

SERVED: July 15, 2011

NTSB Order No. EA-5591

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of July, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-19097RM
	v.)	
)	
ROBERTA LYNN PORCO,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent and the Administrator appeal the written decision on remand of Chief Administrative Law Judge William E. Fowler, Jr., issued on June 30, 2011.¹ The law judge's decision clarified the oral initial decision of June 15, 2011, in that it

¹ A copy of the order on remand and the oral initial decision, an excerpt from the hearing transcript, are attached.

partially affirmed the Administrator's emergency order of revocation of respondent's airline transport pilot, flight instructor, and first-class medical certificate, as well as any other certificates respondent holds, based on a finding that respondent violated 14 C.F.R. § 67.403(c)² by submitting an incorrect answer on her medical certificate application. The law judge did not affirm the Administrator's allegation that respondent violated 14 C.F.R. § 67.403(a)(1)³ by intentionally falsifying the information she provided on the application. As a result of finding a violation of 14 C.F.R. § 67.403(c), the law judge only affirmed revocation of respondent's first-class medical certificate. We deny respondent's appeal and grant the Administrator's appeal.

As we stated in our opinion and order remanding this case to the law judge for clarification, the Administrator issued the order, which serves as the complaint in this case, on May 12, 2011. The complaint alleged respondent violated § 67.403(a)(1) by certifying she had "previously reported" an "arrest and/or conviction while driving while intoxicated by, while impaired

² The relevant portion of § 67.403(c) provides as follows: "The following may serve as a basis for suspending or revoking a medical certificate ... (1) [a]n incorrect statement, upon which the FAA relied, made in support of an application for a medical certificate."

³ Section 67.403(a)(1) provides that no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate.

by, or while under the influence of alcohol or a drug," in response to question 18v on the medical certificate application. The complaint stated this answer was false because respondent was arrested on March 24, 2010 for driving under the influence of alcohol, and her "previously reported" notation on the application did not refer to the March 24 arrest, but instead referred to an earlier one. The complaint also stated that the Administrator relied upon respondent's answer to question 18v in issuing her a medical certificate.

Respondent appealed the Administrator's complaint, and the case proceeded to hearing. The law judge issued an oral initial decision at the conclusion of the hearing, in which he appeared to determine respondent did not falsify the medical certificate application at issue. The law judge appeared to make credibility findings in favor of the Administrator's witnesses and adverse to respondent. Initial Decision at 197, 199. At the same time, however, the law judge stated he "[did] not believe it was an intentional false statement on the part of [respondent]," and respondent had relied upon erroneous advice concerning whether to report the arrest that she stated she received from her lawyer. Id. at 200. The law judge concluded the decision by stating the Administrator proved respondent violated § 67.403(a)(1) and (b), which are the intentional falsification provisions. The law judge did not issue a finding

concerning § 67.403(c). We determined the law judge's decision lacked clarity. As a result, we remanded the case to the law judge, with instructions to clarify his findings. Our opinion and order provided an expedited briefing schedule, to ensure we fulfilled the 60-day deadline applicable to emergency cases.⁴

Following the remand, the law judge issued a written decision clarifying his oral initial decision. The law judge stated he determined respondent did not intentionally falsify the medical certificate application, but instead submitted an "incorrect answer" on the application, in violation of 14 C.F.R. § 67.403(c). Order on Remand at 4. In his order, the law judge stated, "The undersigned determined, and continues to find, that respondent's 'Yes' answer, with the explanation 'Previously reported - DUI,' in response to Question 18.v. on the medical certificate application she completed November 19, 2010 was not made with fraudulent intent or knowledge that it was false at the time it was made." Id. The law judge nevertheless imposed the sanction of revocation on respondent, based on his finding that respondent submitted an incorrect statement in violation of 14 C.F.R. § 67.403(c). The written decision contains a credibility finding indicating the law judge found credible respondent's defense that she misunderstood question 18v on the

⁴ 49 U.S.C. § 44709(e)(4).

application. In this regard, the law judge stated, “[t]he undersigned has determined that respondent was credible to the extent that she testified as to receiving such erroneous legal advice and relying thereon in providing her answer to that question, and has, accordingly, determined that said answer was neither fraudulent nor intentionally false.” Id. The law judge made no findings of fact specific to that credibility finding.

Both parties have appealed the law judge’s decision on remand. Respondent contends the law judge erred in finding respondent violated § 67.403(c), because the Administrator did not specifically charge respondent with § 67.403(c) in the complaint. Respondent also argues revocation is an inappropriate sanction, based on the law judge’s finding that respondent did not violate § 67.403(a)(1). The Administrator argues the law judge erred in determining respondent was credible, as the finding is “contrary to the overwhelming weight of the evidence and clearly erroneous.” FAA Appeal Br. at 12.

We find the law judge bifurcated his credibility determinations. He found respondent not credible except on the issue of whether she relied on the advice of her attorney in failing to report the arrest on her application. We find the portion of his credibility finding relating to this advice to be arbitrary and capricious, based on our careful review of the record. In this regard, we believe a detailed summary of the

evidence in this case is necessary to explain our finding. The following paragraphs contain this summary.

The Administrator presented five witnesses at the hearing, two of whom observed respondent's arrest on March 24, 2010, and testified she was intoxicated. These two eyewitnesses, Gretchen Tunstall and Thomas Byerly, saw respondent driving erratically around 10:00 pm on March 24, 2010, and testified they did not observe anyone else with respondent. Ms. Tunstall witnessed Mr. Byerly block respondent's car near Ms. Tunstall's house, to keep respondent from proceeding. Ms. Tunstall, a nurse, asked respondent if she had medical problems that impeded her driving ability, to which respondent replied she did not. When respondent opened the door to answer Ms. Tunstall's question, Ms. Tunstall noticed an overwhelming odor of alcohol, as well as respondent's slurred speech. Similarly, Mr. Byerly testified he intentionally stopped respondent from driving further down the residential street down which they were proceeding, after two other cars honked their horns at respondent. Mr. Byerly stated respondent hit his knees with her car as she attempted to drive past him. Respondent then stopped, slid to the passenger seat of the car, and placed her car keys on the driver side seat. Mr. Byerly knocked on respondent's window to ask her if she needed help, and noticed the strong odor of alcohol and "very, very slurred" speech. Tr. at 101.

