

SERVED: October 16, 2008

NTSB Order No. EA-5412

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 15th day of October, 2008

_____)	
ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18095
v.)	
)	
MARIA ROSE FINAZZO,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins following an evidentiary hearing held on January 23 and 24, 2008.¹ By that decision, the law judge granted respondent's appeal of the

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

Administrator's order of revocation of respondent's airline transport pilot (ATP) certificate, based on respondent's alleged intentional falsification of several applications for her airman medical certificate.² We grant the Administrator's appeal.

The Administrator issued the revocation order, which became the complaint in this case, on August 22, 2007. The complaint alleged that respondent submitted a total of nine applications for her medical certificate, from October 4, 2001, to May 24, 2006, which contained falsifications. In particular, the complaint alleged that respondent omitted visits to Dr. George Seberg on the portion of the certificates that requested disclosure of visits to health professionals within the last three years, and that respondent knew of these omissions because she sought treatment from Dr. Seberg for her sleep disorder, General Anxiety Disorder (GAD), and ailments that caused Dr. Seberg to prescribe several medications for respondent.³ In addition, the complaint alleged that respondent knowingly failed

² The Administrator charged respondent with violating 14 C.F.R. § 67.403(a)(1), which provides that no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate. The Administrator also charged respondent with violating 14 C.F.R. § 61.153(c), which provides that, to be eligible for an airline transport pilot certificate, a person must "[b]e of good moral character."

³ The Administrator's complaint, however, mentioned that respondent disclosed visits to Dr. Seberg for a sprained ankle and a cold on two medical certificate applications. Compl. at ¶¶ 7-8.

to disclose her use of prescription medications and her diagnosis of GAD on the medical certificate applications at issue. The complaint ordered revocation of respondent's ATP certificate for a period of one year.

Respondent filed a timely appeal of the Administrator's order, and the case proceeded to hearing. At the hearing, the Administrator provided copies of respondent's medical certificate applications, Exh. A-1, in conjunction with the testimony of Dr. Stephen Roberts, who is a regional flight surgeon at the FAA, and was an aviation medical examiner (AME) for 23 years prior to joining the FAA. Tr. at 24. Dr. Roberts testified that, when the FAA reviews each medical certificate application, they review question 17(a) on the application, which asks, "Do You Currently Use Any Medication (Prescription or Nonprescription)?" in conjunction with question 18, which asks, "HAVE YOU EVER IN YOUR LIFE BEEN DIAGNOSED WITH, HAD, OR DO YOU PRESENTLY HAVE ANY OF THE FOLLOWING?" and contains a list of 22 categories, which includes "[m]ental disorders of any sort: depression, anxiety, etc." and "[o]ther illness, disability, or surgery." Tr. at 31; Exh. A-1 at 1. Dr. Roberts also testified that airmen must report "all medications" that they have taken on a regular or irregular basis in question 17 of the application. Tr. at 32. With regard to the prescription drugs that respondent allegedly took at the time of her

applications, Dr. Roberts testified that notes from Dr. Seberg, whom respondent saw several times for a variety of conditions, reflected that Dr. Seberg prescribed respondent the following medications between October 4, 2001, and February 22, 2005: Valtrex, Allegra, Nexium, Prilosec, Albuterol, Combivent, Augmentin, Celebrex, Advair, Ambien, Ativan, Phentermine, and Remeron. Tr. at 49. Dr. Roberts testified that respondent certainly should have disclosed her use of Ambien, Ativan, Phentermine, and Remeron, as these medications could be disqualifying. Tr. at 50-51, 54. Dr. Roberts also testified that respondent did not report her diagnoses of GAD, allergies, high blood pressure, and insomnia. Tr. at 63-64, 67. Dr. Roberts indicated that his conclusion that Dr. Seberg had diagnosed respondent with these conditions was based upon several pages of Dr. Seberg's notes. Exh. A-2 at 72, 73, 75. At the conclusion of Dr. Roberts's testimony and the Administrator's case-in-chief, the Administrator's counsel opined that, "it belies credibility that a patient will go [to] a doctor, be diagnosed with all these conditions, prescribed all these medications, and not list them on a medical application." Tr. at 71.

In response to the Administrator's case-in-chief, respondent testified that she did not intentionally omit any items. Tr. at 112. In particular, respondent testified that

she did not realize that she had failed to list her visits to Dr. Seberg on her first application for a medical certificate, and that she believed that she did not need to list subsequent visits to Dr. Seberg on succeeding applications, because listing a physician one time sufficed. Tr. at 113, 115. Respondent also indicated that she saw Dr. Pearlman, who is a doctor in Miami, after 2001, but that she did not disclose her visits to Dr. Pearlman because she believed she had already disclosed them, even though Dr. Pearlman had also prescribed medication for respondent's sleeping problems. Tr. at 192-93. Respondent testified that she saw Dr. Gail Ingram, a psychiatrist, but did not list her visits to Dr. Ingram on her certificate applications because her main purpose in seeing Dr. Ingram was for "job counsel," as respondent was experiencing "issues at work." Tr. at 193.

