

SERVED: February 13, 2020

NTSB Order No. EA-5866

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 13th day of February, 2020

_____)	
STEPHEN M. DICKSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-30315
v.)	
)	
PAUL S. FULLERTON,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued June 15, 2017.¹ By that decision, the law judge determined that the Administrator proved by a preponderance of the evidence that respondent violated 14 C.F.R. § 91.155(a),²

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

² Section 91.155(a) states that in Class E airspace at an altitude of less than 10,000 feet MSL, no person may operate an aircraft under visual flight rules (VFR) at a distance from clouds that is less than 500 feet below, 1000 feet above, and 2000 feet horizontal.

§ 135.183(a),³ and § 91.13(a)⁴ by operating a passenger-carrying flight under VFR in Class E airspace between Traverse City, Michigan, and Mackinac Island, Michigan, at a distance of less than 300 feet below the overcast cloud ceiling around Mackinac Island and at an altitude over the Straits of Mackinac (hereinafter “the Straits”) that would not have allowed the aircraft to reach land in the event of engine failure. We deny respondent’s appeal.

A. Facts

Respondent holds a Commercial Pilot Certificate and is both the owner of and a pilot for Great Lakes Air, Inc. (Great Lakes Air).⁵ As a pilot for Great Lakes Air, respondent operated aircraft carrying passengers and property for hire under Part 135 of the FARs.⁶ On October 24, 2014, respondent operated, as pilot-in-command, a Piper PA-32-260 (hereinafter “N7122J”) on a Part 135 flight carrying passengers that departed from Cherry Capital Airport in Traverse City, Michigan, and landed at Mackinac Island Airport in Michigan.⁷ Respondent operated the flight under VFR in Class E airspace.⁸

That same day, Federal Aviation Administration (FAA) Principal Operations Inspector (POI), Thomas Kozura, was conducting observations from Mackinac County Airport in

³ Section 135.183(a) provides, “No person may operate a land aircraft carrying passengers over water unless it is operated at an altitude that allows it to reach land in the case of engine failure.”

⁴ Section 91.13(a) prohibits operating an aircraft in a careless or reckless manner so as to endanger the life or property of another. The Administrator charged the § 91.13(a) violation as a residual violation. Tr. 180.

⁵ Compl. ¶¶ 1-2; Answer ¶¶ 1-2; Tr. 48, 126.

⁶ Compl. ¶ 2; Answer ¶ 2.

⁷ Compl. ¶ 3; Answer ¶ 3. During the hearing, the Piper PA-32-260 is referred to interchangeably as a “Piper PA-32,” as a “Piper Cherokee,” as a “Piper Cherokee Six,” as a “PA-32 Cherokee Six,” and as a “Cherokee Six.” See, e.g., Tr. 35, 40, 64, 69, 74, 76, 89, 121. To limit confusion, we will refer to the aircraft as a Piper PA-32-260 throughout this Opinion and Order.

⁸ Compl. ¶¶ 4, 6; Answer ¶¶ 4, 6.

St. Ignace, Michigan.⁹ At approximately 8:40 a.m., Inspector Kozura observed an aircraft operating at a distance of less than 300 feet below the overcast cloud ceiling around Mackinac Island and at an altitude over the Straits that would not have allowed the aircraft to reach land in the event of engine failure. Inspector Kozura later determined the aircraft he observed was N7122J and was operated by respondent.

B. Procedural Background

On December 1, 2016, the Administrator issued an order suspending respondent's Commercial Pilot Certificate for a period of 90 days. The Administrator found that respondent violated 14 C.F.R. §§ 91.155(a), 135.183(a), and 91.13(a). The case proceeded to a hearing before the law judge from June 13 through June 15, 2017. Inspector Kozura testified on behalf of the Administrator as a fact witness and as an expert in the field of aviation operation safety. Mr. Dennis Bradley, former assistant manager of Mackinac Island Airport, also testified on behalf of the Administrator. Respondent testified on his own behalf.

Inspector Kozura testified that he was the POI assigned to Great Lakes Air.¹⁰ He stated that he decided to conduct observations on the morning of October 24, 2014, because the weather forecast indicated overcast conditions with cloud cover at 1000 to 1100 feet above ground level (AGL), which was not conducive to flying across water.¹¹ He stated that he drove to Mackinac County Airport at approximately 8:30 a.m. where he observed that the hangar for N7122J was open and empty.¹² Inspector Kozura testified that he then drove to a location that had a higher vantage point a short distance down the road from Mackinac County Airport, and at

⁹ Tr. 50.

¹⁰ Tr. 48.

¹¹ Tr. 50-51.

¹² Tr. 50.

approximately 8:40 a.m., he observed an aircraft about five miles away flying at the base of the cloud ceiling.¹³ He estimated the aircraft's location to be near the end of Mackinac Bridge at Mackinaw City.¹⁴ Inspector Kozura explained that at its closest point, the aircraft was three to four miles away from his location.¹⁵ He stated that using binoculars, he observed the aircraft to be a single engine, low wing aircraft with fixed landing gear and a long nose.¹⁶ Based on these characteristics, he testified that the aircraft he observed was consistent with a Piper PA-32-260, but explained that given the distance, he could not make out the tail number or the color of the aircraft.¹⁷

Inspector Kozura stated that he estimated that the aircraft was flying approximately 200 feet below the cloud ceiling, which he characterized as "solid overcast" at 1100 AGL with no gaps in the clouds.¹⁸ He testified that his observation of the weather was consistent with the certified weather data from the National Center for Environmental Information for the area around Mackinac Island, which showed a cloud ceiling of 1100 feet AGL between 8:00 a.m. and 9:00 a.m. on October 24, 2014.¹⁹ Inspector Kozura explained that because the area surrounding Mackinac Island is elevated approximately 700 feet above sea level, the cloud ceiling at 1100 feet AGL was equivalent to an altitude of approximately 1800 feet mean sea level (MSL).²⁰

¹³ Tr. 51, 78.

¹⁴ Tr. 51; Exh. A-5 (Inspector Kozura's depiction of the flight path).

¹⁵ Tr. 78.

¹⁶ Tr. 51.

¹⁷ Tr. 52, 57, 75, 77.

¹⁸ Tr. 58-59.

¹⁹ Tr. 59-61; Exh. A-9 at 4.

²⁰ Tr. 65.

Inspector Kozura stated that he believed the aircraft was flying too close to the cloud ceiling to be in compliance with the FARs.²¹

Inspector Kozura testified that he continued to observe the aircraft's flight path, and he watched it fly from south of the Mackinac Bridge toward Mackinac Island, directly across the Straits.²² He explained that he saw the aircraft begin a normal descent and approach Mackinac Island for a downwind landing, where he watched the aircraft until it disappeared behind the trees at Mackinac Island.²³ He stated that he did not hear any traffic or radio calls on his handheld radio, which he used to monitor the frequency for Mackinac Island Airport and Mackinac County Airport, nor did he see or hear any other aircraft in the vicinity.²⁴

Inspector Kozura testified that after he watched the aircraft descend for landing, he called Mackinac Island Airport and spoke with Mr. Bradley, who was the assistant airport manager at the time.²⁵ He stated that Mr. Bradley told him that respondent had just landed, had off-loaded passengers, and that respondent was now departing Mackinac Island Airport.²⁶ Inspector Kozura testified that after his phone call with Mr. Bradley, he watched an aircraft take off from Mackinac Island Airport and land at Mackinac County Airport, down the road from where he conducted his observations.²⁷ He stated that he returned to the Mackinac County Airport parking lot and observed N7122J taxi and park approximately 15 feet from Inspector Kozura's vehicle.²⁸

²¹ Tr. 68

²² Tr. 52, 56, 58; Exh. A-5.

