

SERVED: September 2, 2010

NTSB Order No. EA-5545

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 31<sup>st</sup> day of August, 2010

<hr/>		)
J. RANDOLPH BABBITT,		)
Administrator,		)
Federal Aviation Administration,		)
		)
Complainant,		)
		)
v.		)
		)
FRED LEROY PASTERNAK,		)
		)
Respondent.		)
		)
<hr/>		)

Docket SE-18133RM

**OPINION AND ORDER**

On remand from the United States Court of Appeals for the District of Columbia Circuit,<sup>1</sup> we revisit respondent's appeal of

<sup>1</sup> Pasternack v. FAA, et al., 596 F.3d 836 (D.C. Cir. 2010). Although respondent named the NTSB as a respondent in his petition for review before the Court of Appeals, the NTSB performed a quasi-judicial function in that it adjudicated respondent's appeal from the Administrator's order of suspension. The FAA is the party in interest, not the NTSB, which does not typically participate in the judicial review of

the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr.<sup>2</sup> The law judge affirmed the Administrator's revocation of respondent's airline transport pilot, flight instructor, and ground instructor certificates, based on respondent's alleged violation of 14 C.F.R. § 61.14(b), which prohibits a certificate holder from failing to remain at a drug testing site until the testing process is complete under 49 C.F.R. § 40.191(a)(2), or failing to cooperate with any part of the testing process under 49 C.F.R. § 40.191(a)(8). We affirmed the law judge's decision. With due consideration for the issues raised by the Court and the additional briefs on remand submitted by both parties, we remand this case to the law judge for more specific findings of fact and conclusions of law.

The Administrator served respondent with an emergency order revoking his certificates on November 20, 2007. On November 30, 2007, respondent waived the expedited procedures normally applicable to emergency proceedings. The Administrator served a Second Amended Emergency Order of Revocation on May 20, 2008.<sup>3</sup>

---

(..continued)  
its decisions. See 49 C.F.R. § 821.64(a).

<sup>2</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

<sup>3</sup> This amended order withdrew an allegation that respondent failed to appear for testing within a reasonable time after receiving notification of the test under 49 C.F.R.

The law judge held a hearing on July 30 and 31, 2008, and affirmed the Administrator's amended order. Respondent appealed that decision to the full Board. We issued our original decision on April 29, 2009, affirming the law judge. On May 15, 2009, respondent petitioned the United States Court of Appeals for the District of Columbia Circuit. The Court granted the petition and remanded the case to the Board on February 26, 2010.

Respondent, a cardiologist and a part-time pilot for Northeastern Aviation, received notification on June 1, 2007, that he had been randomly selected for a DOT drug test. Pursuant to the instructions of his employer, respondent reported to the LabCorp testing site on June 5, 2007. Ms. Theresa Montalvo, the collector at the testing site, processed him in accordance with DOT procedures, but respondent failed to produce a sufficient amount of urine on his first attempt. Ms. Montalvo then explained to respondent that he would have to provide a second specimen, asked him to wait in the waiting area, and instructed him to drink water. Certification of Record (C.R.) at 625, 633, 640. Ms. Montalvo testified that respondent replied he could not wait and he grabbed his ID card. C.R. at 625, 633. She informed him she

---

(..continued)  
§ 40.191(a)(1).

would have to notify his employer, he said "fine," and left. C.R. at 625-26. On cross-examination, Ms. Montalvo admitted she did not tell respondent that leaving the testing site would be considered a refusal to test under the DOT regulations. C.R. at 641.

Respondent, in contrast, denied that he acted in a confrontational way or that he was offered water after his failed first attempt. C.R. at 982, 983. According to respondent, Ms. Montalvo directed him to the waiting area, he sat down, and subsequently realized "nothing was going to come very quickly." C.R. at 982. After waiting for approximately 10-15 minutes, he left because he had an appointment with a patient at his office eight blocks away. C.R. at 983, 988. Respondent informed Ms. Montalvo he needed to leave and would return to provide a sample the next morning. C.R. at 988. When asked what Ms. Montalvo said in response to this statement, he testified "I guess she said okay." Id. Respondent returned to LabCorp later that afternoon and provided a second urine sample, which tested negative for drug metabolites.

