

SERVED: August 25, 2009

NTSB Order No. EA-5472

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 24th day of August, 2009

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18266
v.)	
)	
JOHN BRADFORD HOLLAND,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals from the oral initial decision and order of Administrative Law Judge Patrick G. Geraghty, issued in this proceeding on September 24, 2008.¹ By that decision, the law judge upheld the Administrator's order revoking respondent's

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

airline transport pilot (ATP), commercial pilot, and flight instructor certificates. We reverse the law judge's order.

The Administrator's revocation order, dated May 8, 2008, alleged that respondent, as a pilot for Aero Air, LLC,² was subject to mandatory drug testing, and that, on October 25, 2007, respondent submitted a urine specimen that tested positive for cocaine. The order also stated that respondent acted as pilot-in-command of a passenger-carrying flight soon after submitting his urine sample on October 25, 2007. The order asserted that a gas chromatography/mass spectrometry test confirmed that respondent's urine tested positive for cocaine, and that, on October 26, 2007, the medical review officer (MRO) for Aero Air verified the positive result. Id. at ¶¶ 8, 10. The order stated that respondent subsequently requested that the MRO arrange for his split urine specimen to be tested, that the split urine specimen tested positive for cocaine, and that an additional gas chromatography/mass spectrometry test confirmed that his urine tested positive for cocaine. Id. at ¶¶ 10-11. The order also stated that the applicable regulations define cocaine as a "prohibited drug," and that respondent's positive test result rendered him in violation of 14 C.F.R.

² The Administrator's order alleged that Aero Air, LLC is an on-demand commercial operator in Hillsboro, Oregon, certificated under 14 C.F.R. Parts 119 and 135.

§ 91.17(a)(3).³ Finally, the order stated that a violation of § 91.17(a)(3) is grounds for suspension or revocation, pursuant to 14 C.F.R. § 61.15(b)(2).

Respondent appealed the Administrator's order, and the case proceeded to hearing before the law judge on September 24, 2008. At the hearing, the Administrator presented evidence regarding the urine specimen collection, chain of custody information, and the finding of a positive drug test result.

The Administrator called Brian Bischoff, a certifying scientist for Pathology Associates Medical Services (PAMS) in Spokane, Washington, to testify. Mr. Bischoff first testified that he had reviewed the paperwork concerning respondent's specimen and that the laboratory had controlled the specimen properly. Tr. at 21-22; Exh. C-1 at 3 (custody and control form for urine specimen). Mr. Bischoff testified that the processing department at PAMS inspects each urine specimen upon receipt, that the specimen arrives in a tamper resistant container, that a seal is placed over the specimen that matches the primary identification number, and that a PAMS employee examines the specimen for any indication of tampering. Tr. at 21.

Mr. Bischoff confirmed that a PAMS employee had checked the box

³ Title 14 C.F.R. § 91.17(a)(3) states that, "No person may act or attempt to act as a crewmember of a civil aircraft ... while using any drug that affects the person's faculties in any way contrary to safety."

of the custody and control form for respondent's specimen, which indicated that the bottle seals on respondent's specimen were intact upon receipt. Tr. at 22.

Mr. Bischoff further testified that the initial test, or screening, of a specimen is the immunoassay, which tests for certain drug metabolites as a percentage of calibration, and that respondent's immunoassay indicated a result of 111 percent.⁴ Tr. at 22, 25. Metabolites are molecular compounds produced by the body, and are present in the body for at least some time period after the body metabolizes a drug or other substance.⁵ Under common drug testing protocols, metabolites are measured and quantified, for example, as nanograms per milliliter. Mr. Bischoff testified that the screening test used by the laboratory was set at a level to indicate a presumptively positive result should the screening test reflect a result of at least 100 percent of calibration, and that the cutoff

⁴ The Administrator's Response to Respondent's Second Set of Interrogatories explains this calculation as follows:

The Olympus AU2700 does not provide a specific ng/ml number, but a percentage. The Olympus AU2700 is calibrated at 300 ng/mL for cocaine metabolite screening. Therefore, any specimen that is 100% is positive; if the percentage is below 100% the specimen is negative. [Respondent's specimen] initial test level was 111%.

⁵ We note that the record does not contain a definition of "metabolite"; we have supplied this definition to facilitate discussion of the legal issues in this case.

calibration for this screening test is 300 nanograms per milliliter. Tr. at 26. Mr. Bischoff also explained the calibration process for the gas chromatography/mass spectrometry confirmation test, and stated that the confirmation test is more precise than the initial immunoassay test. Tr. at 26, 32. With regard to respondent's test result, Mr. Bischoff testified that the confirmation test showed that respondent's urine contained 271 nanograms per milliliter of cocaine metabolite, and that the cutoff level for the confirmation test is 150 nanograms of metabolite per milliliter. Mr. Bischoff also stated that cocaine itself is generally only detected by the presence of such a metabolite, because cocaine remains in a person's body for only 3-4 hours after a recreational use, while a cocaine metabolite is detectible as long as 48 hours after such use, although the record also contains testimony that metabolites last longer in one's system under certain circumstances.⁶ Tr. at 35-37. Mr. Bischoff did acknowledge on cross-examination that cocaine is used as a topical anesthetic. Tr. at 37. He also specifically opined that respondent's immunoassay test was a correct positive initial test. Tr. at 43.

The Administrator also called Michael Daggett, who is a laboratory manager of toxicology at Laboratory Corporation of

⁶ Dr. Vasiliades, who testified on behalf of respondent, stated that cocaine metabolites may be detectible in one's system up to 72 hours after the use of cocaine. Tr. at 80.

