

SERVED: October 28, 2008

NTSB Order No. EA-5413

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 28th day of October, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18349
v.)	
)	
JACK RONDAL DILLMON,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

The Administrator has appealed the oral initial decision and order of Chief Administrative Law Judge William E. Fowler, Jr., issued on October 2, 2008.¹ The law judge granted respondent's appeal of the Administrator's emergency revocation

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

order, based on respondent's alleged intentional falsification of three applications for his airman medical certificate.² We grant the Administrator's appeal.

On August 27, 2008, the Administrator issued an emergency order revoking respondent's private pilot, third-class medical, and any other certificates that respondent holds.³ In the order, the Administrator alleged that respondent submitted three applications for an airman medical certificate, on March 28, 1997; May 2, 2007; and March 17, 2008, and that respondent certified that all the information he provided on each of the applications was complete and true. The Administrator's order stated that, as a result of this certification, the Administrator issued respondent an airman medical certificate, as well as an Authorization for Special Issuance of a Medical Certificate. The order further alleged that, in response to question 18w on the applications, respondent certified that he had "no history of nontraffic conviction(s) (misdemeanors or felonies)." Compl. at ¶¶ 3, 7, 11. The Administrator's order

² The Administrator charged respondent with violating 14 C.F.R. § 67.403(a)(1), which provides that no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate.

³ This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52 - 821.57.

then stated that respondent's responses to question 18w were intentionally false, because respondent knew that, on February 26, 1997, he was convicted of five counts of bribery, a Class C felony, in violation of Tennessee law. Id. at ¶¶ 4, 8, 12. The order alleged that respondent had violated 14 C.F.R. § 67.403(a)(1), and ordered revocation of respondent's certificates.

Respondent filed a timely appeal of the Administrator's order, and the case proceeded to hearing. At the hearing, the Administrator provided a certified copy of the judgment in the criminal/circuit court of Davidson County, Tennessee, that indicated that respondent had been convicted for bribery offenses that occurred four times in 1991, five times in 1992, and one time in 1994. Exh. A-1.⁴ The Administrator also provided a certified copy of respondent's airman medical record, which contained the medical applications at issue. Exh. A-2. Finally, the Administrator provided a copy of the instructions that accompany FAA Form 8500-8, which is the medical certificate application. Exh. A-3. After providing these exhibits, the Administrator rested. In response to the Administrator's case-in-chief, respondent's counsel made a motion to dismiss the case, on the basis that the Administrator had not presented a

⁴ Although the Administrator's complaint stated that respondent had been convicted of five counts of bribery, respondent admitted that he had been convicted of 10 counts at the hearing.

prima facie case regarding the alleged violations of § 67.403(a)(1). The law judge denied the motion, and instructed respondent to present his defense. Tr. at 34-35.

Respondent's counsel immediately stipulated to the fact that respondent had been convicted, and that respondent's answer to question 18w on the medical applications at issue had been false. Tr. at 37-38. Respondent's counsel stated, however, that respondent believed that he only needed to report a conviction if it related to a medical condition, and that respondent did not have an intent to deceive the Administrator. Id. at 37-38. In support of these arguments, respondent provided his own testimony, in which he confirmed that he was convicted of 10 counts of bribery, and that, after a 6-week trial, he appealed the conviction. Tr. at 43. Respondent stated that he "by no means [disputed] the conviction." Tr. at 47. Respondent testified that he listed several medical problems that he has endured, such as high blood pressure and diabetes, on his medical applications. Tr. at 49-51.

Respondent stated that he checked "no" in response to question 18w after he spoke with the medical examiner who reviewed his application and conducted the medical examination because the medical examiner informed him that the FAA was only interested in convictions involving drugs or alcohol. Tr. at 52. Respondent presented letters from the medical examiner,

Dr. Christian J. Van Den Berg, in which Dr. Van Den Berg wrote that he advised respondent that, with regard to question 18v on the medical application, "the FAA was only interested in events drug or alcohol related." Exh. R-1.⁵ Dr. Van Den Berg then submitted a follow-up letter to respondent clarifying that he did not recall a specific discussion with respondent regarding questions 18v or 18w, and that if respondent had asked him about question 18v, Dr. Van Den Berg would have stated that it only relates to drug or alcohol offenses. Exh. R-2. Dr. Van Den Berg's letter stated that, "[i]t is quite possible that he generalized my comment to both 18v and 18w," and that, "a no answer to 18w may have been based upon a misunderstanding created by our discussion." Id. Respondent also stated that he had discussed question 18w with another medical examiner in 1990, but did not state what the medical examiner had told him during that discussion. Id. at 76-77, 86. Respondent testified that he knew he had been convicted of a non-traffic offense when