With regard to her failure to list the prescription drugs that Dr. Seberg prescribed, respondent testified that she did not believe she needed to report her use of Ambien, which is a sleep medication, because she was not taking it "continuously at that point." Tr. at 115. Respondent also testified that an AME who evaluated her applications told her that the FAA had "endorsed" Ambien, and that she need not list Ambien on her

applications unless she took it on a continuous basis.⁴ Tr. at 118. Respondent further explained her failure to list other prescription drugs, such as Ativan, by stating that she believed that if she suspended her use of Ativan for 72 hours prior to the commencement of a flight, then she need not report it. Tr. at 121. In addition, respondent testified that she took Phentermine only once, and that she never took Remeron, despite Dr. Seberg's provision of prescriptions for these medications. Tr. at 123.

Finally, concerning her failure to list any diagnoses on her medical applications, respondent testified that she was unaware that Dr. Seberg had diagnosed her with GAD, any ongoing respiratory problems, high blood pressure, peptic ulcer disorder, gastrointestinal reflux disease, or a sleep disorder, and that she never saw the notes that Dr. Seberg kept in her chart concerning these conditions. Tr. at 121-22, 124, 159. With regard to Dr. Ingram's notes indicating that respondent had an "anxiety disorder," respondent testified that Dr. Ingram only informed her that she had "symptoms" of an anxiety disorder. Tr. at 197. Overall, respondent testified that she was not aware that her applications were incomplete when she submitted

⁴ Respondent did not provide the testimony of the AME who told her that Ambien was permissible, nor did she provide any other type of evidence of this statement, other than her own testimony.

them.

Respondent also provided the testimony of Dr. Ingram and Dr. Wesley Young. Dr. Ingram testified that the principal reason she saw respondent was for "work stress," and that she did not believe respondent had a mental disorder or GAD. Tr. at 214-15. Dr. Ingram also testified that she believed respondent to be "very truthful." Tr. at 219. Dr. Ingram stated that her listing of "anxiety DO" in her progress notes for respondent, which indicates "anxiety disorder," was an error; instead, Dr. Ingram stated that she should have listed "anxiety symptoms" on the progress notes. Tr. at 225. Dr. Ingram also testified that she prescribed respondent Sonata, which is a medication to help with sleep. Tr. at 228. Dr. Young, who also testified on respondent's behalf, stated that he is a senior AME who examined respondent for medical certification. Tr. at 248-49. Dr. Young testified that he discussed respondent's sprained ankle and "work-related reflux" with respondent, and believed respondent to be forthcoming during the examinations. Tr. at 251-53. Dr. Young, unlike the claims that respondent makes regarding the other AMEs whom respondent testified that she saw, testified that he advised respondent to list her sleep medications on the applications, so that the FAA could contact Dr. Young or respondent in case they needed more information about the medications. Tr. at 254-55. Dr. Young testified that he saw no

evidence of any conditions that would disqualify respondent, and that respondent's sleep disorders would not interfere with her flight duties. Tr. at 263-64.

At the conclusion of the hearing, the law judge issued an oral decision and order, in which he determined that the Administrator had not met his burden of proving that respondent intentionally falsified the medical applications at issue. The law judge cited Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), for the standard for intentional falsification, which requires that the Administrator prove that the pilot: (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity of the fact. Based on this standard, the law judge concluded that respondent did not intentionally falsify any of her applications for medical certificates. At the commencement of his decision, the law judge acknowledged that he was "uncomfortable" with the manner in which the Administrator learned of respondent's alleged falsification. Respondent, who had significant experience in commercial aviation, had been involved in a lawsuit against Hawaiian Airlines, and Hawaiian Airlines informed the FAA of Dr. Seberg's notes, probably obtained through discovery, which indicated that respondent falsified her medical applications. Initial Decision at 329. The law judge disagreed with the Administrator, and concluded that the Administrator failed to

prove that respondent "currently" used the medications that Dr. Seberg listed in his notes, even though respondent did not dispute that Dr. Seberg had prescribed the medications for her or provided samples of the medications to her, and that she had indeed taken some of the medications at various times. See id. at 337.⁵ The law judge also concluded that respondent's testimony concerning the diagnoses that she allegedly failed to list was credible, and that the Administrator did not prove that respondent falsified this portion of the application because respondent was not aware of the diagnoses in question. Id. at 338. Finally, the law judge concluded that respondent did not intentionally falsify the portion of the medical applications that requires pilots to list visits to health care professionals within the last three years, despite respondent's acknowledgement that she had seen Dr. Seberg and Dr. Ingram on several occasions, but did not list them on the application. The law judge based this conclusion on his assessment that these omissions were not in reference to a material fact. Id. at 341.

On appeal, the Administrator alleges that the law judge erred in finding that respondent's multiple visits to Dr. Seberg were immaterial for purposes of her medical certificate

⁵ Despite the law judge's references to Dr. Seberg's notes in parts of his initial decision, the law judge later determined that the notes had no probative weight, because Dr. Seberg was allegedly involved in "criminal activity, which resulted in his loss of his medical license." Id. at 339.

applications. The Administrator cites Janka v. Dep't of Transp., 925 F.2d 1147 (9th Cir. 1991), for the standard of materiality; in Janka, the court held that a false statement is material if it could influence the FAA. Id. at 1150 (citing Cassis v. Helms, 737 F.2d 545, 547 (6th Cir. 1984), and Twomey v. NTSB, 821 F.2d 63, 66 (1st Cir. 1987)). With regard to medical cases, the Administrator alleges that all answers on medical applications are material, as the concise application form only requests answers to questions that could affect whether a pilot could receive a medical certificate. In addition, the Administrator argues that the law judge erred in not giving any weight to Dr. Seberg's medical records concerning respondent; the law judge disregarded Dr. Seberg's notes because Dr. Seberg did not testify at the hearing, and because Dr. Ingram testified that Dr. Seberg had a reputation as a physician who would prescribe medications and list incorrect diagnoses in order to receive payment for his services from insurance companies. The Administrator argues that respondent did not provide any evidence to support Dr. Ingram's opinion of Dr. Seberg, and that Dr. Seberg's records are so critical to determining whether respondent intentionally falsified her medical applications that the law judge should not have disregarded them.

