

SERVED: June 27, 2011

NTSB Order No. EA-5589

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 27th day of June, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-19097
	v.)	
)	
ROBERTA LYNN PORCO,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent has appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on June 15, 2011.¹ The law judge's decision appeared to affirm the Administrator's emergency order of revocation of respondent's

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

airline transport pilot, flight instructor, and first-class medical certificate, as well as any other certificates respondent holds, based on a finding that respondent violated 14 C.F.R. § 67.403(a)(1).² We remand for clarification concerning the law judge's order.

The Administrator issued the order, which serves as the complaint in this case, on May 12, 2011. The complaint alleged respondent violated § 67.403(a)(1) by certifying she had "previously reported" an "arrest and/or conviction while driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug," in response to question 18v on the medical certificate application. The complaint stated this answer was false because respondent was arrested on March 24, 2010 for driving under the influence of alcohol, and her "previously reported" notation did not refer to the March 24 arrest, but instead referred to an earlier one. The complaint also stated the Administrator relied upon respondent's answer to question 18v in issuing her a medical certificate.

Respondent appealed the Administrator's complaint, and the case proceeded to hearing. The Administrator presented four witnesses at the hearing, two of whom observed respondent's

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.

arrest on March 24, 2010, and testified she was intoxicated and combative. Respondent rebutted the Administrator's case by testifying that she did not believe she had been arrested, and that, when she sought the advice of an attorney concerning the medical certificate application, she was informed—and believed—she need not report it. The law judge did not appear to consider this defense.

Respondent appeals the law judge's order, principally on the basis that the law judge's credibility findings are incomprehensible. Respondent also emphasizes that the law judge did not make a specific finding concerning respondent's alleged belief that she need not report the arrest on her medical certificate application. Given the expedited time frame in which we must resolve this case, we issue this opinion prior to receiving the Administrator's reply brief. We presume, however, the Administrator would dispute each of respondent's arguments.

The law judge's oral initial decision lacks clarity. On one hand, the law judge stated "[w]e have a great deal of candor, veracity, truthfulness and honesty involved in this proceeding where Ms. Porco is concerned." Initial Decision at 198. On the other hand, the law judge appeared to make credibility findings in favor of the Administrator's witnesses and adverse to respondent. Id. at 197, 199, 203. At the same time, however, the law judge stated he "[did] not believe it was

an intentional false statement on the part of [respondent],” and that respondent, if she were to be believed, had relied upon erroneous advice from her former lawyer concerning whether to report the arrest. Id. at 200. The law judge concluded the decision by stating the Administrator proved respondent violated § 67.403(a)(1) and thus revocation was appropriate under § 67.403(b). The law judge did not issue a finding concerning § 67.403(c)(1)³ presumably because he purported to find a violation of § 67.403(a)(1).

In Administrator v. Dillmon, NTSB Order No. EA-5528 (2010),⁴ we instructed law judges to make specific factual findings—especially with regard to credibility—when a respondent asserts, as a defense, he or she misunderstood a document and believed the answer or information provided on the document was correct. The D.C. Circuit’s opinion stated we must complete such an analysis, in light of the three-part Hart v. McLucas standard for intentional falsification.⁵ As a result, and as we

³ Section 67.403(c)(1), charged in the alternative here, states, “an incorrect statement, upon which the FAA relied, made in support of an application for a medical certificate” may serve as the basis for suspension or revocation of a medical certificate.

⁴ As the parties know, we issued Dillmon in response to a remand from the Court of Appeals for the D.C. Circuit. Dillmon v. NTSB, 588 F.3d 1085, 1094 (D.C. Cir. 2009).

⁵ 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942) for the falsification standard that the Board has used for intentional falsification cases, in

emphasized in Dillmon, law judges must make specific credibility findings concerning a respondent's subjective understanding of a question on the medical certificate application, when the respondent argues he or she did not intentionally falsify the document because he or she did not believe the answer provided was incorrect. Law judges' credibility findings concerning respondents' subjective interpretation of questions on the application is critical. In light of Pasternack v. FAA, 596 F.3d 836, 838 (D.C. Cir. 2010), which the D.C. Circuit remanded to us on the basis that we had inappropriately determined the law judge made an "implied" credibility finding, we are reluctant to substitute our own credibility determinations for the law judge's, or supplement the law judge's determinations in any manner. For this reason, we must remand this case to the law judge for a specific determination concerning whether he believed respondent did not think she needed to report the March 24, 2010 arrest on her medical certificate application. We also instruct the law judge to clarify his overall credibility determinations; as discussed above, the findings he included in the initial decision are contradictory. Finally, we

(..continued)

which the Board has held the Administrator must prove that a certificate holder: (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity of the fact).

instruct the law judge to resolve the conflict between his conclusion of law that respondent violated § 67.403(a)(1) with his apparent finding of fact that respondent did not intentionally falsify her medical application.