In accordance with DOT drug testing procedures, Dr. Melvin Samuels, the designated medical review officer (MRO) for Choice Point, reviewed respondent's test. Both Dr. Samuels and Choice Point's chief MRO, Dr. Stuart Hoffman, testified that regardless of the second negative sample, respondent's conduct in leaving

the testing site after the failed first attempt without completing the test constituted a refusal under the DOT testing requirements. As such, Dr. Samuels reported the test as a refusal. On June 15, 2007, Dr. Hoffman received a phone call from respondent after respondent had learned that Choice Point reported his test result as a refusal. C.R. at 1137 (Exh. A-4). During the conversation, respondent explained he was a doctor with aviation medical experience, as well as a pilot, and the refusal to test result would have very adverse consequences for him. C.R. at 729-30, 1137. Respondent asked whether Dr. Hoffman could do anything to rectify the situation. C.R. at 730, 1137. Dr. Hoffman told respondent there was nothing he could do, because the moment respondent left the testing facility it was considered a refusal to test. Id. Dr. Hoffman asked respondent, in light of respondent's apparent good knowledge of the testing procedures, why he left the testing facility, and respondent replied that he should have known better. Id.

Additionally, Mr. Craig Jordan, Northeastern's then-acting chief pilot, testified 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 testing requirements.

In our prior opinion, we sought to resolve two legal issues

raised by respondent: (1) whether respondent was subject to the DOT random drug testing requirements at the time he reported for his drug test, and (2) whether his departure from the testing facility before he had provided an adequate urine sample and before the testing process was complete constituted a refusal to submit to the drug test. As to the first issue, we concluded that, "respondent, as a part-time or intermittent pilot designated to perform flight crewmember duties under [Northeastern Aviation's] Part 135 operating certificate, fell within the aegis of the DOT random drug testing requirements" and, because he was performing a safety-sensitive function at the time he was notified of his selection for a DOT drug test, he was properly subject to the DOT requirements.<sup>4</sup> The Court's decision did not review this portion of our opinion and order.

As for the second issue, we concluded that:

We ... 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. 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).

NTSB Order No. EA-5443 at 11 (footnote omitted).

Notwithstanding this ultimate conclusion, we endeavored to

---

<sup>4</sup> Administrator v. Pasternack, NTSB Order No. EA-5443 at 9 (2009).

explain why we found respondent's rebuttal evidence to the Administrator's case unavailing. It was this latter discussion that the Court focused upon and, ultimately, concluded:

Because the Board expressly relied on its finding that Montalvo was "precluded" from warning Pasternack that his leaving would constitute a refusal and because that finding is not supported by substantial evidence, we must vacate the Board's decision. In so doing, we do not purport to say that the Board was required to consider Pasternack's "exculpatory justification"; it may be that 49 C.F.R. § 40.191(a)(2) is a strict liability provision. But the Board having entertained Pasternack's "exculpatory justification," and having rejected it on a ground not supported by substantial evidence, we are constrained to vacate the Board's decision.

Pasternack, 596 F.3d at 839.

Subsequent to the Court's remand of this case, the Administrator filed a motion for leave to file a brief on remand with the Board, which we granted on April 21, 2010. Both parties filed briefs addressing the issues of: (1) whether Ms. Montalvo failed to advise respondent that leaving the testing site would constitute a refusal; (2) whether such a failure, if it occurred, sufficed to absolve respondent of his duty to remain at the testing site in accordance with the shy bladder procedures; and (3) whether the law judge based his determination concerning the dialogue between Ms. Montalvo and respondent upon a credibility determination.

The Administrator, in his brief on remand, conceded that 49 C.F.R. § 40.191(a)(2) is not a strict liability provision.

