

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: June 10, 1993

FAA Order No. 93-17

In the Matter of:)
)
)
BURTON D. METCALF)
)
)
_____)

Docket No. CP91NM0066

DECISION AND ORDER

Respondent Burton D. Metcalf has appealed from the written initial decision of Administrative Law Judge Burton S. Kolko.^{1/} The law judge found that Respondent operated a helicopter, carelessly or recklessly, when it hovered at low altitudes near persons on the ground in violation of the Federal Aviation Regulations (FAR).^{2/} The law judge

^{1/} A copy of the law judge's written initial decision is attached. Respondent was represented by counsel at the hearing but appeals pro se.

^{2/} The complaint alleged that Respondent violated the following regulations, which were redesignated effective August 18, 1990:

Section 91.79(a), 14 C.F.R. § 91.79(a), redesignated as Section 91.119(a), 14 C.F.R. § 91.119(a), provided in part: "[e]xcept when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(Footnote 2 continued on the next page.)

reduced the \$3,000 civil penalty sought in the complaint to \$2,000. For the reasons set forth below, the law judge's decision is affirmed.

The complaint alleged that on September 4, 1989, Respondent acted as pilot in command of a Bell 47G helicopter on a drug surveillance flight in western Colorado for the Delta, Colorado Sheriff's Department. Deputy Sheriff John Paton was a passenger. The complaint further alleged that Respondent operated the helicopter approximately 20 to 30 feet above ground level (AGL) while hovering:^{3/} 1) near the residence of Virginia McNair; 2) over James Schum; and ³⁾ over a number of persons at an irrigation ditch near the Schum property.^{4/}

Prior to the hearing, Complainant withdrew the complaint allegation concerning the hover near the residence of Virginia McNair. In his initial decision, the law judge found that Complainant failed to prove that Respondent hovered over

(Footnote 2 continued from the previous page.)

Section 91.9, 14 C.F.R. § 91.9, redesignated as Section 91.13, 14 C.F.R. § 91.13, provided in part: "(n)o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

^{3/} Hovering is a maneuver in which the helicopter is maintained in nearly motionless flight over a reference point at a constant altitude and on a constant heading. Basic Helicopter Handbook, FAA Advisory Circular 61-13B at 76 (1978).

^{4/} The irrigation ditch, known as Cedar Gulch, is a stream with trees along each bank, that flows through the property of James Schum and his neighbors. The alleged hover over the persons at the ditch occurred at a point in the ditch that is used as a swimming hole by the Schum family and their neighbors.

James Schum. Complainant did not appeal the law judge's decision. This appeal, thus, pertains only to the allegation that Respondent hovered over persons at the irrigation ditch.

In his initial decision, the law judge found that Respondent operated his helicopter at 30 to 40 feet AGL while hovering over the irrigation ditch where three adult women and five children were gathered.^{5/} The law judge based this finding on the testimony of the adult witnesses on the ground. The law judge found the testimony of the ground witnesses credible because "...their reports contain more indicia of trustworthiness than those of Metcalf and Paton." (Initial Decision at 3). The law judge was impressed by the "immediacy" of the ground witnesses' descriptions of the hovering helicopter, and he found that their estimate of the height of the helicopter was reliable.^{6/} The law judge observed that Respondent testified at the hearing that he had

^{5/} The law judge found that the hover over the persons at the irrigation ditch consisted of three short hovers, closely related in time. The law judge found that the helicopter initially flew north over the persons at the ditch, then returned from the south and hovered 80 feet from the persons at 30 to 40 feet AGL for 10 to 15 seconds. The helicopter then moved and hovered directly over the persons for 15 seconds at the same altitude. The resulting rotorwash caused trees and persons' hair to blow about strongly. The helicopter backed up about 80 feet and hovered for another 10-15 seconds at a slightly lower altitude while Paton looked at the group through binoculars. The law judge found that the first of these "two" hovers at the ditch violated the regulations. He did not explain in his decision why the "third" hover at the ditch did not.

^{6/} After the incident, the ground witnesses measured one of the trees at the site of the alleged hovers. It measured 19.5 feet. From that measurement, they estimated that the helicopter was 1 to 20 feet above the trees at different times.

not hovered over the ditch, while at an earlier civil trial Respondent testified that he had hovered 40 feet above the trees at the ditch.^{7/} Paton's testimony on this point was vague, according to the law judge.

