

SERVED: April 29, 2009

NTSB Order No. EA-5443

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 27th day of April, 2009

_____)	
LYNNE A. OSMUS,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18133
v.)	
)	
FRED LEROY PASTERNAK,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision rendered by Chief Administrative Law Judge William E. Fowler, Jr., on July 31, 2008, in this emergency revocation proceeding.¹ By that decision, the law judge affirmed the Administrator's complaint in its entirety, and affirmed revocation of all certificates held by respondent. We deny respondent's appeal.

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

The Administrator's May 20, 2008 Second Amended Emergency Order of Revocation,² filed as the complaint in this proceeding, proceeding, alleged the following:

1. You are now, and at all times mentioned in this document, were the holder of airline transport pilot and flight instructor certificate, No. 1673380, and ground instructor certificate, No. 185409, issued under 14 C.F.R. part 61.
2. During the events identified in this document, you were employed, on a part time basis, to perform flight crewmember duties for Northeastern Aviation Corporation ("Northeastern").
3. Northeastern is the holder of air carrier certificate No. AOYA206C issued pursuant to 14 C.F.R. part 135 and is now, and was at all times mentioned in this document, an employer within the meaning of 14 C.F.R. part 121, app. I, § II.
4. Under 14 C.F.R. part 121, app. I § III, each employee who performs a safety-sensitive function for an employer must be subject to drug testing under an anti-drug program implemented in accordance with 14 C.F.R. part 121, app. I.
5. Under 14 C.F.R. part 121, app. I, § III, flight crewmember duties are safety-sensitive functions.
6. Under 14 C.F.R. part 121, app. I, § II, a "refusal to submit" means that a covered employee engages in conduct specified in 49 C.F.R. § 40.191.
7. Under 49 C.F.R. § 40.191(a) you are considered to have refused to take a drug test if you:
 - (1) Fail to remain at the testing site until the testing process is complete; or
 - (2) Fail to cooperate with any part of the testing process (e.g. refuse to empty pockets when so directed by the collector, behave in a confrontational way that disrupts the collection process).
8. On Friday, June 1, 2007, you were notified by

² Respondent waived the expedited procedures normally applicable to emergency proceedings.

Northeastern that you were selected for a random drug test and instructed to proceed to [LabCorp] for collection of a specimen.

9. You informed the designated employer representative that you could not proceed to [LabCorp] because you did not have a copy of the Federal Drug Testing Custody and Control Form.
10. You reported to [LabCorp] on Tuesday, June 5, 2007 to provide a specimen for a random drug test.
11. On June 5, 2007 on or around 1:00 p.m.:
 - (a) You arrived at [LabCorp] and attempted, but failed to provide, a sufficient urine specimen;
 - (b) Following your failed attempt to produce a sufficient sample, the Collector, Theresa Montalvo, informed you that you had to wait in the waiting room and try to produce another sample again;
 - (c) Despite Ms. Montalvo's instructions, you told her that you had to leave and that you were not going to wait at [LabCorp];
 - (d) You left [LabCorp] on or about 1:20 p.m. without producing a sufficient amount of urine; and
 - (e) You failed to follow Ms. Montalvo's instruction to remain at the testing site until the testing process was complete.
12. By reason of the foregoing, you refused to take a drug test required under 14 C.F.R. Part 121, Appendix I.
13. Under 14 C.F.R. § 61.14(b), a refusal by the holder of a certificate issued under part 61 to submit to a drug test required under 14 C.F.R. part 121, Appendix I, is grounds for revocation of any certificate or rating issued under part 61.
14. By your actions, described above, you have demonstrated that you presently lack the qualifications required to hold and exercise the privileges of [an airman] certificate.

