

SERVED: August 4, 2008

NTSB Order No. EA-5400

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 1st day of August, 2008

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| _____ |) | |
| ROBERT A. STURGELL, |) | |
| Acting Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-18092 |
| v. |) | |
| |) | |
| JEFFREY R. SWATERS, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| _____ |) | |

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued March 4, 2008, after a 2-day evidentiary hearing.¹ By that decision, the law judge upheld the Administrator's emergency order of revocation against respondent's airline transport pilot (ATP), and any other airman, certificates; and his first-class, and any

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

other medical, certificates held by respondent.² We deny respondent's appeal.

The August 27, 2007 emergency order of revocation, which serves as the complaint in this proceeding, charged respondent with violating sections 91.17(a)(3) and 121.455(b) of the Federal Aviation Regulations (FARs), and, further, alleged that respondent is not qualified, in accordance with FAR sections 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), to hold an airman medical certificate.³ The Administrator's complaint, orally amended, without objection, on the record at the hearing, alleged in pertinent part:

* * *

7. At all times material to the allegations contained herein, you were employed by Spirit Airlines ... a Part 121 air carrier.
8. On February 26, 2007, you served as pilot in command of a passenger carrying flight, operated by Spirit as Flight 676 from Kingston, Jamaica to Fort Lauderdale, Florida.

² Respondent waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

³ Section 91.17 prohibits a person from acting or attempting to act as a crewmember of a civil aircraft while using any drug that affects the person's faculties in any way contrary to safety. Section 121.455 forbids a certificate holder or operator from knowingly using any person to perform, and forbids any person from performing for a certificate holder or operator, either directly or by contract, any function listed in appendix I to part 121 while that person has a prohibited drug, as defined in appendix I, in his or her system. Section 67.107(b) states that the mental standards for a first-class airman medical certificate include no substance abuse within the preceding 2 years, and defines abuse as a verified positive drug test result acquired under an anti-drug program or internal program of the Department of Transportation (DOT) or any other administration within the DOT. Sections 67.207 and 67.307 contain similar language for second- and third-class medical certificates.

9. Upon arrival in Fort Lauderdale, at about 2:45pm hours, you were notified that you had been selected for random DOT drug and alcohol testing.
10. At about 3:40pm, you were given and signed the testing notification form and were directed to report to the collection site, Global MRO....

* * *

14. That urine specimen was tested by a Department of Health and Human Services (HHS) certified laboratory in accordance with [] Appendix I of Part 121 drug testing program and the procedures under Part 40 (49 C.F.R. 40).
15. The result of the drug test of your specimen was positive for cocaine, morphine, and 6-monoacetylmorphine [6-MAM].
16. The result of the drug test of your specimen was positive for cocaine, a prohibited drug within the meaning of Appendix I of Part 121.
17. The result of the drug test of your specimen was positive for opiates, which are prohibited drugs within the meaning of Appendix I of Part 121.
18. The test result for Morphine was 16023 ng/ml.
19. On or about March 8, 2007, a Medical Review Officer (MRO) reviewed that positive drug test result from the HHS certified laboratory and verified that the result was positive for cocaine/morphine/6-acetylmorphine [6-AM] with morphine.
20. You requested a test of the split sample.
21. The result of the drug test of your [split] specimen was positive for cocaine, morphine, and 6-monoacetylmorphine.
22. The result of the drug test of your [split] specimen was positive for cocaine, a prohibited drug within the meaning of Appendix I of Part 121.
23. The result of the drug test of your [split] specimen was positive for opiates, which are prohibited drugs within the meaning of Appendix I of Part 121.

24. The [split] test result for Morphine was 16023 ng/ml.
25. The combination of the positive results, indicates the presence of the metabolites for Heroin.
26. On or about March 16, 2007, a [MRO] reviewed that positive drug test result of the split sample from the HHS certified laboratory and verified that the result was positive for cocaine, morphine and 6-acetylmorphine with morphine.
27. As a result of this verified positive drug test, you have been found to lack the qualification to hold an airman medical certificate.
28. At the time of the above-described incident, [] Spirit had an Anti-Drug and Alcohol Misuse Prevention Program in place in accordance with Part 121, Appendix I, and 121.457.
29. In accordance with Part 121, Appendix I, Section II, you were a "covered employee" of Spirit and, therefore, subject to drug testing under the FAA-approved Spirit Anti-Drug and Alcohol Misuse Prevention Program.

