

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

LANGHORNE M. BOND, ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION

Complainant

vs.

LESLIE E. ECKHART

Respondent



Docket SE-4436
Providence, Rhode Island
Circuit IV
January 30, 1980

Thomas W. Reilly, Administrative Law Judge:

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ORAL INITIAL DECISION

This has been an evidentiary proceeding under Section 609 of the Federal Aviation Act of 1958, as amended, conducted pursuant to the Board's Rules of Practice in Air Safety Proceedings, 49 CFR Part 821.

This hearing was the result of an appeal of the Administrator's Order of Suspension issued through his New England Regional Counsel in his letter to the Respondent dated October 11, 1979, which Order of Suspension became the Complaint in this proceeding, pursuant to the Board's Rules of Practice.

In that Order of Suspension the Administrator

1 had proposed to suspend the Respondent's airman certificate
2 for a period of 120 days for certain alleged low-flying
3 violations.

4 Paraphrasing the complaint briefly, it was alleged
5 that on June 17, 1979, the Respondent, while in command
6 of a Cessna 172, N 1551 Victor, owned by another, on a
7 flight with two passengers in the vicinity of Newport and
8 Middletown, Rhode Island, at approximately 1430 local
9 time, made a pass over Sachusset Beach at an altitude
10 of less than 300 feet over persons on the beach and that
11 at the time of said pass the beach was occupied by approxi-
12 mately 2,000 people.

13 It was also alleged that on that flight, at
14 approximately 1440 he also made a pass over Easton's Beach
15 in Newport, Rhode Island at an altitude of less than 200
16 feet and that at that time the beach was occupied by approxi-
17 mately 2,000 persons.

18 By reason of that, he was charged with violating
19 FAR Section 91.79B, which prohibits operating an aircraft
20 over an open air assembly of persons below 1,000 feet
21 above the highest obstacle; and also charged ^{with violating} FAR Section
22 91.9, in operating the aircraft in a careless and/or reckless
23 manner so as to endanger the lives and property of others.

24 At today's hearing here in Providence, Rhode
25 Island, Mr. Frank Kelley, who is not an attorney, did appear

1 as representative of the Respondent, and not being an
2 attorney, he did very well, I must say.

3 The FAA was represented by Mr. George Thompson.

4 We had three witnesses appear on behalf of the
5 Administrator; Inspector William T. Cook, the Chief Inspector
6 of the Norwood GADO; Mr. Joseph L. Parente, an Aeronautical
7 Inspector from the Department of Transportation of the
8 State of Rhode Island; and, Mr. Joseph J. Trombino, with
9 the United States Navy, and he was an eyewitness at one
10 of the beaches.

11 It so happens that all three of the FAA witnesses
12 were eyewitnesses. The Chief of the ^{FAA's} Norwood GADO was
13 on the beach that day, and so was Mr. Parente and Mr.
14 Trombino, although they were on different beaches.

15 Now, on behalf of the Respondent, the Respondent
16 testified on his own behalf. He was the only live witness
17 but there was an affidavit, or a letter that is, entitled
18 "an affidavit", from another member of his flying club.

19 There were two exhibits offered on behalf of
20 the FAA; A-1 was a two-page letter from the Respondent
21 replying to the Norwood GADO "NOI" letter, the Notice of
22 Investigation letter; A-2 was a one-page letter dated
23 July 31, 1979 (sic) of George Gomes to the FAA.

24 Respondent had one exhibit offered and received.
25 That was R-1 and that was the "affidavit", so-called "affidavit"

1 -- really a written statement -- of George Gomes, but
2 it had been witnessed by two signed witnesses, although
3 not sworn and notarized to, and that was dated 23 January,
4 1980.

5 The Respondent is a Quality Engineer for the
6 Raytheon Corporation and he has been flying steadily now
7 for four years, although he soloed about ten years ago.
8 He has a private pilot^{certificate,} single engine land and instruments,
9 315 hours total time now, and he plans to obtain an ATP
10 eventually and do part-time charter work. He is now in
11 training for a commercial pilot certificate and has an
12 instrument rating.

13 I think Exhibit A-1, the Respondent's reply
14 to the FAA notice of investigation letter, is probably
15 a good summary of the Respondent's position in this matter.
16 He said, in effect, that he was the pilot in command of
17 Cessna 1551 Victor on June 17, 1979, and that he was flying
18 in the vicinity of Easton Beach between 2:40 and 2:45
19 p.m. with two passengers on board.