The order concluded that by reason of the foregoing, safety in

air commerce and air transportation and the public interest require the revocation of respondent's airline transport pilot (ATP), flight instructor, and ground instructor certificates.³

At the hearing, held July 30-31, 2008, in New York, New York, the Administrator presented her case through nine witnesses (including pertinent employees of Northeastern Aviation, employees of LabCorp who administered respondent's specimen collection, employees of Choice Point who provided medical review of respondent's drug test pursuant to a contract with Northeastern and verified the result as a refusal, the lead FAA investigator in respondent's case, and the manager of the FAA's special investigations and enforcement branch of the drug abatement division of aerospace medicine) and numerous exhibits. In rebuttal, respondent testified on his own behalf, and also presented the testimony of the FAA's northeast regional flight surgeon with whom he worked professionally as an aviation medical examiner, as well as numerous exhibits.

Respondent is a founding partner, and current co-owner, of

³ FAR section 61.14(b), 14 C.F.R. Part 61, states:

Sec. 61.14 Refusal to submit to a drug or alcohol test.

* * * * *

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

* * * * *

(2) Suspension or revocation of any certificate, rating, or authorization issued under this part.

Northeastern. He founded Northeastern with several partners in 1978, and has held various positions within the company, including chief pilot. Respondent is also a cardiologist, with a practice in Manhattan, and, up until the drug test that is at issue in this case, was also an FAA-authorized senior airman medical examiner. He also has served as a medical review officer, providing this service to transportation clients with DOT drug testing programs as recently as 2006.

Respondent last flew a Part 135 flight for Northeastern in October 2006, as second-in-command of a company Learjet. Respondent last completed required ground training as a Northeastern pilot sometime between March and June 2007. According to respondent, during all times relevant to this proceeding, respondent's primary occupation was his medical practice but he remained willing to fly if Northeastern needed him. Northeastern continued to list respondent as an authorized flight crewmember on its list of safety-sensitive employees subject to DOT-required random drug testing.

On June 1, 2007, Northeastern's designated employee representative (DER) notified respondent by telephone that he had been randomly selected for a DOT drug test and requested that he proceed to the authorized test site, LabCorp. Respondent replied that he would do so, but then called back a few minutes later to report that he did not have any custody and control forms that Northeastern had previously provided him for the purpose of Northeastern drug testing requirements.⁴ The DER told respondent

⁴ Northeastern's pilots are tested by contract at another

that she would mail him the forms, and that he should proceed to LabCorp for testing upon receipt of the forms. Respondent testified that he received the forms late in the afternoon on Monday, June 4, and he reported to LabCorp for testing at approximately one o'clock the following afternoon, June 5.⁵

Upon arriving at LabCorp on June 5, respondent was processed in accordance with DOT requirements, but, according to the test administrator, respondent produced only a few drops of urine. Therefore, she explained to respondent that he would have to wait in the waiting area, where there was water available to drink, in order to try again to produce a urine sample. The test administrator testified that respondent replied that he had a busy schedule, and he rushed out of the room and the LabCorp facility before she could continue to explain the shy bladder procedure. She testified that as respondent was leaving, she called after him that she would have to notify Northeastern, to which he purportedly replied "fine." The test administrator testified that she did not have time to explain that leaving the test site would be considered a refusal to test under the DOT

(..continued)

facility near Republic Airport, Farmingdale, New York, but because respondent was an intermittent or part-time pilot, and lived and worked in Manhattan, Northeastern previously made arrangements for respondent to be tested at a LabCorp facility in Manhattan.

⁵ We note that the delay between the original notification on June 1 and June 5, when respondent ultimately presented himself to the LabCorp facility, apparently with the approval of Northeastern's DER, appears to thwart the purpose of random drug screens. Although at first glance implicitly inconsistent with the objectives of a random drug testing program, this issue does not form a basis for our resolution of the issues presented on appeal.

regulations. Additionally, the test administrator's supervisor, LabCorp's site coordinator, testified that she observed from the front desk respondent rush out of the facility very quickly, and that the test administrator subsequently told her that as she was explaining to respondent that he would need to wait and drink water he interrupted the test administrator and "stormed out."