We are mindful of Congress's direction to us to resolve emergency cases within 60 days of the Administrator's issuance of the emergency order. We take this duty very seriously, and appreciate the due process rationale for the expedited time frame. As a result, and in light of our keeping with the 60-day deadline, we set forth a new briefing schedule below, under the assumption that either or both parties may decide to appeal the law judge's post-remand decision. In this regard, we must waive the application of some of our rules concerning the deadlines for filing certain pleadings. The law judge and parties must adhere to the new schedule, as follows:

REQUIREMENT	DEADLINE
Law Judge's service of decision	June 30, 2011
Notice(s) of Appeal	July 1, 2011
Appeal brief(s)	July 6, 2011
Reply brief(s)	July 11, 2011

In addition, we direct the law judge to serve his decision on remand to the parties and the Board via facsimile or email during regular business hours, in addition to the typical method of certified mail. Parties and the law judge's office should

communicate over the telephone to ensure timely, complete receipt of the decision. Moreover, in addition to submitting the briefs via overnight delivery, we ask parties to also transmit their appeal and reply briefs via facsimile to the Office of General Counsel, at (202) 314-6090. Provided the law judge and parties fulfill these new required deadlines, we fully intend to issue a decision disposing of this case by July 18, 2011, pursuant to the statutory deadline under 49 U.S.C. § 44709(e)(4).

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.

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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *
ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. *

Docket No.: SE-19097

JUDGE FOWLER

ROBERTA LYNN PORCO, *

Respondent. *

* * * * *

U.S. Tax Court
U.S. Custom House
200 Chestnut Street
Courtroom 300
Philadelphia, Pennsylvania

Wednesday,
June 15, 2011

The above-entitled matter came on for hearing, pursuant
to Notice, at 10:14 a.m.

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

APPEARANCES:

On behalf of the Administrator:

JAMES M. WEBSTER
General Attorney
Office of the Aeronautical Center
Counsel, AMC-7
6500 S. MacArthur Blvd.
Oklahoma City, OK 73169-6901
(405) 954-3296
(405) 954-4676 (Fax)
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On behalf of the Respondent:

JOSEPH MICHAEL LAMONACA, ESQ.
PO Box 10583
Wilmington, DE 19805-0583
(302) 388-2621

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE FOWLER: This has been a

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proceeding before the National Transportation Safety Board held

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pursuant to the provisions of the Federal Aviation Act of 1958, as

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that act was subsequently amended, on the appeal of Roberta Lynn

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Porco from an Emergency Order of Revocation dated May 12, 2011,

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which seeks to revoke the airline transport pilot certificate,

1 flight instructor certificate, and first-class medical
2 certificate, and the Administrator says in his order, or any other
3 airman certificates that the Respondent may hold.

4 The Administrator's Emergency Order of Revocation duly
5 promulgated by the National Transportation Safety Board Rules of
6 Practice in Air Safety Proceedings was issued by the Office of
7 Aeronautical Center counsel of the Aeronautical Center in Oklahoma
8 City, Oklahoma.

9 This matter has been heard before this United States
10 Administrative Law Judge, and under the Board's Rules of Practice
11 as they are provided, this is an emergency proceeding in Section
12 821.56 of the Board's Rules of Practice dealing with emergency
13 proceedings. As apropos here, and accordingly it is mandatory
14 that as the Judge in this proceeding, I issue an Oral Initial
15 Decision forthwith at this time.

16 Following notice to the parties, this matter came on to
17 trial on June 15, 2011. The Respondent was present at all times
18 and was very ably represented by Joseph Lamonaca, Esquire. The
19 Administrator was likewise very ably represented during the course
20 of this proceeding by James Webster, Esquire, of the FAA's
21 Regional Counsel's office.

22 Both parties have been afforded the opportunity to offer
23 evidence, to call examine, and cross-examine witnesses. In
24 addition, the parties were afforded the opportunity to make final
25 argument in support of their respective positions.