Police officer Steven Templin also testified that he observed respondent as intoxicated the evening of March 24, 2010. Officer Templin stated respondent was very combative when Officer Templin touched her to help her out of the car, and noted her speech was slurred, the odor of alcohol surrounded her, and she had bloodshot eyes. Officer Templin recalled respondent told him she did not own the vehicle she was in, and was not driving it. Tr. at 111-12. Officer Templin stated, however, that other officers who arrived at the scene checked the license plates of respondent's car and discovered she was indeed the owner. Officer Templin arrested respondent after she began to fight him physically. Once at the police station, Officer Templin stated respondent refused to take a breathalyzer test.

Brenda Smith, a special agent in the FAA's Security and Investigations Division in Oklahoma City, also testified. Ms. Smith identified a certified copy of respondent's medical file, which shows respondent answered "yes" to Question 18v on her medical certificate application, as well as the notation, "previously reported - DUI." Exh. A-1 at 2. Ms. Smith also identified respondent's official Pennsylvania driving records, showing an arrest occurred on March 24, 2010, and a notice of suspension for chemical test refusal. Exh. A-3. The driving records include a page Officer Templin read to respondent on

March 24, 2011, informing her of her arrest before she completed her November 2010 medical certificate application. Exh. A-3 at 8; tr. at 31. Ms. Smith also obtained respondent's police records from Allegheny County, Pennsylvania. Although obtaining such records is not Ms. Smith's typical practice for investigating intentional falsification cases, Ms. Smith believed it necessary to obtain these records because respondent informed Ms. Smith that she was not the driver of the car on March 24, 2010. Her review of the police records, however, revealed that two eyewitnesses' observed respondent driving the vehicle. Ms. Smith also identified the letter respondent sent in response to the FAA's letter of investigation concerning this case. Exh. A-6. In the response, respondent admits she was arrested on March 24, 2010, but stated she believed she need not report the arrest. The response states respondent was appealing the DUI charge, but did not allege she was confused about whether to report the arrest on her medical certificate application.

In addition, the Administrator called Steve Schwendeman, an FAA aerospace and occupational medicine specialist, to testify. Dr. Schwendeman stated aviation medical examiners (AMEs), who review all medical certificate applications, rely on the veracity of the information provided on such applications. Dr. Schwendeman testified alcohol-related events are important

for AMEs to consider in determining whether to issue or defer a medical certificate application. If an AME knows of two alcohol-related episodes, such as the two DUI incidents in respondent's history, then the relevant FAA guidance would require the AME to defer the application to an FAA office for further review, rather than issue the medical certificate. Tr. at 78; Exh. A-7 (FAA guidance listing criteria under which AME must defer application).

In response to the Administrator's case, respondent testified on her own behalf. Respondent stated an attorney advised her she need not list the new DUI arrest on her medical certificate application. Tr. at 140. Respondent testified she read question 18v when completing the application, and did not find it confusing. She further testified the reason she stated in her response to Ms. Smith's letter of investigation that she was not driving the car was that she "was not driving the vehicle when the police showed up," and that she "was in the passenger seat with the keys out of the ignition." Tr. at 147-48. Respondent also testified she did not know she had been arrested on March 24, 2010, despite her acknowledgement that Officer Templin placed handcuffs on her and took her to the police station in his police car.

Based on respondent's testimony at the hearing, respondent's sole reason for not listing the March 24, 2010

arrest on the application was based on the advice she claims she obtained from a current attorney. Respondent did not provide the name of the attorney, nor any information concerning this advice, such as whether it was in writing or verbal. Respondent did not describe the circumstances of or context in which the advice was given, nor did she provide an approximate date on which she received this advice. Indeed, respondent's answers to the few questions her attorney asked at the hearing concerning this advice consisted of brief responses, bereft of any details. Tr. at 144–45. When the law judge asked her some follow-up questions about the advice from her attorney she was equally vague. Tr. at 145.

In intentional falsification cases, such as this one, the law judge's findings regarding credibility of the witnesses, to include that of the respondent if the respondent testifies, are essential to the case. In Administrator v. Dillmon, NTSB Order No. EA-5528 (2010),⁵ we explicitly instructed law judges to make specific factual findings—especially with regard to credibility—when a respondent asserts, as a defense, that he or she misunderstood a document and believed the answer or information provided on the document was correct. The D.C.

⁵ As the parties know, we issued Dillmon in response to a remand from the Court of Appeals for the D.C. Circuit. Dillmon v. NTSB, 588 F.3d 1085, 1094 (D.C. Cir. 2009).

Circuit's opinion stated we must complete such an analysis, in light of the three-part Hart v. McLucas standard for intentional falsification.⁶ As a result, and as we emphasized in Dillmon, law judges must make specific credibility findings concerning a respondent's subjective understanding of a question on the medical certificate application, when the respondent argues he or she did not intentionally falsify the document because he or she did not believe the answer provided was incorrect, as a result of allegedly misunderstanding the question. We continue to hold that law judges' credibility finding concerning respondents' subjective interpretation of questions on the application is critical.

We have long deferred to law judges' credibility findings. Over the past several years, Board cases involving credibility determinations have been the subject of much appellate litigation. Both the Courts of Appeals for the District of Columbia Circuit and the Ninth Circuit have remanded cases to us for failing to follow our own precedent in this regard.⁷ In

⁶ 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942) for the falsification standard that the Board has used for intentional falsification cases, in which the Board has held the Administrator must prove that a certificate holder: (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity of the fact).