* * *

31. In addition, the Federal Air Surgeon finds that your verified positive drug test makes you unable to perform the duties and exercise the privileges of any airman medical certificate.
32. By reason of the foregoing, you lack the qualifications to be the holder of any airman pilot, flight instructor, ground instructor or any airman medical certificate.

* * *

Further, the Federal Air Surgeon has found that you are not qualified to hold an FAA airman medical certificate under sections 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), because your misuse of a substance makes you unable to safely perform the duties or exercise the privileges of any class of medical certificate.

* * *

At the hearing, the Administrator presented evidence regarding the urine specimen collection; chain of custody information; and the presence of cocaine, morphine, and heroin metabolites in respondent's urine specimen reported by two HHS-certified laboratories, Quest Diagnostics and DSI Laboratory. Respondent essentially asserted three defenses, and testified accordingly, in addition to presenting witnesses who testified that respondent did not display evidence of drug use during the timeframe he would allegedly have been under the influence of the drugs. He claimed, first, that he had not used drugs and, secondly, that the facts regarding the time period during which he is alleged to have taken and been under the influence of the drugs do not support a finding that he used the drugs, particularly in light of the reported high levels of the drugs in his system. Finally, he argued that chain of custody or procedural problems require dismissal of the complaint. The law judge, who did not find respondent's exculpatory claims credible, or his arguments sufficient to overcome the Administrator's *prima facie* case, concluded that the test results were valid and affirmed the Administrator's emergency order of revocation.⁴

On appeal, respondent advances the same arguments. The Administrator has filed a reply brief urging us to uphold the law judge's decision.

⁴ The law judge's decision provides an account of the testimonial and other evidence presented by both parties. We discuss the evidence only to the extent needed for analysis of the relevant legal issues raised in respondent's appeal.

We agree with the law judge's analysis and discern no basis to overturn his decision. First, respondent demonstrates no legitimate issue with the chain of custody of his urine specimen, or any other grounds for concluding that the Quest Diagnostics and DSI Laboratory findings were not based on tests of the urine specimen respondent provided after his duty day on February 26, 2007. See Administrator's Reply Br. at 5-6 and 10-11, and Initial Decision at 294-298. The law judge appropriately considered the Quest Diagnostics and DSI Laboratory test records and the testimony explaining the reliability of those records.

Respondent also does not demonstrate any error in the law judge's application of the subject FAR provisions. The relevant Part 67 provisions make clear that in order to qualify for a medical certificate an airman must not have had a "verified positive [DOT] drug test result" within the past 2 years. See, e.g., 67.107(b)(2). It is clear that respondent does not meet this standard. Moreover, the Administrator presented the testimony of FAA Deputy Regional Flight Surgeon Dr. Matthew Dumstorf, who testified that it was FAA practice to revoke any medical certificate based upon a verified positive DOT drug test. Tr. at 147-49. This testimony is bolstered by Exhibit A-16, a memorandum from the federal air surgeon requesting emergency revocation of all medical certificates held by respondent. That request is based on the finding, upon the federal air surgeon's review of the information pertaining to respondent's positive drug test, that respondent does not meet the provisions of §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) and is unable to

safely perform the duties or exercise the privileges of any airman certificate.

Further, we disagree with respondent's argument regarding the law judge's statement that respondent "could have ingested the drugs during the evening of February 25th, 2007 when he was, by his own account, alone." Initial Decision at 299. Respondent states that the law judge's determination in that regard "simply cannot be reconciled with the record,"⁵ and that the law judge's

speculation that "[t]he amount of time that 6-monoacetylmorphine is detectable in urine is an estimate, and from the testimony of Dr. White and Dr. Spiehler, could be influenced by the tolerance of the drug in the user, and by the quantity ingested..." has no basis in the record.

Id. (emphasis in original). The quoted statement, however, follows another by the law judge:

I agree that it appears unlikely that the Respondent could have ingested prohibited drugs in the quantities found in his urine after he reported for work at 4:55 a.m. on February 26, 2007.

Initial Decision at 301. The law judge also stated that, "there was no clear evidence from any observer that the Respondent showed any symptoms of drug use while flying." Initial Decision at 305. The law judge's ultimate finding in this regard was:

Clearly, and I so find, it is not inconsistent with the use of heroin and cocaine during the evening of February 25th, 2007, that the Respondent would not exhibit any outward and observable signs of drug use on February 26, 2007, but it would still be detectable in his urine.

⁵ Respondent's Appeal Br. at 10.