²³ Tr. 52, 57-58, 78.

²⁴ Tr. 51, 57-58, 104.

²⁵ Tr. 52.

²⁶ Tr. 52-53.

²⁷ Tr. 53, 96.

²⁸ Tr. 62.

Inspector Kozura explained that he saw respondent deplane and recognized him because Inspector Kozura had been the POI for Great Lakes Air for the past 11 years, and was well-acquainted with respondent and considered him a friend.²⁹ He testified that after respondent exited N7122J, respondent made eye contact with him and began to briskly walk away rather than say hello and make small-talk as was respondent's normal custom.³⁰ Inspector Kozura stated that he followed respondent and had a brief discussion with him about his flight during which respondent admitted that he had been flying at an altitude of 1600 feet MSL.³¹ He characterized respondent's demeanor as agitated and angry during their conversation, and explained that this was different from their normal interactions.³² In this regard, Inspector Kozura stated that respondent spoke to him in a "gruff" manner and that respondent initially refused to read and sign the Pilot's Bill of Rights document that Inspector Kozura provided, at one point throwing the document onto a table.³³ Inspector Kozura stated that he had never seen respondent this agitated and explained that respondent was very angry that he had been "caught red-handed."³⁴

Inspector Kozura opined in his capacity as an expert witness that the aircraft he observed flying over the Straits could not have safely reached land in the event of engine failure. In this regard, Inspector Kozura estimated that there was approximately four miles' distance between the location at which he first observed the aircraft, at the southern point of Mackinac Bridge, and

²⁹ Tr. 48, 53.

³⁰ Tr. 53-54, 62.

³¹ Tr. 54, 65.

³² Tr. 53-54.

³³ Tr. 54.

³⁴ Id.

Mackinac Island Airport, where he saw the aircraft descend for landing.³⁵ He explained that given the aircraft's observed flight path over the Straits, the aircraft would need to be able to glide approximately two miles to safely reach land in the event of engine failure.³⁶ Inspector Kozura further explained that according to the Piper PA- 32-260 glide performance chart, to glide this distance the aircraft would need to be operating at a minimum altitude of 1600 to 1700 feet AGL.³⁷ He calculated that an altitude of 1600 to 1700 feet AGL was equivalent to an altitude of approximately 2300 to 2400 feet MSL when crossing the Straits, because the area surrounding Mackinac Island Airport is elevated approximately 700 feet above sea level.³⁸ Inspector Kozura explained that if respondent's aircraft was flying at 1600 feet MSL, as respondent admitted during their conversation, respondent's aircraft would be below the required altitude threshold of 2300 to 2400 feet MSL, and only 800 to 900 feet above the water.³⁹ He testified that this altitude was insufficient to permit the aircraft to glide to safely reach land in the event of engine failure.⁴⁰ Inspector Kozura stated that FAA's Sanction Guidance Table called for a suspension of 60 to 180 days for failure to comply with distance from cloud requirements in controlled airspace, and he explained that respondent's 90-day suspension fell within that range.⁴¹

³⁵ Tr. 65; Exh. A-5.

³⁶ Tr. 70.

³⁷ Tr. 70; Exh. A-8.

³⁸ Tr. 70.

³⁹ Tr. 70-71.

⁴⁰ Tr. 71.

⁴¹ Tr. 73; Exh. A-7 at 55.

Mr. Bradley testified that he was formerly the assistant airport manager at Mackinac Island Airport and that he has known respondent professionally for about 20 years.⁴² Mr. Bradley read his written statement into the record and stated that at approximately 9:00 a.m. on the day of the events at issue in this case, he was working in the garage area at Mackinac Island Airport when he heard an aircraft land and approach the terminal.⁴³ He explained that he did not actually see the aircraft land but that he looked out of the window and saw respondent and N7122J on the ramp and noticed two people in the lobby.⁴⁴ He further stated that shortly thereafter, Inspector Kozura called him and asked who landed at the airport and that he told Inspector Kozura that respondent had been there with N7122J and had just taken off again.⁴⁵ Mr. Bradley testified that marginal weather conditions tended to “drastically reduce the number of aircraft” flying into Mackinac Island Airport.⁴⁶ He stated that he did not remember seeing any other aircraft operating in the area at the time he saw respondent’s aircraft.⁴⁷

Testifying on his own behalf, respondent confirmed that he flew two passengers from Traverse City to Mackinac Island Airport on October 24, 2014.⁴⁸ He testified that he arrived at Mackinac Island just before 9:00 a.m., and that he was paid approximately \$425 for the flight.⁴⁹

⁴² Tr. 107.

⁴³ Tr. 109-12, 115; see also Exh. A-6 (Mr. Bradley’s written statement).

⁴⁴ Tr. 109-12, 115-16.

⁴⁵ Tr. 110, 113; Exh. A-6.

⁴⁶ Tr. 110-11.

⁴⁷ Tr. 110, 115.

⁴⁸ Tr. 127-28.

⁴⁹ Tr. 150, 152.

He stated that he did not see or hear any other aircraft in the vicinity of Mackinac Island during this time period.⁵⁰

Respondent disputed that the aircraft Inspector Kozura saw flying across the Straits was his aircraft.⁵¹ In this regard, respondent testified that he flew to Mackinac Island Airport by way of Pellston, Cheboygan, and Bois Blanc Island in Michigan which is south and east of Mackinaw City; he explained that this would have placed him and his aircraft in a different location than where Inspector Kozura observed an aircraft flying too close to the clouds.⁵² Respondent acknowledged that he did not identify the specifics of this flight route in his response to FAA's Letter of Investigation or in discovery, explaining that "no one asked me until today, other than my attorney."⁵³ He further testified that along his flight route, the clouds were solid overcast at around 3000 to 3500 feet, and respondent disputed that he flew within 500 feet of the cloud ceiling at any point.⁵⁴ Respondent confirmed that after he dropped his passengers off at Mackinac Island Airport, he flew to Mackinac County Airport and had a discussion with Inspector Kozura, though he could not remember the precise content of that conversation.⁵⁵ Respondent disagreed with Inspector Kozura's characterization of their encounter at Mackinac County Airport, stating that it was Inspector Kozura, not himself, who was upset during their conversation.⁵⁶ Respondent admitted that his conversation with Inspector Kozura included

⁵⁰ Tr. 150-51.

⁵¹ Tr. 128-33.

⁵² Tr. 128-29, 130-33; Exh. R-10 (respondent's depiction of his flight path).

⁵³ Tr. 151.

⁵⁴ Tr. 135.

⁵⁵ Tr. 140-41.