⁷ See e.g., Dillmon v. NTSB, 588 F.3d 1085 (D.C. Cir. 2009) and Andrzejewski v. FAA, 548 F.3d 1257 (9th Cir. 2009).

performing a critical review of our case law subsequent to receiving remands in cases such as Dillmon and Andrzejewski, we acknowledge that the Board has developed numerous standards in this regard over the years. This case presents us with the opportunity to discuss the historical development of our credibility doctrine and to clarify the Board's standard of reviewing our law judge's credibility findings to prevent future confusion by our law judges, the Administrator, future respondents, and future Boards. In Dillmon, the D.C. Circuit stated:

[W]e have held that where an agency departs from its precedent, it must do so by "reasoned analysis." Ramaprakash v. FAA, 346 F.3d 1121, 1124-25 (D.C.Cir.2003); see Motor Vehicle Mfg. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("[A]n agency changing its course must supply a reasoned analysis."). As the Supreme Court recently explained, the APA does not impose a heightened standard of review upon an agency to justify its departure from precedent. FCC v. Fox Television Stations, Inc., --- U.S. ----, 129 S.Ct. 1800, 1810-11, 173 L.Ed.2d 738 (2009). To the contrary, an agency "is free to alter its past rulings and practices even in an adjudicatory setting." Airmark Corp. v. FAA, 758 F.2d 685, 691-92 (D.C.Cir.1985). But we do require the agency to "display awareness that it is changing position" and not to "depart from a prior policy sub silentio or simply disregard rules that are still on the books." Fox Television, 129 S.Ct. at 1811. This permits us to ensure the agency's "prior policies and standards are being deliberately changed, not casually ignored." Ramaprakash, 346 F.3d at 1125. Reasoned decision making, therefore, necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent. See Fox Television, 129 S.Ct.

at 1811 (“[T]he agency must show that there are good reasons for the new policy.”). Applying the corollary of this requirement, “agency action is arbitrary and capricious if it departs from agency precedent without explanation.” Ramaprakash, 346 F.3d at 1124.

588 F.3d at 1089-90.

Today, we intend to provide this required notice that we are deliberately defining our standard of review for law judge’s credibility determinations and are deliberately disregarding prior policies that have developed as derivatives of our original standard over the years.

We hereby reaffirm the standard of review, which the Board has long held, that resolution of a credibility determination, unless made in an *arbitrary or capricious manner*, is within the exclusive province of the law judge. While this is not a per se new standard of review, we feel compelled to define it specifically so we can necessarily reject the other standards of review regarding credibility determinations that have crept into our jurisprudence over the years.

To understand how we reach this conclusion, we will discuss the historical development of the credibility standards of review the Board has employed over the years. The Board’s credibility standard is principally based upon two cases—which established the standard of review as “arbitrary and capricious.” While our precedent has changed somewhat over time, as will be discussed in detail below, it is subject to

reconciliation. However, the overarching principle in all the cases is that the Board will generally defer to a law judge's credibility determinations.

In Administrator v. Jones, 3 NTSB 3649 (1981), the Board held that it would defer to the credibility findings of law judges unless the findings were arbitrary or capricious. In Jones, the respondent challenged the law judge's credibility determinations, to which the Board stated as follows:

It is a well established Board precedent that resolution of a credibility determination, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge who, as the trier of fact, is alone in a position to observe and assess the demeanor of the witnesses.

Id. at 3651 [internal citations omitted].

Administrator v. Smith, 5 NTSB 1560 (1986), is the seminal Board case for deference to law judges' credibility determinations. In Smith, the Board stated as follows with regard to credibility:

Respondent has also attacked the manner in which the law judge has reconciled various differences in the testimony of the thirteen witnesses. Such a determination on the part of the law judge is in the nature of a credibility choice which we see no reason to disturb herein. "It is a well established Board precedent that resolution of a credibility determination, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge." As the trier of fact he was in the best position to observe the demeanor of the witnesses. Our review of the record discloses that his credibility finding against respondent was neither arbitrary nor capricious.

Id. at 1563 [internal citations omitted]. Since Smith and Jones, the Board has stated in numerous cases that it will not overturn a law judge's credibility findings unless the findings are arbitrary or capricious.⁸

Additionally, after Smith and Jones, the Board began to cite both cases in support of its deference to law judges' credibility findings, based on the fact that law judges are in the best position to evaluate witnesses' demeanor and conduct during live testimony.⁹ Over time, the Board has stated

⁸ See Administrator v. Tur, 7 NTSB 1354 (1991); Administrator v. Vicinanzo, NTSB Order No. EA-3488 (1992); Administrator v. De Mooy, NTSB Order No. EA-3502 (1992); Administrator v. Del Rio, NTSB Order No. EA-3617 (1992); Administrator v. Harding, NTSB Order No. EA-4086 (1994); Administrator v. Somers, NTSB Order No. EA-4650 (1998) (also stated that the Board owes "extreme deference" to law judges' credibility findings); Administrator v. Basco & Koch, NTSB Order No. EA-4788 (1999); Administrator v. Olds, NTSB Order No. EA-4871 (2000); Administrator v. Wright, NTSB Order No. EA-4895 (2001); Administrator v. Bosela, NTSB Order No. EA-4928 (2001); Administrator v. Kolodiajnyi, NTSB Order No. EA-4837 (2002); Administrator v. Sturges, NTSB Order No. EA-5025 (2003); Administrator v. Schroeder, NTSB Order No. EA-5121 (2004); Administrator v. Brassington, NTSB Order No. EA-5180 (2005); Administrator v. Nickl, NTSB Order No. EA-5287 (2007); Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Giffin, NTSB Order No. EA-5390 (2008); Administrator v. Angstadt, NTSB Order No. EA-5421 (2008); and Administrator v. Bourgeois, NTSB Order No. EA-5427 (2009).