20 However, he asserts that at no time did he descend
21 below 500 feet, nor at any time did he come closer than
22 500 feet to the shoreline. He asserts that he descended
23 to this altitude to observe what appeared to be a person
24 floundering in the water, possibly needing assistance.

25 Before getting close enough to observe better

1 he decided he was getting too low and left the area.

2 Exhibit A-2, a letter from Mr. Gomes to the FAA,
3 admits that he was one of the passengers on the plane
4 with the Respondent. He was also a passenger on earlier
5 flights of the same aircraft. That is, I think, germane
6 to this incident.

7 There apparently were two earlier passes by
8 the same aircraft but the evidence discloses that on those
9 two earlier passes another pilot was flying the plane.
10 After he landed, and some hour or so later, then the Respond-
11 ent, for the first time, was piloting the plane and flew
12 close to the beach at the time indicated in the complaint.

13 Mr. Gomes' letter to the FAA states that he was not
14 sure of the altitude but thought that "we stood over water".
15 He also is a private pilot. He also points out in the
16 letter that the first two times the plane had been piloted,
17 on the first two passes of three, the pilot was Mr. Anthony
18 Blum. Those two earlier passes are not charged against
19 this Respondent, but they are relevant.

20 R-1, the typed statement that Mr. George Gomes
21 signed on 23 January, 1980, is in a little more detail
22 but it essentially repeats the fact that Mr. Gomes was
23 a passenger, that they were near the shoreline, that although
24 he did not observe the altimeter, Mr. Gomes said it did
25 not appear that "we were any lower than five or 600 feet",

1 and I assume by that it's clear he means 500 or 600 feet.

2 In there he indicates that he believed that
3 Mr. Eckhart was maintaining a reasonable altitude and
4 away from the shoreline. Mr. Gomes, in that written
5 statement says that at no time did he turn back or fly
6 directly over the heads of people on the beach -- "We
7 did not fly over the land at all while in the vicinity
8 of Newport".

9 So, that R-1 is consistent, I think, with the
10 defense of the Respondent in which he asserts that he
11 did not fly over the beach, just flew over the water,
12 and his argument is that although he was down to 500 feet
13 he's entitled, under the regulations, over open water
14 to descend to 500 feet.

15 The section that's charged, by the way, 91.79B,
16 specifies a minimum altitude of 1,000 feet, but that only
17 applies to congested areas, and subsection C of that section,
18 with regard to open water or sparsely populated areas,
19 allows descent to 500 feet but in that case, no closer
20 than 500 feet to any person, vessel, vehicle or structure.

21 The Respondent apparently asserts that he would
22 come under "C" and that he complied with "C."

23 The three eyewitnesses we have on the FAA's
24 case all have aviation backgrounds. The Chief Inspector
25 of the Norwood ^{FAA}GADO has an ATP in airplane and helicopter

1 and is a flight instructor for instruments, and has 12,000
2 total pilot hours and some 28 years in aviation. He was
3 an eyewitness on First Beach, otherwise known as Easton's
4 Beach.

5 He testified that he observed Cessna 172, N
6 1551 Victor, color apparently white with gold trim about
7 2:41 p.m. on the subject date, and he observed it to dive
8 down to an altitude of 75 to 100 feet over the beach,
9 and he observed all three passes.

10 But, as the evidence clearly indicates, it's
11 only the third pass we're concerned with here. All three
12 passes were east to west and Inspector Cook testified
13 they were directly over the beach and he estimates that
14 there were more than 1,000 people but less than 2,000
15 people on the beach.

16 He later investigated and found out that the
17 subject aircraft was leased to a flying club and through
18 further investigation found out that Mr. Brum was flying
19 the first two passes and the Respondent the third.

20 Mr. Joseph L. Parente, an Aeronautical Inspector
21 for the Department of Transportation of the State of Rhode
22 Island, also has an aviation background; 20 years in aviation
23 He has commercial pilot ^{certificate,} single engine, multi engine,
24 land, flight instructor ratings and other ratings, has
25 14,000 hours total pilot time, both helicopter and fixed

1 wing.

