal, respondent called Isaac Moorvitch, one of the passengers on the balloon flight in question. Mr. Moorvitch stated that he felt wind during the balloon ride, that he did not see any moving cars or buses in or around the parking lot, and that the only people he saw were on the other side of a fence on the perimeter of the school's campus. Mr. Moorvitch recalled that Officer Mohr directed respondent to take off, and that respondent did so, after hovering for a couple of minutes. Mr. Moorvitch also identified a written statement from his wife, who was the other passenger in the balloon, in which she recalled that respondent attempted to land the balloon several times previously, but that windy conditions did not permit the landing.

Respondent also testified on his own behalf.<sup>4</sup> He stated

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<sup>4</sup> Respondent listed numerous certificates and ratings that he has, and stated that he previously worked for the Federal Aviation Administration. Respondent testified that he has over 1,800 hours of pilot command time in hot air balloons, and

that he checked the weather conditions prior to taking off on April 25, 2008, and found the weather to be satisfactory. Respondent stated that the winds were fairly light, so he expected to take off, drift, and land. Respondent testified, however, that he proceeded faster than he expected after takeoff, and that the wind caused him to make a sudden change in direction, so that he drifted toward the south. Respondent explained that this direction was undesirable, because it is over downtown Temecula, which is congested, and can present problems with managing the balloon. To correct this problem, respondent stated that he climbed higher, but that the wind picked up in velocity and continued to take him in the direction of downtown. Respondent testified that the wind took his balloon toward the high school, and that he could not land in an open field near the high school, because as soon as his balloon was above the staff parking lot, the wind "zeroed out," and caused his balloon to halt. Tr. at 94. Therefore, respondent stated that he could not make it to the field to land, and that he elected to stay low. Respondent opined that, from the air, the staff parking lot appeared to be an appropriate place to land, because he did not see any school buses, pedestrians, or vehicular traffic. Respondent recalled that he landed between

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(..continued)

currently runs a repair station for hot air balloons.

two rows of parked cars in the parking lot after he vertically descended.

On cross-examination, respondent acknowledged that he had sufficient fuel to climb to a higher altitude before he landed, and that he told Officer Mohr that his balloon did not have problems. Respondent stated that he took off again after Officer Mohr directed him to do so, and opined that Ms. Castaneda and Ms. Hawley remembered the event incorrectly because there were no people or moving cars in the vicinity of the parking lot when he landed the balloon. Respondent stated that, under the circumstances, the parking lot was the safest place for him to land the balloon.

Respondent also called David Lynch, who has run a balloon operation since 1984 and is familiar with the Temecula area, to provide expert testimony. Mr. Lynch opined that, based on respondent's description of the circumstances of the flight, the staff parking lot at the high school was a suitable place to land. On cross-examination, Mr. Lynch acknowledged that respondent could have chosen another landing site or elected to cause the balloon to ascend.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he determined that the Administrator proved that respondent violated 14 C.F.R. §§ 91.119(b) and 91.13(a). The decision included a detailed

summary of the evidence in the record, and stated that the case principally rested upon a credibility determination. The law judge determined that Ms. Castaneda and Ms. Hawley provided credible testimony concerning their observation of respondent's balloon and of the pedestrian and vehicular traffic at and around the high school during the incident at issue. The initial decision stated that Ms. Castaneda, Ms. Hawley, and Officer Mohr had no reason to lie about their observations. The law judge found that because classes at the high school begin at 7:30 am for most students, and the balloon landed around 7:20 am, it would be "highly improbable" that no traffic was in the area. Initial Decision at 143. Conversely, the law judge concluded that respondent's testimony was not credible with regard to the wind conditions. The decision further stated that respondent did not inform Officer Mohr that any type of emergency existed, and that the wind conditions did not prevent respondent from taking off in the balloon again and proceeding to a field, approximately one mile away, to land. The law judge cited previous Board cases for the precedent that a PIC of a hot air balloon is required to find a suitable landing site.<sup>5</sup> In the decision, the law judge concluded that respondent had not

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<sup>5</sup> The decision included cites to Administrator v. Prior, NTSB Order No. EA-4416 (1996); Administrator v. Corey, 6 NTSB 536 (1988); and Administrator v. Rees, 4 NTSB 1323 (1984).

encountered an emergency situation, and that he acted deliberately. As a result, the law judge affirmed the Administrator's suspension of respondent's certificate for a period of 90 days.

