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NTSB Order No. EA-4543

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 22nd day of April, 1997

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BARRY L. VALENTINE,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-14126
)	SE-14121
)	SE-14107
CARL KELLY MULLINS,)	
DURWARD LAWRENCE WELLS, and)	
LEO ALLEN WILLIAMS,)	
)	
Respondents.)	
)	
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OPINION AND ORDER

Respondents have appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered in this proceeding at the conclusion of an evidentiary hearing held on October 18-20, 1995.¹ By that decision, the law judge affirmed most of the allegations contained in the Administrator's

¹An excerpt from the hearing transcript containing the initial decision is attached.

suspension orders (complaints). For the most part, those orders charged respondents with operating aircraft in aerobatic and formation flight at low altitudes. Specifically, the law judge found, by a preponderance of the evidence, that the Administrator proved Respondent Mullins violated sections 61.3(c), 91.13(a), and 91.119(c) of the Federal Aviation Regulations (FARs); Respondent Wells violated sections 91.13(a), 91.111(a), 91.119(c), 91.303(d), 91.303(e), and 91.9(a); and Respondent Williams violated sections 61.3(c), 91.13(a), 91.111(a), 91.119(c), 91.303(d), and 91.303(e).² 14 C.F.R. Parts 61 and

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²The pertinent sections of the FARs state, as follows:

§ 61.3 Requirement for certificates, rating, and authorizations.

* * *

(c) *Medical certificate.* ... [N]o person may act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under part 67 of this chapter.

§ 91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry.

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

91. The law judge upheld the 120-day suspensions against Messrs. Wells and Mullins and reduced the 210-day suspension against Mr. Williams to 120 days.³

On appeal, respondents argue that the law judge's decision is not supported by preponderant evidence but is, instead, based upon flawed credibility assessments. As we shall discuss, respondents have neither shown the law judge's credibility determinations to be arbitrary or inherently incredible, nor have

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§ 91.111 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * *

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.303 Aerobatic flight.

No person may operate an aircraft in aerobatic flight-

* * * *

(d) Within 4 nautical miles of the center line of any Federal airway; [or]

(e) Below an altitude of 1,500 feet above the surface....

The law judge determined there was insufficient evidence to support the allegation that Respondents Williams and Wells refused, upon request, to present their pilot certificates to a federal law enforcement officer, in violation of FAR section 61.3(h).

³The Administrator did not appeal the reduction in sanction.

they demonstrated that the conclusions are supported by insufficient evidence. Consequently, we deny the appeal.

Michael Townsend, a law enforcement officer for the U.S. Forest Service,⁴ testified that, while on duty on January 10, 1995, at the Morehead District Office in the Daniel Boone National Forest, at approximately 3:15 p.m. on a clear day, he observed a red and white aircraft flying about 100 feet over the dam at Cave Run Lake.⁵ He further described it as a single engine aircraft with fixed landing gear, a bubble canopy, with low, red-striped, and red-tipped wings attached beneath the fuselage. (Tr. at 69, 213.) He recognized the aircraft as one he identified in July 1994 belonging to Respondent Leo Williams.⁶

The aircraft descended quickly to 50-60 feet above the lake and, as it came in low over the lake, about 100 feet from the shore, pulled up abruptly, performed aileron rolls, continued into a half-loop, leveled out across the water, and headed south.

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⁴Prior to his five years with the U.S. Forest Service, Officer Townsend worked for three and a half years in the airport police department, Lexington, Kentucky, and two years as a Kentucky Park Ranger. (Tr. at 61-62.)

⁵The Morehead District Office, at an elevation of 840 feet, provides a clear view to the lake, which is at an elevation of about 726 feet. (Tr. at 79-80.)

⁶Mr. Williams has an amateur-built RV4 aircraft. See n.11, infra. The parties stipulated that Officer Townsend saw an aircraft at the Morehead Rowan County Airport on July 10, 1994, and that Mr. Mullins identified himself as the owner of that aircraft. (Tr. at 122.) Officer Townsend then testified that it was the same red and white aircraft he observed on January 10, 1995.

