

SERVED: July 10, 2009

NTSB Order No. EA-5462

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 July, 2009

---

J. RANDOLPH BABBITT,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-18398
v.	)	
	)	
STEPHEN R. LYNN,	)	
	)	
Respondent.	)	
	)	

---

**OPINION AND ORDER**

Respondent, who proceeds pro se, has appealed from the oral initial decision and order of Administrative Law Judge William A. Pope, II, issued in this proceeding on March 12, 2009.<sup>1</sup> By that decision, the law judge denied respondent's appeal of the

---

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

Administrator's order revoking his airline transport pilot (ATP) certificate, as well as any other certificates that respondent holds. We deny respondent's appeal.

The Administrator's emergency revocation order, dated October 9, 2008,<sup>2</sup> alleged that respondent, as a pilot for James Flying Services,<sup>3</sup> operated an air ambulance flight from Lexington, Kentucky, with an intended destination of St. Louis, Missouri, to transport a patient and the patient's spouse on June 19, 2008. The order further stated that, while boarding the aircraft, the patient's spouse smelled the odor of alcohol on respondent, and contacted TAC AIR, a fixed base operator (FBO) at the airport. According to the order, the TAC AIR FBO contacted the police department at the airport, which sent an officer who observed respondent in a confused state and unsteady, and also noticed the odor of alcohol. The order alleged that the officer asked respondent to submit to a field sobriety test, and that, after initially refusing several times, respondent took the test and failed it. The order stated that the officer concluded that respondent was under the influence of alcohol; as a result, the Administrator charged respondent with

---

<sup>2</sup> Respondent waived the expedited procedures normally applicable to emergency proceedings.

<sup>3</sup> The Administrator's order alleged that James Flying Services is certificated under 14 C.F.R. part 135.

a violation of 14 C.F.R. § 91.17(a)(2).<sup>4</sup> The order revoked respondent's certificates, based on the determination that he lacked the care, judgment, and responsibility to hold any pilot certificate.

At the hearing, the Administrator called Polly Anna Dewitt, the wife of the patient who respondent was scheduled to transport. Ms. Dewitt provided a detailed description of her observation and contact with respondent shortly after she and her husband arrived at the airport around 8:15 am. Ms. Dewitt stated that respondent helped lift the backboard on which her husband was lying, and testified that she smelled alcohol on respondent's breath. Tr. at 43, 62. Ms. Dewitt also stated that she saw that respondent's eyes were bloodshot and watery, and that he looked tired. Ms. Dewitt testified that she did not believe the odor on respondent to be hairspray or deodorant. Ms. Dewitt then informed the supervisor of training and safety for TAC AIR at Bluegrass Airport of her observation, and the supervisor contacted the Department of Public Safety at the airport.

Richard Graham and James Maupin, employees of the Department of Public Safety at Bluegrass Airport, both testified that they observed respondent and smelled the odor of alcohol on

---

<sup>4</sup> Title 14 C.F.R. § 91.17(a)(2) states that no person may act or attempt to act as a crewmember of a civil aircraft while under the influence of alcohol.

him. Tr. at 88–89 (Officer Graham’s testimony that the odor of alcohol on respondent was strong), 123 (Officer Maupin’s testimony that he could smell the odor of alcohol on respondent from 6 feet away). Both Officers Graham and Maupin opined that respondent was under the influence of alcohol when they observed him. Officer Maupin testified that respondent told him that he had not recently had any drinks, but that he had consumed two drinks before 11:00 pm the night before; Officer Maupin further stated that respondent changed his answer and told him that he had consumed four drinks before 11:00 pm. Tr. at 141; Exh. A-5 at 2 (arrest report indicating that respondent told Officer Maupin that he had consumed “[a]t first 2 drinks then 4 drinks before 2300”). Officer Maupin testified that he informed respondent that he did not believe respondent’s initial answer that he had consumed only two drinks the previous night. Officer Maupin stated that respondent initially refused to take the field sobriety test outside. Once respondent consented to take the test inside a hangar, Officer Maupin stated that respondent walked slowly and in a “very guarded” manner, as though he was unsure of his steps on his way to the hangar. Tr. at 113–14. Officer Maupin recalled that he inquired of respondent as to whether respondent had any sort of disability or problems walking that could affect his ability to walk for the test, and that respondent replied that he did not. Officer

Maupin also testified that he administered a portable breath test (PBT), which indicated that respondent had a blood alcohol level of 0.034 percent.<sup>5</sup> As a result of his observations of respondent, including the field sobriety test, Officer Maupin arrested respondent.

In response to the Administrator's case, respondent testified on his own behalf. Respondent stated that he was born with a club foot and wore corrective shoes until age 9 because he had problems walking; respondent testified that, at present, he "makes a slight conscious effort" to keep his feet straight when walking. Tr. at 156. Respondent also testified that he has a hiatal hernia, which causes him to wake up at night at times, and that he has allergies during the summer and general problems with his sinuses. Respondent also stated that he used deodorant and hairspray, both of which contain alcohol, before he reported to the airport the morning of the intended flight.

Respondent also testified, in detail, with regard to his conduct the night before and the morning of the intended flight. Respondent stated that he and his wife had gone to the hotel lounge the night before the flight and had two drinks each, which contained bourbon. Tr. at 193; Exh. R-9 (hotel bill

---

<sup>5</sup> Officer Maupin also testified that respondent later submitted to a breath test on the Intoxilyzer 5000 at the police station, which indicated that respondent had a blood alcohol level of 0.007 percent.

showing "4 Seag VO" charged to respondent's room). Respondent testified that he consumed his last drink at 11:40 pm. Respondent stated that he woke up at approximately 2:00 am from "acid reflux," and sat up for about an hour watching television. Tr. at 240-41. Respondent testified that, after arriving at the airport in the morning for the flight, he assisted in helping put the patient into the aircraft, during which respondent stated that he perspired and his eyes burned. Shortly thereafter, Officer Maupin approached respondent and began questioning him to determine whether he was under the influence. Respondent stated that he declined one of the sobriety tests due to his problems with his feet, and that Officer Maupin did not ask him if he had any such problems with walking. On cross-examination, respondent acknowledged that he did not have any studies or X-ray materials showing his foot problem, that he had not failed any check rides as a result of difficulties with his feet, and that he had never reported allergy problems on his medical certificate applications.