On appeal, respondent asserts that the law judge erred because his credibility determinations were contrary to the evidence. Respondent contends that the Administrator did not provide any evidence to show that respondent operated the balloon over a congested area. Respondent argues that "[a] simple explanation" for the allegations exists, and that, "after a perfectly safe landing, a crowd, acting out of curiosity, came to the scene," creating "a sort of mob psychology." Appeal Br. at 3. Respondent consequently asserts that the law judge should have found respondent's testimony credible with regard to the traffic in the area. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

We have previously held that a respondent's selection of a suitable landing site for a balloon is dependent upon the balloon's proximity to power lines, buildings, and trees, and the availability of alternative landing sites.<sup>6</sup> Moreover, we have considered traffic on a road to constitute a congested area

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<sup>6</sup> Prior, supra, at 9.

for purposes of § 91.119(b).<sup>7</sup> We have also deferred to our law judges' credibility determinations with regard to whether a respondent believes that he or she must land a balloon in a certain area due to wind conditions. For example, in Administrator v. Thompson et al., NTSB Order No. EA-4800 (1999), we rejected respondents' argument that the low flight of their balloon was the best option available to them, due to unexpected wind shifts. In Thompson, we deferred to the law judge's credibility assessment, which prompted his determination that respondents' low altitude was not necessary for takeoff or landing. We also note that, in general, we defer to our law judges' credibility determinations unless they are arbitrary, capricious, or contrary to law.<sup>8</sup>

On appeal, respondent presents no reason to compel us to depart from our law judge's credibility determination. To the extent that respondent attempts to argue that no vehicular or pedestrian traffic was at the high school at the time at issue, we reject this argument as contrary to the evidence in the record. The photographs of respondent's balloon in the high

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<sup>7</sup> See, e.g., Administrator v. Traub, NTSB Order No. EA-4188 (1994).

<sup>8</sup> Administrator v. Nickl, NTSB Order No. EA-5287 at 6 (2007) (citing Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982)); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983).

school's staff parking lot show several parked cars, indicating that people were at the school. In addition, respondent does not deny that school was scheduled to start at 7:30 am, and that he landed in the staff parking lot at approximately 7:20 am. In addition, Ms. Hawley testified that she was directing vehicular and pedestrian traffic at the school before classes began, because the school campus was crowded. We conclude that the law judge did not err in determining that a preponderance of the evidence shows that respondent operated his balloon less than 1,000 feet above the highest obstacles, and within a horizontal radius of 2,000 feet of the obstacles.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed;
3. The Administrator's 90-day suspension of respondent's ATP certificate is affirmed; and
4. Respondent's suspension shall begin 30 days after the service date indicated on this opinion and order.<sup>9</sup>

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

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<sup>9</sup> 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).

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

\* \* \* \* \*

In the matter of: \*

J. RANDOLPH BABBIT, \*  
ADMINISTRATOR, \*  
Federal Aviation Administration, \*

Complainant, \*

v. \*

DOMINIC CHEMELLO, \*

Respondent. \*

\* \* \* \* \*

Docket No.: SE 18472  
JUDGE GERAGHTY

NTSB Courtroom  
1515 West 190th Street  
Suite 555  
Gardena, California

Wednesday,  
June 10, 2009

The above-entitled matter came on for hearing, pursuant  
to Notice, at 9:34 a.m.

BEFORE: PATRICK G. GERAGHTY  
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

THEODORE BYRNE  
Westwood Pacific  
Region Office of the Regional Counsel  
P.O. Box 92007  
Los Angeles, California 90009-2007

On behalf of the Respondent:

ARTHUR WASSERMAN, ESQ.  
Law Offices of Wasserman & Miller  
16380 Roscoe Boulevard, Suite 120  
Van Nuys, California 91406-1221

1 ORAL INITIAL DECISION

2 Pursuant to notice, this matter came up for trial on  
3 June 10, 2008 in Gardena, California on the appeal of Dominic  
4 Chemello, herein after referred to as Respondent, from an Order of  
5 Suspension which seeks to suspend his Pilot Certificate for a  
6 period of 90 days.

7 The Order of Suspension serves herein as a complaint and  
8 was filed on behalf of the Administrator, Federal Aviation  
9 Administration, herein the Complainant.

10 This matter has been heard before this Judge and as  
11 provided by the Board's Rules, I am issuing a bench decision in  
12 the proceeding.