⁵⁶ Tr. 141-42.

discussion of respondent operating at 1600 feet MSL, but explained that he did not remember the context in which 1600 feet MSL was discussed.⁵⁷ Respondent contended that he told Inspector Kozura that he had flown east of Pellston to Mackinac Island, but that Inspector Kozura was not listening.⁵⁸ He further admitted that he did not observe other aircraft operating in the vicinity of Mackinac Island nor did he hear any other aircraft make radio calls on the morning of October 24, 2014.⁵⁹

C. Law Judge's Oral Initial Decision

The law judge found that the testimony and evidence presented at the hearing rendered the following facts undisputed: (1) respondent operated a Part 135 passenger-carrying flight between Traverse City and Mackinac Island on the morning of October 24, 2014; (2) the flight was operated in Class E airspace; (3) the flight was subject to the VFR restrictions in § 91.155(a); and (4) the flight was subject to the flight-over-water restrictions in § 135.183(a).⁶⁰ The law judge also noted that there was no dispute regarding the weather conditions in the vicinity of Mackinac Island or the Straits on the morning of October 24, 2014, because the certified weather data in Exhibit A-9 confirmed Inspector Kozura's testimony that cloud ceiling was overcast at 900 to 1100 feet AGL.⁶¹ The law judge explained that given these undisputed facts, his determination of whether respondent violated the regulations as alleged in the complaint turned "on the question of whether the Administrator [had] established by a preponderance of evidence that the aircraft Inspector Kozura observed operating... across the

⁵⁷ Tr. 148.

⁵⁸ Tr. 129, 141-43, 149.

⁵⁹ Tr. 150-51.

⁶⁰ Initial Decision at 198-99.

⁶¹ Id. at 198 (referring to Exh. A-9).

Straits to Mackinac Island Airport on October 24, 2014, was in fact N7122J being operated by respondent.”⁶²

The law judge explained that the determination of whether the aircraft Inspector Kozura observed was, in fact, N7122J being operated by respondent turned “largely on the credibility of the testimony of Inspector Kozura versus that of respondent.”⁶³ The law judge suggested that either Inspector Kozura or respondent was “being less than completely candid about what transpired” because their account of their interaction at Mackinac County Airport “differed drastically.”⁶⁴ After evaluating the testimony, the law judge was unwilling to accept that “Inspector Kozura fabricated significant details of their encounter” and afforded his testimony greater weight.⁶⁵ In finding Inspector Kozura to be the more credible witness, the law judge cited Inspector Kozura's demeanor, characterizing him as “candid and not evasive.”⁶⁶ He also noted that Inspector Kozura had no interest in the outcome of the proceedings, and that there was no history of confrontation or animosity between Inspector Kozura and respondent that might suggest motive to fabricate.⁶⁷

Concerning respondent's testimony, the law judge stated that respondent had a clear interest in the outcome of the case and that his testimony included a “number of disparities.”⁶⁸ Specifically, the law judge cited respondent's testimony that he told Inspector Kozura during

⁶² Id. at 199.

⁶³ Id.

⁶⁴ Id. at 200.

⁶⁵ Id. at 202-03.

⁶⁶ Id. at 202.

⁶⁷ Id.

⁶⁸ Id.

their conversation on the morning of October 24th that he had taken an easterly route to bypass the low cloud ceiling that would have been outside Inspector Kozura's field of view.⁶⁹ The law judge observed that the investigative materials were devoid of such an explanation, and that respondent failed to "provide details regarding the specific route he now says he took near Cheboygan, either in response to the Letter of Investigation, in responses to discovery, or in any materials submitted in preparation for hearing, until just days before the hearing."⁷⁰ The law judge noted that respondent's only explanation for not providing route-specific details of the flight path he claims to have taken on October 24th was that "he was never asked that specific question directly;" the law judge concluded that he found "it unlikely that [respondent] would withhold such critical details simply because he was not asked the specific question directly."⁷¹ The law judge also cited respondent's testimony that while he may have discussed operating at 1600 feet MSL on October 24 with Inspector Kozura, he was unable to provide an explanation of what that discussion may have been about.⁷²

The law judge acknowledged that it was "possible that another aircraft with a similar profile was being operated in the vicinity of the Mackinac Island Airport at the exact time;" however, the law judge found that possibility to be "unlikely."⁷³ The law judge further stated that it was "even more implausible that there were two very similar aircraft operating at or near the same airport at the same time, and neither Mr. Bradley, Inspector Kozura, nor respondent

⁶⁹ Id. at 201.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.; see also Tr. 148.

⁷³ Initial Decision at 200.

observed or heard that aircraft.”⁷⁴ Although Inspector Kozura could not make out the tail number of the aircraft he saw flying over the Straits, the law judge found that there was “strong circumstantial evidence that the aircraft he observed on October 24th was respondent’s.”⁷⁵

In a credibility-based decision, the law judge found that the Administrator established all of the allegations in the complaint by a preponderance of reliable, probative, and credible evidence and affirmed the suspension of respondent’s Commercial Pilot Certificate for a period of 90 days.⁷⁶

D. Issues on Appeal

Respondent argues that the law judge erred in affirming the Administrator’s Order of Suspension. Respondent contends that the Administrator “had no proof that the aircraft observed by Inspector Kozura, which he never saw land at the Mackinac Island Airport was [N7122J] operated by [respondent].”⁷⁷ Respondent also argues that the Administrator failed to establish that respondent operated N7122J “too close to the clouds, and too low of an altitude to glide to land in the event of an engine failure.”⁷⁸

2. Decision

While we give deference to our law judge’s rulings on certain issues, such as credibility determinations,⁷⁹ we review the case, as a whole, under *de novo* review.⁸⁰

⁷⁴ Id.

⁷⁵ Id. at 199.

⁷⁶ Id. at 204-206.

⁷⁷ Appeal Br. at 5, 7-8.

⁷⁸ Id.

⁷⁹ Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), aff’d sub nom. Porco v. Huerta, 472 Fed. Appx. 2 (D.C. Cir. 2012) (per curiam).

⁸⁰ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993).

In the present case, respondent challenges as erroneous the law judge's factual finding that the aircraft Inspector Kozura observed flying in violation of the FARs on the morning of October 24, 2014, was N7122J being piloted by respondent.⁸¹ The gravamen of respondent's argument is that the Administrator presented "no direct evidence the [respondent] was the pilot of the... aircraft Inspector Kozura observed."⁸² We are unpersuaded by respondent's argument, which is flawed because it equates a lack of direct evidence with a lack of proof.

It is well settled that the Administrator's case must be "supported by a preponderance of the substantial, reliable, and probative evidence, regardless of its direct or indirect character."⁸³ To meet the burden of proof, the Administrator need only show that a given fact is "more likely true than not" and need not demonstrate that "no other inference could fairly be reached on the evidence."⁸⁴ We have long held that circumstantial evidence is "sufficient to carry the burden of proof on the key issues of aircraft and pilot identity."⁸⁵

In the present case, there is ample circumstantial evidence in the record to support the law judge's finding that Inspector Kozura observed N7122J being piloted by respondent over the Straits to Mackinac Island, and that respondent operated the aircraft over water at an altitude of

⁸¹ Appeal Br. at 5, 7-8.

⁸² *Id.* at 8.

⁸³ Administrator v. Singer, NTSB Order No. EA-4704, 1998 NTSB LEXIS 99 at *5 (1998); See also Proud v. CAB, 357 F.2d 221, 223-24 (7th Cir. 1966) ("The administrator's burden of proof was sustained by substantial evidence, even though circumstantial.").

⁸⁴ Singer, *supra* n. 83 at *6.