Initial Decision at 300-01. Dr. White, the director of clinical chemistry and the scientific director of the toxicology laboratory at DSI Laboratories, testified that:

The cocaine, which is metabolized to Benzoyllecgonine ... the major cocaine metabolite, stays positive in urine for three to five days. ... I have seen one exception to that where somebody tanked up before going into the ... system, and they managed to stay positive ... for six days. ... The morphine ... it's going to be detectible [sic] probably for at least two days, and the 6-acetylmorphine has a much shorter half-life. It ought to be around for a couple of hours, may be out, depending on an individuals metabolism and their state of hydration, may be out to eight, ten hours.

Tr. at 110. And respondent's expert witness, Dr. Vina Spiehler, a pharmacologist, testified as to the breakdown of the metabolites that:

it relates to the appearance in urine, which I guess does relate to both the breakdown and the storage in fatty tissue because, obviously, it's continuing to be seen in urine long after it's no longer detected in the blood. So there's some release. After a distribution phase, then there's a long-term release that's longer than it's present in the blood, or going to the brain.

Tr. at 213. She also testified that it would be unlikely, 12 hours after use of heroin, for the 6-AM metabolite to "have been detected at all in the urine at a 10 nanograms per mil Level."

Therefore, based on the above-quoted testimony, there is a basis in the record for the law judge's conclusions regarding metabolism. Respondent's point that there is no link between tolerance and metabolism may be well taken, but it does not overcome the ultimate issue in the case, which is whether the Administrator has proved his case regarding the positive test results.

We agree with the law judge that the Administrator presented a *prima facie* case of respondent's violation of §§ 91.17(a)(3) and 121.455(b) and of the lack of qualification to hold an airman medical certificate under §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2). The Administrator has done so by virtue of proving a verified positive drug test (administered pursuant to DOT requirements following respondent's execution of his duties as captain of a commercial air carrier flight). Accordingly, it then became respondent's burden to prove his affirmative defense to the regulatory violations by a preponderance of the evidence.⁶ In this regard, the law judge made a clear, adverse credibility finding against respondent's claim as to any errors in the collection procedure or chain of custody of the specimen sample⁷ and credited the testimony of the Administrator's witnesses. Board precedent is clear that credibility determinations are generally within the exclusive province of the law judge and will not be disturbed in the absence of arbitrariness, capriciousness, or some other compelling reason.⁸ Respondent demonstrates no

⁶ See, e.g., Administrator v. Tsegaye, NTSB Order No. EA-4205 at n.7 (1994) (respondent must prove affirmative defense by preponderance of the evidence).

⁷ Respondent testified that he did not see the collector place the two sealed specimen bottles in the plastic bag for shipping to the laboratory, and that respondent, not the collector, disposed of the excess urine following the collection.

⁸ See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986); cf. Administrator v. Crocker, NTSB Order No. EA-4565 at 6 (1997) ("we do not withhold the deference customarily afforded a law judge's credibility assessments simply because other evidence, of whatever description, arguably could have been given greater weight").

compelling reason, nor do we discern one, to overturn the law judge's negative assessment of respondent's testimony.⁹

Respondent's uncredited testimony and the testimony of his witnesses as to their observations regarding the absence of any visible signs of drug intoxication, along with respondent's arguments regarding that evidence, are insufficient to carry his burden to rebut the *prima facie* case of the operational violations and the corresponding lack of qualifications for a medical certificate. In this regard, we note that DOT drug testing requirements specify that the MRO must verify a confirmed positive cocaine test result unless the employee presents a legitimate medical explanation for the presence of drugs found in his system. 49 C.F.R. § 40.137(a). However, the MRO must verify the test result as positive, with no conditions, if the laboratory detects the presence of 6-AM (which indicates heroin use). 49 C.F.R. § 40.139(a). In the absence of 6-AM, if the laboratory detects the presence of the opiate morphine at 15,000 ng/mL or greater, the MOR must verify the test result as positive unless, once again, the employee presents a legitimate medical explanation for the presence of the metabolite in his system. 49 C.F.R. § 40.139(b). In the instant case, 6-AM was present, so 49 C.F.R. § 40.139(b) does not come into play, and the presence of 6-AM required the MRO to verify the test result as positive.¹⁰

⁹ Even if the law judge had credited respondent's testimony with regard to collection-site anomalies, none of the alleged errors would have constituted a "fatal flaw" requiring cancellation of the test or its results. See 49 C.F.R. § 40.201.