⁹ Administrator v. Simonye, 4 NTSB 159 (1982); Administrator v. Hopkins, 4 NTSB 985 (1983); Administrator v. Russell, 4 NTSB 1607 (1984); Administrator v. Gerrior & Walker, 5 NTSB 1011 (1986); Administrator v. Allen & Sima, 5 NTSB 1873 (1987); Administrator v. Wright, 5 NTSB 2040 (1987); Administrator v. Detenly and Mackay, 5 NTSB 2089 (1987); Administrator v. Powell, 6 NTSB 132 (1988); Administrator v. Neuman, 6 NTSB 413 (1988);

"arbitrary or capricious" is the standard of review for law judges' credibility findings, in conjunction with other standards, such as the Board declining to disagree with a credibility finding absent a "compelling reason"¹⁰ or a showing that the finding was an "abuse of discretion."¹¹

Moreover, as described below, the Board has applied more than one distinct standard to certain cases. In many cases, the Board has cited Smith for the proposition that the Board will

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Administrator v. Smith, 6 NTSB 628 (1988); Administrator v. Brauser, 6 NTSB 1118 (1989); Administrator v. Blossom, 7 NTSB 76 (1990); Administrator v. Ryan, 7 NTSB 649 (1990); Administrator v. Tur, 7 NTSB 1354 (1991); Administrator v. Vicinzenzo, NTSB Order No. EA-3488 (1992); Administrator v. De Mooy, NTSB Order No. EA-3502 (1992); Administrator v. Tullius, NTSB Order No. EA-3592 (1992); Administrator v. Del Rio, NTSB Order No. EA-3617 (1992); Administrator v. D'Attilio, NTSB Order No. EA-3738 (1992); Administrator v. Wilson, NTSB Order No. EA-4013 (1993); Administrator v. Ramstad, NTSB Order No. EA-4047 (1993); Administrator v. Harding, NTSB Order No. EA-4086 (1994); Administrator v. Lindsay, NTSB Order No. EA-4095 (1994); Administrator v. Schmidt et al., NTSB Order No. EA-4025 (1994); Administrator v. Stewart, NTSB Order No. EA-4387 (1995); Administrator v. Taylor, NTSB Order No. EA-4509 (1996); Application of Gordon, NTSB Order No. EA-4446 (1996); Petition of Witter, NTSB Order No. EA-4500 (1996); Administrator v. Southworth, NTSB Order No. EA-4742 (1999); Administrator v. Olds, NTSB Order No. EA-4871 (2000); Administrator v. Kolodjajnyi, NTSB Order No. EA-4837 (2002); Administrator v. Sturges, NTSB Order No. EA-5025 (2003); Administrator v. Brassington, NTSB Order No. EA-5180 (2005); Administrator v. Exousia, Inc., d/b/a Mavrik Aire & Schweitzer, NTSB Order No. EA-5319 (2007); and Administrator v. Henderson, NTSB Order No. EA-5372 (2008).

¹⁰ Administrator v. Ramstad, NTSB Order No. EA-4047 (1993); Administrator v. Kalberg, NTSB Order No. EA-5240 (2006).

¹¹ Administrator v. Hordon, NTSB Order No. EA-4065 (1994).

not overturn a law judge's credibility finding absent a showing that the finding was clearly erroneous.¹² The Board in Smith, however, did not explicitly use the terms "clear error" or "clearly erroneous."

Over time, the Board has also employed the standard of "inherently incredible," stating it will not overturn a law judge's credibility findings unless such findings defy credibility.¹³ In other cases, the Board has declined to defer

¹² Administrator v. Bargaen, 5 NTSB 757 (1985); Administrator v. Dieth, 7 NTSB 40 (1990); Administrator v. Tur, 7 NTSB 1354 (1991); Administrator v. De Mooy, NTSB Order No. EA-3502 (1992); Administrator v. Southworth, NTSB Order No. EA-4742 (1999); Administrator v. Keating, NTSB Order No. EA-4968 (2002); Administrator v. Kropp, NTSB Order No. EA-4970 (2002); Administrator v. Murphy, NTSB Order No. EA-4974 (2002); Administrator v. Fraser, NTSB Order No. EA-4977 (2002); Administrator v. Tianvan, NTSB Order No. EA-5050 (2003); Administrator v. Deville, NTSB Order No. EA-5055 (2003); Administrator v. Clair Aero, Inc. et al., NTSB Order No. EA-5181 (2005); Administrator v. Wheeler, NTSB Order No. EA-5208 (2006); Administrator v. Barber, NTSB Order No. EA-5232 (2006); Administrator v. Shaffer, NTSB Order No. EA-5244 (2006); Administrator v. Croston, NTSB Order No. EA-5265 (2007); Administrator v. Exousia, Inc., d/b/a Mavrik Aire et al., NTSB Order No. EA-5319 (2007); Administrator v. Nickl, NTSB Order No. EA-5287 (2007).

