

SERVED: November 27, 2006

NTSB Order No. EA-5261

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 21st day of November, 2006

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17662
v.)	
)	
SEAN T. ROARTY,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued on May 11, 2006, following an evidentiary hearing.¹ By that decision, the law judge affirmed in part and dismissed in part the Administrator's emergency order of revocation² issued against

¹ The initial decision, an excerpt from the hearing transcript, is attached.

² Respondent waived application of the 60-day statutory deadline applicable to emergency proceedings.

respondent's airman and medical certificates.³ The law judge found that respondent had violated section 67.413(a)⁴ of the Federal Aviation Regulations (FARs), but had not violated FAR section 67.403(a)(1).⁵ We deny the appeal.

At the beginning of the hearing, the law judge granted the Administrator's motion for summary judgment as to the section 67.413(a) violation. Neither the Administrator nor respondent has appealed that finding or the law judge's sanction, suspension of respondent's medical certificate pending receipt from respondent of requested information and a decision by the federal air surgeon that respondent meets the standards for issuance of a medical certificate. Therefore, the only issue on appeal is the law judge's dismissal of the falsification charge.

A short history of relevant events is useful in understanding the basis for the Administrator's intentional falsification charge. A chronology follows:

April 16, 1996 - Respondent's driver's license is suspended for driving under the influence of alcohol (DUI).

³ In addition to his airman certificate (private pilot certificate) and medical certificate, respondent also possesses a mechanic certificate.

⁴ Section 67.413(a) -- 14 C.F.R. Part 67 -- authorizes the Administrator to suspend, modify, or revoke all medical certificates if an individual fails to provide (or authorize to be provided) additional medical information or history the Administrator has determined is necessary to determine whether the holder meets the medical standards for issuance of a medical certificate.

⁵ Section 67.403(a)(1) -- 14 C.F.R. Part 67 -- as pertinent, prohibits a person from making fraudulent or intentionally false statements on an application for a medical certificate.

June 3, 1998 - Respondent applies for a third class medical certificate. He fails to report the 1996 driver's license suspension.

February 18, 2000 - Respondent's medical certificate is revoked for failing timely to report the 1996 conviction and failing to disclose it on his 1998 medical certificate application.

March 7, 2000 - Respondent applies for a second class medical certificate, and in completing that application respondent properly answers "yes" to Question 13 regarding whether his medical certificate had "ever been denied, suspended or revoked."

April 24, 2003 - Respondent applies for a second class medical certificate, and in completing that application respondent incorrectly answers "no" to Question 13 regarding whether his medical certificate had "ever been denied, suspended or revoked."⁶

The Administrator presented no witnesses at the hearing, and, instead, relied on the written documentation contained in FAA airman, medical, and enforcement files. Respondent testified in his defense, and was the only witness at the hearing. The Administrator argued that it was not credible for respondent not to have remembered the December 1999 revocation when he completed the 2003 application and, therefore, his answer on the application was intentionally false. Respondent claimed that he did not purposely answer Question 13 incorrectly in filling out his 2003 medical application, and claimed that there was no reason for him to falsify his application.⁷

⁶ The record contains medical applications covering 1998, 1999, 2000, and 2003.

⁷ During his direct testimony, respondent explained:

I sat down very calm and clearly, took my time
(continued...)

The test to be applied to determine whether a statement is intentionally false is found in Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), which states that the elements of

(continued...)

answering. And without another form, a previous form in front of me, to the best of my knowledge answered everything, to my knowledge, correctly. My line of thought when I read that [Question No. 13] was I've never had a medical denied and I never had a medical revoked. I had it suspended because of the pilot license suspension.... The first time after the initial 1999 issue I had answered the question correctly. There was no deferment to my medical. I walked out of that office with a medical that day. It expired three years later. I reapplied, I answered a question wrong unintentionally. But, if that question had stated have you ever had a medical denied, suspended or revoked, there's no question whether or not I would have answered it correctly. But it didn't ask that question.

Transcript (Tr.) at 30-31. Later, during cross examination, the following exchange occurred between the Administrator's counsel and respondent:

Question: "[I]f you had known that that question covered suspensions you would have answered that question, yes."

Answer: "Yeah."

Tr. at 44. Soon after that dialogue, counsel for the Administrator asked:

Question: "[Y]ou believed that your medical certificate had been suspended versus revoked, correct?"

Answer: "That was the mind thought that I was under. I certainly didn't answer the question on purpose wrong. I mean, why would I?"

Tr. at 45. Thereafter, respondent reiterated: "I accidentally marked the wrong question. By no means was I trying to hide anything from anybody in this situation. There is nothing to, there is no reason to. I mean, why, I know you guys keep your records." Tr. at 46.

intentional falsification are: 1) a false representation; 2) in reference to a material fact; and 3) made with knowledge of its falsity. The law judge found that respondent did not intentionally falsify the 2003 application but, instead, acted negligently and apparently made a mistake.⁸ He noted that information on respondent's prior revocation was contained in the Administrator's records.