1 I have reviewed the testimony and the evidence in this
2 proceeding, which has consisted of four witnesses who have
3 testified on behalf of the Administrator: Special Agent Brenda
4 Smith, of the FAA; Dr. Schwendeman, who is a designated medical
5 examiner. The third witness was Gilbert Byerly, who was a witness
6 to the erratic driving habits and intoxication of Respondent Porco
7 on the date of March 24, 2010. Then we had the fourth and last
8 witness of the Administrator, Officer Steven Templin, a police
9 officer with the Shaler Police Department in Pennsylvania.

10 All of the Administrator's witnesses testified copiously
11 and in depth, very candid and forthright. I have believed and
12 accepted the overwhelming majority of those four witnesses'
13 testimony.

14 The Respondent had one witness, the Respondent herself,
15 Ms. Porco, and no exhibits.

16 As I stated, I have reviewed the testimony and evidence
17 in this proceeding, which has consisted of the five witnesses,
18 including the Respondent, coupled with the four of the
19 Administrator. And the Administrator had seven exhibits, all duly
20 admitted into the record as it's presently constituted. And it is
21 my finding and conclusion, final determination that the
22 Administrator has proven the charges as set forth in the
23 Administrator's Emergency Order of Revocation of May 12th, 2011,
24 by a fair and reasonable preponderance of the reliable,
25 substantial and probative evidence.

1 We have had in-depth discussions in this case involving
2 intoxication of the Respondent, refusal to take a chemical alcohol
3 analysis, erratic driving, and two eyewitnesses: Mr. Byerly and
4 Ms. Tunstall, which doesn't happen too often in cases of this
5 type.

6 I would have to say one of the affirmative defenses of
7 the Respondent was a stale complaint or, some people would say,
8 laches. I have reviewed the total evidence, what we had here and
9 as well as in the docket file in this case, and I would have to
10 deny that that affirmative defense is valid. I believe the
11 Federal Aviation Administrator acted as soon as he could based on
12 the evidence that he had.

13 The evidence is very, very credible by Special Agent
14 Brenda Smith and Officer Templin of the Shaler Police Department,
15 who testified in depth, absolutely, no question, based on the
16 evidence that has been adduced before me during the course of this
17 proceeding -- the evidence adduced before me that erratic driving
18 habits, intoxication, refusal to take a chemical alcoholic
19 analysis test are all proven by a more than needed or necessary
20 quantum of evidence during the course of the presentation of the
21 Administrator's case.

22 Much has been made over the term "arrest" in this
23 proceeding. It is my determination and final analysis that I
24 cannot and will not reject out of hand the testimony of Officer
25 Templin. Steven Templin testified virtually about everything we

1 needed to know where this case is concerned. The appearance, the
2 actions where the intoxication element was concerned of Respondent
3 Porco, the slurred speech, the strong smell of alcohol, and of
4 course the extremely erratic behavior of waving fists and elbows
5 at Officer Templin, who testified under oath repeatedly under
6 questions of both counsel here as well as questions from myself,
7 that he arrested the Respondent Porco in this proceeding.

8 This is a federal proceeding. We are not bound or have
9 to acknowledge by state or local regulations, unless, of course,
10 they are overwhelming pertinent and relevant, which I do not deem
11 them so. And as I said earlier, I will not reject the testimony
12 of Officer Templin in this regard.

13 We have a great deal of candor, veracity, truthfulness
14 and honesty involved in this proceeding where Ms. Porco is
15 concerned. This case is strange in that on one medical
16 application of the year 2002, she fully responded and wrote out
17 that she had a DUI -- maybe I misspoke -- DUI, DWI arrest and
18 conviction. Whereas on this application that we have before us of
19 March 24, 2010, she reported that she had previously reported, but
20 she did not particularly specify, lay out and pinpoint her arrest
21 of March 24, 2010, and that her driver's license was suspended by
22 the Department of -- well, at least it was appeared to be
23 suspended by the Department of Transportation of the state of
24 Pennsylvania.

25 The Respondent in this proceeding is an airline

1 transport-rated pilot, and as such is held to the highest degree
2 of care, judgment and responsibility. Respondent on the witness
3 stand, it is my determination and conclusion, in response to both
4 counsels' questions and some of the questions I put to her was
5 less than candid, forthright, and responsive, even though she had
6 heard the testimony of all the Administrator's witnesses.

7 Her basic premise was that she didn't know that she had
8 to report the drunken driving arrest of March 24, 2010. And as
9 the Judge in this proceeding it is my mandatory duty, as the
10 National Transportation Safety Board, as well as the Ninth Circuit
11 of the United States District Court, the D.C. Circuit of the U.S.
12 District Court, has said that the credibility findings of the
13 administrative law judge cannot be ignored or pushed aside, must
14 be taken into account. And that's what I'm going to do where this
15 proceeding is concerned.