⁸⁵ Administrator v. Owens, NTSB Order No. EA-1907, 1983 NTSB LEXIS 221 at *6 (1983) *aff'd*, 734 F.2d 399 (8th Cir. 1984). On appeal, the Eighth Circuit also noted that circumstantial evidence may be used to prove pilot identity. *Id.* at 401. See also Fleischman v. NTSB, 927 F.2d 609 (9th Cir. 1991) ("Even where evidence of pilot identity is entirely circumstantial that does not defeat a finding that the evidence is substantial."); Administrator v. Starr, NTSB Order No. EA-1504 (1980) (upholding "reasonable inference" as to pilot identity drawn from circumstantial evidence).

approximately 1600 MSL, which was less than the 2200-2300 MSL altitude required to glide to landing in the event of engine failure, and less than 500 feet below clouds, which were at approximately 1800 MSL. Respondent admitted that he flew two passengers from Traverse City to Mackinac Island on the morning of October 24, 2014, arriving just before 9:00 a.m.⁸⁶

Inspector Kozura testified that on the morning of October 24, 2014, at approximately 8:30 a.m., he observed that the hangar for N7122J was open and empty, and at approximately 8:40 a.m., he observed an aircraft with a profile consistent with N7122J, a Piper PA-32-260, flying over the Straits.⁸⁷ He observed the aircraft begin a normal descent and approach Mackinac Island Airport for landing.⁸⁸ Inspector Kozura then called Mackinac Island Airport and spoke to Mr. Bradley, who told him that respondent had just landed and had off-loaded passengers.⁸⁹ Mr. Bradley confirmed in his testimony that he saw respondent and N7122J on the ramp at Mackinac Island Airport at approximately 9:00 am.⁹⁰ Inspector Kozura did not hear any other traffic or radio calls while he was observing the aircraft, and none of three witnesses who testified - including respondent - could recall seeing or hearing any other aircraft flying in the vicinity of Mackinac Island.⁹¹

The testimony of respondent and Inspector Kozura differed in critical respects. In this regard, Inspector Kozura testified that based on all of the circumstances surrounding his observations on October 24, 2014, that he was 100-percent confident that the aircraft he observed

⁸⁶ Tr. 127-28, 150.

⁸⁷ Tr. 50-52, 75.

⁸⁸ Tr. 52, 57-58.

⁸⁹ Tr. 52-53.

⁹⁰ Tr. 109-10, 114-15.

⁹¹ Tr. 51, 57-58, 104, 115, 151.

flying across the Straits was N7122J operated by respondent.⁹² In contrast, respondent testified that he flew to Mackinac Island by way of an easterly route to bypass the low ceilings, near Cheboygan, and thus was not flying over the Straits at the time of Inspector Kozura's observation.⁹³ In addition, both witnesses' accounts of their encounter at Mackinac County Airport "differed drastically."⁹⁴ In this regard, Inspector Kozura testified that respondent tried to avoid him, and was evasive, agitated, and angry during their conversation, while respondent disputed this characterization, and testified that it was actually Inspector Kozura who was upset with respondent.⁹⁵ More importantly, Inspector Kozura testified that respondent told him that he had flown to Mackinac Island at 1600 MSL, and that the first time he was made aware that respondent's purported flight path was near Cheboygan was shortly before the hearing, and that respondent did not mention an easterly flight path during their conversation at Mackinac County Airport on October 24, 2014.⁹⁶ In contrast, respondent admitted that he may have generally discussed 1600 MSL with Inspector Kozura, but refuted that he actually flew at 1600 MSL and testified that he discussed his easterly flight path with Inspector Kozura while at the airport and denied flying across the Straits at that time.⁹⁷

In cases where, as here, the witnesses provide conflicting accounts as to the facts, resolving the conflicts rests largely on the law judge's credibility determination concerning the witnesses. It is well settled that we will not overturn a law judge's credibility determination

⁹² Tr. 102-03.

⁹³ Tr. 128-29, 130-33; Exh. R-10.

⁹⁴ Initial Decision at 200.

⁹⁵ Tr. 53- 54, 142-44.

⁹⁶ Tr. 65, 82, 102.

⁹⁷ Tr. 143-44, 148.

unless a party can establish the credibility determination was arbitrary and capricious.⁹⁸ The law judge made a specific finding that Inspector Kozura was the more credible witness and provided a rationale to support that determination. We find the evidence of record supports the law judge's credibility determination. Respondent has failed to establish that the law judge's credibility determination is arbitrary and capricious; therefore, we find no reason to disturb it.

In view of the evidence presented at the hearing and the law judge's credibility determination, to which we defer, we agree with the law judge that while "it might be possible that another aircraft with a similar profile was being operated in the vicinity of the Mackinac Island Airport at the exact time respondent was approaching and landing at the airport from a different direction," such a possibility was "unlikely."⁹⁹ We further agree that it is "even more implausible that there were two very similar aircraft operating at or near the same airport at the same time, and neither Mr. Bradley, Inspector Kozura, nor respondent observed or heard that aircraft," particularly given Mr. Bradley's testimony about the "drastically limited number of aircraft operating at Mackinac Island Airport on such marginal weather days."¹⁰⁰ The law judge did not err by relying on the circumstantial evidence presented in this case, and we find that the Administrator has established by a preponderance of reliable, probative, and credible evidence that respondent violated 14 C.F.R. §§ 91.155(a), 135.183(a), and 91.13(a) as alleged in the complaint.

⁹⁸ Porco, *supra* n. 79.

⁹⁹ Initial Decision at 200.

¹⁰⁰ Id.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's oral initial decision is affirmed; and
3. The 90-day suspension of respondent's Commercial Pilot Certificate shall begin 30 days after the service date indicated on this opinion and order. ¹⁰¹

SUMWALT, Chairman, LANDSBERG, Vice Chairman, HOMENDY, GRAHAM and CHAPMAN, Members of the Board, concurred in the above opinion and order.

¹⁰¹ For the purpose of this order, respondent must physically surrender his commercial pilot certificate to a representative of the FAA pursuant to 14 C.F.R. § 61.19(f).

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

* * * * *

In the matter of: *

MICHAEL P. HUERTA, *
ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. *

Docket No.: SE-30315
JUDGE WOODY

PAUL S. FULLERTON, *

Respondent. *

* * * * *

U.S. Bankruptcy Court
One Division Street North
Courtroom A
Grand Rapids, Michigan

Thursday,
June 15, 2017

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

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

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I N D E X

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P R O C E E D I N G S

(9:05 a.m.)

JUDGE WOODY: Good morning. Please be seated.

ORAL INITIAL DECISION AND ORDER

JUDGE WOODY: Good morning. This is the proceeding under the provisions of 49 U.S.C. Section 44709 and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. This matter has been heard before me and as provided by the Board's rules, I've elected to issue an oral initial decision in this matter.

Pursuant to notice, this matter came on for hearing on June 14 and 15, 2017 in Grand Rapids, Michigan. The Administrator was represented by attorneys Benjamin Borelli and Lauren Hoyson from the FAA Enforcement Division Midwest Team. Respondent was present throughout the proceedings and represented by attorney Steven Chait. The parties were afforded a full opportunity to offer evidence, to call, examine and cross-examine witnesses, and to make arguments in support of their respective positions.

I will not discuss all the evidence in detail. I have, however, considered all the evidence, both oral and documentary. That which I do not specifically mention is viewed by me as being corroborative or as not materially affecting the outcome of this decision.