13 Parties were afforded a full opportunity to call,  
14 examine and cross-examine witnesses, and to make arguments in  
15 support of their respective positions. The Complainant was  
16 represented by one of their staff counsel, Theodore Byrne, Esq.,  
17 of the Regional Counsel's Office Western Pacific Region. The  
18 Respondent was present at all times and was represented by his  
19 counsel, Arthur Wasserman, Esq., of Van Nuys, California.

20 In discussing the evidence, I will summarize the  
21 evidence to that which leads to the conclusion I have reached  
22 herein and interject any comments along the way. That evidence  
23 which I do not specifically mention is deemed by me as being  
24 essentially corroborative or not materially affecting the outcome  
25 of the decision.

1           By pleading, it was agreed there was no dispute as to  
2 the following Paragraphs of the Complaint: Paragraphs 1 and 2,  
3 and, therefore, the matters stated in those paragraphs are taken  
4 as having been established for purposes of this Decision.

5           It is further agreed that so much of Paragraph 5 of the  
6 Complaint as it described the actual operation of the hot air  
7 balloon and the altitude and distances horizontally were correct,  
8 and, therefore, that is also taken as having been established.

9           As stated, the Complainant seeks to suspend the  
10 Respondent's Airline Transport Pilot Certificate for a period of  
11 90 days, which is predicated upon his admitted operation of a hot  
12 air balloon on April 25, 2008, when in the course of the operation  
13 of that hot air balloon on a passenger carrying flight, he landed  
14 the balloon in a Staff Parking Lot of the Chaparral High School,  
15 which is located in the vicinity of Temecula, California.

16           The first witness for the Complainant was Ms. Castaneda.  
17 She is a Campus Supervisor, been in that capacity for six years  
18 and exercises that occupation at the Chaparral High School. She  
19 was on duty on the date in question, that is April 25, 2008, and  
20 at that time and date the school was in session. She indicated  
21 that there was, I believe, she termed a zero-hour arrival at the  
22 school, which is about 6:15 a.m., apparently, for athletes,  
23 football players, or such come in early so they can get their work  
24 in before they have to go to practice, and that most of the  
25 students then arrived at 7:30 a.m.

1           At about 7:20 a.m., on the date in question, she  
2 observed the hot air balloon to be landing on the school campus.  
3 She at first thought that the hot air balloon might be in  
4 distress, and that's why it was coming down into the Staff Parking  
5 Lot at the school.

6           The times stated are of importance in the resolution  
7 herein. If the school is starting at 7:30, and the balloon is  
8 landing at about 7:20, it is difficult to imagine that nobody was  
9 arriving at the school during that period of time. In any event,  
10 she stated she was on the second floor of the building of the  
11 school out on the balcony from which she took the photographs  
12 which are labeled A-1, -2, -3, -4, and that at the time she took  
13 these and was able to observe from the balcony that there were  
14 cars in the parking lot.

15           Most of the spaces were full, and as I observe Exhibit  
16 A-3, which is a picture that that witness took of the hot air  
17 balloon -- apparently just about landing. It is surrounded by  
18 cars so that testimony is correct. It does appear that the lot,  
19 at least in the vicinity of the balloon, is full of cars.

20           She also stated that most of the spaces were full, that  
21 traffic was heavy at the time, and it would be heavy at that time  
22 in the morning, that there were people in the vicinity and that  
23 both staff and students were arriving which I've indicated would  
24 be reasonable for the start of school at 7:30 a.m.

25           As to the depictions that appear in the rest of the

1 Exhibits A-4 through A-8, she described the landing area of the  
2 balloon particularly with respect to the X mark that she placed on  
3 Exhibit A-4 stating that the basket of the balloon had come down  
4 within 5 or 6 feet of cars, which were parked on either side of  
5 the actual landing spot of the hot air balloon's basket.

6           So in my view, the allegations contained in Paragraph 3  
7 of the Complaint is established on a preponderance of the reliable  
8 evidence.

9           The witness also indicated that with respect to Exhibit  
10 A-8 that from where the balloon had actually landed that that  
11 landing site was about 40 feet from a lamp post or light posts,  
12 which were in the area and appear in the photographs, which are,  
13 on the estimate of the witnesses, somewhere around 50 feet in  
14 height, and that the site was also approximately 45 feet from  
15 buildings on the school grounds.