Respondent's mother and wife also testified, and their testimony corroborated respondent's description of his trouble with walking. They also both testified that respondent suffered from allergies. Respondent's wife, Debra Lynn, accompanied him to the airport and was also scheduled to be on the intended flight as a licensed practical nurse. Ms. Lynn stated that,

after arriving at the hotel the night before the intended flight, she had two drinks, both of which contained bourbon and water, and that respondent consumed two drinks, which both contained bourbon and coke. Ms. Lynn testified that respondent had not consumed any more alcohol that night, and that she did not believe respondent was intoxicated or smelled of alcohol.

In rebuttal, the Administrator provided the testimony of John Soper, Ph.D., as an expert in forensic toxicology and how the human body metabolizes alcohol, as well as in the effects of gastroesophageal reflux disease. Dr. Soper stated that the normal rate of alcohol dissipation in an adult male is 0.015 percent per hour, which equates to one drink per hour. Tr. at 280. Dr. Soper stated that, in persons who drink frequently, the rate of dissipation can be almost double the normal amount. Dr. Soper opined that, if respondent had stopped drinking 12 hours prior to the flight, as he testified, then the alcohol should have been "long gone" from his body. Tr. at 293. Dr. Soper also opined that the simplest explanation for respondent's blood alcohol level of 0.034 on the PBT was that respondent consumed alcohol after 11:00 pm.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he found that the Administrator proved that respondent violated § 91.17(a)(2). The law judge determined that respondent's explanation of a congenital foot

problem for his unsteady gait was an affirmative defense, which respondent must prove. The law judge cited a previous Board case that held that physical characteristics, in addition to a PBT result of more than 0.04, were sufficient to establish that a respondent was under the influence of alcohol. Initial Decision at 349 (citing Administrator v. Schroeder, NTSB Order No. EA-5121 (2004)). The law judge further determined that, for purposes of § 91.17, the focus is not on how the pilot operated an aircraft, but the fact that he intended to operate the aircraft at all. Id. (citing Administrator v. Taylor, NTSB Order No. EA-5003 (2002)). The law judge determined that the witnesses who testified that they noticed an odor of alcohol on respondent were credible, and found that respondent's testimony was not credible, because he was "somewhat evasive" concerning the extent of his walking problems at present. The law judge acknowledged that the PBT result of 0.034 did not exceed the limit of 0.04, which presumptively indicates that one is under the influence, but stated that the PBT indicated the presence of alcohol, and that the PBT result should have been zero if respondent had last consumed alcohol at 11:00 pm the night before the scheduled flight. The law judge concluded that the cumulative weight of the evidence indicated that respondent was under the influence of alcohol, in violation of § 91.17(a)(2), even though the alcohol had only "a moderate observable effect"

on respondent. Id. at 356. The law judge also determined that revocation of respondent's certificates was the appropriate sanction.

On appeal, respondent proceeds pro se, and argues that Officer Maupin's arrest report contains errors, such as the time of the PBT as 9:35 am, and the fact that respondent took the walk and turn test prior to the PBT. Respondent also claims that the law judge erred in allowing testimony that respondent failed a horizontal gaze nystagmus (HGN) test, and in finding Officer Maupin's testimony and that of Kevin Dewitt, who was the patient scheduled to be transported, credible. Respondent urges the Board to disregard Dr. Soper's testimony, on the basis that his testimony incorrectly described the way that a PBT works, and was based on "averages and possibilities, not scientific testing." Appeal Br. at 4. Respondent challenges the accuracy of the PBT and the Intoxilyzer 5000 test, which he later took at the police station. The Administrator contests each of respondent's arguments, and urges us to uphold the law judge's decision.

The law judge's decision is based largely on his credibility findings. He specifically determined that the witnesses who smelled the odor of alcohol on respondent—Officers Graham and Maupin and Ms. Dewitt—provided credible testimony. In particular, the law judge found Officer Maupin

credible. Initial Decision at 352. We have long held that we defer to law judges' credibility determinations, absent a showing that the determinations were arbitrary, capricious, or contrary to the weight of the evidence.<sup>6</sup> Respondent has not established that the law judge erred in finding Officer Maupin's testimony credible. Moreover, the portions of Officer Maupin's testimony that respondent argues are erroneous would not change the outcome of the case. For example, regardless of whether the PBT occurred at 9:10 am or 9:35 am, or whether Officer Maupin administered a field sobriety test before or after the PBT, the evidence still indicates that the Administrator showed by a preponderance of the evidence that respondent was under the influence of alcohol in violation of § 91.17(a)(2).

Furthermore, respondent misconstrues the law judge's ruling concerning evidence of the HGN sobriety test: the law judge did not allow the Administrator's counsel to continue questioning Officer Maupin concerning the HGN test, and admonished the Administrator's counsel concerning her failure to notify respondent's counsel of the test prior to the hearing. Tr. at 137. The law judge also did not allow a document that Officer Maupin brought to the hearing concerning the HGN test into

---

<sup>6</sup> Administrator v. Nickl, NTSB Order No. EA-5287 at 6 (2007) (citing Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983)).

evidence, and did not mention the HGN test in the initial decision. We have held that law judges have wide latitude in overseeing hearings,<sup>7</sup> and we will not overturn a law judge's evidentiary ruling absent a showing that the ruling was an abuse of discretion.<sup>8</sup> Overall, we have held that we will only entertain evidentiary questions when they amount to prejudicial error.<sup>9</sup> In the case at hand, respondent has not established how the law judge's ruling concerning evidence of the HGN test was prejudicial, as the law judge did not consider the test in rendering the initial decision, and did not allow evidence of the test into the record. Initial Decision at 351.