¹⁰ Had 6-AM not been present, and had the morphine registered at less than 15,000 ng/mL, the MRO would verify the confirmed

We also note that MROs are prohibited from making decisions about factual disputes between the employee and the collector concerning matters occurring at the collection site that are not reflected on the custody control form. 49 C.F.R. § 40.151(b).

Having reviewed the entire record, we find more than enough evidence to establish the Administrator's *prima facie* case that respondent had a verified positive drug test. Conversely, respondent produced neither a legitimate medical explanation for the presence of drug metabolites in his urine sample, nor evidence indicating that the sample that tested positive was not his or that the integrity of his sample had been compromised.¹¹ The circumstances that respondent does present do not disprove nor explain the positive urinalysis results. Respondent claims that, based on:

(..continued)

positive test result for opiates only if the MRO determined that there was clinical evidence of unauthorized use of opiates. Evidence would include such items as recent needle tracks, behavioral and psychological signs of acute opiate intoxication or withdrawal, clinical history of unauthorized use recent enough to have produced the laboratory test result, or use of a medication from a foreign country. Obviously, personal observation is required to establish the first two forms of evidence. See 49 C.F.R. § 40.139(c).

¹¹ Respondent did contend that the collector violated DOT procedures during the collection of his sample, in that respondent, rather than the collector, disposed of the excess urine following the collection; and that the collector told respondent that he could leave the facility before the collector placed the two specimen bottles in the shipping container. However, the collector testified otherwise. Furthermore, 49 C.F.R. § 40.199 describes four situations in which errors, or "fatal flaws," result in cancellation of the test. Neither of respondent's alleged errors fall in those descriptions. Finally, *de minimis* or irrelevant breaches of these protocols will not vitiate a positive drug result. See, e.g., Administrator v. Sweeney, NTSB Order No. EM-176 (1994).

the absence of a reasonable theory explaining the presence of 6-MAM in his sample under circumstances where the Respondent could not have ingested drugs within the time frame necessary for this substance to be detected ... the Administrator has not met his burden of proof for revocation.

Respondent's Appeal Br. at 15. Respondent misunderstands the administrative process. It was his burden to provide that "reasonable theory explaining the presence of 6-MAM in his sample," supported by evidence establishing a legitimate medical explanation¹² for the drug metabolites in his urine or establishing that the urine that was tested was not his. Respondent failed to do either. The Administrator had no burden beyond establishing a *prima facie* case, not even to rebut respondent's suppositions.¹³ We discern no error in the law judge's decision upholding the Administrator's emergency order of revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's emergency revocation of any airman and medical certificates held by respondent is affirmed.

¹² DOT regulations governing drug and alcohol testing also clearly state that, as regards the positive cocaine result, "the employee has the burden of proof that a legitimate medical explanation exists. The employee must present information meeting this burden at the time of the verification interview." 49 C.F.R. § 40.137(c).

¹³ See Tsegaye, supra, and Administrator v. Zingali, NTSB Order No. EA-3597 (1992) (Administrator not required to rebut affirmative defense when he has established *prima facie* case).

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

APPEARANCES:

On behalf of the Administrator:

GLENN L. BROWN, ESQUIRE
Federal Aviation Administration
FAA Great Lakes Region
2300 East Devon Avenue
Des Plaines, Illinois 60018
(847) 294-7313

On behalf of the Respondent:

ARTHUR M. LUBY, ESQUIRE
JEFFREY A. LOESEL, CONTRACT ADMINISTRATOR
Air Line Pilots Association International
535 Herndon Parkway
Herndon, Virginia 20170
(703) 689-4178

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ORAL INITIAL DECISION AND ORDER

8

This is a proceeding under the provisions of 49 USC
9 Section 44709, formerly Section 609 of the Federal Aviation
10 Act, and the provisions of the Rules of Practice in air safety
11 proceedings of the National Labor Relations Board.

12

Jeffrey R. Swaters, the Respondent, has appealed the
13 Administrator's Emergency Order of Revocation dated August
14 24th, 2007, which, pursuant to Section 821.31(a) of the
15 Board's Rules, serves as the Complaint in which the
16 Administrator ordered the revocation of Respondent's Airline
17 Transport Pilot Certificate and his First Class Airman Medical
18 Certificate, as well as any other Airman, or Airman Medical
19 Certificates he may hold because he allegedly violated
20 Sections 91.17(a)(3) and 121.455(b) of the Federal Aviation
21 Regulations. The Respondent has waived proceeding under the
22 Board's rules applicable to Emergency Orders.

