

SERVED: May 23, 2011

NTSB Order No. EA-5586

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 19th day of May, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18296RM
v.)	
)	
MICHAEL GEORGE MANIN,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

On remand from the United States Court of Appeals for the District of Columbia Circuit,¹ we revisit respondent's appeal of

¹ Manin v. NTSB, 627 F.3d 1239 (2011). Although respondent named the National Transportation Safety Board (NTSB) as a respondent in his petition for review before the Court of Appeals, the NTSB performed a quasi-judicial function in that it adjudicated respondent's appeal from the Administrator's order of suspension. The Federal Aviation Administration is the party in interest, not the NTSB, which does not typically participate in

the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr. The law judge had dismissed respondent's appeal of the Administrator's emergency order² revoking respondent's airline transport pilot, flight instructor, flight engineer, and first-class airman medical certificates, based on respondent's alleged intentional falsification of several applications for his airman medical certificate.

In particular, the Administrator alleged respondent submitted several applications for an airman medical certificate, from 2000 to 2007, in which he answered "no" in response to question 18w on the applications, certifying he had "no history of nontraffic conviction(s) (misdemeanors or felonies)." The Administrator's order stated the FAA discovered respondent had two convictions for domestic violence/disorderly conduct that he had not declared on the medical applications; in particular, respondent was found guilty of such charges both on October 16, 1995, and on September 8, 1997, in Ohio. As a result, the order alleged respondent's answers to at least four medical certificate applications were knowingly and intentionally false. The order concluded with a statement that

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the judicial review of its decisions. See 49 C.F.R. § 821.64(a).

² Respondent waived the expedited procedures normally applicable to emergency proceedings.

respondent had a prior history of falsification of medical certificate applications, and that the Board had previously revoked his certificates as a result of such falsifications.³ The order alleged respondent violated 14 C.F.R. § 67.403(a)(1),⁴ and ordered revocation of respondent's certificates. Respondent submitted an answer to the Administrator's order, in which he presented two affirmative defenses, based on the Board's stale complaint rule⁵ and the doctrine of laches.⁶

The law judge held a hearing to accept oral argument concerning both parties' motions for summary judgment, at which the Administrator submitted into evidence certified copies of respondent's 1995 and 1997 convictions. The Administrator also provided a copy of the Ohio statute that respondent violated, a certified copy of respondent's airman medical certification

³ See Administrator v. Manin, NTSB Order Nos. EA-4303 (1994) and EA-4337 (1995).

⁴ Title 14 C.F.R. § 67.403(a)(1) provides that no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate.

⁵ Section 821.33 of the Board's Rules of Practice provides that a respondent may move to dismiss the Administrator's allegations when the Administrator has based the complaint on allegations of offenses that occurred more than 6 months prior to the Administrator's advising the respondent as to the reasons for the Administrator's proposed action.

⁶ The doctrine of laches is an equitable doctrine by which "some courts deny relief to a claimant who has unreasonably delayed or been negligent in asserting a claim." Black's Law Dictionary 630 (9th ed. 2009).

file, and copies of our previous decisions in which we concluded that respondent had falsified a medical certificate application. In response to the Administrator's evidence, respondent articulated legal arguments concerning the doctrine of laches and his lack of knowledge of the convictions.⁷

At the conclusion of the hearing, the law judge granted the Administrator's motion for summary judgment, and dismissed respondent's arguments based on the doctrine of laches and the stale complaint rule, because the Administrator "proceeded diligently" to pursue the case, in the interest of safety. Initial Decision at 74. With regard to the substantive issue of whether respondent should have reported the "minor misdemeanors" in response to question 18w on his medical certificate applications, the law judge held that, "minor or otherwise, a misdemeanor is a misdemeanor," and respondent therefore should have included it on his applications. Id. at 75. The law judge concluded his decision by stating that respondent's incorrect answers on the applications at issue amounted to intentional falsifications.