16           On cross-examination, she again reiterated that she had  
17 been out on the balcony on the second floor of the building and  
18 that both A-8 and A-5 indicate the same building, A-8 being an  
19 extension of the building which is seen in A-5. She also  
20 discussed the ramping and railing area where special needs  
21 students come into the parking lot area and go up a ramp so they  
22 can enter the school building itself.

23           Ms. Sharon Hawley is also a Campus Supervisor at this  
24 high school, and she was on duty on the date in question.  
25 However, she was around on the other side of the facility from

1 where the hot air balloon actually landed in the Staff Parking  
2 Lot. However, her description of the traffic situation in the  
3 area is, again, significant because it involves what was going on  
4 in the general vicinity of this high school.

5 She stated at about 7:25 a.m., while she was in the front  
6 of the school directing traffic -- so she's talking about traffic  
7 that means moving vehicles or people walking -- and she indicated  
8 she was directing traffic and pedestrians. She classified the  
9 condition as being heavy. That is heavy pedestrian and vehicular  
10 traffic. Cars were entering the Staff Lot according to this  
11 witness.

12 She stated she noticed the hot air balloon coming over  
13 the school, and it appeared to her like it was going to be landing  
14 which concerned her since it's her testimony there were special  
15 needs students that were in that Staff Lot where the balloon  
16 appeared to be landing, and that she was concerned for those  
17 students and any vehicles that might be in that area so,  
18 therefore, she radioed her supervisor and Ms. Castaneda, and then  
19 she went around the building to the Staff Lot itself indicating it  
20 took her about a minute or two to make that transit around to  
21 where the actual landing site was. She, at that point, did  
22 observe Ms. Castaneda and the police officer who had arrived at  
23 the scene.

24 On cross-examination, she stated that classes had not as  
25 yet started, but that students were, therefore, arriving. She

1 indicated buses were moving in the area bringing students into the  
2 school, and they were coming into the Staff Parking Lot, and that  
3 actual buses were even arriving during the event that is the  
4 landing and the departure of the balloon from the lot  
5 subsequently.

6 Deputy Sheriff Mohr was in the area. He had been doing  
7 speed enforcement. He's a Motorcycle Officer. He observed the  
8 hot air balloon and wondered what was going on with it, and so he  
9 proceeded in the general direction of the school. At that time,  
10 he heard a call over his radio about a possible emergency; and,  
11 therefore, he called in and said he would handle it and proceeded  
12 to the Chaparral High School, turning off, I believe it was  
13 Winchester Street or Boulevard, into the school grounds.

14 On his arrival, the hot air balloon was apparently  
15 already on the ground. He observed two passengers from the hot  
16 air balloon and the pilot. He spoke with the Respondent, the  
17 pilot of the balloon and asked him several questions. He asked  
18 the Respondent whether there was anything wrong with the balloon.  
19 Respondent indicated no, there was nothing wrong with the balloon.

20 He asked him, specifically, if there had been an  
21 emergency which required him to land, and the Respondent,  
22 according to the witness, indicated in the negative to that  
23 inquiry also. And also that there was nothing wrong with the  
24 passengers, illness or something like that, which would have  
25 caused him to land to take care of his passengers.

1           Ultimately, he simply asked the Respondent why he  
2 decided to land at the Staff Parking Lot of the high school when  
3 there were moving cars and people in the area. And this is what  
4 the deputy sheriff also described: Moving cars, and people in the  
5 area, and that the statement was that the Respondent thought that  
6 it was a suitable place to land.

7           In response to these questions, according to the  
8 witnesses, and according to the Respondent himself, there is no  
9 indication that he ever told the Deputy Sheriff that he had to  
10 land because he had run out of wind. That is because he was  
11 becalmed, and he had no choice but to land.

12           He never made that statement. He specifically asked him  
13 if it was an emergency, and that would be included in an  
14 emergency. On becalmed, I have no choice. I'm either going to  
15 hover here and come down ultimately because I'm going to run out  
16 of fuel so I decided to put it on the ground. Never said that.

17           On cross-examination, the Deputy Sheriff reiterated that  
18 he saw people moving all around him while he was in the parking  
19 lot and that cars were both entering and leaving, which would be  
20 reasonable, parents bringing students to school and dropping them  
21 off. According to the Sheriff, he did agree that he told the  
22 Respondent to leave the area, and that the Respondent did comply  
23 with that and departed from the area observing that there was a  
24 member of the chase crew, I believe, identified subsequently as a  
25 Mr. Gonzalez, who was there to help in the departure from the

1 school parking lot.

