

SERVED: June 7, 2007

NTSB Order No. EA-5293

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 6th day of June, 2007

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18008
v.)	
)	
CHARLES C. GABBARD,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent, proceeding pro se, appeals the order of Administrative Law Judge William A. Pope, served in this emergency proceeding on May 9, 2007.¹ By that decision, the law

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

judge affirmed the Administrator's Emergency Order of Revocation,² and denied respondent's appeal of the Administrator's order. The Administrator's order revoked respondent's first-class medical certificate, as well as his airline transport pilot (ATP), certified flight instructor (CFI), and ground instructor certificates. We deny respondent's appeal.

The Administrator's emergency order, which also functions as her complaint in this case, alleges that respondent was employed by Nashville Jet Charters, Inc., and was therefore subject to Nashville Jet Charters' approved Antidrug and Alcohol Misuse Prevention Program. Consistent with this Program, the Administrator's order alleges that respondent submitted to a random alcohol and drug test on February 16, 2007, and that the results of the test indicated that respondent had tested positive for cocaine. The Administrator's order also alleges that respondent served as the pilot-in-command (PIC) for flights on February 17, 18, 19, and 21, 2007. Based on these

² The Administrator issued her order seeking revocation of respondent's certificates pursuant to the terms of 49 U.S.C. § 44709(e)(2), which provides that, where safety in air commerce or air transportation requires immediate effectiveness of an order, such order may become instantly operative. The Board's regulations at 49 C.F.R. §§ 821.52–821.57 govern appeals of such orders.

contentions, the Administrator's order alleged that respondent lacks the qualifications to hold any airman certificate, pursuant to 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2).³ The Administrator also ordered revocation of respondent's ATP, CFI, and ground inspector certificates, based on 14 C.F.R. § 135.249(b).⁴

Respondent appealed the Administrator's order, and the case proceeded to a hearing before the law judge on May 9, 2007. At the hearing, the Administrator presented the testimony of Mr. Robert Neal, who conducted an investigation into respondent's positive drug test result as the Administrator's designated drug and alcohol investigator. Mr. Neal testified that the laboratory report on the Federal Drug Testing Control Form indicated that the laboratory had collected a specimen from

³ Title 14 C.F.R. § 67.107(b) states that the mental standards for a first-class airman medical certificate include, "[n]o substance abuse within the preceding 2 years." Subsection (2) of § 67.107(b) defines "substance abuse" as, "[a] verified positive drug test result." Title 14 C.F.R. §§ 67.207 and 67.307 contain this same requirement for second- and third-class medical certificates.

⁴ Title 14 C.F.R. § 135.249(b) states:

No certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or an operator, either directly or by contract, any function listed in Appendix I to Part 121 of this chapter while that person has a prohibited drug, as defined in that appendix, in his or her system.

respondent on February 16, 2007, and that the test of the specimen showed a level of 2,054 nanograms per milliliter of cocaine metabolites. Tr. at 33-34; see also Exh. A-1 at 6, 143. Mr. Neal also testified that respondent's flight records indicated that he flew an aircraft for Nashville Jet Charters on February 17, 2007, and that, as a result of these findings, Mr. Neal concluded that respondent acted as PIC of a Part 135 flight while cocaine metabolites were present in his system. Tr. at 40; Exh. A-2. Mr. Neal stated that the detection time for cocaine in one's system is 4 to 6 hours after ingestion, and that cocaine metabolites would be present in one's system and detectible by a test of a urine sample for a period of 24 to 48 hours. Tr. 42; Exh. A-1 at 145. In addition, the Administrator presented the testimony of Mr. Craig Curtis, who is a supervisor for the Administrator's Nashville Flight Standards District Office. Mr. Curtis translated the times on Exhibit A-2, which consists of respondent's flight records from Nashville Jet Charters, from Zulu time to Central time. Tr. at 65. Based on Mr. Curtis's testimony, the Administrator asserted that the evidence established that respondent had operated an aircraft at 1:10 pm on February 17, 2007, after having ingested cocaine at approximately 5:30 pm on February 15, 2007.

Prior to presenting his case at the hearing, respondent

admitted to the allegations in the Administrator's complaint that alleged that respondent submitted a specimen for a drug test that returned a positive result for cocaine metabolites, but denied the allegations that alleged that he operated an aircraft while a prohibited drug was present in his system. Answer to Compl. at ¶ 1. At the hearing, respondent presented the testimony of Mr. John Tatum, who testified that he was with respondent when respondent unknowingly ingested cocaine by smoking a cigarette that was laced with crack cocaine. Tr. at 74. Mr. Tatum also testified that he has a close friendship with respondent, and that he had never observed respondent using drugs. Tr. at 70. On cross-examination, Mr. Tatum recalled the time of the ingestion as approximately 5:30 pm on February 15, 2007. Tr. at 75. Respondent's mother, Ms. Nola Gabbard, testified that she had never observed respondent using drugs or possessing any drug paraphernalia. Tr. at 80. Finally, respondent testified, asserting that his ingestion of cocaine on February 15, 2007, was accidental.⁵ Respondent conceded that his

⁵ Respondent asserts that he picked up a cigarette that belonged to someone else while he was visiting his friend's house, and did not know that the cigarette contained crack cocaine. Tr. at 83. Upon discovering that the cigarette contained cocaine, respondent's acquaintance told him that he did not ingest enough of the substance to result in a positive drug test result, and respondent asserts that he did not feel as though he had ingested a drug. Tr. at 84-85. Based on these facts, and on

drug test result of 2,054 nanograms per milliliter surpassed the regulatory limit of 300 nanograms per milliliter (Tr. at 92), but contended that, had he provided a specimen for testing 12 hours later, the test result would have indicated that he had 0 nanograms per milliliter of cocaine metabolites in his system, because he had ingested such a small amount of cocaine (Tr. at 95).