¹³ Administrator v. Ryan, 7 NTSB 649 (1990); Administrator v. Tur, 7 NTSB 1354 (1991); Administrator v. Vicinanzo, NTSB Order No. EA-3488 (1992); Administrator v. Del Rio, NTSB Order No. EA-3617 (1992); Administrator v. D'Attilio, NTSB Order No. EA-3738 (1992); Administrator v. Wilson, NTSB Order No. EA-4013 (1993); Petition of Witter, NTSB Order No. EA-4500 (1996); Administrator v. Southworth, NTSB Order No. EA-4742 (1999); Administrator v. Olds, NTSB Order No. EA-4871 (2000); Administrator v. Bosela, NTSB Order No. EA-4928 (2001); Administrator v. Belger, NTSB Order No. EA-4994 (2002); Administrator v. Sturges, NTSB Order No. EA-5025 (2003); Administrator v. Schroeder, NTSB Order No.

to law judges' credibility findings when the findings are inconsistent with the weight, or the overwhelming weight, of the evidence.¹⁴

More recently, in Administrator v. Andrzejewski, NTSB Order No. EA-5263 (2006), the Board declined to defer to the law judge's credibility findings, but not because the findings were inconsistent with the weight of the evidence. Instead, the Board based its reversal of the law judge's decision on the weight of relevant and material evidence, and stated that credibility was not the controlling inquiry. In Andrzejewski, the Board stated the appropriate standard for evaluating the law judge's credibility determinations was whether the findings were "arbitrary, capricious, or clearly erroneous." Id. at 5 (citing Smith).

In some cases in which the Board has applied the standard of consistency with the weight of the evidence, the Board has

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EA-5121 (2004); and Administrator v. Brassington, NTSB Order No. EA-5180 (2005); Administrator v. Nickl, NTSB Order No. EA-5287 (2007).

¹⁴ Administrator v. Blossom, 7 NTSB 76 (1990); Administrator v. Cannon & Winter, NTSB Order No. EA-4056 (1994); Administrator v. Belger, NTSB Order No. EA-4994 (2002); Administrator v. Windwalker, NTSB Order No. EA-4638 (1998) (reversing the law judge's credibility determination, citing Chirino v. NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988), for the notion that the Board, not the law judge, is the ultimate finder of fact, even with regard to credibility determinations); Administrator v. Wedding, NTSB Order No. EA-5130 (2004).

merely recognized it as the standard, rather than reversing a law judge's credibility finding.¹⁵ The Board has also stated it was compelled to defer to the law judge's credibility determination absent a compelling reason¹⁶ or absent extraordinary circumstances;¹⁷ and that it will not withhold deference to law judges' credibility findings simply because other evidence in the record could have been given greater weight.¹⁸

Most recently in Pasternack v. FAA, 596 F.3d 836, 838 (D.C. Cir. 2010), the D.C. Circuit remanded that case to us on the basis that we inappropriately determined the law judge made an "implied" credibility finding and thereby substituted our own credibility determinations for that of the law judge. We have

¹⁵ Administrator v. Ryan, 7 NTSB 649 n.5 (1990); Administrator v. Wilson, NTSB Order No. EA-4013 (1993); Petition of Witter, NTSB Order No. EA-4500 (1996); Administrator v. Brassington, NTSB Order No. EA-5180 (2005); Administrator v. Nickl, NTSB Order No. EA-5287 (2007); Administrator v. Angstadt, NTSB Order No. EA-5421 (2008); and Administrator v. Bourgeois, NTSB Order No. EA-5427 (2009).

¹⁶ Administrator v. Finnell, NTSB Order No. EA-4217 (1994).

¹⁷ Administrator v. Crissey & Pittet, NTSB Order No. EA-4749 (1999).

¹⁸ Administrator v. Klock, 6 NTSB 1530 (1989); Administrator v. Crocker, NTSB Order No. EA-4565 (1997); Administrator v. Fuller et al., NTSB Order No. EA-4887 (2001); Administrator v. Kolodiajnyi, NTSB Order No. EA-4837 (2002); Administrator v. Kalberg, NTSB Order No. EA-5240 (2006); and Administrator v. Swaters, NTSB Order No. EA-5400 (2008).

interpreted the D.C. Circuit's opinion as a caution against supplementing a law judge's credibility finding, where credibility is a necessary element of the Administrator's case-in-chief or the respondent's rebuttal.

Though the underpinnings of many of these standards are the same and they all seemingly evolved from Jones and Smith, the Board clearly has applied more than one standard in deferring to law judges' credibility determinations. While such application may appear to lack consistency, the Board has been clear and consistent on the main principle that it will generally defer to a law judge's credibility determinations. Moreover, many of the standards themselves are not inconsistent: if a determination is arbitrary or capricious, then it is likely contrary to the weight of the evidence or inherently incredible as well. However, some of the standards that the Board has applied over the years, such as clearly erroneous versus abuse of discretion, are at odds with one another.

Therefore, to avoid future confusion on the part of the Board, our law judges, and future litigants, we reaffirm our long-held standard, originating in the cases of Jones and Smith, of deferring to a law judge's credibility findings absent a determination that such findings are arbitrary and capricious as the only standard of review in resolving credibility issues. We believe this standard properly provides the high level of

deference which our law judge's credibility findings should be given.

Turning to the case at hand, we find that the law judge's credibility finding in which he "determined that respondent was credible to the extent that she testified as to receiving such erroneous legal advice and relying thereon in providing her answer to [question 18v]" was arbitrary and capricious.

In his decision on remand, the law judge specifically rejected respondent's "defense that she was not arrested on March 24, 2010." Order on Remand at 3. In rejecting this defense, the law judge found "the testimony of the Administrator's five witnesses ... to be very credible and extremely adverse to respondent." Id. The law judge determined the Administrator's witnesses were more credible than respondent, as their corroborating testimony directly contradicted the vast majority of respondent's assertions, including the following:

- Respondent made statements to both Officer Templin and Ms. Smith claiming she was not driving on the night in question. These claims were rebutted by the testimony of Mr. Byerly and Ms. Tunstall who:
 - o Saw respondent in the driver's seat;
 - o Saw respondent bump her car into Mr. Byerly's legs; and
 - o Saw respondent slide into the passenger-side seat, throwing her keys into the driver's seat.

