

and 91.119(d)² of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91, as well as SFAR (Special FAR) No. 71, Section 6(a),³ as a result of respondent's helicopter operation over Kano Waterfalls, Maui, Hawaii, on a sightseeing tour that took place on July 7, 1995. At the conclusion of the hearing, the law judge dismissed the allegation of a violation of FAR § 91.13(a), affirmed the remaining allegations, and modified the Administrator's order from a 45-day suspension to a 20-day suspension of respondent's commercial pilot certificate.⁴

²FAR §§ 91.13(a) and 91.119(d), provide in pertinent part, as follows:

§ 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.

§ 91.119 Minimum safe altitudes: General.

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

(d) *Helicopters.* Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. **In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.** (emphasis added).

³SFAR No. 71, Section 6(a), at the time of the alleged violations, prohibited operation of air tour operator aircraft in the State of Hawaii below an altitude of 1,500 feet above ground level (AGL). Respondent's employer, Sunshine Helicopters, Inc., held an FAA-issued deviation to the SFAR that permitted operation down to 1,000 feet AGL.

⁴The Administrator alleged and the law judge affirmed an allegation of a violation of FAR § 91.119(d). The law judge's finding of a violation of FAR § 91.119(b) appears to be a transcription error.

The only issue raised by respondent in this appeal is whether the law judge's finding, that imposition of a civil penalty instead of a certificate suspension would not be appropriate in this case, was an abuse of discretion. The Administrator has not appealed the law judge's sanction modification and urges the Board, in her reply brief, to affirm the law judge's initial decision. For the reasons that follow, respondent's appeal is denied.

The testimony of the witnesses and the factual findings of the law judge are fully set forth in the initial decision, and need not be repeated here. The record reveals that as a result of the promulgation of SFAR No. 71, the FAA assigned several inspectors to surveillance teams throughout the State of Hawaii. Their purpose was to insure implementation of the SFAR. On the day in question, the inspectors had driven to Kano Waterfalls, where they hid their vehicle and then hiked up a path to an observation point on a cliff, overlooking the valley below the waterfalls. It was from this vantage point that they observed respondent's operation of his helicopter below an altitude of 1,000 feet AGL. According to the inspectors' testimony, respondent entered the valley at about 800 feet AGL, but then executed a pedal turn and dived steeply in order to gain speed so that he could climb and exit the valley. In so performing this cyclic climb, respondent operated his helicopter approximately 300 feet over the inspectors' positions, and then operated at an altitude of approximately 400 to 500 feet AGL. Respondent, a

highly experienced helicopter pilot, does not dispute that he operated the helicopter below 1,000 feet AGL. His testimony focused mainly on the fact, accepted by the law judge, that he could have at all times safely autorotated to a suitable landing area on the floor of the valley had there been an engine failure. Respondent also testified that he was apparently one of the few pilots on the island who was unaware of the presence of the FAA surveillance team on the day in question.

In the Board's view, the law judge did not abuse his discretion in imposing a 20-day suspension.⁵ Having heard the facts of the case and having compared the circumstances here with those of other low flight helicopter cases, the law judge concluded that a reduction was warranted. FAA does not contest this finding. The law judge was not, however, under an affirmative duty to explain his declination to impose only a

⁵The law judge determined that because no actual hazard was established by respondent's operation, the allegation of carelessness should not be sustained. But see Administrator v. Frost, NTSB Order No. EA-3856 at 8 (1993), and cases cited therein (Where there is an underlying operational violation found, a finding of § 91.9, now 91.13(a), stands as a derivative violation and needs no separate proof of harm, actual or potential). The Administrator took no appeal on this issue.

civil penalty. We believe, on the whole, the law judge's selection of sanction is consistent with precedent, and we will affirm.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;
2. The Administrator's order, as modified by the law judge's initial decision, and the initial decision are affirmed;
and
3. The 20-day suspension of respondent's commercial pilot certificate shall begin 30 days from the service of this order.⁶

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

⁶For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).