SERVED: March 23, 2000

NTSB Order No. EA-4832

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 16th day of March, 2000

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. RONALD D. HORTON, Respondent.	Docket SE-15555

OPINION AND ORDER

Respondent has appealed from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued on May 20, 1999, at the conclusion of an evidentiary hearing.[1] By that decision the law judge affirmed an order of the Administrator, filed as the complaint, finding that respondent operated an aircraft below 500 feet over a sparsely populated

[1]A portion of the transcript containing the initial decision is attached. Respondent filed a letter on appeal, which we will consider as his brief. The Administrator filed a brief in reply.

area and that his actions were careless, in violation of sections 91.119(c) and 91.13(a) of the Federal Aviation Regulations (FAR), 49 C.F.R. Part 91.[2] As discussed below, we affirm the initial decision.

Specifically, the Administrator alleged that, on August 30, 1998, respondent operated a J3 Piper Cub below 500 feet over a private home in Camas, Washington. Two occupants of the home testified that they were outside on the deck between 7:00 and 8:00 that evening. Visible from their deck area are the traffic pattern areas of Grove Airport and, beyond that, Evergreen Airport. While they were on the deck that evening, they saw a yellow J3 Cub performing maneuvers to the south. The aircraft then disappeared from their view to the east, soon after appeared over the trees adjacent to their house, and flew over the house. One witness estimated that the aircraft was at an altitude of

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[2]The regulations state, in pertinent part:

§ 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.

§ 91.13 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.

about 200 feet, while the other said that the aircraft seemed to be just above the approximately 60-foot trees. Neither witness could read the identification number on the aircraft, but both said the number was rather small and on the tail.

As the aircraft passed over the house, the witnesses testified that the pilot dropped rose petals onto the house and deck area. When they observed the aircraft then proceed toward Grove Field and begin touch-and-go maneuvers, the witnesses grabbed their hand-held radio and tuned in to the Grove Airport frequency. One of the witnesses, Ann Marie Donaca, who had a past relationship with respondent, testified that she recognized respondent's voice over the radio. They then observed the aircraft head towards Evergreen Airport. Ms. Donaca called Evergreen Airport to ascertain who had just landed the J3 Cub. She was told that it was respondent. In landing, the pilot of the J3 Cub had used the call sign 29042 several times.

An FAA inspector testified that the low flight over the house was not necessary for take off or landing and that such operation was hazardous. Respondent admitted that he operated a Piper J3, N29042, on a flight in the vicinity of Camas on August 30, 1998. He denied, however, that he operated below 500 feet over the house. Nevertheless, he did not introduce any evidence or testimony to support his assertion.

The issues respondent raises on appeal are primarily procedural. He claims that 1) the law judge should have granted him a continuance when respondent advised him that the hearing

had been scheduled at an extremely busy time and, as a result, it was "impossible" for respondent to contact an attorney for "guidance"; 2) the law judge unfairly cut off his questioning of Ms. Donaca before he could elicit information that would impugn her credibility; and 3) he was handicapped by his lack of knowledge of courtroom decorum and procedure. Finally, respondent argues that the evidence presented was insufficient to support the Administrator's case. We find none of his arguments persuasive.

Regarding the sufficiency of the evidence, the law judge found the testimony of the two eyewitnesses credible and noted that no contradictory testimony or evidence was submitted by respondent. It is well-settled that credibility determinations are within the law judge's exclusive province and will not be disturbed unless they are arbitrary, capricious, or not in accordance with law. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). The law judge heard the testimony and saw the witnesses. Therefore, he was in the best position to assess demeanor and credibility. Respondent points to no evidence to support a reversal of the law judge's determination.

Respondent claims that, had he been given more leeway in questioning Ms. Donaca, it would have allowed him to elicit information to undermine her credibility. We see no indication, however, that the law judge abused his considerable discretion by stopping respondent when his questions dealt with subjects that were not relevant to the proceedings. In fact, the law judge

gave respondent fairly wide latitude in his questioning of the witnesses (which respondent acknowledged). (Transcript (Tr.) at 76.) Respondent's lack of experience with courtroom procedures likewise is not a reason to overturn the initial decision. The law judge explained to respondent the difference between opening statements and testimony. He told respondent to ask him as they went along if he had any procedural questions. (Tr. at 5.) He explained what objections and cross-examination are. (Tr. at 13, 19.) Further, about one month before the hearing, the law judge spoke to respondent via telephone and explained the hearing format, evidence rules, and other general procedural issues. See Memo to Docket File, 4/30/99. Respondent cannot now sustain an argument that he was deprived of a fair hearing. As we have stated, "[i]t is not the law judge's role or responsibility to act as counsel for respondents or to ensure that all their legal rights are protected." Administrator v. Thomason, NTSB Order No. EA-4031 at 3 (1993).

We find implausible respondent's claim that without a continuance he was unable to obtain the "guidance" of an attorney prior to the hearing. The order of suspension was served on February 18, 1999, and the informational letter to respondent from the NTSB Office of Law Judges was dated March 18, 1999. In that letter, respondent was advised, "[i]n the event you intend to hire an attorney, you should do so immediately…. You should not delay your decision as to whether to retain an attorney for the reason that the last minute retention of a

lawyer cannot be used as an excuse for postponement of a hearing."[3] (Emphasis in original.) The Notice of Hearing, served March 31, 1999, set the hearing date as May 20, 1999. He had more than ample time to contact an attorney, if he had chosen to do so.

That an attorney may have argued his case more effectively or presented evidence differently is not a sufficient reason to require a rehearing. See Administrator v. Jorden, NTSB Order No. EA-4037 at 8, n.5 (1993), citing Administrator v. Dudek, 4 NTSB 385, 386, n.5 (1982). It is the respondent's decision whether or not to retain counsel, and the outcome of that decision is not a basis to require a new hearing. Thomason at 4.

In sum, respondent has identified no grounds to reverse the initial decision or require a new hearing.

[3]The informational letter contained the following enclosures: 1) 49 C.F.R. Part 821, the NTSB Rules of Practice; 2) Sample Answer and Policy on Continuances and Transcripts; 3) Entry Appearance Sheet; 4) Case Processing Tips/Guidance Sheets; 5) An Overview of the Enforcement/Appeal Process; 6) Guidance for Obtaining Subpoenas and Other Discovery; 7) NTSB Legal Directory of Pertinent Employees; and 8) Sources and Methods of Obtaining NTSB Decisions.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed; and

3. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[4]

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

[4]For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).