

SERVED: October 7, 2008

NTSB Order No. EA-5409

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 7<sup>th</sup> day of October, 2008

_____	)	
ROBERT A. STURGELL,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18330
v.	)	
	)	
MARCELO F. MARTINEZ,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent, who proceeds pro se, appeals the written decisional order of Administrative Law Judge Patrick G. Geraghty, issued September 9, 2008.<sup>1</sup> By that decision, the law judge granted the Administrator's motion for summary judgment

<sup>1</sup> A copy of the law judge's order is attached.

based on a violation of 14 C.F.R. § 67.403(a)(1).<sup>2</sup> The law judge ordered revocation of respondent's commercial pilot, ground instructor, flight instructor, and medical certificates, as well as any other airman certificates that respondent holds. We deny respondent's appeal.

The Administrator issued the emergency revocation order,<sup>3</sup> which became the complaint in this case, on August 4, 2008. The complaint alleged that respondent submitted an application for an airman medical certificate with an Aviation Medical Examiner on December 12, 2007, and that respondent certified that all the information he provided on the application was complete and true. The Administrator's complaint stated that, as a result of this certification, the Administrator issued respondent an airman medical certificate. However, the complaint alleged that, in response to question 18w on the application, respondent certified that he had "no history of nontraffic conviction(s) (misdemeanors or felonies)." Compl. at ¶ 5. The Administrator's complaint then stated that respondent's response to question 18w was intentionally false, because respondent knew

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<sup>2</sup> The pertinent portion of section 67.403(a)(1) prohibits a person from making fraudulent or intentionally false statements on an application for a medical certificate.

<sup>3</sup> This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52 - 821.57.

that, on April 26, 2007, he pled guilty to and was convicted of disorderly conduct, a Class 1 Misdemeanor, in Maricopa County Justice Courts, Arizona. Id. at ¶ 6. The complaint alleged that respondent's conviction was material in determining whether he was qualified to hold an airman medical certificate, and that respondent had violated 14 C.F.R. § 67.403(a)(1).

Respondent provided a timely answer to the complaint, in which he admitted that he had completed the application and certified that he had no history of "nontraffic conviction(s)," but denied that this certification was intentionally false, and that the conviction was material in determining whether he was qualified to hold an airman medical certificate. Respondent's answer also stated that he did not engage in intentional falsification or attempt to hide his criminal background. In addition, respondent's answer stated that he did not believe that the alleged violation affects his "care, judgment, or safety in or outside an aircraft." Respondent's Answer at ¶ 3.

Based on respondent's admissions in his answer to the factual allegations in the Administrator's complaint, the Administrator filed a motion for summary judgment pursuant to 49 C.F.R. § 821.17(d). The Administrator's motion asserted that no genuine issues of material fact existed, because respondent admitted that he certified his medical application as true, and because respondent pled guilty to one count of disorderly

conduct, was ordered to complete a domestic violence intervention program, and was placed on probation for 1 year. The Administrator attached a copy of the judgment and sentencing order to his motion for summary judgment. Mot. for Summ. J. at Exh. A. The Administrator also attached a copy of respondent's December 12, 2007 medical application, which showed that respondent had checked "no," in response to the question of whether he had a history of "nontraffic conviction(s)" (Mot. for Summ. J. at Exh. B), as well as respondent's response to the Administrator's Letter of Investigation, in which respondent stated that, after reviewing his application for an airman medical certificate, he realized that he made an error on the application, and that this was a "major concern" to him (Mot. for Summ. J. at Exh. C). The Administrator's motion asserted that the evidence indisputably established that respondent had included a false representation in reference to a material fact in his application, and that respondent had knowledge of its falsity. Therefore, the Administrator asserted that summary judgment was appropriate for disposition of this case.

Respondent filed a timely response to the Administrator's motion, in which he argued that, while he was "wrong" in not answering "yes" to question 18w on his medical application, the Administrator did not present evidence to establish that he had a false or fraudulent intent or any intent to deceive or to

falsify the application. Resp. to Mot. for Summ. J. at 2. Respondent further stated that he did not intentionally hide his true criminal history on the medical application, and that he had openly disclosed his criminal conviction on all applications for employment. Respondent also asserted that his conduct showed no disregard for safety; that he has consistently "shown great regard for safety, care, judgment, and responsibility"; and that he is "of good moral character." Id. Respondent attached to his response copies of applications for employment on which he disclosed his criminal conviction, a copy of a certificate indicating that he had completed a Pilot Proficiency Award Program, and copies of letters of recommendation and a list of references. Id. at Exhs. A, B, C.