Respondent Paul S. Fullerton has appealed the Administrator's Order of Suspension, dated December 1, 2016. Pursuant to the

1 Board's rules, the Administrator filed a copy of that order on
2 December 23, 2016, which serves as the complaint in this case.
3 The Administrator ordered a 90-day suspension of Respondent's
4 commercial pilot's certificate based on his alleged violations of
5 the Federal Aviation Regulations which are codified at 14 CFR, and
6 that's Sections 91.155(a), 135.183(a) and 91.13(a).

7 More specifically, the Administrator's complaint alleges that
8 on October 24, 2014, while acting a pilot in command of a Part 135
9 passenger-carrying flight under visual flight rules, or VFR, in
10 Class E airspace between Traverse City, Michigan and Mackinac
11 Island, Michigan, Respondent operated the aircraft less than 300
12 feet below overcast ceiling around Mackinac Island, in violation
13 of 14 CFR Section 91.155(a); operated the land aircraft over water
14 at an altitude that would not have allowed the aircraft to reach
15 landing in case of engine failure, in violation of 14 CFR Section
16 135.183(a); and thereby operated the aircraft in a careless or
17 reckless manner so as to endanger the life or property of another,
18 in violation of 14 CFR Section 91.13(a).

19 In his answer to the Administrator's complaint, Respondent
20 admitted paragraphs 1 through 4 and paragraph 6. As he has
21 admitted those allegations, they're deemed established for
22 purposes of this decision. Respondent has denied the remaining
23 numbered paragraphs, those being paragraphs 5 and 7 through 10.

24 Administrator's Exhibits A-1, A-2 and A-5 through 11 were
25 admitted into evidence. Respondent's Exhibits R-5 and R-10 were

1 admitted into evidence. Exhibit R-1 was offered, but not admitted
2 into evidence. Weather data and affidavit of Paul Gross proffered
3 by Respondent were excluded from evidence pursuant to a motion to
4 exclude, which I granted; however, those documents have been
5 marked as Exhibits ALJ-1 and appended to the record for purposes
6 of any subsequent review.

7 The Administrator presented the testimony of Principal
8 Operations Inspector Thomas Kozura and Mr. Dennis Bradley.

9 Inspector Kozura testified that he is a principal operations
10 inspector at the Grand Rapids Flight Standards District Office, or
11 FSDO, a position he's held for approximately 11 years. His
12 responsibilities in that position include, among other things,
13 surveillance, certification and education for Part 135 operations
14 and their pilots. Prior to the FAA, his aviation experience
15 included 10-plus years as a pilot and instructor/evaluator in the
16 United States Air Force. He holds a number of certificates and
17 ratings, including an air transport pilot certificate; commercial
18 pilot certificate; single-engine land and sea CFII; single-engine
19 land and sea and multi-engine land; mechanic's certificate with
20 A&P rating; and inspection authorization. His education, training
21 and experience are more fully set forth in his CV, which is at
22 Exhibit A-10. He was recognized as an expert in aviation
23 operation safety.

24 Inspector Kozura stated he's familiar with Respondent Paul
25 Fullerton from having acted as the principal operations inspector,

1 or POI, for Mr. Fullerton's company, Great Lakes Air, for the past
2 11 years. He also knows him as a friend. However, he stated he
3 keeps his POI duties and their friendship separate. In that
4 regard he noted a 2011 incident stemming from Great Lakes Air
5 flying too low over the water in bad weather, after which he spoke
6 at length with Respondent and also briefed Great Lakes Air pilots
7 on the need to maintain sufficient altitude over water to safely
8 glide to land in the event of engine failure.

9 He testified that with that history in mind, on October 24,
10 2014, he went to Great Lakes unannounced to conduct surveillance,
11 as the weather that day was marginal at best with low ceilings at
12 1,000 to 1,100 feet AGL. When he arrived, he saw the hangar door
13 open and the Cherokee Six gone. He then proceeded to a higher
14 vantage point near the hospital. From that position he said he
15 observed an aircraft with a similar profile to the Cherokee Six --
16 that is, a single-engine low-wing aircraft with a long nose and
17 gear down -- about 5 miles out. He said his observation was aided
18 by binoculars he had with him. He initially saw the aircraft near
19 the Mackinac Bridge and then proceeding across the Straits of
20 Mackinac, which I may refer to "The Straits," towards Mackinac
21 Island Airport.

22 Inspector Kozura said he called his wife, who is a
23 meteorologist, to confirm current weather conditions, which she
24 reported as overcast ceilings at 1,000 to 1,100 AGL. Inspector
25 Kozura described using Exhibit A-5 how he observed the plane make

1 a modified downwind to base approach to enter the pattern to land
2 at Mackinac Island Airport.

3 Shortly after that, the inspector said he called the airport
4 and spoke with Dennis Bradley, the assistant airport manager. He
5 asked Mr. Bradley if the Respondent had just landed, and was told
6 he had just offloaded passengers and was leaving. Inspector
7 Kozura said that he then observed Respondent take off from
8 Mackinac Island Airport and proceed directly to Mackinac County
9 Airport in St. Ignace and land there.

10 Inspector Kozura said he drove to where Respondent parked the
11 aircraft on the ramp and approached him. He said Respondent saw
12 him and then turned his back and started walking away and
13 initially did not respond when the inspector hailed him. He
14 observed that Respondent's reaction was unusual since they are
15 friends and would normally engage in a friendly banter when seeing
16 one another. He said he informed Mr. Fullerton that he needed to
17 speak with him about his flight to Mackinac Island. He said he
18 gave Mr. Fullerton the Pilot's Bill of Right Notice and asked him
19 to read it, but he initially was agitated and did not want to read
20 it or sign it. After the inspector insisted, Mr. Fullerton did
21 read and sign the notice.

22 Inspector Kozura stated he asked Respondent what altitude he
23 flew a Part 135 flight to Mackinac Island, and Respondent told him
24 1,600 feet. Inspector Kozura testified that would only be 1- to
25 200 feet below the clouds, which was consistent with what he had

1 observed visually. He stated his visual observations were made
2 with the naked eye and also with the binoculars, but even with the
3 binoculars he was unable to make out the tail number of the
4 aircraft. He said he also had a handheld radio, but did not hear
5 any radio calls.

6 He noticed his personal observation of solid overcast at
7 ceilings of approximately 1,000 feet from St. Ignace, where he
8 was, to the Mackinac Bridge where he first saw the aircraft, and
9 across The Straits and around Mackinac Island. He reviewed the
10 certified weather record from October 24th, which is Exhibit A-9,
11 which he noted was consistent with his own personal observations
12 and recorded consistently overcast ceilings at 900 to 1,100 feet
13 AGL between approximately 8 a.m. and 10 a.m. in the area where he
14 observed the aircraft. He explained that 1,100 AGL was
15 approximately 17- to 1800 MSL. At 1,600 MSL, Respondent would
16 have been operating only 1- to 200 feet below the clouds.
17 Inspector Kozura thus opined that the ceilings were not adequate
18 that morning for Respondent to maintain the required VFR clearance
19 of 500 from the base of the clouds.

20 The inspector identified Exhibit A-8 as the glide performance
21 chart from the pilot's operating handbook for the Cherokee Six.
22 Using the chart, he demonstrated that for passenger carrying
23 operations Respondent would have had to operate N7122J at
24 approximately 1,600 AGL, or 22- to 2300 MSL across The Straits in
25 order to maintain safe glide range to reach landing in the event

1 of lost engine power. He noted that by Respondent's own
2 admission, he was operating at 1,600 MSL, well below the required
3 safe glide range.