- Respondent made statements to Officer Templin that the vehicle she was in was not hers. But these claims were rebutted by Officer Templin's testimony that other officers checked the vehicle's license plate and confirmed the vehicle was indeed respondent's.
- Respondent claimed she was not arrested on March 24th. But these claims were rebutted by:
 - Ms. Tunstall who witnessed the police handcuff respondent and place her in a police vehicle;
 - Mr. Byerly who witnessed respondent kick at the police officers who handcuffed her and placed her in a police vehicle;
 - Officer Templin who testified to arresting respondent when she tried to hit and kick him, placing her in handcuffs, placing her in the back of his police car, and driving her to the police station where he booked her for DUI;
 - Respondent's own admission in her response letter to the FAA in which she admits to being arrested (Exh. A-6).

While the law judge found respondent's testimony regarding the circumstances surrounding the arrest not credible, he nevertheless credited her testimony regarding advice she claimed she received from her attorney on reporting the arrest on her medical certificate application in November 2010.¹⁹ While the law judge did make a credibility finding, he failed—in both decisions—to make any specific findings of fact, as required by Dillmon, concerning how he reached that conclusion. We find this credibility finding arbitrary and capricious, as the law

¹⁹ Respondent asserted she received a summons not an arrest and that is why her attorney advised her that she need not report anything to the FAA.

judge's findings of fact failed to comment on or consider the following undisputed facts:

- Respondent testified on direct examination she disclosed her prior DUI to the FAA and claimed no issues with that report existed as far as the FAA was concerned. Tr. at 138. However, this testimony was directly contradicted by Exhibit A-1, which showed:
 - On June 24, 2003, respondent's license was suspended by the state of Pennsylvania for an Accelerated Rehabilitative Disposition (ARD) DUI offense (Exh. A-1 at 73 and Exh. A-3 at 2);
 - On March 18, 2004, respondent applied for a first-class medical and did not mention the suspension (Exh. A-1 at 63);
 - On June 18, 2004, the FAA issued a Notice of Proposed Certificate Action (NOPCA) to respondent for failing to disclose the DUI (Exh. A-1 at 70-72);
 - On October 29, 2004, respondent responded with a letter stating: "I was under advisement from my attorney [emphasis added] that I would NOT have to report any participation in the ARD program once it was completed. According to my attorney and the judge, my driving record would be completely dissolved. That is the benefit in completing the ARD program, and the reason for my entry into the program. I **BY NO MEANS** attempted to hide my situation from the FAA, I mistakenly answered "no" to item 18.v. I was under the impression that because my case had been resolved, it did not require self reporting to the FAA" (Exh. A-1 at 69);
 - On December 22, 2004, the FAA responded with a letter permitting respondent to keep her certificate containing the statement, "**You are cautioned that any further alcohol related offenses, or evidence of alcohol abuse will require re-evaluation of your medical certification**" (Exh. A-1 at 68);
 - On November 1, 2004, respondent reapplied for a medical certificate and wrote in the explanation section "DUI - ARD license suspended" (Exh. A-1 at 58);

- o On each of her reapplications from 2005-2009 (8 total), she handwrote "v. previously reported - no change" (Exh. A-1 at 17, 23, 28, 33, 38, 43, 48, and 53); and
- o On her November 19, 2010 application, subsequent to her March 24, 2010 arrest, she suddenly changed this standard comment and wrote "previously reported - DUI" (Exh. A-1 at 2).
- During respondent's testimony, she repeatedly claimed never to have seen any of the paperwork regarding the criminal matter²⁰ or driver's license suspension proceedings and claimed to be seeing this information for the first time at the enforcement hearing. See generally Tr. at 165-67. This lack of knowledge was rebutted by the following facts:
 - o Respondent hired an attorney to represent her to contest the DUI and appeal the driving privilege suspension, (Tr. at 140, 167); and
 - o The official notice, mailed on May 21, 2010, informing respondent of the suspension of her driving privileges, which respondent claimed she never received, was appealed a week later on May 28, 2010, resulting in respondent's driving privileges being reinstated pending the outcome of the appeal (Exh. A-3 at 2, 7).
- Respondent, in purportedly relying on the advice of her attorney, claimed she was issued a summons but was not arrested, which is why she failed to report the arrest. In addition to all the testimony surrounding the circumstances of the evening of March 24, 2010, the following evidence rebuts this claim:
 - o Respondent's own letter to the FAA. In her letter, sent in response to the FAA investigation, respondent wrote, "I was *arrested* for DWI in March of 2009 but I was not driving the vehicle." Exh. A-6 at 9 (emphasis added);

²⁰ Within her testimony, she seemed to hedge her answers on what, if anything, she had seen of the paperwork relating to her criminal proceeding.

- o Officer Templin's testimony that he completed the criminal complaint/summons at night court as part of his standard procedure following a nighttime arrest. Tr. at 116.
- Regarding this letter (Exh. A-6 at 9), respondent tried to explain away her use of the word "arrest" by testifying she used that word in response to Ms. Smith's letter.²¹ But this testimony is directly rebutted by:
 - o Ms. Smith's letter of investigation, itself, which makes no mention of the word "arrest" does not list any attachments. Exh. A-5.

In reviewing all the evidence presented at the hearing, we find the law judge's bifurcated credibility finding on this issue of the advice respondent received from her attorney is arbitrary and capricious. Respondent's testimony attempted to downplay the circumstances surrounding her prior DUI action with the FAA. She made no mention of the fact that she only reported

²¹ When respondent's counsel questioned respondent about Exhibit A-6, the dialogue included the following:

Q. You talk about various things in the letter, but there's one line that I want to direct you to. It was, "I was arrested for a DUI in March 2009, and was not driving the vehicle." Just to -- I want to direct you to the part that says, "I was arrested for the DUI in March 2009". Can you explain to the court why that was inserted in this letter, if at all?