2 He was on the Third Beach, otherwise known as
3 Navy Beach, and he observed two passes by a Cessna 172
4 or 182. I guess we should note for the record that a
5 Cessna 172 or 182 are generally almost identical in appear-
6 ance when observed from the ground.

7 Mr. Parente noted the time of the first pass
8 as 1330, and the record is clear that that was a pass
9 not involving this Respondent. Then, at about 1430 was
10 the second pass that he observed and he noted that it
11 was so low he thought it was having an emergency problem.

12 He first saw the aircraft when it was about
13 a quarter of a mile away. It passed east to west. He
14 noticed that it made a turn at Second Beach and then dropped
15 down to about 200 to 250 feet and he saw it fly directly
16 over the Second Beach and the people on that beach.

17 He made notes at the time of the N number and
18 color; brown, gold and white; and, N 1551 Victor; and
19 the direction the aircraft was flying, westbound. He
20 noted that the aircraft followed the beaches and stayed
21 over the beaches.

22 The third witness for the Administrator, Mr.
23 Trombino, is in the U. S. Navy, a training devicesman.
24 He has a commercial pilot's license; airplane, single
25 engine, land and instruments.

1 He was at Second Beach with his wife and two-
2 year-old son. He noted the weather, It was a clear day
3 with light wind and ceiling and visibility unlimited.
4 He noted the pass to be at about 2:30 and his written
5 statement to the FAA says "approximately 2:25". He saw
6 the aircraft at about 200 feet altitude about one quarter
7 mile east of where he stood and he saw the aircraft ^{come} back
8 over the shoreline and fly southwesterly over the beach
9 and the people.

10 And he saw the N number and the color of the
11 aircraft. He wrote this down on a piece of paper some
12 ten minutes thereafter, after he got home from the beach.
13 He called the FAA Flight Service Station to report it
14 but they told him to report it to the Rhode Island State
15 Department of Transportation, which he did.

16 The Respondent testified that on the date in
17 question he took off from Fall River with radio contact
18 with Quonset Point and Otis Air Force Base, attempting
19 to do some instrument work, heading for Martha's Vineyard,
20 but that he discontinued that plan to fly to Martha's
21 Vineyard and flew instead toward Easton Beach when he
22 couldn't get the radar service he had been planning on
23 because of air traffic activity and not being under IFR
24 flight plan.

25 So, he flew instead toward Easton Beach, Second

1 Beach and Third Beach. He was not keeping track of the
2 time as such because he did not believe he was violating
3 any of the Federal Aviation Regulations.

4 He flew following the shoreline but testified
5 that he was over 500 feet altitude at all times and over
6 the water at all times and no less than 500 feet away
7 from the beach.

8 He testified that he descended at one point
9 to see if an object in the water was a person in distress
10 but it turned out to be possibly a log causing water turb-
11 ulence and white caps.

12 This case, as a lot of these cases are, is really
13 a question of credibility. And it's not a criminal case
14 wherein we need proof beyond a reasonable doubt. Just
15 the mere preponderance of the evidence will sustain a
16 finding in this administrative proceeding.

17 ^{say}
18 And I must ^{say} that I have to find the credibility
19 to be on the side of the FAA's witnesses here. I note
20 that the pilot Respondent has no prior violations. Testi-
21 mony does indicate that the pilot involved in the first
22 two low passes has already had certificate action taken
23 of sanction, that although the complaint specifies two
24 beaches over which low flying was allegedly conducted,
25 it's clear to me from the evidence that this really

1 involved just one pass, a continuous pass by this Respondent.

2 I think this is important to note with regard
3 to the sanction. If there had been two separate passes
4 the sanction called for, I think, would properly be a
5 greater, more severe sanction.

6 I find that after due consideration of all the
7 evidence that the Administrator has met his burden of
8 proof and has proven by a clear preponderance of the reliable,
9 probative and credible evidence that his order of suspension
10 should be affirmed.

11 However, I believe the sanction should be modified.
12 And I could see why the FAA attorney wished to depart
13 from earlier precedent in this because I think precedent
14 is fairly clear on this and, in fact, it was recited accurately
15 by the the FAA attorney.

16 There is a recent case by the Board called FAA
17 Administrator against Donald L. Shelton, Docket SE 4107,
18 NTSB order number EA 1352, which was served just last
19 December 31, 1979. And in that opinion the Board said
20 two things.