Respondent argues on appeal that the law judge's initial decision contains contradictions because the law judge found James Schum's testimony on the helicopter's altitude near the Schum residence more reliable than that of Respondent or Paton, but credited Respondent's testimony that he did not hover directly over Schum. Schum had testified that the helicopter had hovered directly over him.

Even if these two findings concerning Schum's testimony were contradictory as Respondent argues, it would make no difference to the outcome of this appeal because the law judge found that the alleged hover over Schum was not proven. The findings, moreover, are not contradictory. The law judge credited Schum's testimony concerning the helicopter's altitude because Schum's estimate was based on his subsequent measurement of a nearby tree. The law judge discounted Schum's testimony concerning the direct hover over him because Schum had not mentioned it in his initial report of the incident. The law judge also believed Respondent's testimony that he would not have hovered over Schum if he had spotted him.

^{7/} At an earlier civil trial concerning the same incidents, the jury dismissed allegations of assault, outrageous conduct, and civil rights violations brought against Respondent, but awarded damages of \$1.00 against Respondent for trespass and \$7,000 against the Delta County Sheriff's Department.

While an agency is not inextricably bound by the credibility findings of its law judges, those findings are entitled to special deference on review. Law judges are in the best position to evaluate the demeanor of witnesses in administrative proceedings. See In the Matter of Carroll, FAA Order No. 90-21 at 12 (August 21, 1993). Respondent has not presented, and the record does not contain, any persuasive reason for disturbing the law judge's credibility findings.

The law judge found further that in the event of engine failure Respondent could not have accomplished an emergency landing from 30 to 40 feet (AGL) over the ditch without undue hazard to the persons on the ground. The law judge based this finding on the testimony of the FAA's expert witness, Joseph Walker, who visited the site and heard the testimony at the hearing.^{8/}

Respondent on appeal questions the law judge's acceptance of the testimony of the Complainant's expert witness, Joseph Walker, when Respondent's expert witness, George Pechar, a

^{8/} Walker, the senior helicopter specialist at the Salt Lake City Flight Standards District Office (FSDO), testified:

The fact that the rotor system had downwash to the point where the people on the ground could actually feel rotor wash, that's extremely too close The helicopter, by its nature, is very complex. There's a lot of moving parts. And when these moving part (sic) do break, they have a tendency to spread from an area. It's my opinion that in both situations, these people probably would have been hurt, if he (Respondent) would have to hit the ground ... he (Respondent) would not have made a successful autorotation. Hearing Transcript at 169-171.

retired FAA Aviation Safety Inspector, disagreed with Walker's testimony on several points. Expert testimony is evaluated on the basis of its logic, depth, and persuasiveness. See Administrator v. Carroll, NTSB Order No. EA-2952 at 12 (June 16, 1989); see, e.g., In the Matter of Gabbert, FAA Order No. 90-27 at 7 (October 11, 1990). To reach his decision in this case, the law judge had to find Walker's expert testimony more persuasive than Pechar's expert testimony. A review of the expert testimony shows that Pechar's testimony was not as persuasive as Walker's testimony. Pechar based his opinion that a safe landing in the event of engine failure would have been possible on the assumption that the helicopter hovered at higher altitudes than the 30 to 40 feet AGL altitudes found by the law judge.

The law judge in his initial decision also found that Respondent did not know that there were persons under the helicopter but that Paton did, and Paton directed Respondent to hover over the irrigation ditch. The law judge held that Paton's conduct must be imputed to Respondent because as pilot in command, Respondent was responsible for the safe operation of the helicopter during the flight. Respondent on appeal appears to contest the latter finding when he states that the law judge "found Deputy Paton guilty, but not having jurisdiction, convicted Metcalf."

Respondent, as pilot in command of the aircraft, was responsible for its operation and safety. See Sections 1.1 and 91.3(a), 14 C.F.R. §§ 1.1. and 91.3(a). Respondent, a certificated airman, and not Paton, a passenger, operated the

helicopter while it hovered at low altitudes over the ditch where persons were gathered. Contrary to the law judge's reasoning, however, Paton's knowledge that there were persons at the ditch is not the controlling factor in establishing Respondent's responsibility for the low flight violation. If Respondent, as the law judge found, was not aware of the people in and around the ditch, he should have been. Before hovering at low altitudes, Respondent, as pilot in command, should have ensured that there were no persons under the helicopter. If persons were present below, Respondent should have moved the helicopter away from them.^{9/}

Respondent on appeal argues that the law judge's decision should be reversed because he was not permitted to fully present his defense at the hearing. Respondent argues as follows: the law judge did not permit his attorney a second day of hearing; his attorney had to summarize the defense hurriedly; Respondent was not permitted to speak in his own defense at the conclusion of his case; and the law judge rushed the hearing so that he could catch a flight.

