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NTSB Order No. EA-4266

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 13th day of October, 1994

_____)	
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Dockets SE-13743 and
)	SE-13744
)	
GERALD E. SANTOS and)	
STEVE RODRIGUEZ,)	
)	
Respondents.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this consolidated proceeding on August 26, 1994, at the conclusion of an evidentiary hearing.¹ By that decision the law judge reversed two emergency orders of the Administrator that

¹An excerpt from the hearing transcript containing the initial decision is attached.

suspended, pending successful re-examination, the mechanic certificates, with airframe and powerplant ratings, held by the respondents. For the following reasons, the appeal will be granted and the suspensions reinstated.²

This case involves essentially the same ultimate issue that the Board addressed in Administrator v. Carson and Richter, NTSB Order EA-3905 (June 7, 1993); namely, whether the Administrator had a reasonable basis for requesting the re-examination of certain newly licensed mechanics who had received their certificates from a Designated Mechanic Examiner whose FAA designation, as well as his FAA mechanic, airman, and instructor authority, had been revoked for his submission of mechanic certificate applications that falsely or fraudulently indicated the completion of testing that, in fact, had not been accomplished in accordance with requirements for the exam. In that case, the same law judge had reversed two suspension-pending-re-examination orders after determining that the evidence, which we characterized as "overwhelming and essentially unrefuted on the record," was not sufficient "to support a conclusion that the respondents' tests were so incomplete as to warrant retesting." Id. at 3. In this case, the law judge has again concluded that evidentiary shortcomings preclude concurrence in the Administrator's demand that respondents Santos

²Respondents, by counsel, have filed a reply in opposition to the appeal.

and Rodriguez submit to retesting.³ While the record here arguably provides less direct support for the Administrator's position than that in Carson and Richter, since the order revoking the examiner did not specifically contain allegations concerning the testing administered to Santos and Rodriguez, we think, as explained below, that the record before us nevertheless sets forth a sufficient showing to compel a judgment that the re-examination requests should be affirmed.

Our precedent establishes that a Board determination as to the reasonableness of a re-examination request entails an exceptionally narrow inquiry. We do not attempt to secondguess the Administrator as to the actual necessity for another check of a certificate holder's competence. Rather, in a typical case, we look only to see whether the certificate holder has been involved in a matter, such as an aircraft accident or incident, in which a lack of competence could have been a factor and, if he was, we uphold the re-examination request as reasonable, without regard to the likelihood that a lack of competence had actually played a role in the event. See, e.g., Administrator v. Wang, NTSB Order EA-3264 (1991). In sum, the Administrator in such cases need

³We do not necessarily disagree with the law judge that the Administrator should make changes in his testing procedures which would facilitate after-the-fact determinations concerning a test's scope and thoroughness by others. However, problems of proof current testing methods can create for both the Administrator and a test taker seem to us to pale in the context of a legitimate concern that an examiner's fraudulent testing practices may have allowed hundreds of unqualified mechanics to gain official permission to maintain aircraft.

only convince us that a basis for questioning competence has been implicated, not that a lack of competence has been demonstrated.

This case is somewhat atypical in that the precipitating circumstance is not something the respondents have done to impugn their own qualifications to continue to hold their mechanic certificates, but, rather, a concern that they should not have been certificated at all because they may have not been required in initial testing to demonstrate their qualifications in a manner sufficient to merit certification. We think re-examination requests made in this context must be sustained if the evidence creates even a reasonable doubt as to whether the respondents were tested properly. Thus, contrary to the law judge's view that the Administrator could not prevail without proof that the oral and practical tests the respondents took were deficient, we think that the Administrator, in the face of circumstances strongly suggesting that many individuals may have obtained certificates without demonstrating the knowledge and skill necessary either to obtain or hold them, was fully justified in seeking, if not obligated in the public interest to seek, re-examination of any or all of the licensees he fairly suspected had not been required to establish their qualification. His suspicions in this connection were, we think, adequately validated by the evidence of deficient testing the Administrator's inspectors uncovered in their investigation of the examiner.