America, to testify. Mr. Daggett sponsored Exhibit C-2 into evidence, which includes paperwork concerning the confirmation of respondent's test result. Tr. at 51. Mr. Daggett testified that the paperwork includes an internal chain of custody form that would have identified problems with the sample if Laboratory Corporation of America had not received the sample intact. Tr. at 56; Exh. C-2 at 9. Mr. Daggett stated that he reviewed all of the paperwork, and saw no evidence that the specimen was compromised or that anyone had tampered with it. Tr. at 57. Mr. Daggett also testified that the testing equipment was calibrated appropriately. Id.

The Administrator concluded his case-in-chief by calling Kimberly Greenberg, an enforcement investigator in the FAA Special Investigations Branch's Office of Aerospace Medicine, to testify. Ms. Greenberg testified that she had investigated respondent's drug test result, and that the Custody and Control Form that the MRO submitted indicated that respondent tested positive for cocaine. Tr. at 63-64. Ms. Greenberg stated that, in the course of her investigation, she interviewed the MRO, who stated that respondent told him that he had undergone a surgical procedure, which could be a medical explanation for his positive test result.

At the conclusion of the Administrator's case, respondent argued that there may be a "plausible explanation for the

appearance of cocaine metabolite" in his system, that the testing facilities may not have complied with Department of Transportation (DOT) drug testing procedures, and that the Administrator had not established that respondent operated the aircraft while using a drug that affects a person's faculties in any way contrary to safety, which § 91.17(a) requires. Tr. at 69-70. Respondent further argued that the metabolite level in his urine was below the cutoff prescribed by the program, and that, at the time of the flight, the level would have been below the cutoff. Based on these arguments, respondent made a motion to dismiss the case. The law judge denied the motion, finding that respondent's admissions to certain allegations in the complaint, combined with the evidence from the Administrator's case-in-chief, indicated that the Administrator had set forth a prima facie case. Tr. at 71.

Respondent first presented testimony from Dr. John Vasiliades, a board-certified clinical chemist in forensic toxicology who holds a Ph.D. in analytical chemistry and has worked in laboratories at universities. He testified that the screening cutoff for a positive cocaine test result is 300 nanograms per milliliter, while the confirmation test cutoff is 150 nanograms per milliliter. Tr. at 77. Dr. Vasiliades asserted that his understanding of the testing protocols was that the sample must exceed both cutoffs in order to be a

positive sample. Id. He testified that he reviewed the test results, that the concentration of the cocaine metabolite in respondent's urine was 270 nanograms per milliliter in both the screening and confirmation tests, and that the urine sample must contain an amount of the metabolite that exceeds the cutoff of both tests. Tr. at 77, 79. Dr. Vasiliades asserted that a 20 percent variance is possible in immunoassay tests, that respondent's test result of 270 nanograms per milliliter was therefore within the margin of error, and that respondent's urine sample should not have undergone the confirmation test.

Dr. Vasiliades further opined that the presence of the metabolite in urine is not evidence of impairment, and explained the half-life measurements of both actual cocaine and the cocaine metabolite, with the actual drug remaining in the body only a short period of time. Tr. at 83-84. Specifically, he testified that where no evidence of the drug itself is found in the system, but that evidence of drug metabolites are located in the urine, there is an indication that the drug was consumed and then metabolized by the body, but not that the subject was under the influence of a drug. He also stated that he believed the lab that performed the screening test erred in sending the sample for confirmation testing, because the sample contained less than 300 nanograms per milliliter of the cocaine metabolite. Tr. at 88.

Respondent thereafter testified on his own behalf. He testified that he received notification on October 22 that he would need to complete a drug test, and reported for the test at 7:35 am on October 25, 2007. Tr. at 108–110. He stated that he had surgery on October 23, 2007, at 11:00 am, and was permitted to delay testing until October 25. Id.⁷ He also stated that he had previously taken multiple drug tests and had never tested positive (Tr. at 111), and that he had not used cocaine or any prohibited substance prior to the test (Tr. at 112). He testified that he did not know how the cocaine metabolite got into his system. Tr. at 112. He stated, however, that he informed his MRO that he had recently undergone a surgical procedure, and provided his doctor's telephone number to the MRO. Tr. at 112–13. Respondent also testified that he believed his doctor used lidocaine during the procedure. Tr. at 113.

At the conclusion of respondent's case, the Administrator called Mr. Bischoff in rebuttal. Mr. Bischoff reiterated that respondent's specimen tested at 111 percent of the cutoff. Mr. Bischoff also stated that he had researched a "cross-reactivity list" to determine what, if any, compounds could present a false positive test for the cocaine metabolite. Tr. at 116. He determined that respondent's immunoassay test showed

⁷ We note that the Administrator did not allege any shortcoming because of the delay in testing.

negative results for concentrations of lidocaine and amoxicillin, and that such results exclude the possibility of a false positive caused by lidocaine or amoxicillin. Exh. C-4.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he found that no question existed with regard to the validity of the chain of custody of the specimen (Initial Decision at 140, 143, 150), and that both the immunoassay screening test and the gas chromatography/mass spectrometry confirmation test indicated a positive result for cocaine metabolites in respondent's urine sample (id. at 142). The law judge found respondent not credible with regard to respondent's contention that his positive test result occurred because lidocaine was used in his surgery 2 days before the test. Id. at 152. The law judge concluded that respondent had failed to prove that his alleged exposure to lidocaine was a "reasonable medically legitimate explanation" for the presence of any cocaine metabolites in his urine. Id. The law judge also stated that respondent's contention that his test result was within the margin of error was not sufficient to overcome the evidence that the Administrator presented.