16 The candor of the Respondent in this proceeding is
17 vital. It is of the utmost importance, and I don't think there's
18 anyone in this room, including both counsel, who are not surprised
19 during the course of her testimony at some of the answers that
20 Respondent Porco gave in response to valid material and relevant
21 questions addressed to her. So it would not be stretching the
22 point to say that it is my final determination, conclusion her
23 lack of candor as an airline transport rated pilot, was extremely
24 noticeable. And as the Judge in this proceeding I am taking that
25 into account.

1 It is my determination that in response to Section
2 47.403(b), Federal Aviation Regulations, a false statement in and
3 on an application for a medical certificate is a basis for
4 revocation of the airline transport pilot certificate, flight
5 instructor certificate, first class medical certificate, et
6 cetera. And that's what we have here. I do not believe it was an
7 intentional false statement on the part of the Respondent, but it
8 was a false statement in view that she -- certainly it was
9 incumbent upon her to have the knowledge of an airline transport
10 rated pilot, an experienced pilot flying in excess of 10 years, to
11 have knowledge of the pertinent FAA rules and regulations. The
12 testimony of Special Agent Brenda Smith and Officer Templin, I
13 think is very important in this regard, and I am making my
14 findings accordingly.

15 There is a somewhat regrettable aspect of this case.
16 Apparently, if she is to be believed, she was given some wrong, if
17 not erroneous, advice by her earlier counsel that this issue of
18 arrest or summons, or however you want to deem it, was not apropos
19 for the moment in future and present FAA proceedings where her
20 certificates were concerned. As I stated earlier, she made some
21 attempt 2002 to be truthful and honest and mentioned an arrest and
22 conviction at that time. The same cannot be said where the arrest
23 and conviction, March 24, 2010, is concerned.

24 So that, ladies and gentlemen, the FAA had a duty here,
25 which they proceeded to pursue. As I stated earlier, they were

1 taking into account all those circumstances, were diligent. It
2 took some while, but based on my determination of all of the
3 evidence, testimony and documentary exhibits, they were
4 successful, and I will make the following specific findings of
5 fact and conclusions of law accordingly.

6 FINDINGS OF FACT AND CONCLUSIONS OF LAW

7 1. The Respondent, Roberta Lynn Porco, is currently the
8 holder of airline transport pilot and flight instructor
9 certificates number 003157462. Respondent admits and I find that
10 accordingly.

11 2. Respondent admits and it is found that on or about
12 March 24, 2010, Respondent Porco was arrested incident to an
13 alcohol-related motor vehicle offense in the state of
14 Pennsylvania.

15 3. The Respondent admits and it is found that on or
16 about November 19, 2010, Respondent applied for and was issued a
17 first-class medical certificate.

18 4. The Respondent admits and it is found that she was
19 asked, have you ever on the above-mentioned applications, in
20 response to item 18v, medical history, have you ever in your life
21 had any of the following convictions or administrative action
22 histories: history of (1) any arrest or conviction involving
23 driving while intoxicated or while impaired or while under the
24 influence of alcohol or a drug; or a history of any arrest,
25 conviction or administrative action involving an offense which

1 resulted in the denial, suspension, cancellation or revocation of
2 driving privileges, which resulted in attendance at an educational
3 or rehabilitation program? The Respondent answered yes and in the
4 explanation, previously reported a DUI.

5 5. Respondent admits and it is found that incident to
6 paragraphs -- the proceeding paragraphs, your answer to item 18v
7 on the application was not correct in that your March 24, 2010
8 arrest and June 25, 2010 Pennsylvania driver's license suspension
9 had not been reported on any prior medical application.

10 The Respondent admits and it is found, and incident to
11 paragraphs 6, 7, and 8, the Federal Aviation Administration relied
12 upon the information Respondent provided in response to item 18v
13 on the application.

14 6. It is found that incident to the prior paragraphs,
15 Respondent's answer to item 18v, while not fraudulent, was false.

16 7. It is found that incident to paragraphs above, the
17 information Respondent provided in response to item 18v was
18 material in that an airman medical certificate was issued without
19 consideration of your actions as described in findings in
20 paragraphs 2 and 3 of this Emergency Order of Revocation.

21 8. It is found that by reason of the application form
22 referenced above, the Respondent certified that all answers were
23 complete and true, despite the fact that that entry was false.

