

SERVED: November 13, 1998

NTSB Order No. EA-4724

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 November, 1998

JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15383
v.)	
)	
PHILIP M. KRUMPTER,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The respondent, pro se, has appealed from the oral initial decision Administrative Law Judge William A. Pope, II, rendered in this proceeding at the conclusion of an evidentiary hearing on October 9, 1998.¹ By that decision the law judge affirmed an emergency order of the Administrator revoking respondent's mechanic certificate for his alleged refusal to take a drug test in violation of section 65.23(b) of the Federal Aviation Regulations ("FAR,"

¹An excerpt from the hearing transcript containing the initial decision is attached. We commend the law judge for his patience in assisting the respondent in his effort to represent himself.

14 CFR Part 65).² For the reasons discussed below, the respondent's appeal is denied.³

The Administrator's April 17, 1998 Emergency Order of Revocation, as amended at the hearing, alleges, among other things, the following facts and circumstances concerning the respondent:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate No. 2373443.
2. At all times mentioned herein as an employee of McDonnell Douglas Technical Services Company, you performed aircraft maintenance or preventative maintenance duties for Triad International Maintenance Services Company, a certificated Part 145 Repair Station.
3. At all times mentioned herein, an employee who performs flight crewmember duties, flight attendant duties, flight instruction duties, aircraft dispatcher duties, aircraft maintenance or preventative maintenance duties, ground security coordinator duties, aviation screening duties, and air traffic control duties is performing a covered function, as prescribed in Part 121, Appendix I, Section III. (14 C.F.R. Part 121, Appendix I, Section III.).

²FAR section 65.23(b) provides as follows:

§ 61.23 Refusal to submit to a drug or alcohol test.

* * *

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for -

- (1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and
- (2) Suspension or revocation of any certificate or rating issued under this part.

³The Administrator has filed a reply opposing the appeal. It thoroughly addresses all of the matters raised in the appeal brief, most of which are extraneous and warrant no comment.

4. On or about November 24, 1997, you were notified by McDonnell Douglas Technical Services Company that you had been selected for a random drug test.
5. At all times mentioned herein, a random drug test is a drug test required by Part 121, Appendix I, Section V.C. (14 C.F.R. Part 121, Appendix I, Section V.C.).
6. On or about November 24, 1997, at approximately 4:00 p.m., you reported to the collection facility, Triad International Maintenance Company, Medical Unit, located at Greensboro, North Carolina.
7. On or about November 24, 1997, at approximately 5:40 p.m., Reba Rosemary, the onsite nurse, informed Dick Bayles, McDonnell Douglas Technical Services Company site supervisor, that as of that time you were unable to provide a urine specimen and that she had to leave for the day.
8. As a result of the facts set forth in paragraph 7, above, Mr. Bayles arranged for you to go to another collection facility, PrimeCare located on [sic] Greensboro, North Carolina.
9. On or about November 24, 1997, you were escorted to the PrimeCare collection site by Mr. Bayles.
10. On or about November 24, 1997, at approximately 6:20 p.m., you signed in at the PrimeCare facility and said that you had to use the bathroom. You were told that the collector was busy and that you would have to wait five minutes.
11. On or about November 24, 1997, at approximately 6:40 p.m., you used the bathroom after insisting that you could wait no longer.
12. On or about November 24, 1997, at approximately 6:45 p.m., you were called for a specimen collection.
13. After finishing the collection procedure, you handed you[r] urine specimen to Susan Dixon, the collector.
14. Susan Dixon stated that your urine specimen looked like water and smelled like water.
15. Susan Dixon asked Mr. Bayles to come into the

collection area and showed him your urine specimen.

16. Mr. Bayles stated that your urine specimen looked and smelled like water.

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19. You then took your specimen from Susan Dixon and dumped it down the sink.

20. Upon being asked to provide a new urine specimen, you refused and left the collection site.

Based on the Administrator's proof on these allegations, the law judge found that respondent had, as charged, refused a drug test.⁴ The respondent's brief provides no basis for disturbing that finding, which we will affirm.⁵

Broadly construed, respondent's appeal amounts to an attempt to show not that he did not pour out the specimen he had provided before it could be tested, a fact he concedes, but that his actions were justified because those to whom the specimen was given were not following proper procedures.

⁴Appendix I, Part 121, defines a refusal to submit to a drug test in the following language:

Refusal to submit means that an individual failed to provide a urine sample as required by 49 CFR part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with this appendix, or engaged in conduct that clearly obstructed the testing process.