(Tr. at 70-72, 160.) A few minutes later, Officer Townsend saw the aircraft heading back and saw a second aircraft fly in about 100 feet over the dam and 100 feet from the shore. (Tr. at 72-73.) He described the second aircraft as white with a blue stripe down the side, single engine "Cessna-type," high-wing, with fixed tricycle landing gear, and a red or purple registration number on the blue stripe. (Tr. at 72, 415.) He saw both aircraft approach each other at an altitude of between 50 and 70 feet over the water, no farther than 50 feet apart, and each entered a steep left bank.⁷ (Tr. at 74-75.) The blue and white aircraft headed out over the lake and the red and white aircraft flew over the Stoney Cove recreation and picnic area and the parking lot. Officer Townsend testified that there were people at the picnic area and near the shoreline, as well as cars in the parking lot. (Tr. at 79.)

Next, Officer Townsend observed the aircraft operating in low-altitude formation flight, over the dam and close to the shoreline. (Tr. at 75-76.) The red and white aircraft performed an aileron roll at about 50-60 feet above the water and the blue and white aircraft climbed to between 60-100 feet and performed a slower roll, while losing altitude.

Officer Townsend called the local FAA Flight Standards

⁷He stated that "[t]he red and white plane was flying north on the lake. And it banked to the left, with the wing tips towards the water. The blue and white plane was flying to the south, it banked to the left with the wing tips towards the water." (Tr. at 74.) Officer Townsend estimated that the airplanes each made a 90° bank. (Tr. at 75.)

District Office and was advised to obtain the aircraft registration numbers and, if possible, identify the pilots. (Tr. at 81.) He then drove about four miles to the Morehead Rowan County Airport, where he observed three aircraft fly in staggered formation 50-100 feet over the runway.⁸ (Tr. at 83-84.) He recognized the first two as the aircraft he had seen earlier that day over Cave Run Lake and was able to record the registration number of the third aircraft, N76YD, which was 200-300 feet behind the second aircraft.⁹ He estimated that the first two aircraft were about 100 feet from each other and the closest aircraft passed by about 150-200 feet from the nearest building. (Tr. at 85-87.) Officer Townsend described the third aircraft as white, with high wings (blue-striped underneath), and tail-wheel landing gear. (Tr. at 94.) The three aircraft flew north toward the town of Farmers, Kentucky.

Shortly thereafter, Officer Townsend saw the aircraft descend to about 200 feet over an intersection in Farmers, within 200-300 feet of a firehouse and grocery store. (Tr. at 97-99.)

⁸Upon arrival at the airport, Officer Townsend saw three vehicles in the parking lot. He wrote down the license plate numbers and later confirmed that the vehicles were registered to the respondents. He also saw that the door to the hangar where Mr. Mullins kept his aircraft was open and empty. (Tr. at 90-92.)

⁹N76YD is registered to Respondent Carl Mullins.

As the second aircraft flew over the runway, Officer Townsend could see only part of the registration number, "52U." He later identified the aircraft as N8452U, a Cessna 172, which Respondent Wells admitted operating on January 10, 1995, in the vicinity of Cave Run Lake.

The aircraft went south toward the lake, where the red and white and the blue and white aircraft flew together at about 150 feet over the dam and followed the shoreline. (Tr. at 100.)

Back at the airport, Officer Townsend recorded the registration number of N8452U and, according to his testimony, asked the respondents to present their drivers' licenses, pilots' licenses, or other forms of identification.¹⁰ (Tr. at 109.) Respondents Williams and Wells refused Officer Townsend's repeated requests and, eventually, walked away from him. Respondent Mullins, however, showed the officer his driver's license.

While the respondents testified that they operated aircraft on January 10, 1995, near Cave Run Lake, they dispute that they flew in close formation or operated their aircraft at low altitudes.¹¹ (Tr. at 488-97, 526-30.) Respondents Mullins and

¹⁰Respondents maintain that Officer Townsend asked only for their drivers' licenses, not their pilot certificates. In any event, the law judge did not affirm the related section 61.3(h) charge. See supra, n.2.