The record of the hearing does not support Respondent's contentions that he was not allowed the opportunity to present a full defense. Complainant presented six witnesses. Five witnesses testified for Respondent, and Respondent testified

^{9/} The law judge held that it was the helicopter's proximity to the persons on the ground that constituted a violation of Section 91.9. See Administrator v. Oeming, NTSB Order No. EA-3542 at 8 (May 5, 1992), citing Administrator v. Carman, 5 NTSB 1271 (1986) (to find a Section 91.9 violation based on potential harm, the evidence must demonstrate that the likelihood of harm was unacceptably high or that the pilot's exercise of judgment was clearly deficient).

on his own behalf. Respondent's attorney never requested, on the record, that the hearing continue a second day, and there is no evidence that such a request was made off the record. The parties agreed to submit briefs instead of making closing arguments. There is no indication in the hearing transcript that Respondent's defense was hurried unduly by the law judge during the hearing.^{10/}

Respondent on appeal argues that the law judge's courtroom demeanor prevented him from getting a fair hearing. According to Respondent, during the presentation of his case, the law judge juggled a baseball in his hand. Respondent states that he and his witnesses found this very distracting and disrespectful. Respondent submits on appeal the written statements of several witnesses present during the hearing which support Respondent's claim. According to Respondent, his attorney did not bring the matter to the law judge's attention during the hearing because he did not want to risk "prejudicing further" the law judge against Respondent. Complainant on appeal responds that although the law judge had a baseball in his hand during the hearing, it did not prevent the law judge from paying strict attention to all the witnesses.

^{10/} The law judge's ruling that testimony by more than one expert for Respondent, on matters already covered by Respondent's first expert witness, would be cumulative, was within the law judge's discretion to make. The law judge permitted Respondent's attorney to put on additional expert witnesses to testify on matters not touched upon by Respondent's first expert witness, and to proffer any expert testimony that would be cumulative. Respondent's attorney agreed to this procedure without objection.


The hearing transcript shows that the law judge asked relevant questions of the witnesses and made competent rulings on matters of evidence and procedure throughout the hearing. The law judge's detailed written initial decision issued several months after the hearing further reflects that the law judge also carefully studied the transcript of the proceedings. Respondent's attorney should have called the law judge's attention to any matter in the courtroom that his witnesses found distracting. Respondent's allegation of improper courtroom demeanor, nevertheless, is disturbing. The credibility of the FAA enforcement program depends in part, upon all involved government employees, law judges and prosecutors alike, acting in a highly professional manner. Law judges should avoid all conduct which could appear inappropriate in a courtroom.^{11/}

Respondent's final argument on appeal is that the law judge erred in assessing a civil penalty of \$2,000 because only one of the three complaint allegations was proven. Although only the hover at the ditch was proven, each of the

^{11/} Respondent further claims that a question by the law judge to Respondent while Respondent was on the witness stand during a recess, showed bias because it assumed that Respondent had hovered over persons. Subsequently, the law judge asked the same question to Respondent on the record, and clearly identified it as a hypothetical question. See Hearing Transcript, 228. To be disqualifying, bias must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. See United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). There is no indication here that the law judge's decision resulted from any basis other than from what he learned as the law judge in this case.

three hovers alleged in the complaint violated two distinct regulations. Each hover incident was subject to two maximum \$1,000 civil penalties under Sections 901 and 905 of the Federal Aviation Act, as amended, 49 U.S.C. App. §§ 1471 and 1475. Therefore, a \$2,000 civil penalty may be assessed for the hover over the persons at the ditch.^{12/} Imposition of the maximum \$2,000 civil penalty in this case is appropriate due to the seriousness of Respondent's low flight violation.

The decision of the law judge is affirmed.^{13/}


JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 9 day of June, 1993.

^{12/} The law judge assessed a \$2,000 civil penalty because he found that the hover over the persons at the ditch consisted of two hovers. The law judge, however, cannot expand the single complaint allegation of hovering over persons at the ditch into an additional hover violation not alleged in the complaint.

^{13/} Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).