4 On cross-examination, Inspector Kozura agreed there are a
5 number of other aircraft that have similar profiles to the
6 Cherokee Six. He confirmed he could not see the N number on the
7 aircraft he observed and could not tell if it had fixed or
8 extended gear. He also agreed that he could not visually
9 absolutely identify the aircraft as N7122J.

10 He offered that there were a number of other factors that
11 made him very confident the aircraft he observed was N7122J
12 operated by Respondent, such as his viewing of the profile of the
13 aircraft; his conversation with Dennis Bradley immediately after
14 seeing the aircraft approach to land at Mackinac Island; his
15 observation of the aircraft then taking off from Mackinac Island
16 and returning to Mackinac County Airport; Respondent's reaction to
17 him when he attempted to speak with him about the flight; and
18 Respondent's discussions with him about the flight.

19 Inspector Kozura reiterated that he did not hear a radio call
20 from the aircraft on its approach to Mackinac Island or on the
21 approach to Mackinac County Airport, but conceded that there are
22 aircraft without radios that are allowed to fly at Mackinac
23 Island. He stated that when he first saw the aircraft, it was
24 approximately 5 miles away, and at its closest was approximately 3
25 miles away on approach to Mackinac Island. He agreed that he did

1 not actually see the aircraft land at Mackinac Island; that on
2 final approach it went below the trees.

3 Inspector Kozura testified that he did not hear other
4 aircraft noise that morning, but admitted it was possible if a
5 plane was approaching from further away to the east, he might not
6 hear it.

7 He said that he first heard about a different flight path by
8 Respondent near Cheboygan 2 days ago. He noted that Respondent
9 never mentioned to him that he had flown along the coast near
10 Cheboygan and across The Straits, and that his reaction was edgy
11 after Inspector Kozura asked him about the passenger-carrying
12 flight. He agreed that if Respondent flew along the coast to
13 Cheboygan and across, he would not have been able to see the plane
14 because it would have been too far away. Inspector Kozura said he
15 was not upset at all during his conversation with Respondent on
16 October 24, 2014. The inspector indicated he had no basis to
17 dispute that the weather further east near Cheboygan was 2,800-
18 foot ceilings and 10 miles visibility. He opined that if that
19 were the case, Respondent could maintain adequate distance below
20 the clouds near Cheboygan, but he did not believe that he'd be
21 able to do so all the way to Mackinac Island based on the weather
22 and ceilings there.

23 Inspector Kozura agreed that if the aircraft he observed was
24 not Respondent, then his testimony was not relevant to the
25 allegations in the complaint. He confirmed that Mr. Bradley did

1 not say he saw Respondent land the aircraft at Mackinac Island.
2 He could not recall if Mr. Bradley said he saw the passengers
3 deplane. His best recollection was that Mr. Bradley said
4 Respondent just dropped off passengers and was preparing to depart
5 Mackinac Island.

6 Inspector Kozura confirmed that there were no passengers in
7 the aircraft on the trip from Mackinac Island to St. Ignace, so it
8 was a Part 91 flight. He agreed that the provisions of 14 CFR
9 Section 135.183(a) relative to glide distance therefore did not
10 apply to that flight.

11 Next, Mr. Dennis Bradley was called and testified that he's
12 now retired, but previously was the assistant airport manager for
13 Mackinac Island Airport. He indicated he has known Respondent
14 professionally for approximately 20 years. He identified Exhibit
15 A-6 as a witness statement he made to Inspector Kozura at
16 Inspector Kozura's request shortly after October 24, 2014. After
17 reviewing his statement, Mr. Bradley said he saw Respondent in
18 N7122J on the ramp at Mackinac Island Airport on October 24, 2014
19 at around 9 a.m. He said he heard the aircraft while he was in
20 the shop and he looked out and saw the Respondent's aircraft. He
21 said he received a call from Inspector Kozura about that time, who
22 asked about Mr. Fullerton and what the airport's automated weather
23 operations system, or AWOS, indicated. He said he checked the
24 AWOS shortly afterwards and it indicated overcast at 1,100 AGL.

25 He stated there are typically 15 to 20 flights per day on

1 weekdays into Mackinac Island Airport, but on marginal weather
2 days, that number is drastically reduced. He testified that he
3 did not recall seeing any other aircraft in that time frame on
4 October 24, 2014, but said it was possible that there could have
5 been others. He also agreed that aircraft can fly by the airport
6 without landing.

7 Respondent Paul Fullerton testified in his own behalf. He
8 testified that he's the owner and the director of operations for
9 Great Lakes Air. He stated that he has been a pilot since about
10 1971 and opened Great Lakes in 1983. He holds a commercial
11 pilot's certificate, single-engine land and multi-engine land,
12 with instrument rating. He has approximately 20,000 flight hours,
13 about 15,000 of which are with Great Lakes Air. He testified that
14 aside from the two current enforcement matters, the only other
15 enforcement action he was involved with stemmed from an accident
16 he had in 1984. He said there have been no other actions or
17 investigations involving flying in marginal weather conditions.

18 He confirmed that on October 24, 2014, he flew from St.
19 Ignace to Traverse City to pick up two passengers to transport
20 them to Mackinac Island. He stated that conditions when he
21 departed Traverse City were marginal VFR and that after he left,
22 he was watching the clouds and monitoring the weather conditions.
23 He indicated that south of Mackinac City he was working his way
24 east by Pellston, and approximately 3 miles northwest of Cheboygan
25 in order to make his way back to Mackinac Island. He said there

1 were thicker clouds in The Straits that he avoided by working his
2 way east. He described the conditions along his route as overcast
3 at 3,000 to 3,500 feet with some scattered clouds lower. He said
4 he was never within 500 feet of clouds and he did not fly where he
5 was not within safe gliding distance of land.

6 He stated that on approach to Mackinac Island, he reduced the
7 throttle, but because the Cherokee has a constant speed propeller,
8 it probably did not reduce the noise level much. He said the
9 weather was not an issue when he was landing at Mackinac Island.
10 He could not remember whether he made a radio call on approach to
11 Mackinac Island, but said it was his normal practice to do so. He
12 could not recall how long he was on the ground at Mackinac Island
13 or whether he had to wait for a carriage to pick up his
14 passengers.

15 He said he departed and flew directly to Mackinac County
16 Airport. He said he saw a car approach at brisk speed as he
17 taxied to the ramp and saw Inspector Kozura get out and approach
18 him. He denied that he tried to avoid the inspector or turned his
19 back on him. He also denied that he tried to walk away or was
20 upset with the inspector. In fact, he stated that Inspector
21 Kozura was agitated and was the one who was quite upset with him.
22 He said Inspector Kozura asked about his flight to Mackinac Island
23 and suggested he had observed him flying across The Straits with
24 low ceilings. Respondent said he told Inspector Kozura that he
25 could not have seen him because he had flown east of Pellston, but

1 Inspector Kozura was upset and was not listening or accepting of
2 his explanation. He confirmed that Inspector Kozura provided him
3 with the Pilot's Bill of Rights notice, but denied that he had
4 thrown it on the table or initially refused to read or sign it.
5 Instead, he said he set it on the counter and then accidentally
6 left it there and had to go back to retrieve it and sign it.