⁵We find no abuse of discretion in any of the law judge's procedural rulings, including his decision to allow the Administrator, before respondent put on his defense, to submit an additional document after resting her case-in-chief.

Respondent's position is without merit.⁶ Aside from the fact that he has not shown that the collection site personnel did not follow all applicable Department of Transportation regulations, respondent seems unable to comprehend the fact that it would not have made any difference in the outcome of this case if he had been able to show that some noncompliance with the regulations had actually occurred.⁷ This is so because the respondent cannot, after destroying what he had tendered as his own specimen soon after the collector raised questions about its authenticity, challenge the adequacy of the collection site's compliance with regulations designed to ensure the

⁶We will not here undertake to resolve factual matters, such as the qualifications of the collection site or its personnel to conduct the random drug testing to which respondent's employer was required to subject him, that respondent should have raised in connection with his answer to the Administrator's complaint, so that they could be litigated before the law judge. In addition, we have no reason to disturb the law judge's resolution of the essentially minor discrepancies between the testimony of some of the Administrator's witnesses at the hearing and their contemporaneous, written accounts of the incident. The respondent has supplied no reason for us to second guess the law judge's credibility assessments of those witnesses. Moreover, since he did not testify in his own defense, there is no evidence in the record to contradict their recollections of what transpired with respect to details that are not, in any event, germane to the Administrator's burden of proof in this case, such as, whether respondent had in fact adulterated the specimen he gave the collector. Lastly, we will not entertain respondent's claim that his privacy rights were violated at the collection site, as it is essentially an indirect, collateral challenge to the scope of the Administrator's authority to test him for drugs.

⁷At most, respondent identified an issue of disagreement as to whether the paperwork that must accompany a specimen must be initiated before it is collected or may be begun after the specimen is tendered for submission to

integrity of a sample and the validity of the process for testing it.

The respondent's remedy, if he believed, for example, that fatal procedural errors were committed either when his supervisor was called into the screening room (to be asked whether a second sample should be required, given the collector's expressed doubts about the first one⁸) or when the supervisor smelled the specimen himself, would have been to present such objections and any others pursuant to available procedures for contesting a positive test result, in the event one ensued.⁹ What he could not do, consistent
 (...continued)
 testing.

⁸In addition to questioning the color and odor of the specimen respondent handed her, the collector testified that it was a "cold" sample, that is, it did not register a temperature within the expected range on the scale built into the collection cup. We do not agree, as respondent insists, that this witness needed to be qualified as an expert to recount her personal observations in this connection. Moreover, the fact that respondent had not been charged with adulterating a specimen does not mean such testimony was not relevant and therefore should not have been admitted. The collector's observation, aside from being information she would have been obligated to record had the specimen not been peremptorily dispatched, was, at the very least, relevant to her motivation in seeking verification, from a coworker, of what she believed were other suspicious circumstances concerning respondent's specimen and in asking his supervisor for advice about how he wanted the clinic to proceed, that is, test the first sample or require another one.

⁹A negative test result would have mooted any basis for contesting any perceived procedural shortcoming in the collection phase. Of course, respondent could also have *told* the collector that he had misgivings about how the collection was being managed, thereby giving her the opportunity to resolve or correct the sources of concern, or to explain why, in her view at least, respondent had no good reason for objection. By saying nothing along these lines, respondent created the precise inference he sought at his

with his legal duty to take a drug test as he had been instructed by his employer, was throw out a specimen he had only minutes earlier provided before it could be properly processed or analyzed and leave the collection site without providing another specimen. Such obstructive and defiant conduct, for which respondent has demonstrated no genuine justification, unquestionably constituted a refusal to submit to testing.

On the matter of sanction, we recently ruled, in Administrator v. Pittman, NTSB Order No. EA-4678 (1998), that "unless revocation were the predictable consequence for [those who refuse to submit to a required alcohol breath test], they could routinely escape accountability for alcohol misuse by simply refusing to be tested" (*id.* at 5, note 7). That rationale is no less appropriate in the context of a refusal to submit to a required drug test.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and
2. The initial decision and the emergency order of revocation are affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

(..continued)

hearing to keep the law judge from drawing; namely, that his actions were consistent with an effort, once the specimen's genuineness was questioned, to avoid detection for having supplied either an adulterated sample or some liquid other than his own urine.