Respondent, in contrast, denied that he acted in a confrontational way or that he was offered water after he was unable to provide a sufficient urine sample on his first attempt. According to respondent's testimony, he was directed to the waiting area, where he sat down and subsequently realized that, "nothing was going to come very quickly" and, after a short time, he left because he had a 2:30 p.m. appointment with a patient at his office nine blocks away.

In accordance with DOT drug test procedures, respondent's test was reviewed by the designated medical review officer (MRO), a physician at Choice Point. Both the MRO and Choice Point's chief MRO testified at the hearing that respondent's conduct in leaving the test site at LabCorp, without completing the test, constituted a refusal under the DOT testing requirements. In addition, the chief MRO at Choice Point testified that he received a call from respondent sometime after his test result was reported as a refusal. During the conversation, respondent explained that he was a doctor with aviation medical experience, as well as a pilot, and the refusal to test result would have some very adverse consequences for him, and asked whether there was anything the chief MRO could do to rectify the situation.

The chief MRO testified that he told respondent there was nothing he could do, because the moment respondent left the test facility it was considered a refusal to test. The chief MRO testified that he inquired of respondent, in light of respondent's apparent good knowledge of the testing procedures, why he had left the test facility, and that respondent replied that he should have known better. The chief MRO, who was present during the testimony of the two LabCorp witnesses, also expressed his opinion that the LabCorp personnel did the best they could in light of the fact that respondent walked out during the testing process.

Additionally, the Administrator presented testimony from Northeastern's chief pilot, who testified that respondent was properly listed as a safety-sensitive flight crewmember subject to DOT drug testing requirements. He testified that respondent received training on the DOT drug testing procedures, including specific written guidance that leaving a collection site prior to completion of a test would be considered a refusal under DOT test requirements. The chief pilot also explained that respondent was available to serve as a pilot, if needed, and, therefore, he was considered to be in a safety-sensitive position by Northeastern. The chief pilot explained that Northeastern could resurrect respondent's instrument currency in as short a time as 2 hours should he be needed to fly a Part 135 flight. The chief of the FAA's drug and alcohol special investigations and enforcement division also testified that respondent was properly listed in Northeastern's pool of flight crewmembers who could be subjected

to random drug testing, and was subject to DOT drug testing requirements, notwithstanding his lapse in instrument currency. Northeastern's chief pilot testified that respondent never notified him that he was no longer available or willing to serve as a flight crewmember for Northeastern under Part 135 operations.

At the conclusion of the hearing, after observing 2 days of witness testimony and receiving approximately 30 exhibits from both parties, the law judge concluded that the evidence adduced by the Administrator was "compelling" and "almost overwhelming." Accordingly, the law judge found that the Administrator had proved all allegations in the complaint, and affirmed the order of revocation of respondent's ATP, flight instructor, and ground instructor certificates.

On appeal, respondent argues that (1) he was not eligible for, or subject to, DOT-required random drug testing at the time he was selected and directed to provide a urine sample; and (2) he was not properly advised of the shy bladder process or advised that leaving the test collection site would constitute a refusal to test. The Administrator argues in reply that the record establishes that respondent was subject to the DOT testing requirements, and that the law judge properly concluded that respondent improperly refused a DOT-required drug test.

We first address the threshold question of whether respondent was within the aegis of the DOT drug testing requirements when he was directed by Northeastern in June 2007 to submit to a random drug test. The record is clear that

respondent was a part-time pilot for Northeastern during the relevant period, when he was randomly selected for drug testing. In accordance with the DOT requirements, Northeastern is obligated to ensure that:

[e]ach employee, including any ... individual in a training status, who performs a safety-sensitive function ... [is] subject to drug testing under an antidrug program implemented in accordance with this appendix. This includes ... part-time, temporary, and intermittent employees regardless of the degree of supervision.

14 C.F.R. Part 121, Appendix I, III. Flight crewmember duties constitute a safety-sensitive function. Id. Accordingly, respondent, as a part-time or intermittent pilot designated to perform flight crewmember duties under Northeastern's Part 135 operating certificate, fell within the aegis of the DOT random drug testing requirements.