The Administrator also argues that the law judge erred in finding that respondent did not falsify her answer to the

question concerning prescription drugs when she failed to list several medications. In particular, the Administrator argues that the evidence in the record showed that respondent was prescribed Ambien 34 times, and Dr. Seberg's notes indicate that respondent had requested numerous refills of Ambien, but that respondent did not list Ambien until her last application at issue in this case. Based on the evidence in the record, the Administrator argues that the law judge's conclusion that respondent was not "currently" taking any medications at the time of her applications was erroneous; the Administrator also cited Administrator v. Evans, NTSB Order No. EA-3679 (1992), in support of the argument that brief abstentions from a medication do not mean that a pilot is not "currently" using the medication. The Administrator also argues that respondent's failure to include sleeplessness or anxiety on her applications, and that respondent's failure to list any visits with healthcare providers on the applications, amount to intentional falsification. Respondent opposes each of the Administrator's arguments, and urges us to affirm the law judge's decision.

Much of the law judge's decision in this case is based upon his credibility determinations. First, we note that we have long held that the Board will not disturb a law judge's credibility finding unless it is arbitrary, capricious, or clearly erroneous. Administrator v. Smith, 5 NTSB 1560, 1563

(1987). In this regard, we have previously noted that the law judge's credibility findings are not dispositive, as the Board, in conducting a de novo review of the record and decision below, may weigh the evidence and determine that the law judge's credibility findings are inconsistent with the overall weight of the evidence. Administrator v. Andrzejewski, NTSB Order No. EA-5263 at 11 (2006).

Furthermore, as stated above, with regard to cases in which the Administrator alleges that a respondent intentionally falsified a medical certificate 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, 535 F.2d at 519 (citing Pence v. United States, 316 U.S. 332, 338 (1942)). As the Administrator has argued, 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, 925 F.2d at 1150.

In this case, the law judge has erred in numerous respects. First, we find that the weight of the evidence is directly

contrary to the law judge's credibility assessment. The law judge's assessment that respondent was credible concerning her alleged lack of knowledge of her diagnoses is contrary to the record before us; respondent testified, and the law judge believed, that respondent was completely unaware that Dr. Seberg and Dr. Ingram had diagnosed respondent with anxiety. A reasonable reading of question 18 on the medical certificate application indicates that the question is extremely broad, and would require that a pilot with respondent's history include some sort of notation regarding anxiety. Respondent saw Dr. Seberg numerous times and complained of anxiety, later visited Dr. Ingram and complained of anxiety, and received prescription medication for anxiety. However, respondent did not list anxiety on any of her medical applications. Furthermore, the fact that respondent chose to list a sprained ankle, a cold, and a surgery on her medical applications, but failed to include any mention of diagnoses for anxiety or sleeplessness, for which she frequently sought medical care, also connotes that respondent selectively chose to list certain diagnoses that she knew were not disqualifying.

The law judge's credibility assessment concerning respondent's testimony is also incongruent with regard to the issue of respondent's failure to list any of her visits to healthcare providers concerning anxiety or problems sleeping.

For example, the law judge's determination that respondent's testimony that she saw Dr. Ingram only for "job counseling" was credible is also contrary to the greater weight of the evidence. Dr. Ingram's notes indicate that respondent had symptoms of anxiety; in one record of a visit, Dr. Ingram noted that respondent appeared "extremely anxious." Exh. R-2 at 2; Tr. at 236. In addition, Dr. Ingram testified that respondent could potentially be diagnosed with post-traumatic stress disorder. Tr. at 238. Such records and testimony indicate that respondent visited Dr. Ingram for more than simply "job counseling." Overall, we find that the evidence on the record directly and overwhelmingly contradicts the law judge's finding that respondent had "a tremendous amount of credibility." Initial Decision at 340.

With regard to whether the Administrator has fulfilled his burden in establishing that respondent intentionally falsified her medical application under the longstanding Hart v. McLucas precedent, we have carefully examined the evidence that could prove each of the necessary elements. Respondent does not dispute that she took Ambien and Ativan, yet did not list them on her medical certificate applications. In addition, respondent does not dispute that she saw Dr. Seberg and Dr. Ingram for sleeplessness, which she described as "jet lag." However, she did not list her visits to Dr. Seberg or Dr. Ingram

on the applications at issue. Moreover, both Dr. Seberg's and Dr. Ingram's notes⁶ from respondent's visits show that respondent complained of experiencing anxiety and sleeplessness; this evidence contravenes respondent's contention that she did not consider that she was experiencing anxiety. Given these undisputed facts, it is apparent that respondent did not list relevant prescription drugs, physician visits, or diagnoses on her applications. These facts are also "material" for purposes of the medical certificate applications; in McGonegal and Reynolds, supra, we stated that an applicant's answers to all questions on the application are material. Moreover, in McGonegal, we did not accept the respondent's argument that he did not intentionally falsify his application because the facts that he failed to include on the application were not significant. McGonegal, supra, at 10-11.