Finally, respondent's arguments that the PBT and Intoxilyzer tests were inaccurate and that Dr. Soper's testimony concerning the test results was not credible are also unpersuasive. We have previously upheld the admission of

---

<sup>7</sup> See, e.g., Administrator v. Simmons, NTSB Order No. EA-5275 at 9-10 (2007) (citing 49 C.F.R. § 821.35(b); Administrator v. Reese, NTSB Order No. EA-4896 at n.4 (2001); and Administrator v. Kachalsky, NTSB Order No. EA-4847 at n.4 (2000)).

<sup>8</sup> See, e.g., Administrator v. Raab, NTSB Order No. EA-5300 at 9-10 (2007); Administrator v. Zink, NTSB Order No. EA-5262 at 7-8 (2006); Administrator v. Seyb, NTSB Order No. EA-5024 at 5-6 (2003); Administrator v. Van Dyke, NTSB Order No. EA-4883 at 5 (2001).

<sup>9</sup> See generally Administrator v. Blair, NTSB Order No. EA-4253 at 7 n.10 (1994) (stating that the law judge had improperly excluded evidence, but that the error was harmless). Moreover, an error is considered *prejudicial* when it "actually [affects] the outcome of the proceedings." United States v. Hastings, 134 F.3d 235, 240 (4<sup>th</sup> Cir. 1998).

average alcohol dissipation rates into the record, and applied retrograde numerical extrapolations of the dissipation rates.<sup>10</sup> Even without the results of the PBT and Intoxilyzer tests, the record still contains eyewitness testimony indicating that respondent smelled of alcohol, was unsteady on his feet, and his eyes appeared bloodshot, watery, and tired. The law judge rejected respondent's affirmative defenses by which respondent attempted to explain these observations,<sup>11</sup> based on his credibility assessments. The law judge also found the testimony concerning the blood alcohol level test results credible and indicated that he considered the PBT results to indicate only that some amount of alcohol was present in respondent's body. The law judge's assessment of the evidence was thoughtful and

---

<sup>10</sup> In Administrator v. Blakley, 7 NTSB 719 (1991), we held that the Administrator had sufficiently proved that the respondent operated an aircraft while his blood alcohol level exceeded 0.04 percent, based on the fact that, 3 hours after landing, the respondent's blood alcohol level was measured at 0.02 percent. In Blakley, we applied the average alcohol dissipation rate of 0.015 percent per hour, because the respondent did not show that, "any factor or circumstance unique to the respondent's physical or physiological make-up" indicated that we should not apply the average rate. Id. at 720.

<sup>11</sup> Respondent proposed myriad reasons in his attempt to explain what the witnesses observed. These affirmative defenses included testimony that respondent awoke during the night with digestive problems, and therefore appeared tired the next morning; that respondent's use of hairspray and deodorant containing alcohol explained the odor that the witnesses described; that his congenital foot problems explained his unsteady gait; and that his history of allergies and sinus infections was the reason for his bloodshot, watery eyes.

well-reasoned, and respondent has not established that the law judge erred.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The order of the law judge denying respondent's appeal is affirmed; and
3. The Administrator's emergency revocation of respondent's ATP certificate, and any other certificate respondent holds, is affirmed.

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, and SUMWALT, 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: \*

LYNNE A. OSMUS, \*  
ACTING ADMINISTRATOR, \*  
Federal Aviation Administration, \*

Complainant, \*

v. \*

Docket No.: SE-18398  
JUDGE POPE

STEPHEN R. LYNN, \*

Respondent. \*

\* \* \* \* \*

U.S. District Court  
101 Barr Street  
Courtroom C, Fourth Floor  
Lexington, Kentucky 40507

Thursday,  
March 12, 2009

The above-entitled matter came on for hearing, pursuant  
to Notice, at 10:06 a.m.

BEFORE: WILLIAM A. POPE, II,  
Administrative Law Judge

## APPEARANCES:

On behalf of the Administrator:

STELLAMARIS WILLIAMS  
Regional Counsel  
Federal Aviation Administration  
Southwest Region  
2601 Meacham Boulevard  
Room 664  
Fort Worth, Texas 76193-0003  
(817) 222-5081

On behalf of the Respondent:

ALLEN GAILOR, ESQ.  
730 West Market Street  
Suite 100  
Louisville, Kentucky 40202  
(502) 584-7217

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORAL INITIAL DECISION

This is a proceeding under the provisions of 49 USC section 44709, formerly section 609 of the Federal Aviation Act, and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board.

Stephen R. Lynn, the Respondent, has appealed the Administrator's Emergency Order of Revocation dated October 9, 2008, which, pursuant to section 821.31(a) of the Board's rules, serves as a complaint in which the Administrator ordered the revocation of any airman pilot certificate held by the Respondent,

1 including airline transport pilot certificate number, omitted,  
2 because of alleged violation of section 91.17(a)(2) of the Federal  
3 Aviation Regulations, which states that no person may act or  
4 attempt to act as a crew member of a civil aircraft while under  
5 the influence of alcohol.