A. Well, in response to her letter -- and like I said, this letter came as a surprise to me as well. But in response to her letter, she makes reference to failure to disclose under 18 on a medical certificate. And then the 2009 I got from the officer's report that I eventually saw. So I was just aligning my response to her letter. Like I was -- I'm not trying to --

Q. All right. So you're not trying -- you weren't trying to get --

A. I was trying to shirk -- like avoid anything or -- I was just keeping everything in line with her statement and my reply.

Tr. at 137.

the 2003 action *after* receiving a NOPCA from the FAA. There is a striking similarity between respondent's defense of her November 2010 failure to disclose and her March 2004 failure to disclose. In both omissions, respondent claims she was not attempting to hide anything from the FAA, was acting on advice of her attorney, and misunderstood that the incidents needed to be disclosed to the FAA. Perhaps most notably, she relies on semantic arguments in both situations: in 2004, claiming the ARD wiped away the driving suspension; in 2011, claiming she was "summoned" but not arrested.

Related to this point, we note, in criminal matters, an arrest often occurs at the time of the incident and the summons follows later, if the prosecutor decides to pursue criminal charges. So theoretically speaking, an individual could be arrested for an alleged crime, which they would need to report on question 18v on the FAA's medical certificate application, but that individual may never receive a summons or complaint for the matter if the prosecuting attorney decided to not pursue the charges. Likewise, in her reply brief, respondent argues Officer Templin "request[ed] that a summons be issued by the court, not an arrest or arrest warrant, which arrest was also an option on the form."²² Resp. Reply Br. at 4. However, Officer

²² While arguing this point, respondent acknowledges this exhibit she references (Exh. A-4) was never properly admitted into

Templin clearly explained why he chose to pursue a summons and complaint over an arrest in this case—he had already arrested respondent that evening. Tr. at 116. As a result, respondent's entire assertion in this regard—that an attorney hired to defend her against criminal allegations failed to explain the differences between an arrest and a summons—seems nonsensical.

Furthermore, respondent's testimony concerning this purported legal advice is very vague and contradictory. Throughout her testimony, respondent claimed ignorance as to much of her criminal and civil proceedings in the State of Pennsylvania, yet she knew enough to hire an attorney. She stated she had no idea she was arrested but, unprompted, writes the word "arrest" in her letter responding to the FAA. She claimed she never received the letter informing her that her driving privileges were going to be suspended in June 2010; yet within a week of the letter being mailed, someone—presumably either respondent or her attorney—filed an appeal to prevent her from losing her privileges. In light of these facts presented at the hearing, we must conclude that the law judge's credibility finding in favor of respondent on the issue of whether she misunderstood question 18v was arbitrary and capricious.

(..continued)
evidence.

Furthermore, we find this case easily distinguishable from Dillmon. In Dillmon, the D.C. Circuit reversed our decision because we failed to address the credibility determination of the law judge. The court stated, “[t]he Board's silence on this pivotal factual issue leaves us unable to determine whether it acted consistent with its precedent.” Dillmon, 588 F.3d at 1091. The court, however, also cautioned us, as follows:

Although we hold the Board departed from its precedent in two respects, we do not suggest the Board must reinstate Dillmon's medical and airman certificates. On remand, the Board still must decide whether the ALJ's decision in Dillmon's favor was correct. Under its precedent, the Board may reverse the ALJ's credibility determination, so long as it does so pursuant to the appropriate standard of review. The Board may even modify this standard, but only if it does so by reasoned decision making. Furthermore, the Board is entitled to weigh the evidence and make factual determinations different from those made by the ALJ, if supported by substantial evidence.

Id. at 1095. Upon reviewing the case on remand in Dillmon, we deferred to the credibility determination of the law judge based upon the testimony of the respondent taken in conjunction with the letters provided by the respondent's AME indicating the AME gave respondent conflicting information regarding his medical certificate application.

In this case, unlike in Dillmon, the law judge made no specific findings of fact as to why he chose to believe the uncorroborated, self-serving testimony of respondent on this single issue of her reliance on the advice of counsel in not

reporting her arrest, when the law judge clearly did not believe the rest of her testimony. Respondent, unlike Dillmon, did not claim to be confused by the question. Tr. at 155. She simply makes the bald assertion—ironically very similar to that she made to the FAA in trying to excuse her failure to report her first DUI—that her lawyer told her not to report it.²³ Because the law judge fails to make any findings of fact supporting his credibility determination, we find his credibility determination concerning respondent's claim that her attorney told her she need not report the incident to the FAA arbitrary and capricious.

In light of our determination that the law judge's credibility determination was arbitrary and capricious, we need not address the parties' arguments concerning notice of the § 67.403(c) charge or sanction of revocation of respondent's medical certificate as a result of the § 67.403(c) charge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's appeal is granted;
3. The law judge's written decision on remand is reversed

²³ We note respondent provided no information about this attorney other than the fact that he was a Pennsylvania attorney. Respondent did not assert the attorney had any knowledge regarding the Federal Aviation Regulations or medical certificate applications.

with regard to his finding that respondent did not violate 14 C.F.R. § 67.403(a)(1); and

4. Respondent's airline transport pilot, flight instructor, and first-class medical certificates, as well as any other certificates respondent holds are hereby revoked.

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

J. RANDOLPH BABBITT,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-19097RM

ROBERTA LYNN PORCO,

Respondent.

**JUDGE'S ORDER ON REMAND AMENDING AND SUPPLEMENTING
ORAL INITIAL DECISION IN COMPLIANCE WITH NTSB ORDER EA-5589**

Served: Joseph M. Lamonaca, Esq.
131 North Dupont Highway
New Castle, Delaware 19720

(BY FAX AND CERTIFIED MAIL)

James M. Webster, Esq.
Federal Aviation Administration
Mike Monroney Aeronautical Center
Post Office Box 20582
Oklahoma City, Oklahoma 73125

(BY FAX)

William E. Fowler, Jr., Chief Administrative Law Judge: In this proceeding, respondent has appealed from a certificate action by which the Administrator of the Federal Aviation Administration ("FAA") revoked her airline transport pilot flight instructor and first-class medical certificates, for an alleged violation of § 67.403(a)(1) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), and pursuant to FAR §§ 67.403(b)(1) and 67.403(c)(1).¹ According to the Administrator's complaint, as amended, the factual basis

¹ The aforesaid FARs provide as follows:

"§ 67.403 Applications, certificates, logbooks, reports and records: Falsification, reproduction, or alteration; incorrect statements.