Furthermore, the facts of this case compel us to conclude

⁶ We also find that the law judge's dismissal of Dr. Seberg's notes, based on alleged "criminal activity" and "his loss of his medical license," was inappropriate in this case. No evidence in the record exists to show that Dr. Seberg had lost his medical license; the law judge relied on hearsay testimony on this issue, with little indicia of reliability. In addition, the Administrator's brief indicates that the State had not revoked Dr. Seberg's license. In any event, an analysis of the law judge's handling of this issue is unnecessary, because respondent has admitted that she did not list that she had taken prescription medications, seen doctors for various problems, or been diagnosed with any condition related to anxiety on her medical applications. Dr. Seberg's notes merely corroborate these admissions.

that respondent knew that she was omitting requisite information from the applications. First, the Instructions for Completion of the Application for Airman Medical Certificate, FAA Form 8500-8, explicitly require reporting of any listed conditions in question 18 with which an applicant has ever been diagnosed. Exh. A-4 at 2. Respondent's contention that she was unaware of any physician ever diagnosing her with an anxiety condition or other reportable condition is not credible, as she does not dispute that she saw Dr. Seberg and Dr. Ingram on several occasions, complained of anxiety, and received prescriptions for Ambien and Ativan. Moreover, the instructions state that applicants must, "[l]ist all visits in the last 3 years to a physician, physician assistant, nurse practitioner, psychologist, clinical social worker, or substance abuse specialist for treatment, examination, or medical/mental evaluation." Id. The instructions further provide, "[m]ultiple visits to one health professional for the same condition may be aggregated on one line." Id. The instructions provide that certain routine visits or visits for counseling may be excluded, in certain specific situations. Here, respondent omitted her visits to Dr. Seberg, even though she saw him frequently, as well as her visits to Dr. Ingram, who is a psychiatrist from whom respondent obtained a prescription for sleeping medication. Respondent's argument that she did not know that she failed to

report these visits, or that she was required to report these visits, is similarly implausible.

In conclusion, we find that the law judge erred in granting respondent's appeal below, as the overwhelming weight of the evidence establishes that respondent intentionally falsified her applications, as alleged.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed; and
3. The Administrator's order of revocation is affirmed.

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

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

* * * * *

In the matter of:	*	
	*	
ROBERT A. STURGELL,	*	
ACTING ADMINISTRATOR,	*	
Federal Aviation Administration,	*	
	*	
Complainant,	*	Docket No. SE-18095
v.	*	JUDGE MULLINS
	*	
MARIA ROSE FINAZZO,	*	
	*	
Respondent.	*	
	*	

* * * * *

U.S. Bankruptcy Court
6th Floor
1132 Bishop Street
Honolulu, Hawaii 96813

Wednesday,
January 23, 2008

The above-entitled matter came on for hearing,
pursuant to notice at 9:40 a.m.

BEFORE: WILLIAM R. MULLINS,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

This has been a proceeding before the National Transportation Safety Board, and that proceeding was held here in Honolulu on the 23rd and 24th of January 2008. And the matter was on for hearing on an Order of Revocation issued by the Administrator, the Federal Aviation Administration, seeking to revoke this Respondent's Airline Transport Pilot Certificate and Medical Certificate.

1 As just an aside, I think this is one of the first
2 Orders of Revocation that I've seen in the number of years that
3 wasn't issued as an Emergency Order. It was not an emergency
4 case. It was issued as a regular case. And I think the Order of
5 Revocation is dated September of 2006, or -- is that correct? Was
6 it 2006 or '7? I believe it was '7.

7 MR. ADOLPH: I think it was '7, Your Honor.

8 ADMINISTRATIVE LAW JUDGE MULLINS: I know I have that.

9 MR. WELLS: Are you talking the Complaint or the Order?

10 ADMINISTRATIVE LAW JUDGE MULLINS: 2007. September --
11 the cover letter -- the stamp date on the Order of Revocation is
12 August 22nd, 2007, and the letter -- cover letter forwarding that
13 to our office in Washington, DC was September 11, 2007. So the
14 matter is on here several months after the issuance.

15 But that Order of Revocation, as I said, seeks to revoke
16 the Respondent's Airline Transport Pilot Certificate and Medical
17 Certificate for alleged intentional falsification of an Airman
18 medical, and then the other regulatory violation. That regulatory
19 violation of intentional falsification is FAR 67.403(a)(1), and
20 then, as a follow-on to that, is the allegation of lack of good
21 moral character required by an Air Transport Pilot Certificate
22 holder, which is Section FAR Section 61.153(c).

23 The Order of Revocation was issued by the Administrator
24 through the Regional Counsel's office of the Western Pacific
25 Region. The matter has been heard before me, William R. Mullins,

1 and I am an Administrative Law Judge for the National
2 Transportation Safety Board. And pursuant to the Board's rules, I
3 will issue a decision at this time.