On appeal, respondent presents five issues: questions concerning chain of custody; the laboratories' compliance with DOT testing procedures; the law judge's credibility ruling concerning the possible medical explanation for the positive

test result; the assertion that respondent's urine would have been below the cutoff for a positive sample at the time of his flight on October 25, 2007; and the issue of whether the Administrator can rely on a low level of cocaine metabolite to sustain a violation of § 91.17(a)(3). In particular, respondent argues that the Administrator failed to present evidence concerning what happened to the sample between the time the collection facility collected the sample and the time the testing facility received the sample. As a result, respondent argues that the Administrator cannot authenticate evidence establishing the chain of custody of the sample. Respondent also argues that the laboratory that conducted the immunoassay screening test used a test calibrated below the level that DOT regulations require, and that the test included compounds "not expressly authorized" by the regulations.

Respondent's argument concerning his medical excusal or explanation is based on his physician's "possible" use of a compound containing cocaine in the surgery that respondent underwent 2 days prior to his drug test. Respondent argues that the Administrator's rebuttal of this defense is weak because the Administrator did not present testimony from the MRO concerning his conversations with respondent about the surgery, and that respondent's record of no previous positive test results, combined with his compliance in scheduling the drug test and not

attempting to evade it, lend credibility to his defense concerning the use of lidocaine for his surgical procedure.

Respondent also contends that the Administrator did not prove that he violated § 91.17(a)(3) because the Administrator did not establish that he operated an aircraft "while using" a "drug" that affected his faculties. Respondent cites Gabbard v. FAA, 532 F.3d 563 (6th Cir. 2008), for the notion that the Administrator must provide expert testimony to prove that the crewmember had a certain quantity of prohibited substances in his or her system that would affect the crewmember's faculties. Respondent contends that the Administrator did not provide expert testimony on this issue, but that respondent provided the testimony of Dr. Vasiliades to prove the contrary. Respondent bases this argument on the contention that cocaine itself, rather than its metabolite, is the prohibited substance, and that the Administrator did not prove that respondent had cocaine in his system while operating the aircraft. The Administrator contests each of these arguments and urges us to uphold the law judge's decision. Our resolution of this case rests upon the issue concerning the Administrator's interpretation of § 91.17(a)(3); as such, we will not address the other issues that respondent presented.

We recognize that we are generally obligated by law to defer to the Administrator's interpretation of the Federal

Aviation Regulations under 49 U.S.C. § 44709(d)(3); see also Garvey v. NTSB, 190 F.3d 571, 576–79 (D.C. Cir. 1999). However, this obligation is not without limitation: section 44709(d)(3) provides that the Board is “bound by all validly adopted interpretations of laws and regulations the Administrator carries out ... unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.” We have previously held that, where the Administrator attempts to impose a requirement not contained in the plain language of a regulation, the Administrator’s interpretation of that regulation is not entitled to deference. Administrator v. Glennon and Shewbart, NTSB Order No. EA-5411 at 20 (2008); see also Garvey, supra, at 580 (stating that, “[d]eference, of course, does not mean blind obedience,” and that the Board need not follow an interpretation if it “is arbitrary, capricious, or otherwise not according to law”).

Stated at its simplest, the Administrator here asks us to affirm the interpretation that the presence of drug metabolites in an airman’s urine prior to a flight amounts to prima facie evidence that the airman was “using” a prohibited substance at the time of his or her operation of an aircraft contrary to § 91.17(a)(3). However, the Administrator has presented no evidence of any actual prohibited substance in the system of the respondent at the time of the flight. For the reasons outlined

below, we conclude that the Administrator's proffered interpretation of his regulatory standard is arbitrary and capricious.

Although we are mindful of the Administrator's obligation to advance safety in aviation, and we are ourselves troubled by the evidence indicating the presence of cocaine metabolites in respondent's system contemporaneous with his operation of an aircraft and while in possession of a commercial pilot certificate, we must nonetheless evaluate the Administrator's order in a manner faithful to jurisprudential norms, the factual record, and legal standards. Applying these principles to this proceeding, we are constrained to rule against the Administrator because he has not met his burden in supporting his contention that the presence of metabolites (which are evidence of past use of an impairing substance) prior to flight as a crewmember is or should be prima facie evidence of impairment by a prohibited substance during a subsequent flight. Making a finding in support of the Administrator would first require evidence in the record that the metabolites likely remained in place at the time of flight. There was limited evidence to this effect in the proceeding below, save from perhaps respondent's own expert testifying to the half-life of metabolites and the actual drug compounds themselves. Assuming, arguendo, that the evidence showed that metabolites most likely remained in respondent's

system at the time of flight, under § 91.17(a)(3), the evidence must also establish that the metabolite affected respondent's faculties adversely. On this issue, the record is devoid of any attempt to prove such an element.