Following the law judge's decision, we denied respondent's appeal of the law judge's conclusions. We held respondent's

⁷ Respondent argued the Administrator could not prove that he knowingly and intentionally falsified the medical certificate applications because respondent could not have known that he needed to list on his medical applications the "minor misdemeanor" of which he was twice convicted.

arguments concerning the doctrine of laches and the stale complaint rule did not present a genuine issue of material fact that was sufficient to overcome disposition by summary judgment. We cited previous Board cases for the proposition that the doctrine of laches is relevant to Board cases only in the context of the stale complaint rule.⁸ We further stated that, because the Administrator alleged respondent lacked qualifications to hold an airman certificate, the stale complaint rule was inapplicable, and we therefore did not consider respondent's argument concerning the doctrine of laches to form a basis for reversing the law judge's decision.

We also rejected respondent's argument that he did not falsify his medical certificate applications because he did not know he needed to report the convictions of misdemeanors. We referenced our long-held three-part standard for 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.⁹ We then stated we had previously rejected a respondent's own interpretation of the requirements of a medical certificate, and

⁸ We cited Administrator v. Robertson, NTSB Order No. EA-5315 at 6-7 (2007); Administrator v. Adcock, NTSB Order No. EA-4507 at 2 (1996); and Administrator v. Brown, 4 NTSB 630, 631 (1982).

⁹ Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)).

indicated a person of "ordinary intelligence should be able to interpret question 18w on the medical certificate application to include all nontraffic convictions of any type."¹⁰ We stated respondent was cognizant of the falsity of his answers to question 18w on the medical certificate applications, and therefore had violated 14 C.F.R. § 67.403(a)(1). We decided the law judge did not err in denying respondent's appeal concerning the intentional falsification issue.

On appeal, the Court of Appeals for the District of Columbia Circuit disagreed with our analyses. Based on this decision, we remand the case for further proceedings as follows.

Doctrine of Laches

With regard to the doctrine of laches, the Court cited other Board cases holding a respondent may use the equitable defense of laches in cases where the stale complaint rule is inapplicable. The Court consequently ordered us to reconsider respondent's argument concerning the doctrine of laches to determine whether the Administrator's delay in issuing the order of revocation prejudiced respondent's ability to defend against the order. The Court indicated respondent's laches defense may

¹⁰ Administrator v. Manin, NTSB Order No. EA-5439 at 9-10 (2009) (citing Administrator v. Dillmon, NTSB Order No. EA-5413 at 8-10 (2008); Administrator v. Martinez, NTSB Order No. EA-5409 at 9-10 (2008); Administrator v. Boardman, NTSB Order No. EA-4515 at 8-9 (1996); and Administrator v. Sue, NTSB Order No. EA-3877 at 5 (1993)).

be meritless, but nevertheless instructed the Board to consider it. Specifically, the Court stated as follows:

It is ... true that Manin made his assertions of prejudice in vague and conclusory terms: He never identified particular people he was hoping to find or specific details he had forgotten. Nor did he explain how any people, files, or memories that he can no longer access would enhance his ability to defend against the revocation of his airman certificates. Therefore, if the Board had considered the merits of Manin's laches defense at the summary judgment stage, it may well have ruled just as it did.

627 F.3d at 1242–43. The Court based this reasoning on the standard that a respondent may not assert a defense based on laches "when he makes only 'conclusory allegations ... that delay has adversely affected [his] ability to locate witnesses or produce evidence,' because such allegations are 'insufficient to establish that an airman has in fact been prejudiced in defending against a charge.'"¹¹ Our case law indicates respondents have a challenging burden to fulfill in prevailing on the basis of a laches defense, as they must establish the delay caused them "actual prejudice."¹²

¹¹ Id. at 1242 (citing Administrator v. Peterson, 6 NTSB 1306, 1307 n.8 (1989), and quoting Administrator v. Shrader, 6 N.T.S.B. 1400, 1403 (1989): "[i]t is not sufficient ... simply to claim ... that the passage of time has or may have affected the availability of documents or witnesses or the strength of the latters' memories").

¹² Administrator v. Rauhofer, 7 NTSB 765, 766 (1991) (stating, "[e]ven if the doctrine of laches were available as a defense to a respondent in Board proceedings, he would have to show actual prejudice in the ability to defend himself, caused by the delay,

On remand, we direct the law judge to consider whether respondent proved he suffered actual prejudice in assessing whether respondent is entitled to equitable relief pursuant to the doctrine of laches. Specifically, the law judge should consider whether respondent articulated how the delay specifically harmed him, and provided evidence indicating such harm.