6 In his answer to the complaint, the Respondent admitted  
7 paragraphs one, two, three and four and denied all other  
8 allegations of the complaint. Thus, there is no dispute that the  
9 Respondent is the holder of airline transport pilot certificate as  
10 alleged, that at all times pertinent he was the chief pilot  
11 employed by James Flying Services, a part 135 operator; that at  
12 all times pertinent James Flying Service operated a multi-engine  
13 Cessna, model 414 civil aircraft, N1216G; and, that on June 16th,  
14 2008, he attempted to act as pilot in command of N1216G on an air  
15 ambulance flight operated by James Flying Services from Lexington,  
16 Kentucky, with an intended destination of St. Louis, Missouri, to  
17 transport a patient and his wife.

18 SUMMARY OF THE EVIDENCE

19 Polly Anna Dewitt, a Registered Nurse with ten years  
20 experience, including one year working in a detoxification and  
21 alcohol rehabilitation unit, arrived at the Bluegrass Airport --  
22 did I say June 16th?

23 MR. GAILOR: Yes, sir. That may not be correct.

24 ADMINISTRATIVE LAW JUDGE POPE: No, it's June 19th.

25 MS. WILLIAMS: Yes.

1 ADMINISTRATIVE LAW JUDGE POPE: I'm sorry, correct that  
2 if you would, please. On June 19th, 2008, to accompany her  
3 paraplegic husband to St. Louis for medical treatment on a flight  
4 arranged by the Veteran's Administration onboard an aircraft  
5 piloted by the Respondent. The Respondent and two EMTs from the  
6 ambulance loaded her husband's stretcher -- actually, I think he  
7 was on a backboard, onboard the aircraft.

8 Her husband was in considerable pain and was under  
9 medication. She asked the nurse attendant on the flight for a  
10 catheter kit but was told there was none on the aircraft. She  
11 went to the baggage compartment outside the aircraft with the  
12 Respondent to get a kit from her luggage. The Respondent stood  
13 beside her, opened the door of the compartment and handed her her  
14 bag.

15 She smelled the odor of alcoholic beverages coming from  
16 the Respondent. She could not identify the specific beverage.  
17 She thought the odor was on his breath. She recognized the smell  
18 of alcoholic beverages, mainly bourbon and beer, from her medical  
19 experience.

20 His eyes were bloodshot and he looked very tired. She  
21 told a man from TAC Air, the fixed base operator, that she smelled  
22 alcohol on the pilot's breath. She told the manager of TAC Air of  
23 her concerns, and the airport police were called. Her husband  
24 told her when she came back to the aircraft that the pilot had  
25 come in the aircraft and had asked the woman attendant if he

1 should refuse a sobriety test.

2           The Respondent was arrested and the EMTs took her  
3 husband back to the V.A. Hospital. And from there he was  
4 transferred to another hospital. Some days later he was flown to  
5 St. Louis in another aircraft. She acknowledged on cross-  
6 examination that bloodshot eyes could be caused by allergies. She  
7 did not ask the Respondent anything about the consumption of  
8 alcohol. When the Respondent heard her talking to the TAC  
9 representative, he said he had smoked a cigarette. She did not  
10 smell hairspray or deodorant on the Respondent.

11           Her husband, Kevin Dewitt, acknowledged he was in pain  
12 and was taking medication that made him drowsy that day. But he  
13 remembered hearing the Respondent say in the aircraft that they  
14 wanted him to take a breathalyzer and field sobriety test.

15           Tim Farmer, the supervisor of training and safety at TAC  
16 Air, testified that Mrs. Dewitt had reported her concerns to him.  
17 He asked her to write a statement and he and the manager called  
18 the airport police. He did not speak to the Respondent.

19           Assistant Chief Earl Richard Graham, Department of  
20 Public Safety at the Bluegrass Airport, where the events at issue  
21 in this case took place, saw the Respondent when he was called by  
22 Officer Maupin to bring a breathalyzer or a PBT. He observed that  
23 the Respondent's eyes were glassy and watery and he detected an  
24 odor of alcoholic beverages coming from the Respondent.

25           It was not a strong odor, but it was there. He saw the

1 results of the breathalyzer test administered by Officer Maupin  
2 was .034. Based on this, he concluded that the Respondent was  
3 under the influence and the Respondent was placed under arrest.  
4 He agreed that pure alcohol does not have an odor, but certain  
5 alcoholic beverages do and what he smelled on the Respondent's  
6 breath was more like a mixed drink. Officer Graham said that he  
7 had been trained on the use of the breathalyzer and in giving  
8 field sobriety tests, but was not currently certified in giving  
9 breath tests.

10           Officer James Maupin has been with the Bluegrass Airport  
11 Police Department for 15 years and is certified by the state of  
12 Kentucky as a police officer, fire fighter and EMT. He received  
13 his police training at the Kentucky Department of Public Justice  
14 Police Academy in 1994. His training covered breath test operator  
15 basic, and DUI/field sobriety, which covered sobriety field tests.

16           Every two years since then he has completed breath test  
17 operator recertification. He said in the past three years he has  
18 made ten to 12 arrests for being under the influence of alcohol.  
19 All but two pled guilty. Two went to court and the cases were  
20 dismissed on jurisdictional grounds.

21           He has performed at least ten field sobriety tests a  
22 month. He received a call from Tim Farmer at TAC Air on June  
23 19th, 2008, about a complaint of a pilot being under the  
24 influence. A-4 is a call for service record of the police  
25 department. It shows he arrived at 8:59 a.m., and he arrested the

1 Respondent at 9:40 a.m.

2           When he arrived, he saw the Respondent who was  
3 subsequently pointed out to him by Farmer as the person about whom  
4 the complaint had been made, smoking a cigarette behind the  
5 aircraft. Officer Maupin said he asked the Respondent if he had  
6 been drinking and the Respondent replied that he knew the rules  
7 and could not drink after ten hours before flight time.