23

In his Answer to the Complaint, Respondent admitted
24 Paragraphs 1, 2, 3, 4, 5, 6, 7, 10, in part 11, in part 12,

1 13, 18, 20, 26, 28, and 29. He further admitted Paragraph 8,
2 except that he was the pilot-in-command of a passenger
3 carrying flight from Kingston, Jamaica on February 26, 2007,
4 not a flight from LaGuardia Airport, New York.

5 He denied the allegations in Paragraphs 14, 15, 16,
6 17, 18, 21, 22, 23, 24, 25, 27, 30, 31, and 32. He denied
7 violating Federal Aviation Regulations.

8 As affirmative defenses, he stated that he did not
9 use any drugs that could have produced the results alleged by
10 the Administrator. He has surrendered his licenses. The
11 samples he provided were not properly handled by the
12 laboratories and facilities responsible for them. The drug
13 test results referenced in the Administrator's Complaint are
14 not correct. The Administrator's Complaint fails to state a
15 cause of action for revocation of his certificates, and
16 revocation of his certificates is contrary to law and
17 regulation.

18 I have considered the admissions by the Respondent
19 in his Answer, testimony of the witnesses, and the Respondent,
20 and the written exhibits, and from them I find that the
21 Respondent's urine in both the primary specimen and the split
22 sample, tested as alleged in the Complaint, were positive for
23 cocaine, 6-monoacetylmorphine and morphine, all prohibited
24 drugs. And further, as alleged in the Complaint, the Medical
25 Review Officer verified confirmed positive tests for those

1 drugs.

2 I further find that the evidence of record,
3 including the chain of custody forms, testimony of the urine
4 collector, whom I find to be a completely credible witness,
5 who has no reason to testify falsely concerning the procedures
6 he followed, and other witnesses for the Administrator, shows
7 no fatal flaws in the collection process, no reason to doubt
8 that the two sealed specimen bottles received by Quest
9 Diagnostics and -- what was the name of the other laboratory?

10 MR. LUBY: DSI.

11 ADMINISTRATIVE LAW JUDGE POPE: DSI?

12 MR. BROWN: DSI.

13 ADMINISTRATIVE LAW JUDGE POPE: -- DSI were, in
14 fact, the Respondent's urine, which had not been tampered with
15 in any way, and that the documentation packages provided by
16 the laboratories that tested the primary sample and the split
17 sample in no way invalidates the test results by the
18 laboratories of the Respondent's urine.

19 The Respondent has raised affirmative defenses that
20 he contends invalidate the collection process. They have to
21 do with perceived defects in the collection process and
22 omissions from the chain of custody forms. Specifically, the
23 Respondent contends that he did not witness the transfer of
24 his urine to the two specimen bottles and the sealing of those
25 bottles with tamper resistant seals, did not witness placing

1 the sealed specimen bottles in a plastic bag with pouches that
2 were sealed in his presence.

3 He further says Block 4 of the chain of custody form
4 does not show who the laboratories released specimen bottles
5 to, although the Respondent concedes that it is shown in other
6 laboratory documents. And the Respondent, not the Collector,
7 as required, disposed of the excess urine after the specimen
8 bottles were filled.

9 It is well established in Board law that the
10 Respondent has the burden of proving affirmative defenses he
11 raised by a preponderance of the evidence. Here I find that
12 Respondent has failed to meet that burden.

13 I further find that Arthur Stachurski, the urine
14 collector, is a completely credible witness with no reason to
15 testify falsely. He did not remember the Respondent
16 specifically, but testified to his usual procedures in
17 collecting urine for DOT random drug tests. He testified
18 credibly that he always pours the urine from the collection
19 cup into the two specimen bottles in the presence of the
20 donor, has the donor sign the tamper evident seals, and places
21 them on the specimen bottles in the donor's presence.

22 Although the Respondent may claim that he did not
23 witness the transfer of his urine from the collection cup to
24 the specimen bottles, and the sealing of the bottles, I find
25 the evidence indicates otherwise.

1 In Step 5 of the chain of custody form, A-4, the
2 Respondent signed and dated, on 2/26/07, a statement to the
3 effect, "I certify that I have provided my urine specimen to
4 the Collector, that I have not adulterated it in any manner.
5 Each specimen bottle used was sealed with a tamper evidence
6 seal in my presence and that the information provided on this
7 form and on the labels affixed to each specimen bottle is
8 correct."