4 As I said, the matter came on for hearing pursuant to
5 notice to the parties here in Honolulu on the 23rd of January of
6 2007, and today is the 24th. The Administrator was represented
7 throughout these proceedings and was represented by counsel,
8 Mr. Courtney Adolph of the Western Pacific Region and Los Angeles,
9 and the Respondent was present throughout these proceedings and
10 was represented by Mr. Jay Wells of the Airline Pilots Association
11 of Herndon, Virginia.

12 The parties were afforded a full opportunity to offer
13 evidence, to call, examine, and cross-examine witnesses. In
14 addition, the parties were afforded an opportunity to make
15 argument in support of their respective positions.

16 As I indicated through the trial, I'm a little
17 uncomfortable with the way the case came on because this
18 Respondent has a huge background in aviation, started flying when
19 she was 18, currently was an airline pilot in her 20s, was a
20 captain in her 30s, and by the time she was in her 40s, now in her
21 40s, she was a wide-body jet captain for Hawaiian Airlines with
22 over 11,000 hours of flight time. But her problems have emanated
23 from an apparent sexual harassment lawsuit that she has instituted
24 against her employer, and as a result of that, apparently the
25 employer forwarded to or made the FAA aware of some medical

1 records that weren't normally kept in the Administrator's normal
2 line of medical records, and the FAA, after being apparently
3 advised by Hawaiian Airlines, went to the federal court, or there
4 was testimony representation made to me that the Administrator
5 obtained the records of Dr. Seberg and Dr. Ingram, and I'll talk
6 about both of them in a little bit, as a result of a Court Order,
7 versus the normal procedure of obtaining FAA medical records.

8 In any event, based on the statements contained in
9 Dr. Seberg's records, and one entry in Dr. Ingram's records, which
10 she said was an error on her part, the Administrator has alleged
11 that this Respondent has intentionally falsified her medical
12 application. And that's sort of the statement of the case.

13 And the issue in the case is whether or not, under the
14 Hart v. McLucas decision, that there was a false representation,
15 one; two, in reference to a material fact; and three, and it was
16 made with the knowledge of its falsity.

17 The Administrator had one witness, Dr. Steven Roberts,
18 who is the Regional Flight Surgeon for the Western Pacific Region
19 and Los Angeles, and Dr. Roberts testified as to these notes that
20 were submitted as a result of this Court Order that came from
21 apparently an attorney for Hawaiian Airlines, but it was the
22 result of the Court Order, which had these notes by Dr. Seberg,
23 who wrote in his notes, on at least a couple of occasions, that
24 the Respondent had a general anxiety disorder, GAD, and there was
25 some prescription medicine and so forth.

1 And on the basis of Dr. Seberg's and Dr. Ingram's notes,
2 the Administrator has alleged that certain Airman medical
3 applications were intentionally falsified by the Respondent. The
4 actual medical applications were in Exhibit A-1, admitted by the
5 Administrator. A-2 was the notes obtained from Dr. Seberg --
6 well, they weren't obtained from Dr. Seberg. They were obtained
7 from apparently an attorney for Hawaiian Airlines, but they
8 represented his notes. Exhibit A-3 are the notes also obtained
9 from the same attorney by Dr. Ingram, who testified here. And
10 then Exhibit A-4 of the Administrator was the full packet that is
11 presented to an Airman when they take a medical, which I thought
12 it was being offered just for the explanation, but all of that was
13 contained in it. But that's A-4, just a blank application for a
14 Medical Certificate.

15 And Dr. Roberts testified that, based on the information
16 contained in Dr. Seberg's notes, the failure on the part of the
17 Respondent to mention any of these diagnoses made by Dr. Seberg
18 was intentional falsification on the part of Respondent.

19 Respondent had, in addition to herself, two other
20 witnesses. But the Respondent testified about her airline
21 background, about the fact that she was having some personal
22 problems, the loss of a younger sister, was having to commute, and
23 only in the airlines could you even fathom anyone commuting to
24 work between Honolulu and Miami, Florida, which is characterized
25 by Dr. Young as halfway around the world. And as a result of

1 that, she was testifying she was having some sleep problems. She
2 testified that Dr. Seberg was her personal physician, who was just
3 down the street from her home. And she had a good medical policy,
4 and she'd go see Dr. Seberg from time to time when she couldn't
5 sleep, and he prescribed sleep medicine.

6 But her testimony was that it was fairly unequivocal,
7 that Dr. Seberg never discussed with her any diagnosis that might
8 have been reflected on his notes. And the suggestion was, through
9 argument, and even by the testimony of Respondent's witnesses,
10 that there may have been some motivation on the part of Dr. Seberg
11 to put things in his note to justify the obtaining of his fees
12 from the health care insurance people. And that was also
13 confirmed by Dr. Young who testified later.

14 But in any event, Respondent testified that she never
15 believed that she was diagnosed, she believed she was never told
16 that these sort of indications were ever put in her notes. She
17 said in her visits to her AME, when she would go, routine visits
18 to a physician, she discussed them, but they didn't put them down.
19 But she said she did discuss them and was told that she didn't
20 need to put them down. Based on the number of visits, I assume,
21 as Dr. Young testified, these applications would get quite
22 lengthy.