8           He said he had his last drink at 10:30 p.m., the night  
9 before. Officer Maupin asked the Respondent to take the field  
10 sobriety test, but the Respondent refused until Officer Maupin  
11 said he would take the Respondent into the hangar where he would  
12 not be publicly observed. At that point, the Respondent agreed to  
13 take the test.

14           He said he would not take the standing on one leg test  
15 because he had been jammed up before on that test. He seemed  
16 unsure in his steps and had a strong alcohol smell about him.  
17 Officer Maupin said he demonstrated the walk and turn and  
18 administered the test with the Respondent's agreement. He said  
19 the Respondent walked slowly, seeming to be trying to be sure of  
20 his steps and was unsteady.

21           He said he asked the Respondent if he had any physical  
22 disabilities and the Respondent said he had none. Officer Maupin  
23 said it was an oversight on his part that he did not record that  
24 on the arrest report. He said he could smell alcohol six feet  
25 away from the Respondent. At that point Officer Maupin called for

1 the PBT or preliminary breath test machine, called intoxilator  
2 two, and explained its use to the Respondent.

3 The Respondent took the test and the reading was .034.  
4 The test was administered at 9:35 a.m. He said in placing the  
5 Respondent under arrest he took into consideration the alcohol  
6 smell, how the Respondent walked, the number of times he refused  
7 the field sobriety test, his walk and turn test, and the PBT test.

8 On cross-examination, Officer Maupin said the Respondent  
9 told him first that he had had two drinks, then said it was four  
10 drinks the night before. He did not ask the Respondent about lack  
11 of sleep the night before or other problems such as sinus problems  
12 or allergies that could cause bloodshot eyes.

13 An intoxilator 5,000 test was given to the Respondent at  
14 10:45 a.m., apparently, at a police station after the Respondent  
15 had been arrested and transported there. It gave a reading of  
16 .007. Officer Maupin agreed that alcohol does not have a smell,  
17 but it does when it's in drinks.

18 The Respondent elected to testify in his own defense.  
19 He is 52 years old and is married to Debra Lynn, who is a Licensed  
20 Practical Nurse. He has been a professional pilot since 1982. As  
21 a child he had problems with his feet. He wore corrective shoes  
22 until he was nine years old.

23 He was born club-footed with his ankles turned in, his  
24 left foot turned outwards, and he was flat-footed. He was not  
25 coordinated on his feet as a child but played little league

1 baseball as a catcher. He is slightly impaired now and has a  
2 guarded gait. He makes a conscious effort to keep his feet  
3 straight, but his right foot is slightly turned in. Others say he  
4 walks slowly, but he feels he can walk rapidly.

5           The Respondent said he has been diagnosed with a hiatal  
6 hernia that causes acid reflux at night. He has summer allergies  
7 from pollens, particularly after mowing grass. He is also  
8 susceptible to sinus infections, all of which cause red and watery  
9 eyes.

10           He said his wife, who is a Practical Nurse, has flown  
11 flights with him for the past eight years. On June 18th after  
12 being notified by his employer of the flight from Lexington to St.  
13 Louis, he prepped the aircraft and completed the flight plan for  
14 the next day. He and his wife got Mexican take-out food and ate  
15 at the hangar.

16           He left MENA Airport in Arkansas at 1800 central time,  
17 arrived in Lexington at 9:45 p.m. eastern time, and checked into  
18 his hotel, the Crowne Plaza, at about 10:15 p.m. After checking  
19 in, he and his wife went to the hotel lounge, where they each had  
20 two drinks of Seagram's V.O. bourbon. His room bill and bar bill  
21 show a total of four drinks.

22           He did not have anymore drinks that were not charged to  
23 his room. His last drink was at about 11:40 p.m. He and his wife  
24 returned to their room and went to bed. During the night he had a  
25 reflux attack, drank some water and watched television for an

1 hour. The next morning, he showered, used spray deodorant and  
2 hairspray that contained alcohol and finished dressing. He had  
3 coffee and a cigarette.

4 He and his wife left for the airport at about 8:00 a.m.  
5 At the airport, after having coffee and cookies at the fixed base  
6 operator, he and his wife walked out to the aircraft to meet the  
7 ambulance. He assisted the paramedics in moving the patient, a  
8 paraplegic, into the aircraft. He worked up a sweat from moving  
9 the patient into the aircraft.

10 His eyes burned a little and he thought he might have  
11 gotten sweat in them. He did not think he had any odor of alcohol  
12 about him, but the products he had used could have left an odor  
13 such as the hairspray or the deodorant, as did the cigarettes.

14 When Mrs. Dewitt said she needed to get a cath kit from  
15 her luggage, he took her to the outside nose luggage compartment,  
16 opened the door, arms above his head, and got her case for her.  
17 He stood next to her while she opened the case and got what she  
18 wanted. She turned to face him. He thought she gave him a funny  
19 look.

20 Shortly after that, while outside the aircraft, his wife  
21 came out and told him that Mrs. Dewitt was complaining that she  
22 smelled alcohol on him and was calling the police. He asked his  
23 wife if he should take a breath and field sobriety test. He said  
24 he smoked a cigarette, and a few minutes later Officer Maupin  
25 arrived.

1           He asked the Respondent if he had been drinking. The  
2 Respondent said no. Officer Maupin asked if he would take a  
3 little test. He refused, saying it was embarrassing. They went  
4 into the hangar and he agreed to take the test. He blew into the  
5 PBT and it registered .034. Officer Maupin told him to wait and  
6 left the hangar.

7           When he returned, he asked the Respondent to take a  
8 couple of little tests. He explained it was voluntary. He asked  
9 the Respondent to stand on one leg and put his other foot towards  
10 the ceiling, but the Respondent refused.