9 I do not find the Respondent to be a credible
10 witness in this regard. I observed his testimony and, while
11 he was polite, I do not consider his demeanor to be convincing
12 or forthcoming.

13 In any event, I considered it inconceivable that a
14 commercial airline pilot would be so inattentive to details of
15 a statement that he was signing, that he would not read it
16 first.

17 In accordance with the testimony of Karen Leamon,
18 Manager of the FAA Special Investigation Branch, and 49 CFR
19 Section 40.199(b)(1) through (4), whom I consider to be a
20 credible witness, whose testimony is supported by the Federal
21 Aviation Regulations, I find that each of the other alleged
22 flaws raised by the Respondent are not fatal flaws which
23 invalidate the collection process, or raise any doubt that the
24 urine in the specimen bottles was his urine, and it had not
25 been adulterated, or any other way tampered with when received

1 by the laboratories.

2 In any event, even if the Collector did not seal the
3 plastic bag for shipment, which contained the sealed specimen
4 bottles and a chain of custody form in the Respondent's
5 presence, I find that to be a harmless error that did not
6 compromise the integrity of the specimen bottles.

7 On the other hand, I credit the testimony of Mr.
8 Stachurski, the Collector, that he did seal the plastic bag in
9 the Respondent's presence. Further, even if the Respondent
10 was asked to throw away the leftover urine from the collecting
11 cup, that had nothing to do with the urine that had already
12 been transferred to the specimen bottles, which had been
13 sealed in his presence with tamper evident seals.

14 And finally, the Respondent has not shown that the
15 failure to fill out Block 4 of the chain of custody form,
16 showing who the laboratories released the specimen bottles to,
17 is material, because the Respondent concedes that information
18 as shown in other laboratory documents.

19 The Respondent also contends that there is an
20 unexplainable discrepancy between the time his urine was
21 collected, as shown on the chain of custody form, which was
22 8:47 p.m., and the time reported on the MRO's findings as 8:47
23 a.m. That is clearly a harmless error, inadvertent on the
24 part of the MRO, as there is no doubt from the chain of
25 custody forms, and the testimony of various witnesses, that

1 the collection took place in the evening, not the morning.

2 The concentration of cocaine in the Respondent's
3 urine, as tested, was 9,455.91 nanograms. The cutoff for
4 cocaine is 150 nanograms. The concentration of morphine was
5 tested as 16,023.4; the confirmation level is 2,000.

6 Accordingly, the Respondent's urine tested positive
7 for both morphine and cocaine. The Respondent's concentration
8 of 6-monoacetylmorphine, which can only be found as a
9 metabolite of heroin, was 499.27 nanograms. The cutoff level
10 is 10 nanograms. Accordingly, the Respondent's urine tested
11 positive for 6-monoacetylmorphine. All of these drugs are
12 prohibited drugs.

13 As reported to the MRO, the Respondent's urine
14 tested positive for cocaine metabolites at 300 nanograms. The
15 confirmation level is 150 nanograms. Morphine, an opiate, and
16 6-monoacetylmorphine at a level of 16,023, with a confirmation
17 level of 20,000 nanograms.

18 I find nothing in the record here, which would in
19 any way, cast any doubt on the validity of these laboratory
20 findings of the positive presence of cocaine metabolites,
21 morphine and 6-monoacetylmorphine in the Respondent's urine.
22 Accordingly, I so find.

23 The Respondent, who it appears has an unblemished
24 record as a pilot for Spirit Airlines, denied that he had ever
25 taken heroin, morphine, cocaine, or any prohibited drug. He

1 testified that after spending the night of February 25th 2007
2 in Jamaica on a layover, he reported to the San Juan airport
3 at 4:55 a.m. on February 26, 2007 for a series of flights that
4 ended in Fort Lauderdale at 2:52 p.m. that day, after which he
5 was notified that he had been randomly selected for a drug and
6 alcohol test.

7 Each of the stopovers during that day of flights,
8 which took him to Orlando, Fort Lauderdale, back to Jamaica,
9 then ended in Fort Lauderdale, was no more than 40 minutes.
10 During all of the time, there was no time when he was alone
11 for a sufficient amount of time that he could have ingested
12 the illegal drugs found in his urine, without it being evident
13 in his behavior.