Section 91.17(a)(3) does not address or define metabolites, but merely references "any drug." The Administrator thus asks us to accept that, for purposes of § 91.17(a)(3), a metabolite is a "drug" of a prohibited type. However, the Administrator did not define "drug" in § 91.17 or in the record for this case in any manner different from the common meaning of the term. The definition of "prohibited drug" in Appendix I to Part 121 of the Federal Aviation Regulations is as follows: "[p]rohibited drug means marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, as specified in 49 C.F.R. § 40.85." Appendix I sets forth definitions and overall requirements for DOT drug testing programs, but § 91.17(a)(3) does not reference this appendix. Even if § 91.17(a)(3) did refer to Appendix I, the appendix further cites 49 C.F.R. § 40.85 to identify a working definition for "drug," but § 40.85 itself appears to address what substances are targeted in drug testing protocols, and not what is a prohibited drug, particularly for purposes of § 91.17(a)(3), or what quantity of each substance can result in

a sanction.⁸ Section 91.17(a)(3) could presumably even target prescription or over-the-counter medications, as long as they affect an individual's faculties in a manner contrary to safety. While a cross-reference to § 40.85 may be a sustainable interpretation of the regulatory structure to allow the Administrator to pursue an action for drug use or abuse under Part 121, we do not find a sufficiently direct regulatory nexus under § 91.17(a)(3) to reach the same conclusion in this case.

In setting out the elements of proof, and thus the Administrator's interpretation of the regulation, the Administrator asserts that in addition to the prohibited drug use, the Administrator must prove "that the person acted or attempted to act as a crewmember of a civil aircraft." In an initial statement of the elements of the violation alleged in this case, the Administrator revealed no intent to limit the application of the regulation temporally with regard to service as a crewmember. In the subsequent argument, however, the Administrator appears to narrow the interpretation and concede

⁸ Section 40.85 provides as follows:

§ 40.85 What drugs do laboratories test for?

As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test "DOT specimens" for any other drugs.

- (a) Marijuana metabolites.
- (b) Cocaine metabolites.
- (c) Amphetamines.
- (d) Opiate metabolites.
- (e) Phencyclidine (PCP).

that the "usage" under the regulation must be contemporaneous with respondent's service as a crewmember of a civil aircraft, but, making an important distinction for the Administrator's argument, that any level of metabolites alone in the crewmember's system at the time of flight is sufficient to prove the violation. Reply Br. at 15-17.⁹ The Administrator therefore posits an interpretation of the regulatory provision that asserts that any drug level, or any metabolite level from use of a drug likely to affect one's faculties in a manner contrary to safety that is present at the time a person performs crewmember duties, is a violation of § 91.17(a)(3). We find that the Administrator's interpretation that "metabolite" is equivalent to "drug" and that any metabolite level alone would suffice to prove a violation of § 91.17(a)(3) to be an arbitrary and capricious interpretation of the plain language of section 91.17(a)(3).¹⁰

⁹ The Administrator's argument is thus best summarized by the assertion "that the fact that Respondent acted or attempted to act as a crewmember of the airplane with demonstrated cocaine metabolites in his system---even without a demonstration of the drug cocaine simultaneously in his system---is dispositive of this case." Reply Br. at 16.

¹⁰ The logical and reasonable interpretation of § 91.17(a)(3), and specifically the term "using," must still have a temporal context for the proscription to have meaning; the regulation cannot mean "using" at some indefinite point in time in the past, even for a drug that would by definition impair a person's faculties. Otherwise, use of an antihistamine, cough syrup, or an over-the-counter sleep aid in the days, weeks, or even months

We further note that our holding in this case is limited to the context of § 91.17(a)(3). In previous cases in which we discussed drug testing requirements,¹¹ we upheld the Administrator's argument that the respondents were ineligible to hold medical certificates pursuant to 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) following positive drug tests.¹² In the instant case, the Administrator did not allege that respondent was ineligible to hold a medical certificate under §§ 67.107(b)(2), 67.207(b)(2), or 67.307(b)(2), nor did the Administrator charge a violation of a Part 135 provision that expressly defines prohibited drugs by reference to Appendix I of part 121. Instead, the Administrator based the revocation of

(..continued)

prior to one's service as a crewmember could carry regulatory sanction, should there be any residual indication of such past usage in the crewmember's body. While we could construe the drug test results as a prima facie showing of impermissible use, and uphold sanction for such impermissible use, we find the record devoid of evidence that the pilot was impaired by the drug at the time of flight or, alternatively, that the "metabolite" itself impaired the pilot.

¹¹ See, e.g., Administrator v. Swaters, NTSB Order No. EA-5400 (2008); Administrator v. Gabbard, NTSB Order No. EA-5293 (2007); Administrator v. Taylor, NTSB Order No. EA-5132 (2005).

¹² 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.

airman certificates on § 91.17(a)(3) alone. Section 91.17(a)(3) specifically prohibits a person from acting as a crewmember of an aircraft while using any drug "that affects the person's faculties in any way contrary to safety"; § 91.17(a)(3) does not reference generic "substance abuse" as evidenced by a positive drug test result as grounds for sanction.

For operations under Part 91, the Administrator relies upon the regulations governing the authorization of medical certificates, as discussed at note 12, supra, as well as § 91.17(a)(3), to ensure that general aviation pilots are not operating aircraft while using a prohibited substance. We are also very mindful of the fact that the other provisions of § 91.17 involve alcohol use; § 91.17(a)(1), for example, proscribes acting or attempting to act as crewmember "[w]ithin 8 hours after the consumption of alcohol." However, no provision within § 91.17 includes a similar prohibition for drugs—any usage of an illicit drug contemporaneous with service as a crewmember is forbidden, but not necessarily a use within a certain time period prior to flight. Thus, on its face, forbidden is any contemporaneous use, however slight.