On appeal, the Administrator challenges the law judge's findings and conclusions. The gravamen of the Administrator's argument, however, is that the law judge erred in concluding that respondent's false statement was negligent rather than intentionally false.⁹ In reply, respondent repeats the arguments

⁸ The law judge likened the situation to one where pilots had been directed to turn left and turned right, resulting in a loss of separation they clearly did not intend. This observation is not germane to the issues raised in an intentional falsification case, for cases involving operational violations of the FARs typically do not require any showing of scienter whereas it is necessary in an intentional falsification case to present evidence that a false statement was made with knowledge of its falsity. Nonetheless, it is clear from the context of the law judge's discussion of the evidence that he believed respondent's explanation that he did not knowingly make a false statement on his medical application.

⁹ The Administrator also challenges the law judge's implication that, because FAA records contained information that respondent's certificate had been revoked, it was not important that respondent answer that question accurately on the application. The maintenance of the integrity of the system of qualification for airman certification, which is vital to aviation safety and the public interest, depends directly on the cooperation of the participants and on the reliability and accuracy of the records and documents maintained and presented to demonstrate compliance. Administrator v. Cassis, 4 NTSB 555, 557 (1982), reconsideration denied, 4 NTSB 562 (1983), aff'd, Cassis v. Helms, 737 F.2d 545 (6th Cir. 1984). The law judge's observations that the Administrator already had information about the revocation, and

(continued...)

he made at trial, and adopts the law judge's findings.

After careful review of the record, we are constrained to affirm the law judge. Our precedent (see Administrator v. Smith, 5 NTSB 1560, 1563 (1986) and cases cited there) holds that resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge. We may not reverse the law judge simply because, on the appellate record, we might come to a different conclusion.¹⁰ See Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988) (the Board will reverse a law judge's finding when witness testimony is "inherently incredible"). The law judge has the opportunity to observe the witnesses while they are testifying and thus has insights into their veracity that review of a written record does not provide.

The law judge observed that respondent "obviously should have known about" the revocation and "did know about that." Tr. at 54. Nevertheless, the law judge found that respondent had not

(continued...)

that respondent had previously properly reported the revocation on his prior medical application, does not excuse or minimize the importance of respondent's failure to accurately answer question number 13. However, on this record, we acknowledge that the observation was germane to the law judge's assessment of the credibility of respondent's claim that the incorrect answer he provided was unintentional.

¹⁰ For example, we find it difficult to believe that anyone of respondent's background and accomplishments, and someone who has spent his life in the aviation industry, learning to fly when he was 16, would forget the adverse revocation action taken against his certificate a mere 3 years before. Similarly, we are certain that respondent must realize the importance of accurate answers on his medical application.

intentionally falsified the application, crediting respondent's exculpatory claim that his incorrect response on the medical application was unintentional.¹¹ It is clear from the law judge's discussion of the hearing evidence that the law judge believed respondent checked the wrong box on the application inadvertently. Unfortunately, the Administrator did not call any witnesses, and, we think, did not aggressively cross-examine respondent regarding his exculpatory claims. It may well be that respondent had a motive to intentionally falsify his airman application in order to timely obtain a medical application without delay, which, if demonstrated, would have been relevant to the credibility assessment of his claim to have made an inadvertent error; the Administrator, however, did not vigorously pursue such evidence. Therefore, upon review of the record and the Administrator's arguments on appeal, we are constrained to conclude that we have no basis to characterize the law judge's credibility determination in favor of respondent arbitrary or capricious.

¹¹ The Administrator also argues that respondent made similar arguments in connection with his previous enforcement action. Clearly, this allegation would be relevant to respondent's credibility, but no such evidence was proffered at the hearing and this allegation remains unsubstantiated in the record.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's initial decision is affirmed.¹²

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

¹² The law judge's indefinite suspension of respondent's medical certificate, as imposed by the law judge, and unappealed by the Administrator, remains in effect.

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

* * * * *

In the Matter of: *

MARION C. BLAKEY, *

ADMINISTRATOR, *

Federal Aviation Administration, *

Complainant, * Docket No.: SE-17662

v. * JUDGE MULLINS

SEAN T. ROARTY, *

Respondent. *

* * * * *

U.S. Tax Court, Federal Building
517 E. Wisconsin Avenue
Courtroom 498
Milwaukee, WI 53202

Thursday,
May 11, 2006

The above-entitled matter came on for hearing,
pursuant to notice, at 9:02 a.m.