At the conclusion of the hearing, the law judge determined that the evidence indicated that respondent had operated an aircraft less than 48 hours after ingesting the cocaine, and that the significant amount of cocaine metabolites present in respondent's urine sample led to the determination that the Administrator had proven by a preponderance of the evidence that respondent had violated 14 C.F.R. § 135.249(b). Tr. at 109-110. The law judge also concluded that the evidence established that respondent was not qualified to hold a medical certificate, based on the Administrator's allegations regarding 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), because respondent did not provide a legitimate medical explanation for

(..continued)

the fact that respondent's employer maintains a policy that prohibits pilots from smoking cigarettes, respondent did not report the incident to his employer or remove himself from duty. Tr. at 87.

the drug test result to indicate that something else had caused the positive result, and because his evidence as to accidental ingestion of an illegal substance was not sufficient to establish an affirmative defense. Tr. at 106-107 (citing Administrator v. Kalberg, NTSB Order No. EA-5240 (2006)). The law judge also found that respondent's testimony was not credible. Tr. at 110. Based on the foregoing, the law judge affirmed the Administrator's order.

On appeal, respondent argues that the law judge erred in concluding that the evidence established that respondent operated an aircraft while cocaine metabolites were present in his system, in violation of 14 C.F.R. § 135.249(b). Respondent asserts that his operation of the aircraft was a few hours prior to the expiration of the 48-hour period, and that he did not ingest a large amount of cocaine. Based on this contention, respondent argues that the law judge's conclusion, that the Administrator had established that he violated 14 C.F.R. § 135.249(b) by a preponderance of the evidence, was erroneous.⁶

⁶ We note that respondent characterizes his ingestion of the cocaine as an accidental occurrence, but does not appear to assert the circumstances of his ingestion as a reason for overturning the law judge's decision. We view such an argument as similar to that in Administrator v. Kalberg, supra, and find that the evidence advanced to support an affirmative defense of accidental ingestion in this case would not dispel our finding of a regulatory violation.

The Administrator's reply to respondent's argument contends that respondent has not asserted a matter on appeal that warrants the Board's review under 49 C.F.R. § 821.49(a), urges us to affirm the law judge's decision, and argues that revocation is the appropriate sanction for respondent's alleged violations.

Although we find that respondent has not established that the law judge's conclusion was erroneous, we do not adopt the Administrator's argument that respondent has not presented an issue subject to our review on appeal. Respondent's brief, in essence, challenges the law judge's factual conclusions, and the law judge's determination that the Administrator had established that respondent violated 14 C.F.R. § 135.249(b) by a preponderance of the evidence. Therefore, respondent has presented an issue of fact that is subject to appeal under the Board's Rules of Practice, at 49 C.F.R. § 821.49.

With regard to the parties' arguments on the merits of the case, we agree with the law judge that the Administrator has established that respondent violated 14 C.F.R. § 135.249(b) by a preponderance of the evidence. Section 135.249(b) prohibits certificate holders from performing safety-sensitive functions while prohibited substances are present in their systems. In Administrator v. Taylor, NTSB Order No. EA-5132 at 4 (2005), we found that the respondent did not establish that his positive

drug test result was erroneous, notwithstanding the respondent's submission of negative drug test results that were based on hair sample analyses (taken 2 weeks and 10 weeks after the urine test). Id. In determining that the urinalysis test result was accurate, we concluded that the Administrator had established a violation of 14 C.F.R. § 135.249(b) and (c) by a preponderance of the evidence.

In the case at hand, we agree with the law judge that the evidence in this record shows that it was more likely than not that cocaine metabolites were present in respondent's system, in violation of § 135.249(b). First, respondent admitted that he ingested cocaine on February 15, 2007, at approximately 5:30 pm, and he has neither challenged the reliability of the evidence indicating that his test result was positive, nor presented a legitimate medical reason indicating that the test result was positive for a reason other than ingestion of a prohibited substance. In addition, respondent admitted that he operated an aircraft less than 48 hours after ingesting the cocaine, and his drug test result indicated that a significant level of the substance was in his system at the time of the test. Finally, the law judge made an adverse determination with regard to respondent's credibility, and we rely on such determinations. Resolution of a credibility determination, unless made in an

arbitrary and capricious manner, is within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). We agree with the law judge's determinations and affirm his decision.

Safety in air commerce dictates that we uphold the Administrator's revocation of respondent's ATP, CFI, and ground inspector certificates, as well as respondent's first-class medical certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The order of the law judge affirming the Administrator's emergency order of revocation is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.