11           The Respondent said he had trouble putting his pants on  
12 in the morning. The Respondent testified that he was born club-  
13 footed, wore corrective shoes as a child and cannot stand on one  
14 foot. The Respondent said Officer Maupin asked him to stand on  
15 the floor and walk heel to toe, counting nine steps.

16           Officer Maupin did not complain, said nothing about the  
17 Respondent's hands. He said Officer Maupin left the room for five  
18 minutes, and when he returned, said he was placing the Respondent  
19 under arrest. The Respondent said he was not under the influence  
20 and Officer Maupin said, that was close enough, handcuffed him and  
21 said he was going to test his wife and would arrest her if she  
22 tested positive.

23           On cross-examination, Respondent said it had been nine  
24 hours and 15 minutes after his last drink the night before before  
25 he met Officer Maupin. He denied telling Officer Maupin that he

1 had been jammed up with reference to the standing on one leg. He  
2 said he never failed a check ride because of any defect, nor does  
3 he have any problems with the rudder pedals or brakes.

4 He identified his letter submitted to the FAA in  
5 response to an LOI that he had received. He said he never  
6 reported any impairment or defect to an AME over the years, and  
7 did not submit x-rays or MRI's to a medical examiner concerning  
8 any problems that he had.

9 He does not now have any records other than the doctor's  
10 statement that was not admitted, indicating the severity of his  
11 defect. At present and at the time of the incident he wore non-  
12 prescription Dr. Scholl's heel pads in his shoes. He never  
13 reported allergies on a medical certificate application.

14 But he does take infrequently a generic over the counter  
15 brand of allergy medication. On re-direct he says that he thinks  
16 he took the PBT at 9:10 or 9:15 a.m., not at 9:35 a.m. as Officer  
17 Maupin said in his report, Exhibit A-5. He said he had an acid  
18 reflux attack at about 2:00 a.m., drank water and stayed up for an  
19 hour watching television.

20 Francine Lynn, the Respondent's 69 year old mother,  
21 confirmed his testimony that he had foot and ankle problems from  
22 birth through early childhood. She said that at 10 or 11 years of  
23 age he stopped wearing corrective shoes. He could walk but he  
24 could not run.

25 Now he is kind of awkward and clumsy and is not agile on

1 his feet. He kind of puts his right foot inward when he walks.  
2 He has allergies and sinus problems and experiences sneezing and  
3 runny nose. His eyes become scratchy, itchy and red after he mows  
4 grass.

5 Debra K. Lynn, the Respondent's wife, is a Licensed  
6 Practical Nurse in Arkansas and she flies with her husband as an  
7 L.P.N. on his aircraft. She said he has problems with his feet  
8 and ankles and is kind of clumsy. If he walks a lot, his feet and  
9 ankles become sore. He has allergies and sinus problems which  
10 causes sneezing and a runny nose.

11 She confirmed that they had stayed at the Crowne Plaza  
12 hotel in Lexington on the night of June 18th and had to be at the  
13 airport at 8:00 a.m. the next morning. He uses hairspray and  
14 spray deodorant. After checking into the hotel at 10:15 or 10:00  
15 p.m., they went to the hotel bar and had two drinks each.

16 She had V.O. and water and he had V.O. and coke. He was  
17 not under the influence of alcohol when they went to their rooms,  
18 but he got heartburn during the night. He had nothing alcoholic  
19 to drink that night other than in the bar, and nothing alcoholic  
20 to drink the next day.

21 She saw her husband help two medics load the patient on  
22 a backboard into the aircraft. She saw her husband accompany  
23 Mrs. Dewitt to the baggage compartment in the nose and get a bag  
24 down for her. Mrs. Dewitt walked up to the driver of the  
25 ambulance and asked what she should do when the pilot had an odor

1 of alcohol. She went to the FBO and her husband remained near the  
2 aircraft smoking.

3 He asked her if he should take a little test. He  
4 followed Officer Maupin to the FBO. He called her on her cell  
5 phone at about 9:30 a.m. She saw Officer Maupin come out of the  
6 FBO with Mrs. Dewitt, who appeared to be upset, and talked to  
7 Officer Maupin about a foot from his face.

8 Officer Maupin went back in and then returned with a  
9 white officer, who said her husband had been arrested and offered  
10 her the option to take a PBT, which she did. She was not arrested  
11 but the officers would not tell her what the results of the test  
12 were.

13 In rebuttal, the Administrator called Dr. John W. Soper,  
14 Ph.D., who was employed by the FAA in Oklahoma City as a research  
15 scientist and director of the bioaeronautical lab. Based on his  
16 education and experience, Dr. Soper was accepted over objection by  
17 the Respondent as an expert in forensic toxicology, how alcohol is  
18 metabolized by the body, and the effect of GERD, G-E-R-D, on a  
19 breath test.

20 He said he had been involved in alcohol analysis for 28  
21 years and is familiar with the rate at which alcohol dissipates in  
22 the body. He said in a non-drinker's body it is dissipated at the  
23 rate of .015 percent per hour for a unit of alcohol, which he  
24 defined as a can of beer or a drink of Seagram's V.O.

25 For experienced drinkers the rate of dissipation nearly

1 doubles. He said alcohol is metabolized through the liver. As a  
2 person becomes more used to alcohol, its effect on a person  
3 appears less obvious and a tolerant drinker gets used to behaving  
4 normally in appearance, even after consuming alcohol.

5 He said the results of the PBT test are not admissible  
6 in most state courts, including Kentucky, because it does not  
7 produce a printout or a written record. He says that it has  
8 nothing to do with the accuracy of the machine, which utilizes a  
9 fuel cell which reacts to three substances, two of which are  
10 lethal in the human body, and the third is alcohol.