2           Mr. Brad Howard is an Aviation Safety Inspector with the  
3 FAA. On his statement as to his experience and background and is  
4 qualified to express opinions with respect to this particular  
5 event and the suitability of the landing site sought by the  
6 Respondent.

7           Without going through all of the material that  
8 Mr. Howard indicated that he had reviewed, it's clear that he  
9 reviewed the Investigative Report and looked at all the  
10 photographs. He made a personal trip out to the school and around  
11 the area to observe whether there were other suitable landing  
12 areas in the general vicinity of the Chaparral High School, and he  
13 indicated upon his observations that there were other suitable  
14 landing areas in proximity to the Chaparral High School. And, as  
15 it turns out, that after the Respondent departed from this high  
16 school, he was able to land in an open field about one mile away.

17           Ultimately, it was Mr. Howard's opinion that the choice  
18 of landing site by the Respondent in the Staff Parking Lot of the  
19 Chaparral High School was not a suitable landing spot because of  
20 the obstacles there which included in his litany, cars on the  
21 ground, light posts, people in the area, buses, buildings, and the  
22 availability of other suitable landing areas within a reasonable  
23 distance of the school; and, ultimately, that, in his opinion, a  
24 reasonable and prudent hot air balloon pilot would not have  
25 decided to land in this area when there was no emergency requiring

1 an immediate landing.

2 In the Respondent's case in chief he called a  
3 Mr. Moorvitch, who was one of the passengers in the hot air  
4 balloon. Of course, I take his testimony there is no showing that  
5 he had any prior experience with hot air balloons, and he was  
6 simply along for the ride with a female passenger who ultimately  
7 became, apparently, his wife.

8 He indicated that it was windy conditions for the flight  
9 not knowing where it departed from and that they were simply going  
10 to end up wherever they ended up. However, on his testimony that  
11 on the landing in the parking lot, he didn't see any buses, didn't  
12 see any cars moving, and the only people he observed were some  
13 people behind a fence.

14 That was his testimony, and that, subsequently, after  
15 the police officer had a discussion with the Respondent, that the  
16 hot air balloon did depart and land about a minute later in an  
17 open field. Stating that on the departure, they did hover just  
18 for a little bit, and then they moved off to the open field where  
19 they ultimately landed.

20 And as he indicated on cross-examination, he indicated  
21 it was a windy situation that day, and that as far as the  
22 discussions between the Respondent and the police officer, that he  
23 agreed with the description of the questions asked by the Deputy  
24 Sheriff and the responses that the Respondent made to the Deputy  
25 Sheriff, which I have already discussed.

1           Respondent testified on his on behalf. He, again, has  
2 an impressive background in aviation and was also employed with  
3 the Federal Aviation Administration as an Aviation Safety  
4 Inspector. Has about 1,800 hours in the operation of hot air  
5 balloons and apparently does run a hot air balloon enterprise.

6           There is no question as to his preparation for the  
7 departure, releasing of PIBALs, preflight; those are not issues in  
8 front of me. I simply mention that it appears that he conducted  
9 the preflight appropriately.

10           He describes his flight as coming down across the wine  
11 country area from where they had departed, that they had found in  
12 the downtown Temecula area that the wind seemed to indicate to him  
13 that he was going to be drifting over the downtown area.

14           So, with the wind change, he decided that even though he  
15 tried to go up some without any success with that, the choice of  
16 the landing site in the Staff Parking Lot appeared to him to be a  
17 suitable landing place.

18           According to his testimony, there were no people in the  
19 area, or in the lot. There were no children, that would be  
20 students, and there were no buses in the lot, nobody moving, and  
21 there were no cars moving, and that, ultimately, based upon what  
22 he describes as his observation that he felt there was no hazard  
23 to his landing as his balloon was essentially becalmed, was coming  
24 straight down, and that he would, therefore, safely land in the  
25 parking lot, which on the impact of his testimony, to him, would

1 have been a suitable landing spot.

2 On cross-examination, he did not dispute the responses  
3 that I've indicated were given to the Deputy Sheriff on his  
4 questioning, and that he agreed that he did depart from the  
5 parking lot after the Deputy Sheriff told him that it was not a  
6 suitable place and that he should leave.