Likewise, the Administrator conceded Ms. Montalvo did not expressly advise respondent that leaving would constitute a refusal, but argued that we should consider factors such as respondent's aggressive behavior, the timing of his departure, and the size of the room, in determining whether Ms. Montalvo provided any indicia of acquiescence or approval concerning respondent's decision to leave the testing facility. The Administrator further argued that respondent had a regulatory obligation to submit to the drug test under 49 C.F.R. § 40.191(a)(2) and (a)(8), and that the DOT Collection Guidelines (excerpts at C.R. 129-41) were not binding on Ms. Montalvo as the guidelines "state upfront that the 'information contained in this publication should not be used to interpret the legal requirements of the actual rule.'" Administrator's Br. on Remand at 14. In the alternative, the Administrator argued "it was immaterial whether Ms. Montalvo used the words 'if you leave it will be a refusal' because, as Judge Fowler found, [respondent's] failure to comply with her instructions constituted a refusal under 49 C.F.R. § 40.191(a)(8)."<sup>5</sup> Id. at 16. Finally, the Administrator

---

<sup>5</sup> Respondent's counsel (Respondent's Br. on Remand at 13) notes that the law judge's decision merely restates the regulation: "7. It is found that under 49 CFR, Part 40.191(e) [sic], [r]espondent [is] considered to have refused to take a drug test, 'if you' – and I incorporate by reference the following

asserted that the law judge made an implicit credibility determination against respondent and in favor of Ms. Montalvo. Respondent contested each of the Administrator's arguments.

In light of the Court's ruling that the law judge did not articulate credibility determinations in his oral initial decision, and because we have long held that such determinations are within the exclusive province of the law judge who, as the trier of fact, is in the best position to observe and assess the demeanor of the witnesses,<sup>6</sup> we remand this proceeding to the law judge to make the appropriate credibility determinations, factual findings, and conclusions of law. Furthermore, during the hearing, respondent asserted the affirmative defense of reasonable reliance<sup>7</sup>—that he relied on the instruction, or

---

(..continued)

Paragraphs 1 and 2, as set forth under Allegation Paragraph 7 [of the Administrator's Emergency Order]." C.R. at 1124 (emphasis added). Paragraphs 1 and 2 of allegation paragraph 7 of the emergency order state:

- (1) [§40.191 (a)(2)] Fail to remain at the testing site until the testing process is complete; or
- (2) [§ 40.191 (a)(8)] 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).

C.R. at 464 (emphasis added).

<sup>6</sup> Administrator v. Jones, 3 NTSB 3649, 3651 (1981); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

<sup>7</sup> Under the doctrine of reasonable reliance, we have held:

absence thereof, he received from Ms. Montalvo regarding testing procedures. As with our prior decision in this case, we consider respondent's evidence as direct rebuttal evidence to the Administrator's case-in-chief rather than as an affirmative defense.<sup>8</sup> The law judge's credibility and factual determinations are necessary to resolve whether respondent successfully rebutted the Administrator's case-in-chief.

Therefore, we direct the law judge to make express credibility determinations. He should accompany these determinations with findings of fact and conclusions of law regarding, at a minimum: (1) the testing process itself; (2) the applicability and significance of the DOT Collection Guidelines to this case; (3) respondent's knowledge and training on the drug testing program; and (4) the effect, if any, of respondent's failure to follow testing instructions, even absent

---

(..continued)

[a]s a general rule, the pilot-in-command is responsible for the overall safe operation of the aircraft. If, however, a particular task is the responsibility of another, if the [pilot-in-command] has no independent obligation (e.g., based on operating procedures or manuals) or ability to ascertain the information, and if the captain has no reason to question the other's performance, then and only then will no violation be found.

Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 9 (1992) (emphasis in original).

<sup>8</sup> This evidence does not fall within the reasonable reliance doctrine as defined by our prior jurisprudence.

a warning his departure would constitute a testing refusal. To further assist the law judge, we provide the following specific guidance.