24 By reason of the foregoing facts and circumstances, it
25 is my finding, 9, that pursuant to Section 47.403(a)(1) -- am I

1 correct, Mr. Webster, is that the section you're charging her?

2 MR. WEBSTER: Yes, sir, intentional falsification.

3 ADMINISTRATIVE LAW JUDGE FOWLER: Yeah.

4 Pursuant to Section 67.403(a)(1), which of course reads,
5 any fraudulent or intentionally false statement on any application
6 for a medical certificate, et cetera, et cetera, is grounds for
7 revocation of all airman certificates held by the applicant.
8 Section (b) under 47.403, which is in the Administrator's
9 Emergency Order of Revocation sets forth the commission by any
10 person of an act prohibited under paragraph (a) of this section,
11 which I've just read, is a basis for (1) suspending or revoking
12 all airman, ground instructor, and medical certificates and
13 ratings held by that person.

14 It is my determination and conclusion based on the
15 wealth of testimony coupled with the documentary exhibits that the
16 Administrator has adduced during the course of this proceeding
17 that there is substantial evidence to set forth that the
18 Administrator has validly proven under a reasonable preponderance
19 of the evidence needed to prove 67.403(a)(1) and 67.403(b).

20 It is my determination based upon the candor, or lack
21 thereof, of the Respondent and based on her duties,
22 responsibilities and care as an airline transport rated pilot of
23 some longevity, that while it may not be conclusive to say that
24 she falsified intentionally, based upon her knowledge of what she
25 was incumbent to have and to know, and based upon her appearance

1 and testimony during the course of this proceeding, it is my
2 determination that the Administrator has proven that she adduced
3 evidence, false evidence that the Administrator relied upon to its
4 detriment until the Administrator found out what the real fact of
5 the matter is where the issuance of the medical certificate, which
6 was issued to the Respondent on November 19, 2010, without her
7 reporting the knowledge that she had an arrest and charge, which
8 driving and being intoxicated and so forth.

9 My last finding is that this Judge finds that safety in
10 air commerce or air transportation in the public interest does
11 require the affirmation of the Administrator's Emergency Order of
12 Revocation, dated May 12, 2011, in view of the aforesaid
13 violations which I have cited during the course of my decision.

14 ORDER

15 IT IS ORDERED AND ADJUDGED AND DECREED that the
16 Administrator's Emergency Order of Revocation of May 12, 2011 be,
17 and the same hereby is, affirmed.

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19 _____
20 WILLIAM E. FOWLER, JR.

21 Chief Administrative Law Judge
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23 APPEAL

24 ADMINISTRATIVE LAW JUDGE FOWLER: Either side may appeal
25 the Oral Initial Decision just issued by this Judge. A notice of

1 appeal must be filed within 2 days following today's decision of
2 June 15, 2011, and it is mandatory, pursuant to the Board's
3 practices, that a brief be submitted which sets forth the
4 objections to the Judge's Oral Initial Decision, which must be
5 filed within 5 days following the Judge's decision; otherwise, the
6 Judge's decision will become final.

7 (Off the record.)

8 (On the record.)

9 ADMINISTRATIVE LAW JUDGE FOWLER: Counsel for the
10 Respondent has indicated he will be filing a notice of appeal to
11 the Judge's Oral Initial Decision just issued. I'll set forth
12 those parameters again: 2 days from today's decision of June 15,
13 2011, the notice of appeal. And 5 days from today's date, a brief
14 in support of that appeal setting forth the objection to the
15 Judge's Oral Initial Decision.

16 If there's nothing further at this time, I would declare
17 the hearing closed. But before we go off the record, I would like
18 to thank both counsel, for their extremely diligent and erudite
19 efforts. I would like to also thank the -- well, we don't have
20 any witnesses remaining, but those who are here and who testified,
21 for their help, assistance, and cooperation during the course of
22 this proceeding.

23 (Off the record.)

24 (On the record.)

25 ADMINISTRATIVE LAW JUDGE FOWLER: The 5 days follows the

1 2 days of the notice of appeal in which the Respondent is to file
2 his brief. So he has 5 days after the 2 days in order to file
3 that brief.

4 Anything further?

5 MR. LAMONACA: Nothing further.

6 ADMINISTRATIVE LAW JUDGE FOWLER: Thank you all, ladies
7 and gentlemen. We stand adjourned.

8 (Whereupon, at 4:39 p.m., the proceedings in the above-
9 entitled matter were adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Roberta Lynn Porco

DOCKET NUMBER: SE-17169

PLACE: Philadelphia, PA

DATE: June 15, 2011

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Michael McCann
Official Reporter