After reviewing the Administrator's motion and respondent's response, the law judge concluded that the evidence established that respondent had made a material, intentionally false response on his December 12, 2007 application by answering "no" to question 18w. The law judge stated that Board precedent indicates that all statements and answers on an airman medical application are material, as they are all capable of influencing the Administrator's decision of whether to issue a medical certificate. The law judge also concluded that Board precedent establishes that the sanction of revocation is appropriate for an instance of intentional falsification. Decisional Order at 5

(citing Administrator v. McCarthney, 7 NTSB 670, 672 (1990), and Administrator v. Berry, 6 NTSB 185, 190 (1988)).

Respondent now appeals the law judge's decision granting the Administrator's motion for summary judgment. In support of his appeal, respondent asserts that he intended his response to the Administrator's letter of investigation to indicate that he was willing to cooperate with the Administrator, and that his answer to question 18w was "not an answer of deceit."

Respondent's Br. at 3. Respondent's appeal brief also explains that he intended his inclusion of copies of his application for employment and Pilot Proficiency Award Program certificate to indicate that he values safety and holds himself to a high standard. Id. Respondent also asserts that his erroneous answer to question 18w was "a mere oversight," and that he believed question 18w was "a confirmation question or a 'run on' to question 18v," and, as such, that question 18w did not apply to him. Id. at 4.<sup>4</sup> Respondent contends that his oversight in

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<sup>4</sup> Questions 18v and 18w are both categorized under the heading entitled "Conviction and/or Administrative Action History." Question 18v requests a yes or no answer to the following:

History of (1) any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation program.

checking "no" to question 18w was therefore a result of his misinterpretation of the question. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.

Under the Board's Rules of Practice, a party may file a motion for summary judgment on the basis that the pleadings and other supporting documents establish that no factual issues exist, and that the party is therefore entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate. Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)). In this regard, we recognize that Federal courts have granted summary judgment when no genuine issues of material fact exist. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986).<sup>5</sup> In submitting a motion for summary judgment, the burden rests on the moving party to establish that no factual issues exist. Moreover,

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(..continued)

Mot. for Summ. J. at Exh. B. Question 18w requests a yes or no answer to "[h]istory of nontraffic conviction(s) (misdemeanors or felonies)." Id.

<sup>5</sup> A *genuine* issue exists if the evidence is sufficient for a reasonable fact-finder to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986). An issue is *material* when it is relevant or necessary to the ultimate conclusion of the case. Id. at 248.

courts will generally view a motion for summary judgment in a light most favorable to the nonmoving party when a genuine dispute regarding the facts exists. Fed. R. Civ. P. 56(c); Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (stating that, "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial'"); see also Administrator v. Englestead, NTSB Order No. EA-4663 at 2 (1998).

With regard to the issue of falsification of a medical application, we have long adhered to a three-prong standard to prove a falsification claim; in this regard, in intentional falsification cases, the Administrator must prove that a pilot (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity of the fact. Hart v. McLucas, 535 F.2d 516, 519 (9<sup>th</sup> Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)). We have also held that a statement is false concerning a material fact under this standard if the alleged false fact could influence the Administrator's decision concerning the certificate. Administrator v. McGonegal, NTSB Order No. EA-5224 at 4 (2006); Administrator v. Reynolds, NTSB Order No. EA-5135 at 7 (2005); see also Janka v. Dep't of Transp., 925 F.2d 1147, 1150 (9<sup>th</sup> Cir. 1991). In McGonegal and Reynolds, supra, we stated that an



applicant's answers to all questions on the application are material.