11 He said that even a tolerant drinker should be normal in  
12 appearance at 9:15 a.m. if his last drink of alcohol was at 10:00  
13 or 11:00 p.m. the night before. He said if there was no alcohol  
14 in the stomach because it had been metabolized, there would be no  
15 effect from GERD on the PBT.

16 He said he could not accurately determine the prior  
17 blood alcohol from computations based upon the PBT reading, but  
18 that as an estimate and assuming a clearance rate of .015 percent  
19 per hour, a .034 percent reading at 8:15 a.m. would have been 1.8  
20 percent at 11:00 p.m. the previous night. The Administrator  
21 stipulated that alcohol smell is an unreliable indication of  
22 consumption of alcohol.

23 The Respondent's defense that his unsteady gait was the  
24 result of a birth defect is an affirmative defense. Once the  
25 Administrator has presented a prima facie case of Respondent's

1 violation of the FAR's, it becomes the Respondent's burden to  
2 prove his affirmative defense to the regulatory violation by a  
3 preponderance of the evidence. See Administrator v. Kalberg,  
4 NTSB order number EA-5240, 2006.

5 In Administrator v. Schroeder, NTSB order number EA-  
6 5121, 2004, the Board said that it agreed with the Law Judge that  
7 physical characteristics reported by three objective witnesses,  
8 including smell of alcohol, impairment of speech, mumbling and  
9 incoherency, disorientation, wobbliness and bloodshot eyes,  
10 coupled with the PBT reading, in that case in excess of .04, were  
11 sufficient to establish that the Respondent was under the  
12 influence of alcohol and revocation was affirmed.

13 See also Administrator v. Taylor, NTSB order number EA-  
14 5003, 2002, in which the Board said that the focus of a case  
15 involving an intoxicated pilot is not how the pilot attempted to  
16 operate the aircraft, but that he intended to operate it at all.

17 If it is shown that he did, the appropriate sanction is  
18 revocation for airmen possessing the requisite care, judgment and  
19 responsibility, that is, those that can be relied upon not to  
20 knowingly compromise aviation safety, do not take the controls of  
21 an aircraft for any purpose while under the influence of alcohol.

22 FINDINGS AND CONCLUSIONS

23 It is commonly accepted and not challenged in this case  
24 that alcohol has little or no odor. Evidence of the smell of  
25 alcohol coming from this Respondent is contained in the testimony

1 of Mrs. Dewitt, Deputy Chief Graham and Officer Maupin. I  
2 observed the testimony of these witnesses and took into  
3 consideration their lack of any motive to testify falsely against  
4 the Respondent, and I find them to be credible.

5           Officer Maupin, as he agreed, smelled and identified as  
6 the odor of alcohol was actually the odor of the flavoring of the  
7 drink. It could have been beer, wine, scotch, gin, et cetera. It  
8 is well established in literature in the field that it is  
9 difficult to determine what the particular alcoholic drink was  
10 from its odor.

11           In here, Officer Maupin could not determine what  
12 alcoholic beverage the Respondent had consumed, nor could he  
13 determine how much alcohol the Respondent had consumed. The  
14 strength of the odor does not relate to the amount of alcohol  
15 consumed. He characterized, as did Mrs. Dewitt, the odor of  
16 alcohol being smelled as moderate.

17           But there is no correlation between the strength of the  
18 odor and the amount of alcohol that has been consumed. The odor  
19 of alcoholic beverage only indicates that a beverage usually  
20 associated with the presence of alcohol in a drink has been  
21 consumed relatively recently.

22           It does not tell how much alcohol has been consumed. In  
23 fact, there are drinks which are non-alcoholic which smell like an  
24 alcoholic drink. To my knowledge, one such is Near Beer. I find,  
25 therefore, that the odor that the witnesses detected coming from

1 the Respondent and identified as the odor of alcohol is  
2 insufficient standing alone to prove that the Respondent had  
3 consumed alcohol, much less that he was under the influence of  
4 alcohol.

5           The Respondent voluntarily consented to a field sobriety  
6 test. Field sobriety tests are voluntary. There is no  
7 requirement in the FAR's that a pilot suspected of being under the  
8 influence of alcohol must agree to a law enforcement officer's  
9 request to submit to a field sobriety test.

10           Further, from the evidence submitted, a reliable field  
11 sobriety test consists of only three tests. These tests, known as  
12 the standardized field sobriety tests (SFST) are sanctioned by the  
13 National Highway Traffic Safety Administration. They are, one,  
14 the walk and turn; two, the one leg stand, and three, the  
15 horizontal gaze nystagmus, or the HGN test.

16           In this case, the Respondent agreed to take the field  
17 sobriety test administered by Officer Maupin. But he refused to  
18 take the one leg test, and the results of the HGN test were not  
19 allowed in evidence because they were not timely disclosed to the  
20 Respondent and the Respondent had no reasonable opportunity to  
21 prepare a defense to testimony concerning an HGN test.

22           I do not draw an adverse inference against the  
23 Respondent because of any initial resistance or refusal on his  
24 part to agree to the test requested by Officer Maupin. Officer  
25 Maupin explained that they were voluntary, and the Respondent

1 cannot now be penalized because he took Officer Maupin at his  
2 word.

3           Only the results of the walk and turn test are in  
4 evidence. According to Officer Maupin, whom I find to be a  
5 completely credible witness, who was trained in giving field  
6 sobriety tests, and has given many since 1998, the Respondent was  
7 unsteady in his walk and appeared to be very deliberate.

8           The Respondent's evidence, however, is that his slow,  
9 unsteady gait was the result of foot and ankle deformities dating  
10 back to his birth. That is an affirmative defense which the  
11 Respondent has the burden of proving by a preponderance of the  
12 evidence.