14 There was testimony from his First Officer, the
15 Assistant Chief Pilot of Spirit Airlines, and other Spirit
16 Airlines employees who notified him that he had been randomly
17 selected for a blood alcohol test, that he exhibited no signs
18 of use of prohibited drugs.

19 I agree that it appears indeed unlikely that the
20 Respondent could have ingested prohibited drugs in the
21 quantities found in his urine after he reported for work at
22 4:55 a.m. on February 26, 2007. However, that does not
23 preclude that he could have ingested the drugs during the
24 evening of February 25th, 2007 when he was, by his own
25 account, alone.

1 There is ample testimony that the combination of
2 heroin and cocaine is called by its street name as a
3 Speedball. Cocaine is a stimulant; heroin is a depressant.

4 Dr. Robert White is the Director of Clinical
5 Chemistry of DSI Laboratory, who I find to be a knowledgeable
6 and completely credible witness in Forensic Toxicology. DSI
7 tested the split sample and, as stipulated, confirmed the
8 findings by Quest Diagnostics that the Respondent's urine was
9 positive for cocaine, morphine, and 6-monoacetylmorphine
10 metabolites.

11 He said that the action of cocaine on the body is
12 through the bloodstream and lasts 15 to 20 minutes. The
13 action of heroin is also fairly brief and is through the
14 bloodstream and lasts a few hours. It takes some time for the
15 metabolites of these drugs to show up in your urine; he said
16 that cocaine metabolites stay in the bloodstream for three to
17 five days. He said that morphine stays in the urine for three
18 to five days. He said that morphine is detectable for two
19 days, and 6-monoacetylmorphine is detectable for eight to ten
20 hours. Fifteen to 20 minutes is the half-life for cocaine.
21 Two to five hours is the half-life for morphine. He said that
22 heroin is rapidly metabolized to 6-monoacetylmorphine.

23 The testimony of Dr. Vina Spiehler, accepted as an
24 expert on the pharmacology of drugs, was, to a large extent,
25 in the same range as that of Dr. White. Clearly, and I so

1 find, it is not inconsistent with the use of heroin and
2 cocaine during the evening of February 25th, 2007, that the
3 Respondent would not exhibit any outward and observable signs
4 of drug use on February 26, 2007, but it would still be
5 detectable in his urine.

6 The amount of time that 6-monoacetylmorphine is
7 detectable in urine is an estimate, and from the testimony of
8 Dr. White and Dr. Spiehler, could be influenced by the
9 tolerance of the drug in the user, and by the quantity
10 ingested.

11 There was considerable testimony concerning the
12 lapse of time between when the Respondent was notified he had
13 been randomly selected for a DOT drug and alcohol test, and
14 the time he actually reported for the test at the collection
15 site.

16 I am giving the Respondent the benefit of the doubt that the
17 delay was justified and I draw no adverse inference against
18 him because of it.

19 FAR Section 67.107(b)(2), 67.207(b)(2), and
20 67.307(b)(2) provided that the mental standards for a medical
21 certificate of any class includes no substance abuse within
22 the preceding two years. Substance abuse is defined as a
23 verified positive drug test result.

24 The duties of a Medical Review Officer, as set out
25 in the U. S. Department of Transportation's procedures for

1 transportation workplace drug and alcohol testings, 49 CFR
2 Section 40.137(a), states that "As the MRO, you must verify
3 and confirm positive tests for marijuana, cocaine,
4 amphetamines, and/or PCP, unless the employee presents a
5 legitimate medical explanation for the presence of the drugs,
6 metabolites in his system."

7 One of the functions of the Medical Review Officer
8 is to determine whether there is a legitimate medical
9 explanation for confirmed positive adulterated substituted and
10 invalid drug tests form the laboratory, 49 CFR Subpart (g).

11 Section 40.151(d) provides that it is your function
12 to consider explanations of confirmed positive adulterated or
13 substituted drug test results that would not, even if true,
14 constitute a legitimate medical explanation. For example, an
15 employee may tell you that someone slipped amphetamines into
16 her drink at a party, that she unknowingly ingested a
17 marijuana brownie, or that she traveled in a closed car with
18 several people smoking crack. MROs are unable to be able to
19 verify the facts of such passive, or unknowing, ingesting
20 stories. Even if true, such stories do not present legitimate
21 medical explanations. Consequently, you must not declare a
22 test as negative based on an explanation of this kind.