In its review of our prior opinion, the Court focused on testimony regarding the testing process and the credibility of witnesses who testified about the process. On this topic, the oral initial decision does not state that the law judge found the Administrator's witnesses more credible than respondent's witnesses. During the hearing, Ms. Montalvo and respondent provided conflicting testimony on several key facts. After respondent's failed first attempt, Ms. Montalvo stated that she informed respondent that he needed to wait in the waiting room and "drink water" as an aid to providing a second sample. She further testified respondent told her he could not wait, grabbed his ID card, and immediately left the testing site. In contrast, respondent testified that he sat in the waiting room for a period of 10-15 minutes, then informed Ms. Montalvo he needed to leave, and he believed she said "okay" to him to returning the next day. If, in finding respondent's actions constituted a refusal, the law judge determined that Ms. Montalvo was more credible than respondent, he should provide that assessment along with specific findings of fact in his decision. Likewise, we ask that the law judge discuss his factual determinations and conclusions of law regarding whether

anyone informed respondent that he was permitted to leave the testing site.

With regard to the applicability of the DOT Collection Guidelines, the law judge appeared to find that the guidelines were not binding on Ms. Montalvo since he found a violation of § 61.14(b). However, the law judge did not make findings as to whether the DOT Collection Guidelines were binding on the Administrator and thus Ms. Montalvo (although the guidelines do not appear in the regulations themselves), and, if they were binding, whether Ms. Montalvo followed the proper testing procedures. We direct the law judge to make such findings in his decision on remand. In making these findings, the law judge should consider cases such as Administrator v. Rojas, NTSB Order No. EA-5496 (2009), and Administrator v. Heyl, NTSB Order No. EA-5420 (2008), which both involved refusals where the respondents contended they had permission not to test.<sup>9</sup> If the

---

<sup>9</sup> In his brief on remand, by way of analogy, respondent argued that the guidelines should be binding on Ms. Montalvo. He provided citations to several cases where a respondent's failure to adhere to Advisory Circulars was used as evidence against the respondent by the FAA. See Administrator v. Nyerges, NTSB Order No. EA-5483 (2009); Administrator v. McCarthney, NTSB Order No. EA-5304 (2007); and Administrator v. Cannavo, NTSB Order No. EA-5098 (2004). Other cases exist involving an FAA employee's failure to adhere to certain guidance, and negative consequences that result from such a failure. See, for example, Administrator v. Brasher, 5 NTSB 2116 (1987). On remand, the law judge should consider whether such a doctrine exists for drug testing scenarios, such as the case at hand.

law judge finds the DOT Collection Guidelines were binding on Ms. Montalvo, we further request that the law judge provide us with his conclusions of law as to what effect, if any, those guidelines have on the outcome of this case.

During the hearing, the parties presented conflicting testimony and evidence regarding respondent's knowledge and training on the drug testing program as a pilot, an aviation medical examiner, and an MRO. The law judge should make credibility determinations for the witnesses who testified about respondent's knowledge and training on the drug testing program, as well as make specific findings of fact as to respondent's knowledge and training. If we were to find that respondent rebutted the Administrator's case by showing he relied on Ms. Montalvo's omission, these findings would be essential to determining whether respondent's knowledge and training on the drug testing process would obviate the argument that he relied on Ms. Montalvo.

Finally, we note that the law judge's oral initial decision in paragraph 7 (C.R. at 1124) appears ambiguous, as it simply adopts the language of the emergency order which states, "you are considered to have refused to take a drug test if you:

(1) [49 C.F.R. § 40.191(a)(2)] Fail to remain at the testing site until the testing process is complete; or (2) [49 C.F.R. § 40.191(a)(8)] Fail to cooperate with any part of the testing

process..." (emphasis added). See C.R. at 464. Thus, we are unsure of whether the law judge found a violation of only one subparagraph, or both. Therefore, we ask the law judge to make specific conclusions of law concerning these charges.

Based on the foregoing, we direct the law judge to provide a decision setting out both facts and application of law to those facts sufficient to allow the Board to perform its review as directed by the United States Court of Appeals for the District of Columbia Circuit.

