

SERVED: May 5, 2011

NTSB Order No. EA-5581

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 4th day of May, 2011

_____)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18095RM
v.)	
)	
MARIA ROSE FINAZZO,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

On remand from the United States Court of Appeals for the Ninth Circuit, we revisit the Administrator's appeal of the oral initial decision¹ of Administrative Law Judge William R. Mullins, in which he dismissed the Administrator's order of revocation of respondent's airline transport pilot certificate, based on

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

respondent's alleged intentional falsification of nine applications for her airman medical certificate.²

We granted the Administrator's appeal of the law judge's initial decision, finding the Administrator proved respondent falsified medical certificate applications in violation of 14 C.F.R. §§ 67.403(a)(1) and 61.153(c). In particular, we determined the Administrator proved respondent had falsified her applications when she did not list several visits to physicians, the prescription medications she was taking, and certain diagnoses on her applications. The complaint alleged respondent failed to list several physician visits on her medical certificate applications, and, in our opinion and order, we confirmed the record established that respondent had not listed visits to Dr. George Seberg for her sleep disorder, General Anxiety Disorder, and ailments that caused Dr. Seberg to prescribe several medications. Respondent, however, had sufficient recollection and awareness of reporting rules to list visits to Dr. Seberg for a sprained ankle and a cold on two of

² Finazzo v. Sturgell, No. 09-70617 (9th Cir. filed Jan. 5, 2011). The Administrator charged respondent with violating 14 C.F.R. § 67.403(a)(1), which provides that no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate. The Administrator also charged respondent with violating 14 C.F.R. § 61.153(c), which provides that, to be eligible for an airline transport pilot certificate, a person must "[b]e of good moral character."

the applications at issue. In addition, we found the Administrator proved respondent falsified the applications with regard to her incomplete list of medications, as the record established Dr. Seberg prescribed respondent the following medications between October 4, 2001, and February 22, 2005, none of which respondent listed on her applications: Valtrex, Allegra, Nexium, Prilosec, Albuterol, Combivent, Augmentin, Celebrex, Advair, Ambien, Ativan, Phentermine, and Remeron. Our opinion and order summarized testimony indicating that respondent should have disclosed her use of Ambien, Ativan, Phentermine, and Remeron, as these medications could be disqualifying.

In response to the Administrator's allegations, respondent testified she did not intentionally omit any items from her medical certificate applications. In particular, respondent stated she did not realize she had failed to list her visits to Dr. Seberg on her first application for a medical certificate, and she believed that she did not need to list subsequent visits to Dr. Seberg on succeeding applications, because her admittedly erroneous recollection that she had listed visits to Dr. Seberg on the first application sufficed. Respondent also indicated she saw Dr. Pearlman, a doctor in Miami, after 2001, but that she did not disclose her visits to Dr. Pearlman because she believed she had already disclosed them. Dr. Pearlman had also

prescribed medication for respondent's sleeping problems. Respondent testified she saw Dr. Gail Ingram, a psychiatrist, but did not list her visits to Dr. Ingram on her certificate applications because her main purpose in seeing Dr. Ingram was for "job counsel," as respondent was experiencing "issues at work."

With regard to her failure to list the prescription drugs Dr. Seberg prescribed, respondent testified she did not believe she needed to report her use of Ambien, which is a sleep medication, because she was not taking it on a continuous basis. Respondent further explained her failure to list other prescription drugs, such as Ativan, by stating she believed that if she suspended her use of Ativan for 72 hours prior to the commencement of a flight, then she need not report it. In addition, respondent testified she took Phentermine only once, and that she never took Remeron, despite Dr. Seberg's provision of prescriptions for these medications. Concerning her failure to list any diagnoses on her medical applications, respondent testified she was unaware that Dr. Seberg had diagnosed her with General Anxiety Disorder, any ongoing respiratory problems, high blood pressure, peptic ulcer disorder, gastrointestinal reflux disease, or a sleep disorder, and that she never saw the notes Dr. Seberg kept in her chart concerning these conditions. With regard to Dr. Ingram's notes indicating respondent had an

"anxiety disorder," respondent testified Dr. Ingram only informed her that she had "symptoms" of an anxiety disorder. Overall, respondent denied she was aware that her applications were incomplete when she submitted them.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he determined the Administrator failed to prove respondent "currently" used the medications Dr. Seberg listed in his notes, even though respondent did not dispute Dr. Seberg had prescribed the medications for her or provided samples of the medications to her, and that she had indeed taken some of the medications at various times. The law judge also concluded respondent's testimony concerning the diagnoses that she allegedly failed to list was credible, and that the Administrator did not prove respondent falsified this portion of the application because respondent was not aware of the diagnoses in question. Finally, the law judge concluded respondent did not intentionally falsify the portion of the medical applications that requires pilots to list visits to health care professionals within the last 3 years, despite respondent's acknowledgement that she had seen Dr. Seberg and Dr. Ingram on several occasions, but did not list them on the application. The law judge based this conclusion on his assessment that these omissions were not in reference to a material fact.