21 First of all, they said it is a well-established
22 principle that in cases where all the charged violations
23 have been affirmed it is incumbent on the law judge to
24 offer clear and compelling reasons for reducing the sanction.
25 And they cited the case of Administrator v. Musquiz,² NTSB

1 1474, a 1975 case, and also, Administrator against Collins,
2 2 NTSB 1494, a 1975 case.

3 I note that although both violations, I think,
4 have been proven here, the 91.9 violation is really only
5 a derivative of 91.79B. There was no separate act proven
6 as to 91.9, and so I would not increase the sanction because
7 two separate sections were proven to have been violated.

8 With regard to clear and compelling reasons
9 for reducing the sanction, I think the sanction should
10 be reduced, judging by further language in that same NTSB
11 case, that is, Administrator against Shelton,^{wherein} the Board
12 said, at page 5, "The Board has, on numerous occasions,
13 been confronted with low flight violations. Although
14 the facts and circumstances differ in each case they,
15 nevertheless, involve violations of a similar nature to
16 one of those found herein and may, therefore, be used
17 as a guideline when reviewing the sanction.

18 "In cases of this type the Board has generally
19 ordered a 30-day suspension of the Respondent's pilot
20 certificate", citing Administrator v. Sanchez, 2 NTSB 2422,
21 a 1976 case; Administrator against Maxwell, 2 NTSB 1681,
22 a 1975 case, and certain other cases noted there.

23 Then the Board went on to say, "However, in
24 circumstances involving more serious violations, suspensions
25 of from 60 to 180 days have been deemed warranted". The

1 Board also points out in that same case earlier, at page
2 4, that one logical and appropriate factor which is relevant
3 to any decision with respect to the question of sanction
4 is the type and severity of sanctions previously affirmed
5 by the Board in cases of a similar nature. I've just
6 given the range there.

7 So, I think the proposed sanction of 120 days is
8 a little excessive in this case where we have a pilot
9 who has no prior violations and is, in effect, guilty
10 of one pass over a beach.

11 I do find that there were people on the beach
12 and it was a congested area and, therefore, I think something
13 more than the minimum 30 days should be imposed. I, there-
14 fore find a 60-day suspension would be appropriate in
15 this case.

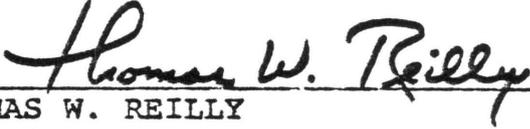
16 And, as modified, I affirm the FAA sanction
17 of a 60-day suspension. I find that safety in air commerce
18 or air transportation and the public interest does require
19 affirmation of the Administrator's order as modified to
20 a 60-day suspension of the airman's pilot certificates,
21 any that he holds now, including Airman Certificate Number
22 172404855.

23 That suspension will start immediately if the
24 pilot chooses to surrender his certificate to FAA counsel
25 now at the hearing, or will start when he delivers the

1 certificate to FAA counsel at the regional office if he
2 does not surrender the certificate until later.

3 Of course, if there is an appeal then this order
4 will be stayed.

5 Edited: 6 March 1980
6 at Washington, D.C.

7 
8 THOMAS W. REILLY
9 Administrative Law Judge

10 APPEAL

11 Any party to this proceeding may appeal this
12 initial decision or order by filing with the Board a notice
13 of appeal within 10 days after this date. Such appeal
14 must be perfected within 40 days after this date by filing
15 with the Board a brief in support of such an appeal.

16 Appeals may be dismissed by the Board on its
17 own motion or on motion of a party in cases where a party
18 fails to perfect its appeal by the timely filing of the
19 brief.

20 Your attention is directed to Sections 821.43,
21 821.47, and 821.48 of the Board's Rules of Practice in
22 Air Safety Proceedings for further information regarding
23 appeals.

24 An original and four copies of each document
25 must be filed with the National Transportation Safety
Board, Docket Section (LJ-10), P. O. Box 23269, L'Enfant

1 Plaza Station, Washington, D. C. 20024, as provided in
2 Section 821.7 of the Board's Rules, with copies served
3 upon the other parties.

4 The timely filing of an appeal herein shall
5 stay the order in this initial decision.

6 [Whereupon, at 12:17 p.m. the hearing concluded.]
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