13           The Respondent admitted, however, that he is only  
14 slightly impaired now and that he had a guarded gait, making a  
15 conscious effort to keep his feet straight, with his right foot  
16 turned slightly in. But he feels that he can walk rapidly. He  
17 has presented no medical evidence of the extent of any disability  
18 that affects him now, such as x-rays or reports.

19           And he admitted that he has never reported to an AME  
20 that he has any such disability. I had the opportunity to observe  
21 the Respondent as he testified and I found him to be somewhat  
22 evasive as to the extent of his disability now. And I conclude  
23 that he is not a credible witness, because he also attempted to  
24 minimize his present disability at the same time he was claiming  
25 that his disability was the cause of his unsteady walk.

1           I find therefore that the Respondent has not proven this  
2 affirmative defense by a preponderance of the evidence. Here, the  
3 Respondent has not presented any credible evidence of pollen in  
4 the air which might have caused his eyes to be bloodshot and  
5 watery, or that he was suffering from a sinus infection at that  
6 time that might have caused his eyes to be bloodshot or watery.

7           Whether the bloodshot and watery condition of his eyes  
8 at the relevant time resulted from anything other than the  
9 consumption of alcohol is no more than speculation and does not  
10 rise to the level of proof by preponderance required for an  
11 affirmative defense.

12           Very significantly, the Respondent admitted to having  
13 consumed two to four alcoholic beverages the night before, the  
14 last being around 10:30 to 11:00 p.m. Further, a field breath  
15 test performed by Officer Maupin with the Respondent's consent at  
16 about 9:30 a.m. in the morning showed a blood alcohol level of  
17 .034.

18           That is close to the legal limit of .04, but it is not  
19 over the limit, and does not conclusively establish that the  
20 Respondent violated the FAR's. But it showed the presence of  
21 alcohol in his blood. And after the passage of the length of time  
22 he said had elapsed since he last consumed an alcoholic beverage,  
23 that percentage was substantial.

24           It is under the cutoff level of .04 specified in the  
25 FAR's, but it is also a test performed approximately 11 hours

1 after the Respondent admitted to having last consumed an alcoholic  
2 beverage. Even at the rate of dissipation of a non-drinker, by the  
3 time of the PBT test, his blood alcohol level should have been  
4 close to zero, if not zero, if his last drink had been at or  
5 before 11:00 p.m. the night before.

6 Furthermore, approximately an hour later the Respondent  
7 was administered a breath test on an intoxilator 5,000, apparently  
8 at the police station where he was transported after he was  
9 arrested, and its result was .007 percent.

10 The PB test does not show when the Respondent last  
11 consumed an alcoholic beverage. But from the rate of dissipation  
12 of .015 percent per hour, it strongly suggests that the  
13 Respondent's last alcoholic drink was after 11:00 p.m. the  
14 previous night.

15 I do not make that determination, however, because the  
16 relevant point is that he had alcohol in his system at 9:30 a.m.  
17 on 6/19/08 when the PB test was administered, and not when he last  
18 consumed alcohol. The Respondent contends there is no evidence  
19 that the PBT machine was properly calibrated.

20 However, in his answer the Respondent raised that issue.  
21 But at the hearing the Respondent did not raise the issue on  
22 cross-examination of Officer Maupin. Further, the Respondent  
23 argues that the PBT tests are not admissible in the courts of  
24 Kentucky or any other states.

25 However, approximately an hour later the Respondent was

1 administered a breath test on the intoxilator 5,000, which would  
2 be admissible in the courts of Kentucky. That was done apparently  
3 at the police station where he was transported after he was  
4 arrested, and the result was .007 percent.

5 That is a consistent reading with the dissipation rate  
6 of .015 to double that if the Respondent is an experienced  
7 drinker, from the PBT reading an hour before of .034 percent.  
8 That indicates the PBT was properly calibrated.

9 Further, Mrs. Lynn, the Respondent's wife, was also  
10 administered a PBT at the airport, and that test did not show  
11 anything remarkable and she was not placed under arrest as a crew  
12 member under the influence of alcohol. That would be consistent  
13 with her not having an alcoholic beverage since about 11:00 p.m.  
14 the night before.

15 I find, therefore, that there is circumstantial evidence  
16 in the record indicating that the PBT was properly calibrated, and  
17 there is nothing in the record which would raise a question that  
18 it was not. Whether the PBT result would be admissible in a state  
19 court is not relevant.

20 This is a federal proceeding, and the only question is  
21 whether or not the PBT was reliable, and I find that it was, see  
22 Administrator v. Schroeder, supra. I find that the cumulative  
23 weight of all of these factors taken together is sufficient to  
24 show by a preponderance that at the time alleged in the complaint  
25 on June 19, 2008, the Respondent was under the influence of

1 alcohol in violation of FAR 91.17(a)(2), as alleged in the  
2 complaint.

3           While I also conclude and find that the effect of being  
4 under the influence of alcohol had only a moderate observable  
5 effect on the Respondent, he was nevertheless under the influence  
6 of alcohol and Board precedent is clear that the appropriate  
7 sanction is revocation.

8           Upon consideration of all the substantial, reliable and  
9 probative evidence of record, I find the Administrator has proven  
10 by a preponderance of the evidence that the Respondent violated  
11 FAR section 61.17(a)(2) and that the appropriate sanction is  
12 revocation of his ATP and any other pilot certificate he holds.

13

14

ORDER

15

16

ACCORDINGLY, IT IS HEREBY ORDERED THAT the  
Administrator's order of revocation is affirmed.

17

18

19

20

21

22

EDITED ON

\_\_\_\_\_  
William A. Pope

23

April 7, 2009

Administrative Law Judge

24

25