

SERVED: February 17, 1998

NTSB Order No. EA-4631

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 5th day of February, 1998

| | | |
|----------------------------------|---|-----------------|
| JANE F. GARVEY, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-14349 |
| v. |) | |
| |) | |
| JAMES KELLY FOSS, |) | |
| |) | |
| Respondent. |) | |
| |) | |

OPINION AND ORDER

Respondent appeals from the oral initial decision of Administrative Law Judge William A. Pope, II, rendered at the conclusion of an evidentiary hearing held on August 27, 1996.¹ By that decision, the law judge found that respondent violated section 105.29(a) of the Federal Aviation Regulations ("FAR") and

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

imposed a 45-day suspension of respondent's airman certificate, a reduction of the 90-day suspension sought by the Administrator.² We deny the appeal.³

This case arose when respondent was the pilot-in-command ("pilot") of an aircraft carrying parachutists on March 21, 1995, over the Island of Oahu, Hawaii. At that time, the Federal Aviation Administration ("FAA") was conducting surveillance nearby in response to persistent complaints from persons at Dillingham Airfield of parachutists descending through clouds. During the FAA's surveillance, parachutists from respondent's aircraft were observed emerging from the base of a cloud near Dillingham Airfield, and respondent was later charged with violating section 105.29(a).

At the hearing, the Administrator and respondent presented evidence as to whether the parachutists could have reached their landing site through a hole in the clouds that was moving through

² The regulation (14 C.F.R. Part 105) provides, in relevant part, as follows:

§ 105.29 Flight visibility and clearance from clouds requirements.

No person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft -

(a) Into or through a cloud;

* * * * *

³ The Administrator has not appealed the reduction of sanction.

the area. The law judge, however, did not base his decision directly on the precise location of the cloud cover, or even on any ability of the parachutists to have avoided passing through clouds. Rather, the law judge concluded that respondent had "abdicated his decisional responsibility," under section 105.29(a), to determine whether the parachutists could make the jump without passing through clouds. Transcript ("Tr.") at 302.

On appeal, the principal point of contention is the scope of a pilot's responsibility under section 105.29. Respondent's appeal brief argues, primarily, his opinion of the point at which pilots should not be responsible for the actions of parachutists jumping from their aircraft.⁴ He seeks to have us reverse the finding of a violation of section 105.29(a) or, alternatively,

⁴ Respondent makes several other arguments which have little merit (and which are irrelevant in light of the basis for respondent's violation). First, respondent discusses the deposition testimony of one of his witnesses, a Lt. Grizzard, who was aboard respondent's aircraft but unavailable to testify at the hearing. He argues that the law judge categorically rejected Grizzard's deposition because Grizzard was also charged with violating section 105.29. Respondent makes similar arguments about the law judge's treatment of non-testimonial evidence of respondent's other witnesses. Our review of the record convinces us that the law judge properly evaluated credibility, when feasible, and weighed evidence in light of permissible factors. We find no error in the manner of his determinations. Respondent also argues that the law judge impermissibly drew a negative inference from the fact that respondent did not call other witnesses who were aboard his aircraft on the subject flight and with whom he still has contact at Dillingham Airfield. We have reviewed the hearing transcript and agree with respondent that a proper foundation for such an inference was not laid. Any error, however, was harmless because this case turns on respondent's own admissions, and not on the testimony of other witnesses.

reduce his sanction. The Administrator's reply brief argues that the law judge's decision reflects the Administrator's valid interpretation of the duties imposed upon pilots by section 105.29 and urges us to affirm the law judge.

We are "bound by all validly adopted interpretations of . . . regulations the Administrator carries out . . . unless [we] find[] an interpretation to be arbitrary, capricious, or otherwise not in accordance with law." 49 U.S.C. § 44709(d)(3). The Administrator's interpretation of section 105.29 is that it creates a "dual responsibility for the pilot and the parachutists to ascertain that the parachutists can adhere to cloud clearance requirements." Administrator's Brief at 15; accord Tr. at 42. Under the Administrator's interpretation of this regulation, "the pilot of a parachute operation is responsible for determining, prior to releasing the parachutists, that the area between the aircraft and the intended landing site meets the cloud clearance requirements of section 105.29." Id.

