

SERVED: March 31, 1993

NTSB Order No. EA-3835

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 16th day of March, 1993

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| _____ |) | |
| JOSEPH M. DEL BALZO, |) | |
| Acting Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-11355 |
| v. |) | |
| |) | |
| JOHN M. WALTERS, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

OPINION AND ORDER

This matter stems from an August 30, 1990 order in which the Administrator revoked all airman medical certificates held by respondent and suspended respondent's airline transport pilot, certified flight instructor, flight engineer and mechanic certificates for 60 days for allegedly making fraudulent or intentionally false statements on several airman medical certificate applications. In the Administrator's order (which serves as the complaint), the following specific allegations were

made:

- "1. At all times material herein you were and are the holder of Airline Transport Pilot and Certified Flight Instructor Certificates No. 2204663 and Flight Engineer and Mechanic Certificates No. 214523198.
2. On or about July 18, 1984, in the County Court of Manatee County, Florida, you pleaded guilty and were convicted of [d]riving with an unlawful blood alcohol level (DUBAL).
3. On or about December 4, 1984, January 9, 1985 [sic, presumably 1986], May 4, 1987, May 25, 1988, and July 24, 1989, you applied for and were issued first class medical certificates by Aviation Medical Examiners.
4. On the applications of December 4, 1984, January 9, 1985 and May 4, 1987, in response to item 21.v. Medical History - Have you ever had, or have you now, any of the following: 'Record of Traffic Convictions', you answered 'no'.
5. You answered 'yes' to item 21.v. in the May 25, 1988 application, but you listed only a speeding ticket and not the 1984 DUBAL conviction.
6. You answered 'yes' to item 21.v. on the July 24, 1989 application, and you listed several speeding tickets and a 1981 DUBAL conviction. You failed to note the 1984 DUBAL conviction.
7. Your answers to item 21.v. on the applications were fraudulent or intentionally false.
8. By reason of the foregoing you have demonstrated that you lack the qualifications necessary to be the holder of an airman medical certificate."

The complaint also relates that a notice of proposed certificate action (NOPCA) had previously been furnished to respondent on February 2, 1990.

At a hearing before Administrative Law Judge Jimmy N. Coffman on January 9, 1991, respondent moved that the complaint be dismissed as stale under Rule 33 of the Board's Rules of

Practice,¹ and the law judge granted that motion.² An appeal was subsequently taken by the Administrator, who maintains that the law judge's decision fails to comport with Board precedent and should be reversed. We concur in that view and will, therefore, grant the Administrator's appeal and remand the case to the law judge for further adjudicatory action.

¹Rule 33 (49 C.F.R. § 821.33) provides in relevant part:

"§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for the proposed action under section 609 of the [Federal Aviation] Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show . . . that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations

* * * * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction."

²Copies of both the law judge's comments setting forth his reasons for granting respondent's motion to dismiss (excerpted from the hearing transcript) and his order effectuating such action are attached.

At the outset, we note that the record in this case indicates that the Administrator initially received information relating to respondent's July 1984 DUBAL conviction in September 1987.³ This was approximately 29 months before the NOPCA was issued to respondent.⁴ In support of his decision to grant respondent's motion to dismiss, the law judge pointed out that the Board had previously affirmed the dismissal of a complaint as stale under Rule 33 in Administrator v. Rothbart and Vorhees, NTSB Order EA-3052 (1990), where there was a shorter interval of 27 months between the time of the Administrator's discovery of the alleged FAR violations and the time the respondents were issued a NOPCA. However, in that case, the Board did not believe that a genuine issue involving the qualifications of either of the respondents had been raised. NTSB Order EA-3052 at 6. Additionally, the Administrator did not assert that there was good cause for the delay in the issuance of a NOPCA or that the public interest warranted the sanction he had sought. Id. at 5. Consequently, the complaint was susceptible to a motion to dismiss under Rule 33.

³See Administrator's November 30, 1990 Response to Respondent's Discovery Request at p.2, ¶ II-3; and Tr. 6, 10.

⁴At the hearing, counsel for respondent mistakenly stated that a period of 40 months had elapsed between the time the Administrator first received information as to respondent's July 1984 DUBAL conviction and the time he issued a NOPCA to respondent. Tr. 7. Counsel for the Administrator did not correct this representation, which the law judge apparently relied upon in granting respondent's motion to dismiss. See id. 11-12, 22-23.

The case now before us differs from Rothbart in that it involves a legitimate issue of qualifications arising from the Administrator's allegations that respondent made fraudulent or intentionally false statements on a series of medical certificate applications.⁵ Such charges, if proven, would clearly provide a basis for sustaining the revocation of respondent's medical certificate.⁶ Consequently, the complaint in this case was not subject to dismissal under Rule 33,⁷ and the law judge thus erred in granting respondent's motion.⁸

⁵Under § 67.20 of the Federal Aviation Regulations ("FAR"), the making of any fraudulent or intentionally false statement on any application for a medical certificate is grounds for the suspension or revocation of any airman, ground instructor or medical certificate (or rating) held by the individual making such a statement.

⁶The Board has consistently upheld certificate revocations which stem from the making of fraudulent or intentionally false statements on medical certificate applications. See, e.g., Administrator v. LeBlanc, 1 NTSB 974, 976 (1970); Administrator v. Bradley, 2 NTSB 1468, 1470 (1975); Administrator v. Wagner, 5 NTSB 543, 545-46 ("[An individual's] lack of qualification is evidenced by the lack of judgment demonstrated by the making of [an] intentional falsification"), reconsideration denied, 5 NTSB 550 (1985); Administrator v. Johnson, NTSB Order EA-2844 at 5 (1988).

⁷See, e.g., Administrator v. Wingo, 4 NTSB 1304, 1305 (1984) ("In order to avoid dismissal under the stale complaint rule, the allegations in the complaint need only present an issue of lack of qualifications" (emphasis original)).

⁸The Board notes that respondent has contended in his reply brief that the Administrator's counsel "concede[d]" at the hearing "that there was no issue concerning lack of qualifications" and thus "abandoned" that issue by arguing that the motion to dismiss should be denied because the public interest warranted the imposition of a sanction despite the delay in the issuance of the NOPCA. Respondent's Br. 5. However, the Administrator has not withdrawn his allegation that respondent lacks the qualifications necessary to be the holder of a medical certificate and there is nothing in the record which would, in

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's order granting respondent's motion to dismiss the Administrator's complaint is reversed; and
3. The case is remanded to the law judge for further adjudicatory action.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

(..continued)

our opinion, support an inference that the Administrator has abandoned that charge. We therefore find respondent's contention to be without merit.