We conclude that the only logical interpretation of § 91.17(a)(3) in the context of the plain language of § 91.17 is that the regulation proscribes having a drug "that affects a person's faculties in any way contrary to safety" in one's

system at the time he or she serves or attempts to serve as a crewmember. The Administrator's argument that drug metabolites alone remaining in a crewmember's system at the time of flight, in any unspecified quantity, whether such drugs are illicit or legal, is inconsistent with the context in which this provision rests and the plain language of the section.

Given the number of critical inferences that we would be required to infer from the plain language of the regulation to find in favor of the Administrator's proposed interpretation of § 91.17(a)(3), combined with the fact that the plain language of § 91.17(a)(3) does not reference metabolites or any specific measurement of metabolites that would indicate prima facie impairment, we find the Administrator's interpretation of this regulation arbitrary and capricious. We urge the Administrator to revisit this provision under agency rulemaking powers and either modify the regulatory provision or reserve its application to those circumstances where the plain language is clearly applicable, specifically that there is evidence to indicate a proscribed drug was present in the person's system at the time of flight. Where a certificated airman has not violated the language in the regulatory provision addressing proscribed activity, we are constrained to find the Administrator's interpretation of the regulation arbitrary and capricious.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The law judge's decision is reversed; and
3. The Administrator's order of revocation is dismissed.

HERSMAN, Chairman, HART, Vice Chairman, and ROSENKER, HIGGINS, and SUMWALT, 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, *
Administrator, *
Federal Aviation Administration, *
*
Complainant, *
v. *
JOHN B. HOLLAND, *
*
Respondent. *
* * * * *

Docket No.: SE-18266
JUDGE GERAGHTY

Jackson Federal Building
915 Second Avenue
Courtroom 514
Seattle, Washington 98174

Wednesday,
September 24, 2008

The above-entitled matter came on for hearing,
pursuant to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding on the Appeal of John B. Holland, hereinafter Respondent, from an Order of Revocation which seeks to revoke his Airman's Certificates, including his Airline Transport Pilot Certificate, Commercial Pilot Certificate, and Flight Instructor Certificates. The Order of Revocation serves herein as the Complaint and was filed on behalf of the Administrator, Federal Aviation Administration, herein the Complainant.

The matter has been heard before this Administrative Law Judge and, as provided by the Board's Rules, I am issuing a bench decision in the proceeding.

Pursuant to notice, this matter came on for trial on September 24th, 2008 in Seattle, Washington. The Complainant was represented by one of his Staff Counsel, Carey Terasaki, Esquire, of the Northwest Mountain Region, Federal Aviation Administration. The Respondent was present at all times and was represented by his Counsel, Peter C. Lown, Esquire, of

1 stipulation, it is clear that there is no dispute to the
2 primary allegation of that statement, that the Medical Review
3 Officer verified to the Respondent that in the Medical Review
4 Officer's evaluation, that there had been a positive drug test
5 result. So, in effect, that allegation is established. It
6 does not, however, prove of itself a positive drug test result.

7 DISCUSSION

8 As noted, the Administrator seeks revocation of the
9 certificates which I enumerated based on the allegation that
10 the Respondent, when selected for a random drug test and
11 submitting himself for such a drug test on October 25, 2007,
12 that on subsequent testing of the specimens that the Respondent
13 supplied, that the testing resulted in positive drug tests and,
14 therefore, based upon those findings by the Administrator, the
15 Complainant herein, it was concluded by the Complainant that
16 the Respondent had been operating in violation of the
17 provisions of Section 91.17(a)(3) of the Federal Aviation
18 Regulations. That Regulation provides as pertinent herein that
19 no person may act or attempt to act as a crew member of a civil
20 aircraft while using any drug that affects the person's
21 faculties in any way contrary to safety. It was further
22 alleged that, by reason of the positive drug tests, that the
23 Respondent was in regulatory violation of provisions of Section
24 61.15(b)(2), which states that an individual committing an act
25 prohibited by Section 91.17(a), as is pertinent here, is

1 grounds for suspension or revocation of any certificate rating
2 or authorization issued under this Part, that is, Part 61.

3 It is clear from the admissions and the pleadings and
4 the stipulation that the case turns, really, on the denials
5 entered by the Respondent with respect to the allegations
6 contained in Paragraphs 8, 11, and 12 of the Complaint, 12
7 being essentially a legal argument, whereas Paragraphs 8 and 11
8 are factual allegations.

9 The Complainant's case is made through the testimony
10 of several witnesses, the first of which was a Mr. Brian
11 Bischoff. He is associated with the Pathology Associates
12 Medical Services Laboratory in, I believe, Seattle, Washington,
13 and it was abbreviated as PAMS. On his statements as to his
14 background experience, he is clearly qualified to testify with
15 respect to the Exhibit and package prepared by that laboratory
16 on their testing of the specimen supplied by the Respondent on
17 October 25, 2007. The testing was done by the laboratory the
18 following day, that is, October 26, 2007.

19 Mr. Bischoff did go through the various pages of the
20 litigation package, as he called it, that was prepared under
21 his supervision, and it does appear from his testimony and I
22 would so find that there is no question as to the validity of
23 the chain of custody, that the specimen tested was, in fact,
24 the Respondent's specimen.