Respondent, nonetheless, argues that his 3-month lapse in instrument currency, and his 7-month hiatus from being assigned by Northeastern as a crewmember on any Part 135 flights, demonstrates that he was not actually performing a safety-sensitive function at the time he was selected for testing. The DOT drug testing requirements state that, "an employee is considered to be performing a safety-sensitive function during any period in which he or she is actually performing, ready to perform, or immediately available to perform such function." 14 C.F.R. Part 121, Appendix I, II. Although respondent presents extensive semantic and policy arguments about why he was not performing a safety-sensitive function when he was selected for testing, the record before us—particularly the testimony of

Northeastern's chief pilot and the chief of the FAA's drug and alcohol enforcement division—supports the Administrator's contention that respondent was, as a matter of law and policy, properly deemed to be subject to random DOT drug testing. At the time respondent was selected, he was a Northeastern employee eligible to perform flight crewmember duties. Respondent's argument fails even under the most literal reading of the DOT definition of performing a safety-sensitive function, for the hearing evidence demonstrates that respondent could have become technically qualified for a Northeastern flight in as few as several hours, and he testified that he was willing to serve as a Northeastern pilot if he was needed. We conclude that a preponderance of the evidence establishes that respondent was subject to the DOT-required random drug testing program at the time he was selected and appeared for testing. At the time respondent was notified of his selection for a DOT drug test, he was performing a safety-sensitive function, a status he could not rescind *ex post facto*.

We also discern no basis to reverse the law judge's finding that respondent's conduct on June 5, 2007, constituted a refusal under 49 C.F.R. § 40.191(a)(2) to submit to a DOT drug test.⁶ There is no dispute that respondent left the test site without providing an adequate urine sample and before the testing process had been completed. This constituted a clear violation of the unambiguous language of section 40.191(a)(2).

⁶ 49 C.F.R. § 40.191(a)(2) states: "[a]s an employee, you have refused to take a drug test if you ... [f]ail to remain at the testing site until the testing process is complete[.]"

Furthermore, respondent's exculpatory justifications for his refusal to submit to the DOT drug test are also unavailing. The Administrator presented substantial and persuasive testimony from the Choice Point MRO and chief MRO, the LabCorp percipient witnesses, and the FAA witnesses that there were no fatal flaws in how the testing process was conducted. Moreover, the law judge's findings constituted a clear, albeit implicit, credibility determination against respondent's claim that he was not told by LabCorp personnel, and did not perceive, that he could not leave the LabCorp facility before he completed the collection process. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Finally, we think the preponderance of the evidence also demonstrates that respondent's own behavior at LabCorp precluded the LabCorp test administrator from explaining, as specified by Part 40, the shy bladder procedures or that his departure from the facility prior to the completion of the testing process would constitute a refusal under DOT regulations. In short, we find adequate basis to sustain the law judge's finding in favor of the Administrator's assertion that respondent's conduct constituted a refusal to take the DOT-required drug test.⁷ Our precedent is clear that refusal to

⁷ We note that it is undisputed that respondent stated that he would return the next morning to submit another urine sample when he left the LabCorp facility on June 5, but that he nonetheless subsequently returned approximately 3 hours later and provided a urine sample that proved to be negative for illicit drugs. However, this subsequent remedial action by respondent is not germane to our analysis of the issues in this case. The FAA and Choice Point MRO witnesses who testified on this point unanimously and convincingly argued that, once respondent left the facility prior to the completion of his test, the result of that test must, in accordance with Part 40, be documented as a

submit to DOT drug testing warrants the Administrator's revocation of all airman certificates held by respondent. See, e.g., Administrator v. Heyl, NTSB Order No. EA-5420 (2008); Administrator v. Hamrick, NTSB Order No. EA-5282 (2007); Administrator v. Wright, NTSB Order No. EA-4895 (2001).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The Administrator's emergency revocation of respondent's airline transport pilot, flight instructor, and ground instructor certificates is affirmed.