7 On cross-examination, Respondent said he may have said to
8 Inspector Kozura that he operated at 1,600 feet, but he couldn't
9 remember what they were discussing. Respondent said he saw no
10 other aircraft and did not hear any radio calls that morning. He
11 indicated he did not provide Inspector Kozura with the specifics
12 of his route when they spoke on October 24, 2014, because he could
13 tell the inspector was upset and the conversation was going
14 nowhere.

15 He stated that he did respond to the letter of investigation
16 through his attorney and offered that he did not provide the
17 specifics of his route in the response because he was not
18 specifically asked that question. Similarly, he said he provided
19 no specifics of his route during discovery because no one asked
20 him about it except his attorney. He indicated he probably would
21 have charged about \$425 in 2014 for the flight from Traverse City
22 to Mackinac Island, and that he would not get paid if the flight
23 was cancelled.

24 That concludes my summary of the evidence of testimony, and
25 having summarized that, I'll now discuss the evidence as it

1 pertains to the allegations in the complaint.

2 First, with respect to the alleged violations of 14 CFR
3 Sections 91.155(a) and 135.183(a), there is no debate regarding
4 whether Respondent operated N7122J on a passenger-carrying Part
5 135 flight under visual flight rules from Traverse City to
6 Mackinac Island on October 24, 2014. Respondent has admitted as
7 much in his answer to the complaint and during his testimony, and
8 Dennis Bradley confirmed that he observed Respondent in the
9 aircraft at Mackinac Island Airport on October 24th at
10 approximately 9 a.m.

11 Nor is there any real dispute about the weather conditions in
12 the vicinity of Mackinaw City, Mackinac Island or the Straits of
13 Mackinac that morning. Respondent concedes that there were low
14 ceilings in that vicinity. Inspector Kozura testified to his
15 observations of the overcast conditions, and the certified weather
16 data at Exhibit A-9 confirms overcast ceilings at 900 to 1,100
17 AGL.

18 Respondent also admitted in his answer, and Inspector Kozura
19 confirmed during his testimony that the airspace between mainland
20 Michigan and Mackinac Island is Class E airspace subject to the
21 VFR restrictions set forth in 14 CFR Section 91.155(a), and more
22 specifically to this case, no VFR operations less than 500 feet
23 below clouds.

24 Further, Inspector Kozura's testimony established, and
25 Respondent did not dispute, that his operation of a passenger-

1 carrying Part 135 flight using a land aircraft between Traverse
2 City and Mackinac Island on October 24, 2014, was subject to the
3 requirements in 14 CFR Section 135.183(a) that it be operated when
4 over water at an altitude that would allow it to reach land in the
5 event of an engine failure.

6 The determination of whether Respondent violated Section
7 91.155(a) and 135.183(a) turns, then, on the question of whether
8 the Administrator has established by a preponderance of evidence
9 that the aircraft Inspector Kozura observed operating from
10 Mackinac City across The Straits to Mackinac Island Airport on
11 October 24, 2014, was in fact N7122J being operated by Respondent,
12 and that determination turns largely on the credibility of the
13 testimony of Inspector Kozura versus that of Mr. Fullerton.

14 The inspector said he saw an aircraft with the same flight
15 profile as Respondent; that is, a low-wing single-engine aircraft
16 with a long nose and fixed or extended gear. Although he noted it
17 was likely fixed gear, since one would not normally operate over
18 the distance observed with the gear extended. Respondent argues
19 that there are other similar profile aircraft, and the inspector
20 admitted that he did not directly observe the tail number of the
21 aircraft. Nonetheless, there is strong circumstantial evidence
22 that the aircraft he observed on October 24th was Respondent's.
23 He observed the aircraft crossing The Straits and on a modified
24 downwind final approach to land at Mackinac Island Airport just
25 before 9 a.m. that day. Shortly after he observed the aircraft

1 apparently landing at the airport, he talked with the assistant
2 airport manager, Mr. Bradley, who confirmed that Respondent had
3 just landed and deplaned passengers. Mr. Bradley stated he
4 recalled no other aircraft at or near the airport in that time
5 frame. Inspector Kozura likewise did not observe or hear any
6 other aircraft or radio calls in the vicinity during that time,
7 and even Respondent said he did not see other aircraft at the
8 airport or observe any operating near the airport that morning.

9 While it might be possible that another aircraft with a
10 similar profile was being operated in the vicinity of the Mackinac
11 Island Airport at the exact time Respondent was approaching and
12 landing at the airport from a different direction, I find that
13 unlikely. I find it even more implausible that there were two
14 very similar aircraft operating at or near the same airport at the
15 same time, and neither Mr. Bradley, Inspector Kozura, nor
16 Respondent observed or heard that aircraft. Coupled with
17 Mr. Bradley's testimony about the drastically limited number of
18 aircraft operating at Mackinac Island Airport on such marginal
19 weather days, I find the likelihood of such a coincidence highly
20 improbable.

21 Beyond that improbability, Respondent's and Inspector
22 Kozura's accounts of their encounter at Mackinac County Airport
23 after Respondent's return from Mackinac Island that morning
24 differed drastically, suggesting that one or the other is being
25 less than completely candid about what transpired. Inspector

1 Kozura noted that Respondent made no mention on October 24th of
2 taking an easterly route to avoid weather. Although Respondent
3 testified that he told Inspector Kozura that morning that he had
4 taken an easterly route to bypass the low ceilings locally, no
5 mention was made of such an explanation in the investigative
6 materials, nor did Respondent provide details regarding the
7 specific route he now says he took near Cheboygan, either in
8 response to the letter of investigation, in responses to
9 discovery, or in any materials submitted in preparation for
10 hearing, until just days before the hearing. His only explanation
11 for not providing route-specific details before then is that he
12 was never asked that specific question directly. I find it
13 unlikely that he would withhold such critical details simply
14 because he was not asked the specific question directly.

15 Inspector Kozura testified that Respondent told him
16 specifically that he had flown the flight to Mackinac Island at
17 1,600 MSL. Respondent admits that he may have discussed 1,600 MSL
18 with the inspector, but was unable to provide an explanation of
19 what that discussion may have been about, although he generally
20 denied in his testimony that he flew the passenger-carrying flight
21 at 1,600 MSL or less than 500 feet below clouds.

22 Inspector Kozura indicated Respondent tried to avoid him, did
23 not initially respond when he hailed him, and became edgy when he
24 questioned him about the passenger-carrying flight. Respondent's
25 testimony that Inspector Kozura was instead the one who was

1 clearly agitated and upset when he approached Respondent that
2 morning and refused to listen to or accept his explanation that he
3 had taken a different route is not consistent with what I observed
4 of Inspector Kozura's demeanor and forthrightness on the witness
5 stand. I found him to be non-argumentative, not at all evasive
6 and candid in the responses. For instance, he admitted that he
7 could not see the tail number of the aircraft he observed and
8 could not make an absolutely positive identification of the
9 aircraft based just on his visual observations.

10 In order to accept Respondent's account, I would have to
11 believe that Inspector Kozura fabricated significant details
12 regarding their encounter on October 24, 2014, including that
13 Respondent admitted flying the flight at 1,600 MSL; that
14 Respondent made no mention of taking an easterly route to avoid
15 low ceilings; and that Respondent tried to avoid the inspector
16 initially and was edgy when asked about the passenger-carrying
17 flight.