23 In Administrator v. Taylor, NTSB Order Number EA-
24 5132 (2005) at Footnote 9, the Board said, "Department of
25 Transportation regulations governing drug and alcohol testing

1 also clearly state that the employee has the burden of proof
2 that a legitimate medical explanation exists. The employee
3 must present information meeting this burden at the time of
4 the verification interview, 49 CFR Section 40.137(c)."

5 Whereas, as here the Administrator has made a prima
6 facie showing that the Respondent violated Sections
7 91.17(a)(3) and 121.455(b), and is unqualified to hold any
8 airman medical certificate under FAR Sections 67.107(b)(2),
9 67.207(b)(2), and 67.307(b)(2), the Respondent has the burden
10 of proving his affirmative defense by a preponderance of the
11 evidence, and the Administrator has no duty to rebut the
12 affirmative defenses that the Respondent has raised.
13 Administrator v. Tsegaye, NTSB Order Number EA-4205 (1994),
14 and Administrator v. Zingali, NTSB Order Number EA-3597
15 (1992).

16 In Administrator v. Kalberg, NTSB Order Number EA-
17 5240 (2006), at Pages 8 and 9, a case in which the Respondent
18 claimed his ingestion of marijuana was inadvertent and
19 unknowing, the Board said it is doubtful whether the
20 Respondent's exculpatory claims, even if believed, would
21 establish a legally sufficient defense to the operational
22 violations. The Board said:

23 In this regard, we note that DOT drug testing
24 requirements specify that the Medical Review Officer must
25 verify a confirmed positive drug result unless the employee

1 presents a legitimate medical explanation for the drugs found
2 in his system, 49 CFR Section 40.137.

3 DOT drug testing requirements specify the
4 explanation by an employee of inadvertent or passive ingestion
5 of drugs do not constitute a legitimate medical explanation
6 that can be considered by an MRO to not verify a positive drug
7 test result, 49 CFR Section 40.151.

8 Accordingly, I find that the MRO verified a
9 confirmed positive drug test for cocaine, morphine, and 6-
10 monoacetylmorphine within the past two years. And, therefore,
11 the Respondent is ineligible to hold an airman medical
12 certificate.

13 I cannot readily fathom why a pilot, with the
14 responsibilities and experience the Respondent has as a
15 Captain with a commercial airline, would jeopardize his
16 promising career and livelihood by use of prohibited drugs.

17 However, the overwhelming weight of the evidence is that
18 metabolites of cocaine, morphine, and 6-monoacetylmorphine
19 were detected by a random DOT drug and alcohol test on
20 February 26, 2007, as alleged in the Complaint, and were
21 verified as positive by an MRO.

22 Unfortunately, the Respondent has not provided any
23 legitimate medical explanation for the presence of those drugs
24 in his urine, other than he denies that he ingested them.

25 The Respondent is charged with violating both FAR

1 Sections 91.17(a)(3) and 121.455(b). With regard to the FAR
2 91.17(a)(3) offense, there was no clear evidence from any
3 observer that the Respondent showed any symptoms of drug use
4 while flying. However, the drugs, heroin, morphine and
5 6-monoacetylmorphine and cocaine were in his urine at that
6 time.

7 It is beyond dispute that these are mind-altering
8 drugs that affect the pilot's faculties in a way contrary to
9 safety. Therefore, I find there is no certainty that these
10 drugs that he ingested did not affect his faculties in the
11 prohibited fashion during the day of February 26, 2007, while
12 he was conducting a series of commercial passenger carrying
13 Part 121 flights.

14 There is no doubt that the Administrator has proved,
15 by a preponderance of the evidence, that the Respondent
16 violated Section 121.455(b) as charged, by having prohibited
17 drugs in his system.

18 To avoid any possible prejudice to the Respondent, I
19 shall limit the imposition of sanction to the Section
20 121.455(b) offense. I am compelled, therefore, to affirm the
21 Administrator's Complaint. Revocation of both the
22 Respondent's ATP Certificate, and any other airman's
23 certificate he holds, and all of his medical certificates, is
24 the appropriate sanction under Board precedent.

25 Upon consideration of all the substantial, reliable,

1 and probative evidence, I find the Administrator has proven,
2 by a preponderance of the evidence, that the Respondent
3 violated FAR Sections 91.17(a)(3) and 121.455(b).

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ORDER

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ACCORDINGLY, IT IS HEREBY ORDERED that the
Administrator's Order is affirmed, and that the Respondent's
appeal is denied.

DATED & EDITED ON
April 1, 2008

WILLIAM A. POPE, II
Administrative Law Judge