⁵ Questions 18v and 18w are both categorized under the heading entitled "Conviction and/or Administrative Action History." Question 18v requests a yes or no answer to the following:

History of (1) any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation program.

he completed his applications in 1997 and in 2007. Id. at 86. Respondent further testified that, if he completed the application today, he would answer "yes" to question 18w. Tr. at 88. At the conclusion of respondent's testimony, respondent's counsel offered several exhibits into evidence in support of his argument that question 18w was ambiguous. The law judge admitted these exhibits despite the Administrator's objections concerning relevancy. Tr. at 103, 105, 107, 111-14.

The law judge issued an oral decision at the conclusion of the hearing, at which he determined that the Administrator did not prove that respondent had falsified his medical applications, because the evidence did not establish that respondent intended to falsify the applications. Initial Decision at 133. The law judge stated that the issue critical to this case was respondent's intent when completing the applications. Id. at 130. The law judge stated that respondent "did not use the best judgment when he filled out these applications and when he answered ... question 18w," but that respondent was likely confused by his most recent discussion with Dr. Van Den Berg, and in a hurry when he completed the applications. Id. at 131. The law judge concluded that respondent had successfully rebutted the Administrator's case. Id. at 133.

On appeal, the Administrator alleges that the law judge

erred in numerous respects. Specifically, the Administrator alleges that the law judge erred in finding that respondent did not have the intent to falsify his medical applications and therefore did not violate § 67.403(a)(1); that the law judge's finding that respondent did not know his answers were false is contrary to the weight of the evidence; that the law judge erred in determining that question 18w was vague and ambiguous; that the law judge erred in not upholding revocation of all of respondent's certificates, based on the falsification of his applications; and that the law judge should not have granted respondent's petition challenging the Administrator's emergency determination. Respondent disputes each of these arguments, and urges us to affirm the law judge's decision. We address each of these issues in turn.

With regard to cases in which the Administrator alleges that a respondent intentionally falsified a medical certificate application, we have long adhered to a three-prong standard to prove a falsification claim; in this regard, in intentional falsification cases, the Administrator must prove that a pilot (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity of the fact. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)). As the Administrator has argued, we have also held that a statement is false

concerning a material fact under this standard if the alleged false fact could influence the Administrator's decision concerning the certificate. Administrator v. McGonegal, NTSB Order No. EA-5224 at 4 (2006); Administrator v. Reynolds, NTSB Order No. EA-5135 at 7 (2005); see also Janka v. Dep't of Transp., 925 F.2d 1147, 1150 (9th Cir. 1991).

With regard to whether the Administrator has fulfilled his burden in establishing that respondent intentionally falsified his medical applications under the longstanding Hart v. McLucas precedent, we have carefully examined the evidence that could prove each of the necessary elements. Respondent does not dispute that he was convicted of 10 counts of bribery and was incarcerated for 1 year, followed by 7 years on probation, as a result of the conviction. Tr. at 78. Overall, respondent clearly knew that he had been convicted of a non-traffic offense. Tr. at 86. In spite of these admissions, at the hearing, respondent relied on the fact that he discussed these convictions with his Aviation Medical Examiner (AME), who respondent says told him that the FAA was only concerned with drug- and alcohol-related offenses. Tr. at 52. This contention is unavailing. First, respondent's own admissions easily establish two of the three prongs of intentional falsification: respondent does not dispute that he was convicted of bribery (Tr. at 47) and knew that he did not list the conviction on his

medical applications (Tr. at 52). Moreover, respondent did not provide any case law or arguments to indicate that the conviction was not material for purposes of the intentional falsification standard; in this regard, we note that several Courts of Appeal have previously held that all questions on the medical application are material.⁶ In spite of respondent's admissions, however, the law judge concluded that respondent's evidence of confusion concerning whether to report the conviction rebutted the Administrator's evidence of falsification. Initial Decision at 133.