18 Inspector Kozura has no interest in the outcome of these
19 proceedings, nor is there any history of confrontation or personal
20 animosity between the inspector and the Respondent that might
21 suggest a motive to fabricate. In fact, both testified that they
22 have worked together and been friends for a number of years. On
23 the other hand, Respondent has a clear interest in the outcome of
24 this proceeding and, as noted, his testimony included a number of
25 disparities. Considering the demeanor of the witnesses throughout

1 the consistency of the testimonies provided, an apparent motive to
2 fabricate or lack thereof, I found Inspector Kozura to be the more
3 credible witness and afford his testimony greater weight.

4 Based on the foregoing, I find that the Administrator has
5 proven by a preponderance of evidence that the aircraft observed
6 by Inspector Kozura operating from Mackinaw City across the
7 Straits of Mackinac to the Mackinac Island Airport on October 24,
8 2014, was N7122J operated by Respondent.

9 Further, a preponderance of evidence establishes that
10 Respondent was operating that aircraft in Class E airspace under
11 visual flight rules at approximately 1,600 MSL, which was less
12 than 500 feet below clouds which were at approximately 1,800 MSL.

13 Likewise, a preponderance of evidence establishes that
14 Respondent operated a land aircraft over water at an altitude of
15 approximately 1,600 MSL, which was less than the 22- to 2300 MSL
16 altitude required to allow the aircraft to reach land in case of
17 engine failure.

18 Respondent is also charged with careless or reckless
19 operations so as to endanger the life or property of others in
20 violation of 14 CFR Section 91.13(a). The Administrator charged
21 this as a residual violation; in other words, he asserts a
22 violation of 91.13(a) is established by virtue of proving another
23 operational violation. Board precedent unequivocally establishes
24 that when the Administrator proves an operational violation, he
25 also proves a violation of Section 91.13(a). Thus, I find that by

1 virtue of having proved the operational violations under Sections
2 91.155(a) and 135.183(a), the Administrator has also established a
3 violation of Section 91.13(a).

4 Accordingly, I find that all the numbered allegations in the
5 complaint, paragraphs 1 through 10, are established by a
6 preponderance of the reliable, probative and credible evidence. I
7 further find that the evidence establishes that Respondent
8 operated an aircraft in Class E airspace under visual flight rules
9 at a distance less than 500 feet below clouds in violation of 14
10 CFR Section 91.155(a); operated a land aircraft over water at an
11 altitude that would not have allowed the aircraft to reach land in
12 case of engine failure, in violation of 14 CFR Section 135.183(a);
13 and thereby operated the aircraft in a careless or reckless manner
14 so as to endanger the life or property of another, in violation of
15 14 CFR Section 91.13(a).

16 Having found that the Administrator has proven all of the
17 allegations in the Administrator's complaint by a preponderance of
18 reliable, probative and credible evidence, I now to the sanction
19 imposed by the Administrator in this case.

20 In August 2012, Public Law 112-153, known as the Pilot's Bill
21 of Rights, was signed into law by the President and became
22 effective immediately. The Pilot's Bill of Rights specifically
23 strikes from 49 U.S.C. Section 44709 and 44710 language that in
24 cases involving amendments, modifications, suspensions or
25 revocation of airman certificates, the Board, "is bound by all

1 validly adopted interpretations of laws and regulations the
2 Administrator carries out, and of written Agency policy guidance
3 available to the public relating to sanctions to be imposed under
4 this section, unless the Board finds an interpretation is
5 arbitrary, capricious or otherwise not according to law."

6 While I'm no longer bound to give deference to the FAA by
7 statute, that agency is entitled to judicial deference due all
8 other federal administrative agencies under the Supreme Court
9 decision in Martin v. Occupational Safety & Health Review
10 Commission. In applying the principle of judicial deference to
11 the interpretations of laws, regulations and policies, the
12 Administrator carries out, I must analyze the facts and
13 circumstances in each case to determine if the sanction selected
14 by the Administrator is appropriate.

15 In the case before me, the Administrator has argued that the
16 appropriate sanction based on deference to FAA sanction guidelines
17 is a suspension of 90 days. The Administrator notes that the
18 sanction guidance table calls for a 60- to 180-day suspension for
19 failure to comply with to cloud requirements. In this case
20 Respondent also did so while carrying passengers for hire, in
21 addition to operating over water at an altitude that would not
22 permit the aircraft to safely reach land in the event of engine
23 failure. Respondent made no argument as to specific sanction, but
24 argued that the evidence does not establish any regulatory
25 violations by Respondent, and dismissal is therefore warranted.

1 Now, having considered the facts and circumstances of this
2 case and giving appropriate deference to the Administrator's
3 reasonable choice of sanction, I find that the sanction sought by
4 the Administrator is appropriate and warranted in the public
5 interest in air commerce and air safety. Therefore, I find that
6 the order of suspension, the complaint herein, shall be affirmed
7 as issued.

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ORDER

IT IS HEREBY ORDERED:

1. That the Order of Suspension, the complaint herein, is affirmed as issued.

2. Respondent's commercial pilot's certificate is hereby suspended for a period of 90 days.

Entered this 15th day of June 2017, at Grand Rapids, Michigan.

STEPHEN R. WOODY

Administrative Law Judge

1 APPEAL

2 JUDGE WOODY: That concludes my oral initial decision.

3 Mr. Fullerton, as your counsel may have already discussed
4 with you, you have certain appeal rights. You can certainly
5 appeal my decision. If you desire to do so, I have here those
6 appeal rights in writing.

7 Counsel, I would ask you to come forward, if you wouldn't
8 mind. I'm going to hand you a copy, one for you and one for your
9 client.

10 Does the Administrator need a copy?

11 MR. BORELLI: No, Your Honor.

12 JUDGE WOODY: Okay. Mr. Chait, do you intend to advise your
13 client of his appeal rights or would you like me to advise him
14 further?

15 MR. CHAIT: Your Honor, I will advise him of his appeal
16 rights.

17 JUDGE WOODY: All right. Thank you.

18 So, Mr. Fullerton, I'll let your counsel advise you
19 specifically regarding your appeal rights. The one thing I would
20 point out to you, as I'm sure your counsel will, is that there are
21 some deadlines for filing both a notice of appeal and a brief
22 perfecting the appeal if you decide that you're going to do that.
23 Those deadlines are generally hard and fast. If you miss one of
24 those deadlines, the Board does not typically look favorably upon
25 that and oftentimes will not accept that appeal as being untimely.

1 So I would just point that out to you and suggest to you that if
2 you do decide to appeal my decision, that you pay attention to the
3 deadlines that are outlined in that piece of paper and make sure
4 you meet those.

5 MR. FULLERTON: Thank you, sir.

6 JUDGE WOODY: All right. Is there anything of an
7 administrative nature that we need to discuss, then, before we
8 adjourn the proceeding?

9 MR. CHAIT: Nothing from Respondent.

10 MR. BORELLI: Nothing from the Administrator, Your Honor.

11 JUDGE WOODY: All right. Thank you both very much. With
12 that we will terminate this proceeding.

13 (Whereupon, at 9:44 a.m., the hearing in the above-entitled
14 matter was concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Paul S. Fullerton

DOCKET NUMBER: SE-30315

PLACE: Grand Rapids, Michigan

DATE: June 15, 2017

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

Karen Banks
Official Reporter