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

(..continued)
refusal. See also Wright, infra, at n.5.

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, *

v. *

Docket No.: SE-18133
JUDGE FOWLER

FRED LEROY PASTERNAK, *

Respondent. *

* * * * *

General Services Administration
26 Federal Plaza
Courtroom 238
New York, New York 10278

Thursday
July 31, 2008

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:30 a.m.

BEFORE: WILLIAM E. FOWLER, JR.,
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

JAMES CONNEELY, Esquire
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

On behalf of the Respondent:

GREGORY S. WINTON, Esquire
Yodice Associates
601 Pennsylvania Avenue
Washington, DC 20004

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ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1958, as that Act was subsequently amended, on the appeal of Fred Leroy Pasternack from an amended Emergency Order of Revocation, dated May 20, 2008, which seeks to revoke the airline transport pilot certificate, the flight instructor's certificate number (omitted)

1 of Respondent Pasternack, as well as his ground instructor's
2 certificate number (omitted).

3 The Administrator's Emergency Order of Revocation, as
4 duly promulgated, pursuant to the National Transportation Safety
5 Board's Rules of Practice, was issued by the Enforcement Division
6 of the Chief Counsel's Office, of the Federal Aviation
7 Administration.

8 This matter has been heard before this United States
9 Administrative Law Judge and, as provided specifically by the
10 Board's Rules of Practice in Air Safety Proceedings, even though
11 the emergency aspects of this proceeding has been waived by the
12 Respondent, I am still going to issue an oral initial decision at
13 this time so as to comport and comply with the Board's direction
14 to the judges to try to dispose of this case finally within the
15 sixty-day period. That is no longer applied because the emergency
16 aspects have been waived, as I mentioned a moment ago.

17 Following notice to the parties, this matter came on for
18 trial on July 30th and 31st in New York City. The Respondent,
19 Dr. Fred Leroy Pasternack, was present at all times and was very
20 ably represented by Gregory Winton, Esquire. The Administrator,
21 sometimes referred to as the Complainant in this proceeding, was
22 likewise very well represented by James Conneely, Esquire, of the
23 Federal Aviation Administration.

24 Both parties have been afforded the opportunity to offer
25 evidence, to call, examine, and cross-examine witnesses. In

1 addition, the parties have been afforded the opportunity to make
2 argument in support of their respective positions.

3 DISCUSSION

4 During the course of this proceeding, we have had nine
5 witnesses adduced by the Administrator, two, I believe, by the
6 Respondent. The Administrator has adduced ten documentary
7 exhibits, which have been duly admitted into the hearing record as
8 it is presently constituted. The Respondent has had a number of
9 exhibits, let me just say, in excess of 20. I have taken judicial
10 notice of a number of Respondent's exhibits which were not
11 admitted in evidence.

12 I have reviewed the testimony and the evidence in this
13 proceeding. I just mentioned the number of witnesses that we've
14 had. The paramount, central, and overriding issue in this
15 proceeding, why we are here, is that the Respondent refused a
16 valid drug test as the Administrator has set forth in his amended
17 Emergency Order, required under Part 121, Appendix I.

18 I have reviewed the testimony and the evidence here. It
19 is my conclusion and determination that the Administrator's case
20 is not only persuasive, but it is compelling. The nine witnesses
21 that the Administrator has adduced, starting with witness Schmitt,
22 Montalvo, Samuels, Hoffman, some of these witnesses are doctors.
23 It comes down to my final determination that the Administrator was
24 validly premised in bringing this action.

25 It's an unfortunate case, because here we have, in the

1 Respondent, an exceedingly qualified and diversified gentleman,
2 who is not only an airman, he has been a medical review officer
3 and he has been a designated medical examiner.

4 I don't think I've ever heard a case where the
5 Respondent has had all of this background and training. Now you
6 get the drift of why I say it's unfortunate, because certainly
7 Respondent Pasternack in no way could be deemed not a
8 knowledgeable airman. Simply and solely, he made a mistake. He
9 made a mistake when he left the laboratory where he was undergoing
10 a drug test.