25 The first test was an immunoassay test, which is,

1 essentially, the preliminary screening or initial screening
2 test. On the testimony and the Exhibit, it reflects that on
3 testing in that laboratory, that the test was returned positive
4 for cocaine metabolites with 111%. This laboratory does not
5 report it in numerical figures such as in 49 C.F.R., the cutoff
6 of 300 nanograms per milliliter. On Mr. Bischoff's testimony,
7 100% in their laboratory and the equipment that they use would
8 be equivalent to the 300 figure. So on his testimony, clearly,
9 111% return on their calibrated testing equipment would be an
10 initial screening positive which would require a confirmation
11 of the results pursuant to the requirements under the DOT
12 requirements in 49 C.F.R. Page 37 of Exhibit C-1 is the
13 confirmation results, and it confirms the presence of cocaine
14 metabolites in the amount of 271.41 nanograms per milliliter.
15 As to the equipment itself, Mr. Bischoff pointed out that on
16 Page 56 there is the report of the testing of the equipment,
17 that is, the calibration. He states that the equipment is
18 calibrated daily and tested every morning prior to any use, and
19 on Page 58 is further data showing the testing and, further,
20 that the machine is recalibrated before each run or, that is,
21 each test that is performed on the particular equipment. After
22 the testing, he did indicate that the results had been sent by
23 one of the employees in the laboratory to the Medical Review
24 Officer, the MRO.

25 On cross-examination, he did again testify that, if a

1 test was tested on the initial testing as higher than 300
2 nanograms per milliliter, that would be indicated returned as a
3 positive test requiring a confirmation and that anything below
4 that would be declared a negative test and would end any
5 testing at that time. He stated the screening test is a
6 presumptive test and, if it's positive, then further testing is
7 required, as he's already testified to, and pointing out that
8 the gas chromatography/mass spectrometry is the more precise
9 test, and as I've already indicated, according to their
10 testing, it was returned at 271.4 nanograms per milliliter,
11 where the DOT cutoff given in 49 C.F.R. for confirmation
12 testing is 150. So that, again, this was clearly a
13 confirmation of a positive test in his view.

14 As far as the metabolites from the use of cocaine
15 being detectable in the urine, not in the blood, in the urine,
16 he indicated it would be detectable depending on the amount
17 originally injected or otherwise ingested anywhere from one to
18 two days after use of the primary drug.

19 For continuity, I discuss his rebuttal testimony
20 here. On rebuttal, he indicated with respect to Exhibit C-4 as
21 to the testing was solely for particular metabolites in a
22 particular specimen, not just the cocaine metabolite,
23 indicating that the presence of, in some manner, of some
24 additional metabolites, which are not relevant to whether or
25 not the test is positive, can be included. However, he was

1 clear in his testimony that that did not affect the primary
2 assay which he again viewed as reflecting a positive test
3 requiring the confirmation test. He also testified that in
4 testing for the preliminary assay testing with respect to the
5 confirmation testing where the confirmation is 271 or 271.4 is
6 not a linear extraction, so that the 271, in his view, did not
7 mean that the specimen itself was less than 300 nanograms per
8 milliliter on the assay test. That is, you could not
9 extrapolate from one back to the other, that it was not a
10 linear; it was more like a curve, as he described it.

11 Mr. Michael Daggett is with the Laboratory
12 Corporation of America or, as referred to, LabCorp. On his
13 testimony, he is essentially responsible for all the operations
14 within the Lab or, as he indicated, the Lab Manager for
15 toxicology, the daily operations and training. This laboratory
16 was used for the confirmation test which was conducted on
17 November 1, 2007. They use the gas chromatography/mass
18 spectrometry testing, which is the more accurate one, and using
19 a times 2 dilution, again, referring to his Exhibit C-2, after
20 going through the chain of custody, which I simply observe on
21 his testimony, also, there is no evidence to me that would
22 indicate that the chain of custody was not correctly followed.
23 It was brought out on cross-examination that the first
24 laboratory had dispatched the test by courier on the 29th of
25 October and that LabCorp received it on 10/31, with only the

1 indication of courier, but there's no indication that -- in the
2 record -- that anything other than when the tests were -- or
3 the specimen to be tested was taken into LabCorp, that there
4 was anything wrong with the specimen as transported from one
5 lab to the other. The seals were intact, the numbers were
6 correct, and there's simply no evidence offered that would
7 cause questioning of the chain of custody of the specimen
8 itself. As he put it, in his view, the chain of custody was
9 "okay". Referring to Page 9, it was received with seals intact
10 and no evidence of any tampering or other untoward action with
11 the vials that were submitted from one laboratory to the other.

12 The testing was done on that, as I've indicated in
13 his testimony, with the two times dilution, which is reflected
14 on Page 13 of the Exhibit. That came back in their testing 270
15 nanograms per milliliter and, again, which would be a positive
16 test, and it was so reported as indicated on Page 6 of Exhibit
17 C-2 and Page 7 of C-2. So reported on the chain of custody
18 form to the Medical Review Officer, the MRO.

19 Ms. Kimberly Greenberg testified also for the
20 Complainant. She's an investigator for the Federal Aviation
21 Administration in the Special Investigation Branch dealing with
22 medical problems, apparently. She testified with respect to
23 the fact that she had been involved in the investigation of the
24 Respondent's report of a positive test and confirmed that on
25 Exhibit C-3, the completed CCF, that the medical review officer

1 had, in fact, after interview with the Respondent and reviewing
2 the materials submitted, had reported it as a positive drug
3 test.

4 The Respondent testified on his own behalf and called
5 one witness. The witness called was John Vasiliades. And I'm
6 sure I have mispronounced the name, and I apologize if I did.
7 However, this witness was clearly qualified to testify in this
8 proceeding. Without belaboring his background, he's Board-
9 Certified in chemistry, in toxicology, and forensic toxicology.
10 He's been a Professor of Toxicology and associated with various
11 labs and, interestingly enough, intimately involved with the
12 drug testifying program of the United States Air Force. So,
13 clearly, he was testing on a background of experience and
14 qualifications which I clearly accept.