We find that the law judge erred in concluding that respondent's failure to include his conviction on his medical applications due to his confusion concerning question 18w did not constitute intentional falsification. Respondent asserted that he had not read the instructions that accompany the application, and that he presumed that the FAA would not be concerned with convictions that did not relate to drugs or alcohol. Tr. at 79, 83. We rejected this argument in Administrator v. Boardman, NTSB Order No. EA-4515 at 8-9 (1996),

⁶ See, e.g., Janka, 925 F.2d at 1150 (citing Cassis v. Helms, 737 F.2d 545, 547 (6th Cir. 1984), and Twomey v. NTSB, 821 F.2d 63, 66 (1st Cir. 1987), and holding that a false statement is material if it could influence the FAA). In our own cases, we have also held that a statement is false concerning a material fact under this standard if the alleged false fact could influence the Administrator's decision concerning the certificate. McGonegal, supra, at 4; Reynolds, supra, at 7.

in which we stated that the respondent's failure to consider question 18w on a medical application carefully before providing an answer did not establish a lack of intent to provide false information. Similarly, we recognized in Administrator v. Sue, NTSB Order No. EA-3877 at 5 (1993), that the argument that question 18w on the medical application is vague was unavailing, and that, "the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence."

We also find that the law judge erred in concluding that the Administrator was required to establish that respondent had a specific intent to deceive the Administrator when completing his application. In McGonegal, supra, we held that the Administrator need not establish such intent, but must provide evidence showing that the respondent made the incorrect answers while cognizant of their falsity. Id. at 9. We further stated that the law judge applied the wrong standard in McGonegal, because he "referred repeatedly to the Administrator's failure to prove that [the] respondent had 'false or fraudulent intent' or an 'intent' to deceive or falsify." Id. We clarified that, "the legal standard for intentional falsification does not require any showing that a respondent intended to falsify or to deceive." Id. Our review of this standard in other Board cases concerning intentional falsification charges is consistent with this interpretation. See, e.g., Administrator v. Exousia, Inc.

and Schweitzer, NTSB Order No. EA-5319 at 8 n.10 (2007); Administrator v. Brassington, NTSB Order No. EA-5180 at 10 (2005).

Given our determination that the law judge erred in concluding that respondent successfully rebutted the Administrator's case-in-chief by presenting evidence that he relied upon his AME and was confused about question 18w, we need not address the Administrator's other arguments concerning this issue. With regard to the issue of sanction, we note that we have long held that revocation of all certificates is the appropriate sanction for intentional falsification cases.⁷ We also note that we do not review law judges' rulings concerning petitions that challenge the Administrator's exercise of his authority to issue emergency orders.⁸

In conclusion, we find that the law judge erred in granting

⁷ Administrator v. Croston, NTSB Order No. EA-5265 at 6-7 (2007) (citing Administrator v. Culliton, NTSB Order No. EA-5178 (2005)); see also, e.g., Administrator v. Croll, NTSB Order No. EA-4460 at 7-8 (1996); Administrator v. McCarthney, 7 NTSB 670, 672 (1990).

⁸ Title 49 C.F.R. § 821.54(f) provides, in part, "[t]he law judge's ruling on the petition [for review of the Administrator's determination of emergency] shall be final, and is not appealable to the Board." Section 821.54(f), however, allows the Board to note, in the Board's order disposing of the appeal, its views on the law judge's ruling on the petition. Given that we have granted the Administrator's appeal on the merits of this case, we decline to exercise our discretion to include our views concerning the law judge's ruling on the petition, as this issue is moot.

respondent's appeal below, as the evidence establishes that respondent failed to include required information on his applications with knowledge of the omission, as alleged.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed; and
3. The Administrator's emergency revocation of any airman and medical certificates held by respondent is affirmed.

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

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *

In the matter of: *

ROBERT A. STURGELL, *

ACTING ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, *

v. * Docket No.: SE-18349

JACK R. DILLMON, * JUDGE FOWLER

Respondent. *

* * * * *

U.S. Tax Court
Courtroom 1136, 11th Floor
Russell Federal Building &
Courthouse
75 Spring Street, SW
Atlanta, Georgia

Thursday,
October 2, 2008

The above-entitled matter came on for hearing,
pursuant to notice, at 10:15 a.m.