BEFORE: WILLIAM R. MULLINS,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

GLENN L. BROWN, ESQ.
Office of the Regional Counsel
FAA/Great Lakes Region
2300 E. Devon Avenue
Des Plaines, IL 60018

On behalf of the Respondent:

JACK J. BURKE, ESQ.
DFW Airport Complex
106 Charlottesville
Colleyville, TX 75034-6814
(817) 788-4645

1 ORAL INITIAL DECISION AND ORDER

2 This has been a proceeding before the National
3 Transportation Safety Board here in Milwaukee. Today is May
4 11, 2006. And it was on for hearing on an Emergency Order of
5 Revocation that has revoked this Respondent's airman
6 certificate and his airman medical certificate.

7 The Order of Revocation serves as the complaint in
8 these proceedings and was filed on behalf of the Administrator
9 through regional counsel of the Great Lakes Region. The matter
10 has been heard before me, William R. Mullins. I'm the
11 Administrative Law Judge for the National Transportation Safety
12 Board. And pursuant to the Board's rules, I'll issue a bench
13 decision today.

14 The matter came on for hearing pursuant to notice of
15 the parties, and the Administrator was represented by counsel,
16 Mr. Glenn Brown, Esquire, of the Great Lakes Region. And the
17 Respondent was present at all times and represented by his
18 counsel, Mr. Jack Burke, Esquire, of Colleyville, Texas. The
19 parties were afforded a full opportunity to offer evidence, to
20 call, examine and cross-examine witnesses. In addition, the
21 parties were afforded an opportunity to make arguments in
22 support of their respective positions.

23 DISCUSSION

24 The hearing started with a presentation of the
25 Administrator's motion for Summary Judgment on these issues,

1 and after conclusion of argument, I ruled that the Summary
2 Judgment would be sustained as to the regulatory allegations of
3 FAR 67.413(a), which basically states that when Respondent was
4 requested to provide further medical information to the federal
5 air surgeon he has refused and has not done so as of this date.

6 The motion for Summary Judgment as to the regulatory
7 violation of FAR 67.403(a)(1) was overruled, and that goes to
8 the fraudulent and intentional false statement. And we
9 proceeded to trial on that issue.

10 There were two exhibits, A-1 and A-2, which were
11 responses to Respondent's request for discovery in letters
12 dated 8 March and 17 March to Mr. Burke. And those were
13 presented in relationship to the motion for Summary Judgment.

14 Exhibits A-3, 4, 5, 6 and 7 were admitted and these
15 were the official files involving the previous violation
16 history of the Respondent and his medical file. And the
17 Sanction Guidance Table is A-7. A-6 is the investigative file
18 of this case. A-5 is the airman certification file. A-4 is
19 the medical file, and then the A-3 was the file involving the
20 prior violation history.

21 There was raised a comment about the airman
22 certification file. There are some certificates that are not
23 in there, and I'll leave that to the Respondent to resolve
24 whatever issues may be raised there with the folks in Oklahoma
25 City who maintain those records. But in any event, he has

1 admitted in his answer that he had all those certificates as
2 alleged.

3 The issue then was whether or not on his application
4 for medical dated 24 April of 2003, which is contained in
5 Exhibit A-6 and throughout these proceedings, certainly has
6 been admitted, wherein this Respondent answered no to the
7 question 13 which directly relates to whether or not his
8 medical certificate had ever been suspended, revoked or denied.
9 And he answered no to that question, which obviously raises a
10 question about whether it's an intentional false statement.

11 The Administrator has the burden of establishing that
12 it was an intentional false statement by a preponderance of the
13 evidence. As I've said, this is probably the most difficult
14 issue for the Administrator to prove even by a preponderance of
15 the evidence. The landmark case in this area is Hart v.
16 McLucas at 535 F.2d 516, a 1976 case from the 9th Circuit Court
17 of Appeals. And in that case it talks about the Administrative
18 Law Judge Harley Moorehead, who was one of the early
19 Administrative Law Judges with the Board, in this particular
20 case found that Mr. Hart's action in that case were more
21 consistent with inattention than with an outright attempt to
22 defraud anyone. And that is absolutely the situation in this
23 case.

24 The real issue for me in these cases is where there's
25 some sort of something else that has gone on that's not readily

1 apparent in the Administrator's records that could or could not
2 be perceived as some attempt to deceive on the part of a person
3 who makes the statement. Here the statement clearly goes to
4 information that the Administrator had, i.e., the Administrator
5 not only had the information, but it was the Administrator who
6 revoked the medical certificate in 1999 or 2000 or whatever the
7 date was, and that's not important. But it had been revoked.