11 The Administrator's case could rise or fall. It
12 doesn't, but it could rise or fall on three exhibits. A-3, which
13 is the custody and control form that Theresa Montalvo made, she
14 states it all here that Respondent came in, under the remarks
15 section, at 1:00 p.m. He left at 1:20 p.m. He left before he was
16 told to wait in the waiting room, after he had given an
17 insufficient specimen. He returned at 4:00 that same day, as
18 Ms. Montalvo has written here in this custody and control form as
19 set forth in Administrator's Exhibit A-3. He returned at 4:00 the
20 same day, submitted a substantial specimen, which turned out to be
21 negative.

22 But, as I mentioned earlier here, the real issue here is
23 did the conduct of Respondent Pasternack constitute a refusal to
24 take the test. The FAA says it did, the cases are legion to that
25 effect.

1 The FAA has brought an action under the apropos sections
2 of the Federal Aviation Regulations that state and, as I
3 mentioned, the cases are legion that any refusal, as we have here,
4 to take the test by Respondent leaving the immediate testing
5 premises without permission, even though he had been told to wait
6 in the waiting room.

7 I can understand he was under time pressures. He had an
8 appointment at 2:30 and he didn't think twice that anything would
9 come of it, of him leaving. But, in addition to the custody and
10 control form, being very material, pertinent, and relevant to the
11 Administrator's case, we have the affidavit, itself, by Respondent
12 Pasternack, Administrator's Exhibit A-9. Wherein, he says his
13 part of the phone calls that he had, he says, and I quote, "during
14 these many phone calls, I did ultimately find Subpart I, it was
15 clear," and I'm quoting his affidavit now, as he stated, "it was
16 clear that according to 40.193(b)(3), my action constituted a
17 refusal to take the test."

18 You may recall during the testimony of Dr. Hoffman, the
19 chief medical review officer, that during Dr. Hoffman's testimony,
20 he stated, the Respondent stated to him, "that he should have
21 known better." This is Dr. Pasternack's statement to Dr. Hoffman
22 and Dr. Hoffman alluded to it during his, Dr. Hoffman's,
23 testimony.

24 So we could stop right there and find that the evidence
25 that I mentioned, Exhibits A-3 and A-9, would be sufficient, in my

1 estimation. Dr. Hoffman's statement about Respondent Pasternack's
2 statement to him is also set forth in Administrator's Exhibit A-4,
3 which is the statement of Dr. Hoffman, which alludes to this.

4 If there was ever any question in this case for air
5 safety sensitive functions and the positions that those functions
6 applied to, I think Captain Jordan testified voluminously and
7 extensively on all the possibilities and exceptions thereof. I am
8 not going into at this time what he said in-depth. But he covered
9 what could and could not be applied where eligible individuals
10 would be subject to the drug test, as Respondent Pasternack was.

11 He mentioned, of course, during his testimony, that
12 Respondent, at the time of the test of June 5th, 2007, was lacking
13 some requisite ground training and, thus, lacking currency.

14 Now we have had a wealth of testimony, in opening
15 statements, and in final argument by both extremely learned,
16 diligent, and industrious counsel involved in this case, on what
17 is involved and what is not involved, where people, pilots,
18 airmen, mechanics, where air safety functions are concerned.

19 Counsel for Respondent, Mr. Winton, has put on an
20 extremely able and competent defense for his client. He has taken
21 the position that, in this instance, the apropos FAA regulation
22 has been misapplied to his client.

23 Unfortunately, for him and his client, as I stated a few
24 minutes ago, the evidence, in my determination, adduced by the
25 Administrator is almost overwhelming. If not, certainly, it is

1 compelling and extremely persuasive to the contrary point of view,
2 as opposed to Respondent's position.