**ACCORDINGLY, IT IS ORDERED THAT:**

This case is remanded to the law judge for further proceedings consistent with this opinion.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, 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,	*	
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

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

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

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

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

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

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



1 It comes down to my final determination that the Administrator was  
2 validly premised in bringing this action.

3           It's an unfortunate case, because here we have, in the  
4 Respondent, an exceedingly qualified and diversified gentleman,  
5 who is not only an airman, he has been a medical review officer  
6 and he has been a designated medical examiner.

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

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

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

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

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

22           You may recall during the testimony of Dr. Hoffman, the  
23 chief medical review officer, that during Dr. Hoffman's testimony,  
24 he stated, the Respondent stated to him, "that he should have

1 known better." This is Dr. Pasternack's statement to Dr. Hoffman  
2 and Dr. Hoffman alluded to it during his, Dr. Hoffman's,  
3 testimony.

4           So we could stop right there and find that the evidence  
5 that I mentioned, Exhibits A-3 and A-9, would be sufficient, in my  
6 estimation. Dr. Hoffman's statement about Respondent Pasternack's  
7 statement to him is also set forth in Administrator's Exhibit A-4,  
8 which is the statement of Dr. Hoffman, which alludes to this.

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

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

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

24           Counsel for Respondent, Mr. Winton, has put on an

1 extremely able and competent defense for his client. He has taken  
2 the position that, in this instance, the apropos FAA regulation  
3 has been misapplied to his client.

4           Unfortunately, for him and his client, as I stated a few  
5 minutes ago, the evidence, in my determination, adduced by the  
6 Administrator is almost overwhelming. If not, certainly, it is  
7 compelling and extremely persuasive to the contrary point of view,  
8 as opposed to Respondent's position.

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

13           But as a judge in this proceeding, I am bound by the  
14 applicable and apropos law, rules, and regulations, as they are  
15 validly promulgated by the Federal Aviation Administration and  
16 validly interpreted, as at least at this juncture I deem they are  
17 and have been, and I have to apply them accordingly.

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

23           But as I mentioned earlier, I have to determine and  
24 conclude, as I have, that the second amended Emergency Order of

1 Revocation lodged against Dr. Fred Leroy Pasternack was validly  
2 premised.

3           The evidence here is more than ample that the  
4 Administrator has adduced that all fourteen paragraphs of the  
5 Administrator's amended Emergency Order of Revocation has been  
6 successfully proven by the material, relevant, and probative  
7 evidence that has been adduced here, during the course of this  
8 two-day proceeding, before this Judge.

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

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

17           2. It is found that during the events identified in  
18 this document, Respondent Fred Leroy Pasternack was employed on a  
19 part-time basis to perform flight crewmember duties for  
20 Northeastern Aviation Corporation, hereinafter referred to as  
21 Northeastern.

22           3. It is found that Northeastern is the holder of air  
23 carrier certificate number AOY8206C, issued pursuant to Part 135  
24 of the Federal Aviation Regulations, and is now and was at all

1 times mentioned in this document an employer within the meaning of  
2 14 CFR, Part 121, Appendix I, Section 2.

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

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

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

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

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

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

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

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

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

10           13. It is found that 61.14(b) does specify that a  
11 refusal by the holder of a certificate issued under Part 61 to  
12 submit to a drug test required under 14 CFR, Part 21, Appendix I,  
13 is grounds for revocation of any certificate or rating held under  
14 Part 61.

15           14. It is found that by Respondent's actions described  
16 above, Respondent has demonstrated that at least, at this present  
17 time, he appears to lack the qualifications required to hold and  
18 exercise the privileges of an airman certificate.

19           15. It is found that, based on the foregoing, the  
20 Federal Aviation Administrator has determined, pursuant to 49  
21 U.S.C., 44.709(b), that safety in air commerce, and air  
22 transportation, and the public interest does require the  
23 revocation of Respondent's airline transport pilot's certificate  
24 and flight instructor's certificate number (omitted), and