15 He also indicated he was familiar with the DOT
16 testing program, the screening test of the assay being the
17 initial procedure, if there is a positive on that, then there's
18 the confirmation test, and again, the gas chromatography mass
19 spectrometer being the more reliable of the two in testing for
20 metabolites.

21 He indicated, however, that the testing is used to
22 find the users of the drug and it is not to determine when a
23 particular individual was using the drug, that the metabolites,
24 after the use of the drug in a percentage, and I think he said
25 40% of like a Sweet 'N Low package, you could have a

1 persistence -- and this was essentially the same as Bischoff --
2 he said, this witness, indicated it could perseverate for up to
3 three days with metabolites in the urine and, as he indicated
4 in his testimony, that it would not be possible to say how much
5 an individual was using or when the drug was taken, simply that
6 the metabolites are there.

7 The witness indicated he had reviewed the laboratory
8 reports, which are referred to as Exhibits C-1 and C-2, and did
9 indicate that the reports were, as I've already discussed, the
10 initial assay test of 111% being the 300 nanograms per
11 milliliter, the confirmation of both the first lab and the
12 second lab of, roughly, 270 nanograms per milliliter, as he
13 stated, almost identical. However, the witness took issue with
14 the testing. In his view, the testing done by the PAMS was
15 questionable in that, in his view, based upon a letter that had
16 been written to Mr. Bischoff indicating that there was like a
17 20% variance possible in their initial assay, immunoassay test,
18 that there could be in what in his view would be a false
19 positive because 280, based upon what he read in the letter,
20 could come back as a positive, although it was less than what
21 the DOT sets forth in 49 C.F.R., that is, the 300 nanograms per
22 milliliter. So, to summarize his testimony, there really
23 should never have been any confirmation test and that the
24 entire testing process should, in his view, have been stopped
25 immediately and that it was an error in the testing procedure

1 to proceed because, based upon their own statement as to the
2 fact that there could be an error of 20% one way or the other
3 in the initial assay test that, since this was close to the 300
4 nanograms per milliliter, that the testing should not be relied
5 upon.

6 The Respondent testified on his own behalf. He holds
7 the Certificates that I've already discussed. He's been a
8 pilot since 1971, a professional pilot since 1979. He
9 essentially flies Part 91, and I take that that is his primary
10 source of livelihood. He testified to the fact that about four
11 days prior to the testing, that he had cancer surgery to remove
12 some cancerous growth on his forehead. That was done the 22nd
13 or the 23rd of October. He was given medication for that,
14 according to his testimony, topically to numb his forehead.
15 With respect to that medication, the witness did say that,
16 according to the surgeon, that lidocaine was the medication
17 used topically, and there was also testimony on cross-
18 examination as to an affidavit from the nurse. The notes were
19 not complete. However, the only evidence offered as to the
20 type of medication would be lidocaine, and lidocaine is not a
21 base type drug which would result in the type of testing that
22 was already discussed.

23 The Respondent indicated that over his career, he has
24 had drug testing of about at least 20 tests, that he has never
25 had a problem with any of those tests, and that he had never

1 used any prohibited type of drugs 90 days prior to this
2 particular event of October 2007 or ever in his testimony.

3 That, to me, is the basic evidence in the case. As
4 the Board has clearly held, in this type of case, where the
5 Administrator has established a prima facie case, the
6 Respondent then has the burden of proving an affirmative
7 defense by a preponderance of the evidence. The Complainant,
8 the Administrator, has no duty to rebut the affirmative
9 defenses, and I cite to the Board's holdings in Administrator
10 v. Tsegaye, T-s-e-g-a-y-e, which is Board Order EA-4205, a 1994
11 case, and Administrator v. Zingali, Z-i-n-g-a-l-i, Order No.
12 EA-3597, a 1992 case. Also, in evaluating the testimony here,
13 I take into account the Board's decision in Administrator v.
14 Kalberg, Board Order EA-5240, a 2006 case in which the Board
15 accepted the verbiage and language of 49 C.F.R., which
16 essentially is that explanations of inadvertent ingestion or
17 unknown ingestion of a prohibited substance, that type of
18 explanation is unavailing. It is doubtful whether that type of
19 exculpatory claims, even if believed, would establish a
20 sufficient defense to operational violations because of the
21 language in 49 C.F.R. which requires the MRO also to not accept
22 that type of explanation, and the explanation must be offered
23 to the MRO at the time of the interview, and it must be a
24 medically legitimate explanation, and explanations that someone
25 else unknowingly gave an individual a prohibited drug is not an

1 acceptable explanation, and that language also is accepted by
2 the Court in a case which was originally heard in the 6th
3 Circuit U.S. Court of Appeals.

4 And, lastly, I do acknowledge that the Board in the
5 case of Administrator v. Swaters, S-w-a-t-e-r-s, Order No. EA-
6 5400, a 2008 case, that the Board in that case, in affirming
7 the revocation in that case, discussed and accepted the
8 presence of drug metabolites in the urine as a basis for
9 finding a regulatory violation of Section 91.17(a) of the
10 Federal Aviation Regulations.

11 So it is not whether the cocaine or heroin or
12 whatever is found in the blood system; it is sufficient if the
13 metabolites on the testing come back to indicate prohibited
14 levels of metabolites' presence in the urine. That is
15 sufficient, a violation of that Section of the Regulations.