Intentional Falsification

The Court further instructed us to reconsider respondent's arguments concerning intentional falsification, given the Court recently remanded Dillmon, supra note 10,¹³ with direction that we must consider a respondent's subjective understanding of a question on a medical certificate application when a respondent presents such an argument. In light of the D.C. Circuit's opinion in Dillmon, we issued a post-remand opinion and order instructing law judges to assess a respondent's credibility in determining whether the respondent misunderstood a question on a medical certificate application.¹⁴ In addition, we issued an

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in order to avail himself of this"); see also Administrator v. Brzoska, NTSB Order No. EA-4288 at 6 (1994) (stating the laches defense "cannot succeed unless the respondent makes a showing that he suffered actual prejudice to his defense as a result of the delay").

¹³ Dillmon v. NTSB, 588 F.3d 1085 (D.C. Cir. 2009).

¹⁴ Administrator v. Dillmon, NTSB Order No. EA-5528 at 12-13

opinion in Administrator v. Singleton, applying this new standard and consequently stating summary judgment is an improper means for disposing of intentional falsification cases.¹⁵ It is this standard we direct the law judge to apply on remand in the case at issue here.

Similar to the circumstances of Singleton, we are compelled to remand this case to the law judge for a determination concerning respondent's state of mind at the time he completed the medical certificate applications in question. As we indicated in our post-remand Dillmon opinion, law judges' credibility findings concerning a respondent's defense that he or she misunderstood a question on the application are critical in determining the veracity and overall practicability of the defense. Therefore, we ask the law judge to consider all evidence—both direct and circumstantial—indicating respondent's state of mind at the time he completed the applications.¹⁶

(..continued)

(2010). We further stated we will consider circumstantial evidence that may indicate a respondent's state of mind at the time he or she completed the medical certificate application.

¹⁵ Administrator v. Singleton, NTSB Order No. EA-5529 (2010) (on remand from D.C. Cir., Singleton v. Babbitt et al., 588 F.3d 1078 (D.C. Cir. 2009) (per curiam)). The Court issued the opinions in both Dillmon and Singleton after we served Manin, NTSB Order No. EA-5439 (2009).

¹⁶ See Administrator v. JetSmart and Howe, NTSB Order No. EA-5572

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further proceedings consistent with this opinion and order.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

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at 17-18 (2011) (relying on law judge's credibility findings concerning respondent's self-serving testimony in tandem with circumstantial evidence the Administrator presented).

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. *
MICHAEL GEORGE MANIN, *
*
Respondent. *
* * * * *

Docket No.: SE-18296
JUDGE FOWLER

U.S. Tax Court
Celebrezze Federal Building
1240 East 9th Street, Room 3013
Cleveland, Ohio

Tuesday,
September 16, 2008

The above-entitled matter came on for hearing,
pursuant to notice, at 10:00 a.m.

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

APPEARANCES:

On behalf of the Administrator:

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Federal Aviation Administration
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

JUDGE FOWLER: Thank you very much, gentlemen. As I said earlier, at least in my opinion, this is a case of first impression. We have a total of four exhibits admitted into the record on behalf of the Administrator, and five exhibits on behalf of the Respondent. I have reviewed these exhibits, and we've had lengthy argument here pertaining to this case.

We know why we're here. The Administrator's has charged, and I have later denied an Administrator's Motion for Summary Judgment and the Respondent's Cross Motion for Summary Judgment as to whether or not the Respondent Michael G. Manin was required to place a disorderly conduct charge in 1995 and 1997 on his medical applications. That's why we are here.

I'm going to try to be as brief and concise as I can be. We have had extensive arguments on this renewed Motion for Summary Judgment. The Administrator's additional argument and the evidence adduced thereby is circumstantial, but it is my final analysis and determination that it is enough to have me grant the Administrator's Motion for Summary Judgment. This is

1 not the usual case, by far.