The respondents are two of 247 individuals to whom the revoked examiner, Alvin Harris, while employed full-time as an instructor at a school for aviation mechanics, administered tests for mechanic certificates during a 259-day period in 1992. The record reflects that while the oral and practical portions of a test for both airframe and powerplant ratings for an individual could be accomplished in as few as 8 to 12 hours, it would not be unusual for the tests to take from one and a half to three days to complete. Based on the view that so many applicants could not have been tested adequately in so short a space of time, the Administrator undertook to investigate Mr. Harris, whose test takers enjoyed a 100 percent pass rate on the mechanic exam, by conducting extensive interviews of some of the individuals, sixteen in all, whose applications he had approved. Without exception, those interviews disclosed that the oral and practical tests administered by Mr. Harris, some of which lasted less than three hours, were seriously wanting in both depth and breadth, in that they did not include enough, or in some cases any, questions or practical tests in many of the 43 areas in which mechanic certificate applicants are required to establish proficiency.⁴ We think the testimony of the inspectors regarding their findings based on those interviews, along with the statements of the

⁴Respondent Santos was interviewed by the inspectors and signed a statement at its conclusion in which he estimated that the entire exam given to him and one other applicant took about 5 to 5 and a half hours. See Adm. Exh. 5(a). Respondent Rodriguez was not interviewed.

individuals interviewed, provide ample justification for questioning the bona fides of *all* of the tests the examiner represented he had administered, not just the sixteen given to the individuals whose cooperation the Administrator was able to enlist.⁵

Our conclusion that the results of the investigation of Mr. Harris established a sufficient basis for requesting the re-examination of all of the individuals who had been approved for certification by him, at least those in the relevant timeframe, does not mean that such a request would have been upheld as to a specific applicant who came forth with persuasive proof that the exam he had been administered met requirements. However, neither of the respondents in this proceeding made any serious attempt to do that, preferring, instead, to attack the evidence on which the Administrator relied in support of his determination that the examiner had not been fulfilling his testing obligations.⁶ While

⁵Counsel for the respondents appears to fault the Administrator for not seeking re-examination of individuals Mr. Harris tested prior to the 9-month period involved in the investigation. While the drawing of any line might seem arbitrary and perhaps unfair to those on the side of it who have been asked to submit to retesting, the propriety of the Administrator's determination to limit the reach of his re-examination efforts is not before us.

⁶Respondents argue, for example, that the Administrator should not be able to rely in this proceeding on the emergency order of revocation issued to Mr. Harris because the allegations in that order were never adjudicated, as he withdrew an appeal he had initially noted. The argument is without merit and beside the point. The Administrator did not have to prove his allegations of misconduct by the examiner in order to institute action to correct its likely or possible adverse effects on others. Stated differently, the Administrator's authority, or

we appreciate that it might not be easy to recall the content of the exams they had taken with sufficient detail to overcome the prima facie showing of inadequate testing the Administrator's case established, the fact remains that there is essentially no evidence to contradict the Administrator's largely circumstantial showing that the adequacy of the tests given by Mr. Harris are open to question to a degree that simply cannot be disregarded. Consequently, we are not persuaded that the re-examination requests the respondents have thus far rejected can be deemed unreasonable.⁷

Finally, we should reiterate, as we acknowledged in Carson and Richter, supra, as to the respondents in that case, that our decision here does not reflect an adverse determination as to the respondents' actual competence to be certificated as mechanics. However, just as a pilot may be required to demonstrate

(..continued)

duty, to act on the information on which the allegations in the revocation order were based was not affected by the examiner's decision not to challenge the allegations. Second, essentially all of the evidence on which the revocation order against the examiner was predicated was introduced in this proceeding, where the respondents had the opportunity to contest it. In short, respondents have not shown that the order against Mr. Harris could not appropriately be used in this matter to create an inference that the adequacy of any exam given by an examiner revoked for giving bogus exams is questionable.

⁷Although it has no bearing on our decision, we note that the Administrator has made good faith efforts to minimize the burden and inconvenience a retest might present. Specifically, the retest applies only to 9 of the 43 subject areas the original tests should have covered, refresher courses and study materials for those 9 subjects have been made available, and it is being offered without charge to any of the individuals originally tested by Mr. Harris.

competency in a retest when no actual incompetency has been identified, the qualifications of these respondents to be aviation mechanics are not derogated by the Administrator's insistence that they demonstrate them again, in the interest of "insuring that unqualified individuals not be allowed to perform maintenance on aircraft" (Id. at 5).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. The emergency orders of suspension pending re-examination are affirmed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.