8 And this Respondent obviously should have known about
9 that, did know about that, and at the time he made the entry it
10 obviously was false, but there's not been any showing here
11 today that that was an intentional false statement. It's more
12 like just sheer negligence. And I was thinking, and I don't
13 even know why I thought of this case, but I had a case a number
14 of years ago in Little Rock where a couple of individuals were
15 in a Beech Baron aircraft and they were taking off Little Rock
16 and they were both air transport pilot rated pilots. One of
17 them was getting recertified or checked out in this Baron. And
18 as they were starting to roll on runway 17, the other ATP was
19 checking him out shut down one for the engine and, of course,
20 that always gets everything exciting, I'm sure.

21 But in any event, they got the aircraft shut down and
22 they taxied back, and then they took off again, and I could
23 only imagine what's going on in the cockpit. But I'm sure that
24 the pilot being checked out was real nervous about whether this
25 was going to happen again. But in any event, they took off on

1 FAR 67.403(a)(1) and that count will be dismissed.

2 As I previously said, the regulatory violation of
3 67.413(a) was admitted and found, as a result of the motion for
4 Summary Judgment, and as a result of that finding, the medical
5 certificate will be suspended until such time as the federal
6 air surgeon is satisfied that all of the requested information
7 has been received and has been acted upon. And that will be
8 the Order for today.

9

10

11 DATED & EDITED ON

WILLIAM R. MULLINS

12 JUNE 13, 2006

Administrative Law Judge

13

14 ADMINISTRATIVE LAW JUDGE MULLINS: Let me say, also
15 in closing, that the Administrator given the circumstances of
16 this case, was substantially justified in proceeding with this
17 violation. And I hope every one of them, I just can't believe
18 that a person of Mr. Roarty that has taken on the
19 responsibility that you've taken on could possibly have made
20 that comment on there because look what it has caused you, the
21 time and the trouble and the money and the effort. But, these
22 things are critical. So don't be negligent in filling these
23 forms out.

24

APPEAL

25

Both parties have a right to appeal this order today

1 and may do so by filing Notice of Appeal with the National
2 Transportation Safety Board. Since the emergency procedures
3 were waived the usual procedures for appeal would apply from an
4 oral initial decision which requires that your Notice of Appeal
5 will be filed within ten days of this date and that appeal must
6 be filed with the National Transportation Safety Board, Office
7 of Administrative Law Judges at Room 4704 at 490 L'Enfant Plaza
8 East S.W., in Washington, D.C. and 20594 is the zip code.

9 And then within 50 days of this date a brief must be
10 filed in support of that appeal and that brief would go to the
11 same street address but to Room 6401, the Office of General
12 Counsel of the National Transportation Safety Board.

13 Filing your Notice of Appeal is extremely important
14 that it be filed timely and that you do put the right address
15 on it or it won't be filed timely. And I would ask Mr. Burke
16 to come up and I will hand you a copy of your rights to appeal
17 which have these addresses. And I have another copy of this
18 Mr. Brown if you'd like a copy.

19 MR. BROWN: I'll take it.

20 ADMINISTRATIVE LAW JUDGE MULLINS: Okay, let's go off
21 the record just a second.

22 (Off the record.)

23 (On the record.)

24 ADMINISTRATIVE LAW JUDGE MULLINS: All right, the
25 record should reflect that I've handed copies of the written

1 rights to appeal with those addresses and times and so forth to
2 both counsel for the Administrator and counsel for the
3 Respondent. Does the Administrator have any question about the
4 order today?

5 MR. BROWN: No, Your Honor.

6 ADMINISTRATIVE LAW JUDGE MULLINS: Any question from
7 Respondent?

8 MR. BURKE: The, since this is an emergency
9 proceeding, Your Honor, and even though the emergency was
10 waived the certificate stays revoked until the appeal time has
11 run?

12 ADMINISTRATIVE LAW JUDGE MULLINS: As far as I know,
13 it does.

14 MR. BROWN: That's my understanding.

15 ADMINISTRATIVE LAW JUDGE MULLINS: But in that regard
16 the Administrator, excuse me, in that regard the Safety Board
17 does give the second highest priority to emergency waived
18 cases. Again, the highest priority to emergency case. And
19 then the second highest priority of the number of cases that
20 they receive is given to those where emergency has been waived.
21 So there will be some expediting of that process unless you
22 folks, I assume under the medical suspension thing that you can
23 get on with getting that taken care of with the federal air
24 surgeon and pending whatever the Board does on this if there is
25 an appeal.

1 MR. BURKE: Thank you, Your Honor.

2 ADMINISTRATIVE LAW JUDGE MULLINS: All right, thank
3 you gentlemen, well presented and this will terminate these
4 proceedings. Thank you.

5 (Whereupon, at 10:40 a.m., the hearing was
6 concluded.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Sean T. Roarty

DOCKET NUMBER: SE-17662

PLACE: Milwaukee, Wisconsin

DATE: May 11, 2006

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.

STUART KAROUBAS
Official Reporter