23 Anyway, that was the testimony of Respondent. The
24 second witness called was Dr. Ingram, and Dr. Ingram's CV appears
25 as Exhibit R-1. She is a psychiatrist, an M.D. practicing here in

1 Honolulu. And I'll just mention this in passing. There was some
2 talk that Respondent was obfuscating or intentionally falsifying
3 when she put down visits to Dr. Ingram as job counseling. Based
4 on Respondent's testimony, it was pretty clear that she was having
5 a lot of problems with her job, and I think, as a layperson, that
6 would be the reason she went to visit. She didn't put "general
7 anxiety disorder," that's a medical term. But I think it was very
8 credible on the part of this Respondent to put down "job
9 counseling," because that's the reason she went. She was having
10 problems in her job, and she wanted to talk to a health care
11 professional. I think that was very understandable.

12 In any event, Dr. Ingram testified that she had seen
13 Respondent over a period of time, that Respondent didn't have
14 general anxiety disorder, never had general anxiety disorder, said
15 that any anxiety she had was a very natural product of these
16 problems that she was going through with the loss of an immediate
17 family member and problems in her job and this sexual harassment
18 lawsuit, which, I said, has stimulated the submission of this
19 information to the Administrator. Dr. Young testified -- oh,
20 Respondent's Exhibit 2 are additional notes from Dr. Young's --
21 Dr. Ingram's office, and that was admitted. Respondent's Exhibit
22 3 was not admitted, but that was just the Federal Aviation
23 Regulations, which need not be admitted.

24 Then Dr. Young was called, and Respondent's Exhibit 4 is
25 Dr. Young's CV. And Dr. Young, who is a long-time resident, or a

1 native of Hawaii, and a very impressive curriculum vitae, has
2 completed the Air War Colleges and is an Air Force certified
3 Flight Surgeon, has been doing Airman medical stuff for a long
4 time. And I thought it was interesting that he testified that
5 over the years he had done hundreds of Airman medicals and had
6 never had the Air Surgeon reverse any of those. His decision to
7 grant one or his decision not to grant one had always been
8 affirmed by the Administrator.

9 And he testified about the problems with this form, that
10 there were a lot of problems, a lot of ambiguities. But he
11 testified about his belief, having issued a number of Airman
12 medical certificates to Respondent, that in his visits with her,
13 in his professional capacity, he believed that she was extremely
14 honest. His testimony was the she always presented more and was
15 very forthright in all of her problems and everything, he said,
16 than probably any other airline pilot that he dealt with. He said
17 usually they were very closed-mouth, weren't very forthcoming with
18 any problems they had, would just walk in and walk out. But he
19 said he had visits with this Respondent, and she talked about all
20 these things.

21 And he felt, his testimony was that if you put down
22 visits to every health care professional for just common problems,
23 that the Airman medical application would have to have addendums
24 and extra pages. And he said in his years of practice and dealing
25 in this area, he had never seen any additional pages. And the

1 block down there, I think it's Block 19, has three lines for other
2 health care professionals.

3 Respondent's Exhibit 5 was Dr. Young's notes or the
4 doctor's notes that go along with the Airman medical applications,
5 and these were his notes involving those medicals that he was
6 involved in that are part of this lawsuit, this action.

7 His testimony, and it's consistent with the testimony of
8 Respondent, that when he started dealing with her, he would have
9 her put down some of this medication, even though she didn't
10 currently use it. And that's reflected in that, and that, in my
11 belief, not only enhanced Dr. Young's credibility, because he was
12 talking about putting information that really wasn't required, but
13 it was enough information that the Air Surgeon had a question
14 about it when they reviewed these things. There would be an entry
15 there that they could raise a question about what kind of sleep
16 medications were used, and how often were they using them, and
17 that enhanced his credibility. But it also enhanced the
18 credibility of this Respondent because her testimony was
19 consistent with that.

20 And then Respondent's Exhibit 6 was the "Frequently
21 Asked Questions," but it had a list of disqualifying conditions on
22 an Airman medical, and none of those conditions even are reflected
23 in this case.

24 The other thing, and I thought it was interesting,
25 Dr. Roberts talked about there was a list of medications that were

1 disqualifying. And Dr. Young, and it was unrebutted, and the
2 Administrator had an opportunity to rebut any number of these
3 comments, but Dr. Young said there wasn't any list of
4 disqualifying medicines. He said it would be nice if the AMEs had
5 a list of those things when they talked to these patients. But he
6 said there wasn't one, and he thought probably the reason there
7 wasn't is because that area of medicine is constantly changing,
8 and it might be impossible for the Administrator to keep up. But
9 it was the AME's job to inquire about those things, and he did.

10 The other thing, and I thought it was unrebutted, on the
11 testimony of Respondent, was that she talked about these
12 medications, and she knew that some of them you couldn't take
13 within 24 hours of flying or 48 hours of flying or 72 hours of
14 flying, the sleep medications and so forth. And she believed
15 that, and certainly the Administrator had an occasion with their
16 Regional Flight Surgeon here to rebut that, but they didn't.

17 Okay. That covers the witnesses, the exhibits.
18 Basically, and I won't go through the Order of Revocation, but
19 there were three areas on the medical application that need to be
20 addressed, and one was Paragraph 17 that says, "Do you currently
21 use any medication, prescription or non-prescription?" For some
22 reason, the Administrator, throughout these proceedings, has
23 seemed to have adopted the position that if you have medicine that
24 has been prescribed, you have to put it down on this application.
25 That's not what the application says, it says "currently use."