2 We have a Respondent here who, not only was the
3 holder of an airline transport pilot's certificate, which is
4 the highest certification you can get in the aviation realm
5 where the United States is concerned. He has a previous history
6 of airman medical certification application qualifications
7 which certainly alerts me that he is not the average or the
8 typical airman.

9 I cannot disagree, in essence, with the earlier case
10 of David Hinson versus Michael Maddin, decided by Judge Patrick
11 P. Geraghty. It is almost hard to believe, on my part, that
12 when you're applying for a first class airman medical
13 certificate that any conviction, you would not answer
14 affirmatively about it. It is very difficult and we cannot see
15 or read into an individual's mind as to whether he had actual
16 knowledge or an element of fraud when he made this application
17 on October 23, 2007.

18 The fact that the Administrator didn't bring an
19 action here until February of 2008, to me, the time element is
20 inconsequential. The Administrator, and the Board has held on
21 so many occasions, particularly in emergency proceedings that
22 upon the time and date when the Administrator got first
23 knowledge, that he proceeded diligently, that was sufficient to
24 enforce the Administrator's burden of the public safety his
25 primary concern.

1 It is my determination, after reviewing the totality
2 of the evidence we have before us, the exhibits, and the
3 arguments here, that there is substantial, although
4 circumstantial, there is substantial and sufficient
5 circumstantial evidence to know that the Respondent knew he had
6 been convicted of these two disorderly conduct charges in
7 October 1995 and September 1997. He, certainly with his
8 experience, knowledge, training, and background, and certainly
9 in view of a previous violation, should have been put on notice
10 and should have answered the question accordingly, Question 18W,
11 that he had had convictions.

12 Much has been made, and it's a very interesting point
13 about the Ohio Revised Code, classifying these two disorderly
14 conduct convictions as minor misdemeanors, but I cannot
15 disagree with the Administrator's position that minor or
16 otherwise, a misdemeanor is a misdemeanor, and it should have
17 been answered to accordingly on the Respondent's medical
18 application.

19 There is ample Board precedent by the Board, in prior
20 cases, that an incorrect answer on a medical application
21 constitutes sufficiently a prima facie proof of intentional
22 falsification, and that, I think, that's apropos here. Other
23 than circumstantially here, the Administrator has not proven on
24 this recent medical application where the disorderly conduct
25 charges are concerned, that the Respondent knowingly and

1 intentionally or fraudulently answered as he did with relation
2 to these two disorderly conduct convictions.

3 We don't know that, but based on the remaining
4 circumstantial evidence, coupled with the prior convictions and
5 the record, as set forth in Administrator's Exhibit A-4,
6 relative to the date of 9/7/2005, that in and of itself, in
7 view of the Respondent's history, would be enough to sustain
8 the Administrator's Motion for Summary Judgment by a fair and
9 reasonable preponderance of the evidence, as adduced before me
10 at this time.

11 ORDER

12 SO, MY RULING IS THAT: On the Motion for Summary
13 Judgment, on behalf of the Administrator and the
14 Administrator's amendment to the Complaint concerned, is
15 granted and affirmed, this, of course, affirms the order of
16 revocation where the Respondent is concerned. This decision
17 and Order is issued by William E. Fowler, Junior, Chief Judge
18 for the National Transportation Safety Board.

19 Off the record.

20 (Off the record.)

21 (On the record.)

22 JUDGE FOWLER: On the record, let the record indicate
23 that, as the Judge in this proceeding, I have granted the
24 Administrator's Motion for Summary Judgment after extensive,
25 thorough and lengthy presentations and arguments by both

1 Counsel on both sides of this case, coupled with the admission
2 of a minimum of nine exhibits, which have been duly admitted
3 into the hearing record in this proceeding, as it's presently
4 constituted.

5 That being so, I will declare the hearing closed. We
6 stand adjourned, ladies and gentlemen.

7 (Whereupon, at 2:20 p.m., the hearing in the above-
8 entitled matter was concluded.)

9

10

11 EDITED AND DATED ON

12 October 6, 2008

13

WILLIAM E. FOWLER, JR.

Chief Judge