3 This is the type of case that perhaps could go before,
4 and I had the pleasure of hearing him less than a week ago, the
5 Honorable Justice Anton Scalia and his colleagues in the United
6 States Supreme Court.

7 But as a judge in this proceeding, I am bound by the
8 applicable and apropos law, rules, and regulations, as they are
9 validly promulgated by the Federal Aviation Administration and
10 validly interpreted, as at least at this juncture I deem they are
11 and have been, and I have to apply them accordingly.

12 As I said and I think I have expressed my analysis, I
13 can see both sides of the picture here in this proceeding. This
14 may be a case of first impression. I believe that it is, and one
15 that could, and very well may be, decided in an opposite respect
16 ultimately to my decision.

17 But as I mentioned earlier, I have to determine and
18 conclude, as I have, that the second amended Emergency Order of
19 Revocation lodged against Dr. Fred Leroy Pasternack was validly
20 premised.

21 The evidence here is more than ample that the
22 Administrator has adduced that all fourteen paragraphs of the
23 Administrator's amended Emergency Order of Revocation has been
24 successfully proven by the material, relevant, and probative
25 evidence that has been adduced here, during the course of this

1 two-day proceeding, before this Judge.

2 So I will now proceed to make the following specific
3 findings of fact and conclusions of law:

4 1. The Respondent admits and it is now found that at
5 all times mentioned, pertaining to this document, the Emergency
6 Order of Revocation, that the Respondent was and is the holder of
7 airline transport pilot and flight instructor certificate number
8 (omitted), and ground instructor's certificate number (omitted),
9 issued under 14 CFR, Part 61.

10 2. It is found that during the events identified in
11 this document, Respondent Fred Leroy Pasternack was employed on a
12 part-time basis to perform flight crewmember duties for
13 Northeastern Aviation Corporation, hereinafter referred to as
14 Northeastern.

15 3. It is found that Northeastern is the holder of air
16 carrier certificate number AOY8206C, issued pursuant to Part 135
17 of the Federal Aviation Regulations, and is now and was at all
18 times mentioned in this document an employer within the meaning of
19 14 CFR, Part 121, Appendix I, Section 2.

20 4. It is found that under Part 121, Appendix I,
21 Section 3, each employee who performs a safety sensitive function
22 for an employer must be subject to drug testing under the anti-
23 drug program implemented in accordance with the aforesaid section.

24 5. It is found that under this section, flight
25 crewmember duties are safety sensitive positions.

1 6. It is found that under Part 121, Appendix I,
2 Section 2, a refusal to submit means that the covered employee
3 engaged in conduct specified in 49 CFR, Part 40.191.

4 7. It is found that under 49 CFR, Part 40.191(e),
5 Respondent is considered to have refused to take a drug test, "if
6 you" -- and I incorporate by reference the following Paragraphs 1
7 and 2, as set forth under Allegation Paragraph 7 of the
8 Administrator's Emergency Order.

9 8. It is found on Friday, June 1, 2007, Respondent was
10 notified by Northeastern that he was selected for a random drug
11 test and instructed to proceed to Lab Corp for collection of a
12 specimen.

13 9. It is found that Respondent informed the designated
14 employer representative that he could not proceed to Lab Corp
15 because he did not have a copy of the federal drug testing custody
16 and control form.

17 10. It is found that Respondent Pasternack reported to
18 the Lab Corp on Tuesday, June 5, 2007, to provide a specimen for a
19 random drug test.

20 11. It is found that on June 5, 2007, on or around
21 1:00 p.m., and I am incorporating by reference, Subparagraphs A,
22 B, C, D, and E, under Paragraph Allegation 5.

23 12. It is found by reason of the foregoing, Respondent
24 Fred Leroy Pasternack refused to take a drug test as required
25 under Part 21, Appendix I, of the Federal Aviation Regulations.

1 the same is hereby affirmed.

2 This order is issued by:

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6 DATED & EDITED ON

7 AUGUST 20, 2008

WILLIAM E. FOWLER, JR.

Chief Administrative Law Judge