1 Respondent's testimony, and her testimony was consistent, she
2 didn't put anything down because she didn't currently use them.
3 She used sleep medication as needed and didn't take them within a
4 period of time that she was flying.

5 And in that regard, Dr. Young's testimony was that he
6 believed not just that she was medically qualified, but his
7 testimony was that after all of his discussions with this Airman,
8 Respondent, that she was very safety-conscious about not only her
9 aviation career, but her medications in relationship to her
10 medication aviation career.

11 But to show intentional falsification of 17(a), the
12 Administrator would have to show not that she had been prescribed
13 this medicine, but that she was currently using that medicine.
14 There was not a scintilla of evidence that any of these medicines
15 were being currently used at the time she made these applications.
16 So in that regard, the Administrator just failed to present the
17 evidence on that issue, any probative evidence on that issue. So
18 as to that paragraph and those allegations, I find in favor of the
19 Respondent.

20 The second paragraph for my consideration is the medical
21 history, which is under Paragraph 18. And there was continued
22 comments about the mental disorder, which is 18(m) as in "Mike,"
23 "mental disorders of any sort, depression, anxiety, et cetera."
24 Respondent testified that she was never told of any diagnosis by
25 Dr. Seberg, that she was never told of any diagnosis of any of

1 those things, or a condition. She was being treated because she
2 was having a sleep problem, this 12-hour, or however long a
3 commute it is, from Miami to Honolulu. She was having personal
4 problems and was having some anxiety and loss of sleep, but she
5 was never told of any diagnosis. So to answer "no" on that would
6 not be an intentional falsification. And the Administrator has
7 not presented any evidence on that issue, except the comments by
8 Dr. Seberg.

9 And I wanted to talk to that. I want to talk about
10 Dr. Seberg a little bit. The Hart v. McLucas case says that
11 circumstantial evidence of intent in a falsification case must be
12 so compelling that no other determination is reasonably possible.
13 Respondent's Counsel has suggested that that is a burden of proof
14 beyond preponderance of the evidence. And I thought so too, until
15 the Fuller case came along. I don't know if no other
16 determination is reasonably possible. I think it's reasonably
17 possible in this case that she was never told about these
18 conditions that Dr. Seberg was putting in his notes.

19 And I think that meets that requirement. But in the
20 Fuller case, the Board goes on and says that that speaks not to
21 the quantum of proof necessary for the Administrator to prevail,
22 but to the probative quality of the evidence required to justify a
23 finding of actionable scienter. And this case turns on this, that
24 evidence, which is unrebutted, that Dr. Seberg probably was
25 doctoring up his notes to get paid. But the testimony is

1 certainly un rebutted that Dr. Seberg has been medically barred
2 from practicing medicine in the state of Hawaii and that the
3 actions that were involved in his disbarment, that might be a
4 legal term, but in the revocation and/or suspension of his medical
5 license was probably related to criminal activity, and he's
6 probably been convicted of that or he's facing charges of that
7 right now.

8 The probative quality of the evidence relied on -- as
9 counsel properly pointed out, hearsay evidence is admissible. But
10 that's not a blanket acceptance of the evidence. The evidence has
11 to reviewed as to what weight it should be given. Dr. Seberg's
12 notes have no weight because of his criminal activity, which
13 resulted in his loss of his medical license. And that's the
14 reason he wasn't called here today, I'm certain. It's not because
15 he's unavailable, he's right here in Honolulu, apparently. At
16 least there's no indication he's gone anywhere else, unless he's
17 in prison. And the testimony of someone like that, which is being
18 used to show that this lady had some knowledge that he didn't
19 impart to her, based on her testimony, which is un rebutted, is
20 absolutely not qualified to any probative quality at all to be
21 assigned to it by this Administrative Law Judge.

22 So the Administrator is pretty much hanging his hat on
23 the testimony of Dr. Seberg, and it is not qualified to receive
24 any probative weight based on the testimony I received about his
25 disbarment or the revocation and/or suspension of his medical

1 license.

2 Now, and this is troubling to me, the third area that
3 the Administrator has alleged was intentionally falsified was the
4 visits to health care professionals within the last three years.
5 The standard under Hart v. McLucas is that it has to be a false
6 representation in reference to a material fact made with the
7 knowledge of its falsity. And as pointed out by counsel, several
8 of these cases have acts of commission by people who falsified
9 mechanics' records, for example, the Alaskan Airline case. The
10 other one, and it wasn't a commission, but it was facts so
11 egregious, where this Airman was about to jump off of a building,
12 commit suicide, and was committed and then didn't report this.
13 Those were the sort of things that the Board and other
14 Administrative Law Judges have found that the Respondents have no
15 credibility.

16 And it's just the opposite in this case. The Respondent
17 has a tremendous amount of credibility. And if I go, and I do go
18 and I have gone, to AME to get my medical, and I don't report that
19 I went to a health care professional for an annual physical
20 examination, which I have every year, and I don't think I report
21 that on my certificate, I discuss it with my AME, and I've never
22 been required by an AME to sit down and write that down. They
23 always inquire, "Well, what was the result of your physical?" And
24 I tell them, "I'm okay."