16 Turning to the specific issues that were raised on
17 the pleadings in the case, Paragraph 8 of the Complaint, as I
18 indicated, was denied. On my view, the preponderance of the
19 reliable and credible evidence is that the PAMS Laboratories
20 are certified by Health and Human Services Department and also
21 accepted by DOT. They're certified. Their equipment is
22 tested. There's no indication that equipment was in any way in
23 error on the date in question. The testing is accepted. As to
24 the Respondent's offer of testimony that, based upon a letter,
25 that there would be possibly a 20% deviation and, therefore, it

1 could have been a false positive, that is just in my view not
2 sufficient by a preponderance of the evidence to overcome a
3 prima facie case of the Administrator by testimony of
4 Mr. Bischoff as to the testing that they did, finding an assay
5 test of 111%, which would indicate more than the 300 nanograms
6 per milliliter and, as he testified in rebuttal, there is
7 really no linear connection between the 271.41 nanograms per
8 milliliter and the existence of 111% or 300 nanograms per
9 milliliter on the primary assay test. I, therefore, find that
10 the allegations contained in Paragraph 8 and 8A and B are
11 established on the preponderance of the evidence.

12 Paragraph 11 deals with the confirmation testing done
13 on the split sample as Mr. Daggett testified to, and there is
14 no question that Exhibit C-2 and the testimony of Mr. Daggett
15 that the gas chromatography/mass spectrometry test performed by
16 that laboratory on November 1st reconfirmed that there was, in
17 fact, a positive result for prohibited metabolites of cocaine.
18 Again, as I've indicated, with both of these laboratories,
19 there's no question in my mind or evidence offered that would
20 cause a question as to the chain of custody either in the
21 initial transport to the first laboratory or between the two
22 laboratories. It was the Respondent's specimens which were, in
23 fact, tested in both instances.

24 Turning to the argument as to the validity of
25 scientifically a violation of Section 91.17(a)(3) of the

1 Regulations, which prohibits a person from acting or attempting
2 to act as a crew member of a civil aircraft, the Respondent
3 individually acted as a crew member on the date of the drug
4 testing, that is, October 25, 2007. I believe he said block
5 out time was 9:40 a.m. The specimen was collected about an
6 hour and a half or two hours earlier. And the Regulation goes
7 on to say that, while using any drug that affects the person's
8 faculties in any way contrary to safety. Without belaboring
9 it, cocaine would obviously adversely affect a person's ability
10 to act safely. But the language does not mean that one has to
11 be sitting in the cockpit and ingesting or injecting the
12 particular drug. It is if he has been using it while using any
13 drug that may affect the faculties contrary to safety. On the
14 evidence here, the Respondent testified positive for
15 metabolites of cocaine, which indicates that he had used
16 cocaine within a period of time that metabolites would show up
17 in his system. So he was using when he ingested that substance
18 that would affect in a contrary way aviation safety. That is
19 sufficient under this Regulation, and that is the same
20 interpretation that the Board followed in the Swaters case.
21 Obviously, the pilot in that case was tested after having
22 flown, and there was no indication that he was using the
23 prohibited substance, I think it was cocaine and heroin in that
24 case, while he was actually flying. It was that he had used it
25 at some time prior, and there were metabolites on testing that

1 showed that he had used it and so he had been using it, and it
2 was a drug that would affect aviation safety. In my view, the
3 Regulation is correct and, of course, the Board does not rule
4 on the Regulations. But that interpretation in my view is the
5 reasonable interpretation and the interpretation of the
6 Administrator and, therefore, on the evidence in front of me,
7 there is no reasonable medically legitimate explanation for the
8 presence of any metabolites found in the urine samples. The
9 burden is on the Respondent to furnish an explanation. The
10 only explanation he gave was lidocaine, and that's not
11 sufficient. It was rejected by the MRO, and the explanation,
12 in any event, under 49 has to be given to the MRO at the time
13 of interview, and on the evidence here, there is no showing
14 other than that the Administrator has by a preponderance of the
15 reliable and probative evidence established the charges in his
16 Complaint. I, therefore, find that it is established that the
17 Respondent did act in regulatory violation of Section
18 91.17(a)(3) of the Federal Aviation Regulations.

19 Section 61.15(b)(2) authorizes the Administrator, the
20 Complainant herein, to either suspend or revoke any and all
21 certificates or ratings or authorizations issued to an
22 individual who has been found to have acted in regulatory
23 violation of the Regulation of which I have just previously
24 cited, that is, the one in Part 91. Board precedent, again,
25 the Swaters case, is sufficient for that. In the Kalberg case

1 the Board affirms revocation. Deference, by statute, is
2 required to be shown to the Administrator's choice of sanction
3 and by statute, unless it is shown to be arbitrary or
4 capricious, which has not been shown here, or not in accord
5 with precedent. Board precedent does, as I've already
6 indicated, substantiate revocation and, therefore, I must
7 necessarily on the finding of regulatory violations affirm the
8 Administrator's Order of Revocation, the Complaint herein, as
9 issued.

10

ORDER

11

IT IS, THEREFORE, ADJUDGED AND ORDERED THAT:

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1. The Complainant's Order of Revocation, the
Complaint herein, be and the same hereby are affirmed as
14 issued.

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2. The Respondent's Airline Transport Pilot
Certificate, Commercial Pilot Certificate, and Flight
Instructor Certificate are hereby revoked.

18

19

Entered this 24th day of September 2008, at Seattle,
Washington.

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EDITED AND DATED ON

PATRICK G. GERAGHTY

23

OCTOBER 17, 2008

Administrative Law Judge

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25