Respondent does not offer a compelling reason for us to reject the Administrator's interpretation of section 105.29 and, instead, appears to merely argue his own interpretation of the regulation. Moreover, we see nothing arbitrary or capricious about the Administrator's interpretation of section 105.29. The regulation clearly imposes upon pilots and parachutists a "dual responsibility" to evaluate whether a jump can be made in

accordance with cloud clearance requirements. Administrator's Brief at 15; Respondent's Brief at 10, 12. In the case of pilots, the duty under section 105.29(a) is to not allow parachute jumps into or through clouds. We think it obvious that in order to fulfill this duty a pilot must actively participate in the decision-making as to whether or not a jump should go forward. Simply put, a pilot may not merely defer to the judgment of the parachutists onboard because section 105.29 imposes upon pilots a duty, separate and independent from that of the parachutists onboard, to determine whether the intended jump can and will be made in compliance with cloud clearance requirements.⁵

Respondent did not fulfill the duty imposed upon him by section 105.29(a). At the hearing, respondent testified that even though it was "cloudy" at the airport just prior to

⁵ The point at which a parachutist becomes solely responsible for non-adherence to cloud clearance requirements is a decision we need not reach in this case, for respondent's culpability stems from his lack of active decision-making *prior* to the time the parachutists jumped from his aircraft. We are compelled, however, to enunciate our belief -- in accordance with the "dual responsibility" imposed by the regulation -- that pilots would be responsible under this regulation for all *foreseeable* violations by parachutists of the requirements of section 105.29. In this regard, pilots should discuss with parachutists the requirements of section 105.29, particularly because parachutists are not licensed by the FAA and they will not necessarily be familiar with FAR requirements. It also seems axiomatic that a pilot could not make the required independent evaluation unless he has taken steps to insure that the parachutists know the cloud clearance requirements and plan to abide by them.

departure, "[w]e [could] see that there was blue sky wide open two to three miles [away], so we anticipate[d that] . . . the blue sky was going to be over the drop zone at the time that we were [in position for jumping]." Tr. At 206. Yet, upon reaching the intended drop zone, respondent did nothing to evaluate whether the parachutists could reach their intended landing point without passing through clouds.⁶ Instead, although he could have maneuvered the aircraft so as to be able to view their landing zone for himself, respondent "relied on . . . Mr. Grizzard," one of the parachutists onboard and also, apparently, a part-time instructor for respondent's operation.⁷ Tr. at 207.

⁶ In this regard, we note that it is irrelevant whether there were no clouds directly below respondent's aircraft at the time the parachutists jumped. Respondent knew that the parachutists' intended landing zone was adjacent to the runway at Dillingham Airfield, and, given the fact that he knew it was "cloudy" there when he took off only minutes before, respondent should have been concerned with whether the jump could be completed without passing through clouds.

⁷ Respondent's complete reliance on the judgment of the parachutists is evidenced by his testimony in response to being asked whether prior to the jump he could have viewed the parachutists' intended landing point for himself. Respondent stated that:

[b]ased upon [Lt. Grizzard's] experience, [Lt. Grizzard] would . . . probably have spotted for the whole load [of parachutists] and said to the person next to him, [to] do a second pass, or yelled at the third group out, [to] do a second pass or [to] take a good look and see if there was a possibility that [the clouds were] going to be closed up.

Tr. at 207. See also Tr. at 205 ("[M]y [job] is to get [the
(continued ...)

Respondent's complete deferral to the judgment of Grizzard and the other parachutists is contrary to the responsibilities imposed upon him by section 105.29(a).⁸ Accordingly, we affirm the law judge's finding that respondent violated section 105.29(a) when he allowed a parachute jump through a cloud.⁹

Finally, respondent argues that a 45-day suspension of his airman certificate is excessive. The law judge has already reduced respondent's sanction from a 90- to a 45-day suspension, and respondent's brief merely reiterates factors that were

parachutists] up to altitude. Their job is to do the skydives.").

⁸ Respondent also testified that, "[b]asically, I can get them up in the air to 13,000 feet and tell them where they are . . . , but it [is] their final decision to look out the door and look straight down to make sure that they can make it safely to the ground." Tr. at 133-134. And respondent's appeal brief refers to his "decision to allow the jumpers to make their own decision as to whether to leave [the] aircraft." Respondent's Brief at 17.

⁹ Respondent's invocation of our decisions in Administrator v. Webb, 3 NTSB 3390 (1981), and Administrator v. DeVille, 3 NTSB 2752 (1981), for the proposition that he is not responsible for the parachutists having passed through clouds, is unavailing. Aside from the fact that respondent appears to be attempting to have us forego the Administrator's validly adopted interpretation of section 105.29(a), and the fact that those cases involved a different regulation, the facts of those cases clearly established that, unlike here, the pilot *had* participated in the decision-making and planning activity expected of him under the regulation. Similarly, we do not find respondent's attempt to invoke our line of cases pertaining to reasonable reliance to be persuasive, for unlike those cases, the applicable regulation here specifically imposes dual responsibility.

considered by the law judge in making that reduction. We will let the 45-day suspension stand.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

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