BEFORE: WILLIAM E. FOWLER, JR.
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

ANDREA MICHELLE HARPER
Federal Aviation Administration
Office of the Regional Counsel
Post Office Box 20636
Atlanta, Georgia 30320
(404) 305-5200
michelle.harper@faa.gov

On behalf of the Respondent:

ALAN ARMSTRONG, ESQ.
Parkridge 85 Office Park
2900 Chamblee-Tucker Road
Atlanta, Georgia 30341
(770) 451-0313
alan@alanarmstronglaw.com

WELDON E. PATTERSON, ESQ.
Spicer, Flynn & Rudstron, PLLC
Suite 1400
800 South Gay Street
Knoxville, Tennessee 37929

ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958 as that act was subsequently amended. On the appeal of Jack Rondal Dillmon from an Emergency Order of Revocation issued by the Federal Aviation Administration dated August 27th, 2008.

The Administrator's Emergency Order of Revocation, as duly promulgated, pursuant to the Board's Rules of Practice in Air Safety Proceedings, was issued by the Regional Counsel, Southern Region of the Federal Aviation Administration. This matter has been heard before this United States Administrative Law Judge. As is provided by the Rules of Practice, specifically Section 821.56 of those rules, it is mandatory that, as the judge in this proceeding, I issue an oral initial decision on the record following the conclusion of this proceeding.

Following notice to the parties, this matter came on for trial on October 2nd, 2008. Respondent Jack Rondal Dillmon was present at all times, and was very ably represented by Alan Armstrong, Esquire and Weldon Patterson, Esquire. The Complainant in this proceeding on behalf of the Administrator

was likewise very ably represented by Andrea M. Harper, Esquire, of the Regional Counsel's Office, Southern Region of the Federal Aviation Administration.

I have reviewed the testimony and the documentary exhibits in this case. The Administrator had three exhibits produced on behalf of the Administrator. Respondent had upwards of 17, all of which were duly admitted into the hearing record as presently constituted.

We have a very straightforward, central, paramount, and overriding question to be decided in this case. What was the intention of the Respondent Dillmon regarding the question 18W on the three medical applications when he was filling those applications out?

The Administrator has charged that Respondent intentionally committed a false and fraudulent statement when he answered no to question 18W on those applications. These type cases, in my experience, are very difficult to prove on behalf of the Administrator. What is in the man's mind? That's the issue here we have to decide.

The Administrator says that Respondent Dillmon, in effect, issued a false statement knowing that it was false. He had the requisite intention to falsify as set forth in Section 61.403(1) of the Federal Aviation Regulations.

Respondent's Exhibits 1 and 2, which are revealing, and valid, in my appraisal of this case, letters by Dr.

Christian Van Den Berg pertaining to conversations that he had with Respondent Dillmon.

Respondent's Exhibit 1 is a letter where the doctor said that he advised Mr. Dillmon that the FAA was only interested in events like drugs or alcohol related. This is a simple miscommunication the doctor goes on to say, or an unknowingly incorrect answer.

My opinion is that, as the doctor says, "no punitive actions should be taken." A few days later, Dr. Van Den Berg wrote a letter to the special agent of the FAA saying "I would have advised him -- it says, I do not recall specific discussion regarding questions 18V or 18W on the medical application."

"If he had only asked question 18V, I would have advised him that question 18V only relates to alcohol or drug offenses. It is quite possible that he generalized my comment to both 18V and 18W."

Therefore, a no answer to 18W may have been based upon a misunderstanding created by our discussion. Now, after reviewing the totality of the facts here, it is my opinion and determination that Respondent did not use the best judgment when he filled out these applications and when he answered -- question 18W.

His testimony was that on both of those occasions, the three occasions, he was in a hurry. The last two occasions,

or at least the last one, he was confused by the advice of Dr. Van Den Berg. Respondent's testimony is quite to the point, that if he had to answer the question today, he would certainly have answered 18W with a resounding yes. But he was somewhat confused, and made a generalization between questions 18V and 18W as a result of his conversation with Dr. Van Den Berg.

It's true that he was convicted on ten counts of bribery in 1997. He has never hesitated to admit that. My determination is that the Respondent was quite forthright and candid in his testimony. To me, there is quite a notable absence of any indication of an intentional falsehood or interpretation or application when he signed no to these questions in the three applications in question 18W.

As the Respondent testified, "it never entered his mind that flying an airplane in a safe and prudent and reasonable manner had anything to do other than with convictions or offenses related to one's health." Coupling that with, as I stated earlier, a moment ago, the confusion that he had with the generalization that he took, perhaps I should state it that way, from his conversation with Dr. Van Den Berg that his history of the non-traffic convictions, he thought, applied only to drug and alcohol related offenses or convictions.