25 But that doesn't rise to the level of scienter, which is

1 required under Hart v. McLucas. And I think the key element of
2 the three prongs of the Hart v. McLucas case is that it is in
3 reference to a material fact. The material fact that the
4 Administrator would like to say is intentionally falsified here
5 was this diagnosis by this Dr. Seberg that's reflected in his
6 notes of generalized anxiety disorder. But the testimony is
7 unrebutted that she didn't receive that information from
8 Dr. Seberg, never knew there was that sort of diagnosis, didn't
9 know there was any diagnosis. She had a sleep problem. So that's
10 not in reference to a material fact.

11 The scienter required under Hart v. McLucas is that the
12 person who makes the entry, or fails to makes the entry as
13 required, must believe that it was in reference to a material fact
14 that would justify, and a material fact, I think, in these
15 circumstances would be it would justify the Administrator in
16 either rejecting the issuance of the medical and/or require more
17 information from the Respondent about that condition. That's the
18 material fact, and there's nothing to indicate in this case that
19 she was aware of the material fact.

20 Now, counsel for the Administrator has argued that any
21 failure to report the visit to a health care professional is
22 intentional falsification. And that may be where the Board is
23 going to go to request of the Administrator. But I don't believe,
24 under Hart v. McLucas, as I've just discussed it, that that's
25 reference to a material fact, if the health care professional

1 visit does not reflect one of these conditions that might be
2 disqualifying.

3 Now, the Administrator has changed the regulations
4 within the last five or six years to revoke a medical based on a
5 false representation. And if it says you're supposed to list a
6 health care professional and you don't, that's false, that's
7 grounds for losing your medical. But that's not an intentional
8 falsification, and the scienter, i.e., the person lied about it
9 deliberately as to a material fact, that does not rise to that
10 level.

11 So, therefore, based on that discussion, I think the
12 appropriate order here would be to deny the Order of Revocation on
13 the intentional falsification. And then, of course, the other
14 regulatory violation as to the moral character goes directly to
15 the first one.

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ORDER

IT IS THEREFORE ORDERED that safety in air commerce and safety in air transportation does not require an affirmation of the Administrator's Order of Revocation as issued. And specifically as discussed, I find that the Administrator has failed to establish the regulatory allegation of FAR 67.403(a)(1), the intentional falsification issue, and as a result of that finding there would be no finding of the regulatory violation of FAR 61.153(c), which is the lack of good moral character required of an Air Transport Pilot Certificate holder. And as a result of that finding, I'm finding that the Administrator's Order of Revocation should be, and the same is, hereby dismissed.

Entered this 24th day of January 2008, at Honolulu, Hawaii.

EDITED & DATED ON
FEBRUARY 26, 2008

WILLIAM R. MULLINS
Administrative Law Judge

1 APPEAL

2 Now Mr. Adolph, the Administrator has a right to appeal
3 from this Order, and may do so by filing your Notice of Appeal
4 within 10 days of this date. The appeal -- the filing of the
5 appeal must be made to the National Transportation Safety Board,
6 Office of Administrative Law Judges, Room 4704, at 490 Long Palm
7 Plaza East Southwest, Washington, DC 20594. And if you do appeal
8 it, then, within 50 days of this date, you must file a brief in
9 support of that appeal.

10 I have a written copy of those -- and the brief goes to
11 the National Transportation Safety Board, Office of General
12 Counsel, Room 6041, at the same street address, 490 Long Palm
13 Plaza East Southwest, Washington, DC, and the same zip code.

14 And I have a copy. I think probably the Administrator's
15 Office always has a copy of this, but you're welcome to come up
16 and get a copy, Mr. Adolph.

17 MR. ADOLPH: We have a copy, Your Honor, thank you.

18 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

19 And Mr. Wells, I assume your office has a copy of this
20 too. But you're welcome to have a copy in the event the
21 Administrator appeals this order.

22 MR. WELLS: Okay, thank you. I'll take a copy for
23 Respondent here, in case the Administrator does appeal.

24 ADMINISTRATIVE LAW JUDGE MULLINS: All right.

25 Mr. Adolph, do you have any questions about the order

1 today?

2 MR. ADOLPH: No, Your Honor.

3 ADMINISTRATIVE LAW JUDGE MULLINS: Okay. Any comments
4 or questions from the Respondent?

5 MR. WELLS: I do have one. There was a reference you
6 made, Judge, to the Order of Revocation having some relationship
7 to the Medical Certificate. Just so the Administrator doesn't
8 come back on appeal and claim there's lack of clarify, the
9 proceeding here today does only apply to the Airman's certificate,
10 and I wanted to make sure --

11 ADMINISTRATIVE LAW JUDGE MULLINS: Okay.

12 MR. WELLS: -- that was clear on the record.

13 ADMINISTRATIVE LAW JUDGE MULLINS: And that -- thank you
14 for that correction. The Medical Certificate I'm sure has expired
15 by now anyway, so there is no current Medical Certificate. It
16 goes directly to the Airline Transport Pilot Certificate, the
17 pilot's license. Thank you for that correction.

18 MR. WELLS: Thank you.

19 ADMINISTRATIVE LAW JUDGE MULLINS: All right.
20 Gentlemen, it was well tried, and unfortunately in intentional
21 falsification cases, there's no gray area. It's either black or
22 white. So thank you for the presentation of the evidence. We're
23 in recess.

24 (Whereupon, at 10:15 a.m., the hearing in the above-
25 entitled matter was concluded.