7 According to his testimony, he left from the parking lot  
8 about five to maybe ten minutes after being told to leave. He  
9 also agreed on cross-examination that the flight from his point of  
10 departure to where he landed in the parking lot of the school was  
11 about 45 to 50 minutes, and that his normal hot air balloon rides  
12 were about one hour long, but, ultimately, on cross-examination,  
13 that he did state that he agreed with the Deputy Sheriff's  
14 suggestion to take off and go elsewhere.

15 And that's what he did and indicated that he then  
16 departed landing at an open field where the chase crew was able to  
17 get in and complete his flight operation of that day.

18 Mr. David Lynch was called as an expert on behalf of the  
19 Respondent. He also has a long background in operational hot air  
20 balloons and other pilot certificates, and his testimony was  
21 accepted. However, he stated that his conclusions as to the  
22 suitability of the landing site which he thought was suitable was  
23 based essentially upon the description of the events as given to  
24 him by the Respondent.

25 However, he did indicate that having heard the testimony

1 this morning in open session, that he did not, in his opinion,  
2 hear anything that would have caused him to change his opinion,  
3 which was that the site chosen by the Respondent on the date in  
4 question was in fact a suitable place to land, again, agreeing on  
5 cross that most of his information, however, did come from the  
6 Respondent himself.

7 That to me is the pertinent evidence in the case. The  
8 burden of proof and the outcome of this proceeding is, of course,  
9 resting with the Complainant, and he must carry that by a  
10 preponderance of the reliable and probative evidence. The  
11 testimony here involves a credibility decision, and, therefore, I  
12 have taken into account the various interests of the parties.

13 The fact that there's no showing that either of the  
14 Campus Supervisors have any prior involvement with the Respondent,  
15 there would be no reason for them to shade their testimony that  
16 has been shown in this session to me.

17 There's no showing that the Deputy Sheriff had any prior  
18 intercourse with the Respondent which would cause him to be biased  
19 in any way, and in fact the testimony from both sides as to the  
20 interaction between the Deputy Sheriff and the Respondent are  
21 essentially the same.

22 The real difference in the testimony deals with the  
23 situation on the ground at the Chaparral High School at the time  
24 that the Respondent decided to land in the Staff Parking Lot.  
25 This was a school day. There's been no dispute as to the

1 description of the events at the school on the date in question.  
2 That is, that there's a zero-hour arrival of students, and then at  
3 7:30, that's when the main classes begin.

4           This event was taking place at about 7:20 in the  
5 morning, and, therefore, it is highly improbable that there would  
6 be no students arriving, that there would be no cars dropping  
7 students off, or students driving themselves to the school and  
8 parking in the student parking lot. It's also no dispute that  
9 there's a special needs ramp, which is adjacent to the Staff  
10 Parking Lot where special needs students would be dropped off  
11 either by car or by bus so that they could go up the ramp into the  
12 school.

13           The testimony of the two Campus Supervisors is quite clear  
14 that there were students arriving, that there was heavy traffic.  
15 Cars arriving and leaving, that there were buses moving in the  
16 parking lot, and that all of the spaces were in fact mainly full  
17 in the Staff Parking Lot, and if one looks at Exhibit A-3, which  
18 shows the hot air balloon just as it's landing -- of course, the  
19 balloon is still inflated above the basket -- you can see that the  
20 basket is surrounded by cars, and, therefore, I do find on a  
21 preponderance of the reliable probative evidence that the  
22 Supervisor's testimony is the most credible.

23           I must resolve the issue of credibility in favor of the  
24 Complainant, and I do specifically do that, and I find, therefore,  
25 that the allegation in Paragraph 4 of the Complaint is established

1 on a preponderance of the reliable and probative evidence.

2 One of the other events that I take into account in  
3 making this determination so I add this in as an afterthought is  
4 that the Respondent never told the police officer, as I indicated,  
5 that he had any type of emergency. He was asked, "Do you have an  
6 emergency? Why did you do this?" An emergency would, in my view,  
7 for a hot air balloon pilot, encompass the fact that we ran out of  
8 wind. I had no choice. I had to come down. That is an  
9 emergency. I couldn't go anywhere else.

10 He indicated nothing to that effect. And on top of  
11 that, it is on the evidence in front of me, after being told to  
12 leave the area, there was no statement, "Hey, I can't do that.  
13 There's no wind. If I go up, I'm just going to go straight up and  
14 sit there, run out of fuel, and come back down."