¹¹Respondent Mullins stated he flew his airplane, N76YD, a Bellanca BL7KCAB, on January 10, 1995, in the vicinity of Cave Run Lake, and further described his airplane as red, white, and blue, having a white fuselage with red stripes from nose to tail, and wings that are red and white on top, blue and white on the bottom. (Tr. at 47, 488-89, 506-07.)

Respondent Wells stated that he operated a white, blue-striped Cessna 172 on the afternoon of January 10, 1995, from the airport in Rowan County and that, while he does not own the aircraft, N8452U, he has use of it. (Tr. at 37, 525-27, 567.)

Respondent Williams stated that his aircraft is an amateur-built RV4, with a 23-foot wingspan, 150 horsepower engine, white with brown-tipped wings, and totally white on the bottom. (Tr. at 569-72.) He admits operating this aircraft, N87LW, on January

Williams also testified that the registration number on the Cessna operated by Wells is not visible from a distance of 100 feet or more. (Tr. at 508, 584.)

Regarding the alleged aerobatics, Mr. Mullins testified that he has never known of a Cessna 172 being rolled and, furthermore, it is impossible to roll a 172 on its axis in level flight without losing altitude. (Tr. at 509-510.) He never performs aerobatics at an altitude of less than 2500 feet, and if he were to attempt to take his airplane (the Bellanca) to vertical flight from a straight and level flight, it would "stall and fall out of the sky." (Tr. at 511-12.) Respondent Wells testified that the aircraft he flies are not capable of performing aerobatics and, in any event, he has never done aerobatic flying. (Tr. at 525.) Respondent Williams testified that he does not know of anyone who ever successfully rolled a Cessna 172 and it cannot be done without losing several hundred feet of altitude. (Tr. at 575-76.) Furthermore, he stated, his plane (the RV4) is not capable of performing the maneuvers that Officer Townsend claims he saw. (Tr. at 579-80.)

Respondents argue there was insufficient evidence to warrant a finding that they operated the aircraft in violation of the FARs or that the aircraft could, in fact, perform the aerobatic maneuvers as alleged. However, the evidence introduced at

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10, 1995, in the vicinity of Cave Run Lake. (Tr. at 49-50.)

hearing amply supports the law judge's conclusion.¹² Simple disagreement with a law judge's credibility determinations is insufficient to justify reversal. See Administrator v. Klock, 6 NTSB 1530, 1531 (1989).

The law judge identified the factual issues requiring resolution as 1) did the aircraft perform the maneuvers as alleged, and 2) if so, were the respondents the pilots-in-command of those aircraft. (Tr. at 695.) He found that a preponderance of the evidence supported an affirmative answer to both questions. Officer Townsend, the law judge concluded, was a credible witness without a motive to fabricate testimony, while the credibility of the three respondents was doubtful. It is well-established that, without compelling reason to show that the law judge's credibility findings are arbitrary, inherently incredible, or clearly erroneous, the Board will not disturb those findings. See Administrator v. Rivera and Helivan Helicopters, NTSB Order No. EA-4419 at 5 (1996); Administrator v. Smith, 5 NTSB 1560, 1563 (1987). No such evidence has been offered here.

¹²For example, the Administrator presented the testimony of Officer Townsend, who described in detail the flights that he witnessed; FAA Inspector Richard Kelly, who testified that a 360 degree roll could be performed in most aircraft (Tr. at 373); FAA Inspector Joseph Keating, who stated that it is possible to perform a roll in a Cessna 172 below 1500 feet (Tr. at 384, 394-96). Inspector Kelly also testified that Cave Run Lake is within four miles of a federal airway. (Tr. at 306, 308.)

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeals are denied;
2. The decision of the law judge is affirmed; and
3. The 120-day suspensions of respondents' private pilot certificates shall begin 30 days after service of this order.¹³

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹³For the purpose of this order, respondents must physically surrender their certificates to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).