We found the law judge erred in his initial decision in numerous respects. In particular, we concluded the weight of the evidence was directly contrary to the law judge's assessment that respondent's testimony was credible. We stated, "[r]espondent saw Dr. Seberg numerous times and complained of anxiety, later visited Dr. Ingram and complained of anxiety, and received prescription medication for anxiety. However, respondent did not list anxiety on any of her medical applications." NTSB Order No. EA-5412 at 13. We also disagreed with the law judge's determination that respondent's testimony that she saw Dr. Ingram only for "job counseling" was credible, as we found it contrary to the greater weight of the evidence. As we stated in the opinion and order, Dr. Ingram's notes indicated respondent had symptoms of anxiety, and, in one record of a visit, Dr. Ingram noted respondent appeared "extremely anxious." In addition, at the hearing, Dr. Ingram testified respondent could potentially be diagnosed with post-traumatic stress disorder. We found the records contradicted respondent's testimony that she visited Dr. Ingram only for "job counseling." Based on these findings, we stated, "the evidence on the record directly and overwhelmingly contradicts the law judge's finding that respondent had 'a tremendous amount of credibility.'" Id. at 14 (quoting Initial Decision at 340).

We also opined the law judge erred in refusing to consider the notes of Dr. George Seberg, who respondent unequivocally visited on numerous occasions, because Dr. Seberg apparently lost his license to practice medicine. We determined Dr. Seberg's notes corroborated the other evidence in the record. We reaffirmed this determination in an order denying reconsideration of our opinion and order. NTSB Order No. EA-5424 (2009).

The Court of Appeals for the Ninth Circuit disagreed with our granting of the Administrator's appeal. In a succinct opinion, the Ninth Circuit held the Board did not rely upon sufficient evidence in rejecting the law judge's credibility assessment. The Ninth Circuit also indicated the Board should not have considered Dr. Seberg's notes as persuasive, and instead should have relied upon the testimony of Drs. Ingram and Young, who both offered favorable testimony concerning respondent's truthfulness.

It is well-established Board precedent that resolution of a credibility determination, unless made in an arbitrary or capricious manner or unless clearly erroneous, is within the exclusive province of the law judge.³ On occasion, the Board has rejected testimony, accepted by the law judge, after determining

³ Administrator v. Schwandt, NTSB Order No. EA-5226 at 5 (2006) (citing Administrator v. Smith, 5 NTSB 1560, 1563 (1986)).

the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence.⁴ Nevertheless, the Board will not withhold deference to a law judge's credibility findings simply because other evidence in the record could have been given greater weight.⁵

Upon reevaluation of this record in light of the Court's remand and the Court's interpretation of the Board's precedent, we are compelled to affirm the law judge's decision. Although the law judge failed to make a specific credibility finding concerning the knowledge element of the intentional falsification standard, the Ninth Circuit nevertheless stated, "the Board should have deferred to Finazzo's credible explanations for her responses to Questions 18 and 19, which negate the Board's reasons for finding the knowledge element satisfied."⁶ As stated above, respondent did not deny consuming at least some of the medications, even though she did not list them on her medical certificate applications. Nevertheless, based on the Ninth Circuit's opinion, we must

⁴ See, e.g., Administrator v. Windwalker, NTSB Order No. EA-4638 (1998); Administrator v. Blossom, 7 NTSB 76 (1990); Administrator v. Chirino, 849 F.2d 1525 (1988).

⁵ Administrator v. Swaters, NTSB Order No. EA-5400 at n.8 (2008) (citing Administrator v. Crocker, NTSB Order No. EA-4565 at 6 (1997)); see also Administrator v. Klock, 6 NTSB 1530, 1531 (1989).

⁶ Finazzo, supra note 2, slip op. at 1.

accept the law judge's conclusion that the Administrator failed to prove respondent's omissions from her medical certificate application amounted to violations of 14 C.F.R. §§ 67.403(a)(1) and 61.153(c).⁷

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's decision, dismissing the Administrator's order of revocation, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

⁷ As Judge Ikuta mentioned in his dissenting statement, the law judge's determination that respondent did not falsify the application by failing to list all prescription drugs because, at the moment respondent completed the application, she was not using the medications, is wrong as a matter of law. Administrator v. Evans, NTSB Order No. EA-3679 (1992) (brief abstentions from a medication do not mean that an applicant is not "currently" using the medication). Our opinion here does not represent affirmation of the law judge's incorrect statement concerning the issue of current use of medications.

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ORAL INITIAL DECISION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 license.

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

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

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

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

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

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

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

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

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

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ORDER

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

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

EDITED & DATED ON
FEBRUARY 26, 2008

WILLIAM R. MULLINS
Administrative Law Judge