After the Administrator had finished its case, you may recall that I denied the directed verdict as well as, the

motion to dismiss. I felt then that the Administrator at the very minimum had established a prima facie case.

Am I coming through all right?

COURT REPORTER: Yes, sir.

JUDGE FOWLER: That the Administrator established at a very minimum a prima facie case. However, upon additional reflection and analyzation, Respondent's testimony coupled with the Respondent's documentary exhibits, upwards of 17 exhibits, admitted into the hearing record here, it is clear to me that there's no intention on the part of the Respondent to falsify, let alone be fraudulent in setting forth the answers that he did to this question, 18W.

The Respondent's case and the testimony itself, I think, stresses that this medical application, particularly those questions 18V and 18W, definitely be deemed as somewhat excessively vague and fundamentally ambiguous, and could easily raise the specter that we have here in this proceeding on what would appear to be intentional false statements on the part of the applicant.

It is my judgment that the term "intentionally false" is the overriding, paramount and governing factor in this proceeding. My determination and conclusion is that the Respondent successfully rebutted with the documentary exhibits the Respondent produced, as well as the Respondent's testimony itself, the prima facie case earlier established by the

Administrator.

So that ladies and gentlemen, I'm sure you follow the drift of my determination at this time. I will now proceed to make the following specific findings of fact and conclusions of law:

In the Administrator's Emergency Order of Revocation dated August 27th, 2008, the Administrator has, what could be construed as 17 pertinent and salient allegations against the Respondent, which comprise the Administrator's Emergency Order of Revocation. Incorporating, by reference, the following of those numbered paragraphs which are admitted by the Respondent, and are found by this judge; paragraphs one, two, three, five, six, seven, ten, eleven, and thirteen.

Those paragraphs are incorporated by reference from the Administrator's Emergency Order of Revocation having been admitted by the Respondent, and it is my finding they are true. Paragraph four, after reviewing the totality of the testimony and the documentary exhibits, it is found that the answer in the preceding paragraph three was not intentionally false or fraudulent in that on or about February 26th, 1997, in the criminal Circuit Court of Davidson County, Tennessee, Respondent was convicted of five counts of bribery, et cetera, et cetera, et cetera.

Paragraph eight incorporated by reference, the answer on the aforesaid paragraph seven was not intentionally false or

fraudulent regarding the February 1997 conviction of bribery of Respondent Dillmon. Paragraph nine, Respondent originally denied, but it is found that the information provided on Respondent Dillmon's May 2nd, 2007 application where Respondent was granted authorization on the special issuance of a medical certificate authorization on October 19, 2007.

Paragraph 12, the answer on the aforesaid paragraph was not intentionally false or fraudulent in that -- and I'm incorporating by reference the rest of that paragraph pertaining to the criminal conviction in February 1997 on the ten counts of bribery as set forth in the Tennessee Code Annotated.

Finding 14, it is found by reason of the foregoing that Respondent Dillmon has not demonstrated that he lacked the qualifications required of the holder of airman certificate. Paragraph 15, which I'm incorporating by reference, that Respondent has not violated Section 67.403(a)(1) of the Federal Aviation Regulations, which states no person may make or cause to be made a fraudulent or intentionally false statement, et cetera, et cetera, et cetera, to the end of that paragraph.

I am incorporating by reference, paragraph 16, incorporating by reference pursuant to Section 67.403(B)(1), -- the non-intentionally false and fraudulent statements in paragraph three, seven, and eleven, above, are not grounds for revocation of the airman, ground instructor, or medical

certificate, or rating held by Respondent Dillmon.

As a result of the foregoing, this judge finds that safety in air commerce or air transportation and the public interest does not require the affirmation of the Administrator's Emergency Order of Revocation dated August 27th, 2008 in view of the Respondent's non violation of 67.403(b)(1).

ORDER

IT IS ORDERED AND ADJUDGED that the Administrator's Emergency Order of Revocation, dated August 27th, 2008, be and the same is hereby reversed and dismissed.

This order is issued by William E. Fowler, Jr., a United States Administrative Law Judge.

DATED & EDITED ON
OCTOBER 10, 2008

William E. Fowler, Jr.
Chief Judge