In the case at issue, the evidence establishes that respondent pled guilty to a misdemeanor in Maricopa County Justice Courts on April 27, 2007. The evidence also establishes that, less than 8 months later, respondent completed an application for an airman medical certificate, on which he indicated that he did not have a history of "nontraffic conviction(s)." Respondent's attempt to justify his answer to question 18w on his application by stating that he misinterpreted the question is unavailing, as we have previously held that failure to read questions on the medical application closely enough to supply accurate answers is not a basis to dispute a charge of intentional falsification. In Administrator v. Boardman, NTSB Order No. EA-4515 at 8-9 (1996), for example, we stated that the respondent's failure to consider question 18w on a medical application carefully before providing an answer did not establish a lack of intent to provide false information, and that we were not persuaded by the respondent's contention that the fact that he had informed his employer of the impending conviction indicated his lack of an intent to keep anyone from learning of the conviction. Similarly, we recognized in Administrator v. Sue, NTSB Order No. EA-3877 at 5 (1993), that the argument that question 18w on the medical application is

vague was unavailing, and that, "the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence." Overall, we conclude that the law judge did not err in rejecting respondent's argument that he did not answer "yes" to question 18w because he misunderstood the question. In addition, the law judge did not err in concluding that the evidence established that respondent intentionally falsified his application.

With regard to sanction, we find that the law judge did not err in affirming the sanction of revocation. We have previously held that the sanction of revocation is appropriate in cases involving falsification. See, e.g., Administrator v. Farrington, NTSB Order No. EA-4171 (1994) (citing Administrator v. Potanko, NTSB Order No. EA-3937 (1993); Administrator v. Walters, NTSB Order No. EA-3835 at 5, n.6 (1993); Administrator v. Altman, 3 NTSB 3311, 3314 (1981)).

Based on the foregoing, we find that respondent has violated 14 C.F.R. § 67.403(a)(1).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The law judge's order granting summary judgment is affirmed; and

3. The Administrator's emergency revocation of any airman and medical certificates held by respondent is affirmed.

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

**EMERGENCY  
SERVED SEPT. 9, 2008**

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

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ROBERT A. STURGELL, \*  
Acting Administrator \*  
Federal Aviation Administration, \*  
Complainant, \*

v. \*

MARCELO F. MARTINEZ, \*  
Respondent \*

\*\*\*\*\*

Docket No.: SE-18330  
JUDGE GERAGHTY

**SERVICE: BY FAX & REGULAR MAIL**

LIERRE GREEN, ESQ.  
FAA/WESTERN PACIFIC REGION  
P. O. BOX 92007  
LOS ANGELES, CA 90009

**BY OVERNIGHT FEDERAL EXPRESS & REGULAR MAIL**

MR. MARCELO F. MARTINEZ  
39951 HIGH NOON WAY  
ANTHEM, AZ 85086

**DECISIONAL ORDER**

This proceeding is before the Board upon the Appeal of Marcelo F. Martinez, herein Respondent, from an Emergency Order of Revocation, herein the Complaint. Said Order/Complaint was issued against Respondent by the Administrator, Federal Aviation Administration (FAA), and charges that Respondent has acted in violation of the provisions of Section 67.403(a)(i), Federal Aviation Regulations (FARs).<sup>1</sup>

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<sup>1</sup> Section 67,403(a)(1), provides that:

- (a) No person may make or cause to be made—
  - (1) A fraudulent or intentionally false statement on any application for a medical certificate or on a request for any Authorization for Special issuance of a Medical Certification (Authorization) or

In support of that charge of regulatory violation, the Order/Complaint alleges as follows:

- (1) You are now, and at all times mentioned herein were, the holder of Commercial pilot Certificate No. 2772953, Ground Instructor Certificate No. 2772953, Flight Instructor Certificate No. 2772953, and a First Class Certificate issued on December 12, 2007.
- (2) On December 12, 2007, you submitted an application for an airman medical certificate with an Aviation Medical Examiner.
- (3) On the above-referenced application, you certified that all of the statements and answers provided by you on the application were complete and true to the best of your knowledge.
- (4) In part, as a result of your certification on the above-referenced application, you were issued an airman medical certificate.
- (5) On your application referenced in paragraph 2 above, in response to question 18w, you certified that you had no history of nontraffic conviction(s) (misdemeanors or felonies).
- (6) Your certification that you had no history of nontraffic convictions) (misdemeanors or felonies) was intentionally false in that you knew that on April 26, 2007, in the North Valley Justice Court of the Maricopa County Justice Courts, State of Arizona, you pled guilty to and were convicted of Count 1 Amended; Disorderly Conduct, a Class 1 Misdemeanor, in violation of Arizona Revised Statute (A.R.S.) §§§ 13-2904a1, 13-3601, 13-707, and 13-802.
- (7) Your conviction as referenced in paragraph 6. is material in determining if you are qualified to hold a medical certificate.

On the foregoing allegations and regulatory charge, the Complainant seeks revocation of Respondent's Commercial Pilot; Flight and Ground Instructor Certificates, and any unexpired Airman Medical and any other airman certificates held by the Respondent.