15 No. The Respondent agreed to leave. Why would the  
16 Respondent agree to leave, if he knew there was no wind that was  
17 going to take him anywhere else, and when he was on the ground,  
18 agreed to leave at the Deputy Sheriff's suggestion? How would he  
19 know what the winds were aloft? There's no indication he sent up  
20 a PIBAL, but yet he agreed he was going to leave.

21 That, to me, runs counter to the fact that he was  
22 becalmed to begin with. Yes. I'll leave and go somewhere else.  
23 How are you going to go somewhere else if there are no winds? And  
24 how would you know what the winds are unless you knew that it was  
25 windy when you were up there?

1           So, therefore, as I've indicated, in my view, the  
2 preponderance of the reliable and probative evidence does  
3 preponderate in favor of the Complainant.

4           As the Board has repeatedly pointed out back in the  
5 Administrator v. Reese case, which is in 4 NTSB 4322 a 1984 case  
6 Administrator v. Corey, 6 NTSB 536 a 1988 case, and, of course,  
7 also in the Prior case where these two cases are referenced. And  
8 the Prior case is EA 4416 a 1996 case. All of the Board's  
9 decisions indicate that the burden of proof is on the proponent  
10 that a landing site is suitable to show that in fact the landing  
11 site chosen was in fact a suitable landing site.

12           The exception is in Section 91.119(b), if necessary for  
13 takeoff or landing imposes the burden on the proponent of the  
14 exception to show that the exception applies. Herein, on the  
15 evidence in front of me, that burden has not been sustained.  
16 Rather, on the evidence in front of me, it is an unsuitable  
17 landing site. There was no requirement that the Respondent land  
18 there. There was no emergency. He specifically denied that. And  
19 in fact, as I've indicated, left shortly thereafter and went one  
20 mile away and landed in an open field.

21           So, there was clearly, as testified to by Mr. Howard,  
22 other suitable landing areas within the general vicinity of the  
23 school.

24           I, therefore, must conclude that the Respondent did act  
25 in regulatory violation of Section 91.119(b) and that he did

1 operate his hot air balloon when it was not necessary for takeoff  
2 or landing at altitudes over a congested area, which was the Staff  
3 Parking Lot and the school buildings as he admitted in response to  
4 allegation in Paragraph 5 of the Complaint, and, therefore, that  
5 violation is established, and I so find.

6 I also further find and conclude upon the evidence in  
7 front of me that this was a deliberate choice on the part of the  
8 Respondent. It was not inadvertent. It was not an emergency.  
9 Since it was a deliberate choice, it is not careless. It is  
10 reckless because careless is inadvertence or negligence, simple  
11 negligence. If one decides to do something deliberately, it  
12 removes it from carelessness.

13 I, therefore, find that the Respondent did operate in a  
14 reckless manner, and, therefore, a manner that would at least  
15 potentially endanger the life and property of others landing  
16 within six feet of parked cars on either side, students in the  
17 area, heavy traffic potentially endangerment is shown as a  
18 reasonable nexus.

19 Therefore, I do find that the Respondent did operate his  
20 hot air balloon in a reckless manner so as to potentially endanger  
21 the life and property of others, which is sufficient for a finding  
22 of violation. One does not have to wait until an actual  
23 catastrophic incident occurs.

24 On the question of sanction, by Statute deference to be  
25 shown to the choice of sanction by the Complainant, in the absence

1 of a showing that such a choice is arbitrary, capricious, or not  
2 in accordance with Board precedent. That has not been  
3 demonstrated here by the Respondent and, in fact, the Board  
4 precedent is in favor of the choice of sanction, which is a  
5 reasonable range within the sanction guidance; therefore, I will  
6 affirm the Order of Suspension the Complaint herein as issued, and  
7 the suspension of the Respondent's Pilot Certificate for the  
8 period sought of 90 days.

9

10

ORDER

11

IT IS ORDERED THAT:

12

1. The Order of Suspension the Complaint herein be and  
13 the same hereby is affirmed as issued.

14

2. The Respondent's Airline Transport Pilot Certificate  
15 be, and in the same hereby is suspended for a period of 90 days.

16

Entered this tenth day of June 2009 at Gardena,  
17 California.

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21

EDITED ON

\_\_\_\_\_  
Patrick G. Geraghty,

22

JULY 8, 2009

Administrative Law Judge

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