Respondent filed an Answer to the Complaint and therein admitted the validity of the allegations stated in Paragraphs 1 through 5 of the Complaint. Denial was made of those allegations contained in Paragraphs 6 and 7.

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Statement of Demonstrated Ability (SODA) under  
this part;...

Complainant has filed a Motion for Summary Judgment Judgment and in support attaches copies of court records; Respondent's medical application and a letter to the FAA from Respondent.

Respondent has submitted a reply to Complainant's Motion and attaching thereto a copy of his Application for Employment to Sky West Airlines, a certificate for the Pilot Proficiency Award Program, and copies of letters of recommendation.

In his Response, Respondent admits that he was "wrong" in not answering "yes" to the question in Item 18.w on the Application for Airman Medical Certification made December 12, 2007.

Exhibit C of the Motion is a copy of Respondent's Application and does show that Respondent marked "No" to the inquiry of a "History of nontraffic convictions." As noted in his response, Respondent concedes the answer made was not correct; i.e., false, and Exhibit A of Complainant's Motion documents Respondent's guilty plea on the charge of Disorderly Conduct, Class 1 Misdemeanor, entered in the Maricopa County Justice Courts of Maricopa, Arizona.

Upon the foregoing facts, the allegations of Paragraph 6 of the Complaint are found to be established.

The argument by Respondent that the fact that he revealed his record of conviction on his employment application, and that such act ameliorates or excuses his erroneous, false answer on the airman medical application, is unavailing in that the issue presented is whether Respondent made an intentionally false response on his application to the FAA for issuance of airman medical certification.

As the Parties correctly state, the elements of the regulatory violation charged are: a false statement to a material fact, made intentionally, i.e., with knowledge of its falsity.

Herein, the evidence clearly shows that Respondent's answer to Item 18.w on his application was false. And I so conclude. The Board precedent, as sustained by decision in U. S. Courts of Appeal, is that all statements and answers of airman medical application are material in that such are capable of influencing the FAA's decision on issuance of certification.

Respondent argues that there is no intentional falsification in that he did not make a "conscious decision" not to truthfully disclose his criminal conviction. The issue of intent in this type case is, as in most cases, determined upon examination of the circumstantial factors presented.

Herein, the record shows that Respondent, acting pro se, entered his guilty plea on April 26, 2007, just eight (8) months prior to the making of his Application dated December 12, 2007. It is not credible to assert that Respondent would not recall a court appearance and his entry of a guilty plea made just months previously. Further, the question posed in Item 18.w cannot be found to be subject to confusion. It clearly asks if there exists a history of nontraffic convictions of either misdemeanors or felonies. There is no evidence that Respondent did not understand the inquiry being made by Item 18.w. Respondent's assertion that his "wrong", false response was not consciously made is not believable. The answer made was his choice of answer and certainly must be found to have been made by him after his "conscious decision" as to how he would respond.

Upon consideration of the circumstances evident herein, I find and conclude that Respondent made a material, intentionally false response on his Application of December 12, 2007, by answering "NO" to the question in Item 18.w thereof. In sum, therefore, I find that all allegations of the Complaint are established either upon admission or the preponderance of the credible evidence.

Summary Judgment is appropriate where the case record demonstrates that there does not exist any genuine dispute as to any material fact. Herein, I find that upon this record, there can be no dispute as to any material fact as would require Hearing to resolve.

Upon the issue of sanction, Board precedent is that falsification warrants the sanction of revocation and has held that even one instance of intentional falsification is grounds for revocation of all airman and airman medical certificates held by that individual. Administrator v. McCarthy, et al, 7 NTSB 670, 672 (1990), as such act demonstrates lack of qualification to hold any certifications. Administrator v. Berry, 6 NTSB 185, 190 (1988).

Upon this record and Board precedent, I find and hold that Complainant's Motion for Summary Judgment must and hereby is granted. I further find and hold that upon such that the Complaint/Emergency Order of Revocation be and hereby is affirmed as issued and the Respondent's Commercial Pilot, Flight and Ground Instructor, and any other airman certificates and any unexpired airman medical certificates are revoked.

SO ORDERED.

***ENTERED this 9<sup>th</sup> day of September 2008 at Denver, Colorado.***

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PATRICK G. GERAGHTY  
ADMINISTRATIVE LAW JUDGE