(a) No person may make or cause to be made —

(1) A fraudulent or intentionally false statement on any application for a medical certificate or on a request for any Authorization for Special Issuance of a Medical

for that action is that respondent allegedly: was arrested in Pennsylvania on March 24, 2010, incident to an alcohol-related motor vehicle offense; subsequently had her driver's license suspended by the Pennsylvania Department of Transportation "incident to a 'Chemical Test Refusal' offense" on June 25, 2010; and later completed a medical certificate application on November 19, 2010, on which she provided a "Yes" answer to Question 18.v. — which asked whether she had ever in her life had: (1) any arrest(s) and/or conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of, alcohol or a drug, or (2) any arrest(s), conviction(s) and/or administrative action(s) involving offense(s) which resulted in the denial, suspension, cancellation or revocation of driving privileges, or which resulted in attendance at an educational or rehabilitation program — and stated, in the space provided for Explanations, "Previously reported – DUI." The amended complaint further alleged that said response was not correct because respondent had not reported the March 24, 2010 arrest or the June 25, 2010 driver's license suspension on any previous application that she had made for medical certification; that it was both material and relied upon by the FAA in issuing respondent her current first-class medical certificate; and that it was fraudulent or intentionally false.

At the conclusion of an evidentiary hearing held on June 15, 2011, this judge issued an oral initial decision ("OID") in this matter. On an appeal of that OID by respondent, the full five-member Board, in NTSB Order EA-5589 (served June 27, 2011), remanded the case to the undersigned for clarification of certain aspects of the OID.

I.

In NTSB Order EA-5589, the Board observed (at 3-6, footnotes omitted):

The law judge's oral initial decision lacks clarity. On one hand, the law judge stated "[w]e have a great deal of candor, veracity, truthfulness and honesty involved in this proceeding where Ms. Porco is concerned." Initial Decision [reported in Tr.] at 198. On the other hand, the law judge appeared to make credibility findings in favor of the Administrator's witnesses and adverse to respondent. *Id.* at 197, 199, 203. At the same time, however, the law judge stated he "[did] not believe it was an intentional false statement on the part of [respondent]," and that respondent, if she were to be believed, had relied upon

Certificate (Authorization) or Statement of Demonstrated Ability (SODA) under this part.

* * * * *

(b) The commission by any person of an act prohibited under paragraph (a) of this section is a basis for —

(1) Suspending or revoking all airman, ground instructor, and medical certificates and ratings held by that person.

* * * * *

(c) The following may serve as a basis for suspending or revoking a medical certificate; withdrawing an Authorization or SODA; or denying an application for a medical certificate or request for an [A]uthorization or SODA:

(1) An incorrect statement, upon which the FAA relied, made in support of an application for a medical certificate or request for an Authorization or SODA."

erroneous advice from her former lawyer concerning whether to report the arrest. *Id.* at 200. The law judge concluded the decision by stating the Administrator proved respondent violated § 67.403(a)(1) and thus revocation was appropriate under § 67.403(b). The law judge did not issue a finding concerning § 67.403(c)(1) presumably because he purported to find a violation of § 67.403(a)(1).

In *Administrator v. Dillmon*, NTSB Order No. EA-5528 (2010), we instructed law judges to make specific factual findings — especially with regard to credibility — when a respondent asserts, as a defense, he or she misunderstood a document and believed the answer or information provided on the document was correct. The D.C. Circuit’s opinion stated we must complete such an analysis, in light of the three-part *Hart v. McLucas* standard for intentional falsification [(535 F.2d 516, 519 (9th Cir. 1976))]. As a result, and as we emphasized in *Dillmon*, law judges must make specific credibility findings concerning a respondent’s subjective understanding of a question on the medical certificate application, when the respondent argues he or she did not intentionally falsify the document because he or she did not believe the answer provided was incorrect. Law judges’ credibility findings concerning respondents’ subjective interpretation of questions on the application is critical. In light of *Pasternack v. FAA*, 596 F.3d 836, 838 (D.C. Cir. 2010), which the D.C. Circuit remanded to us on the basis that we had inappropriately determined the law judge made an “implied” credibility finding, we are reluctant to substitute our own credibility determinations for the law judge’s, or supplement the law judge’s determinations in any manner. For this reason, we must remand this case to the law judge for a specific determination concerning whether he believed respondent did not think she needed to report the March 24, 2010 arrest on her medical certificate application. We also instruct the law judge to clarify his overall credibility determinations; as discussed above, the findings he included in the initial decision are contradictory. Finally, we instruct the law judge to resolve the conflict between his conclusion of law that respondent violated § 67.403(a)(1) with his apparent finding of fact that respondent did not intentionally falsify her medical application.

The clarification sought by the Board appears below.

II.

The statement in the OID that “we have a great deal of candor, veracity, truthfulness and honesty involved where [respondent] is concerned” has been misinterpreted, although understandably so. That statement was meant to reference the *proceeding* itself, and principally was intended to refer to the testimony of the Administrator’s five witnesses, which the undersigned found to be very credible and extremely adverse to respondent. Such testimony was especially compelling in the undersigned’s rejection of respondent’s defense that she was not arrested on March 24, 2010. See Tr. at 197, 199, 203.²

² This is exemplified by the cogent testimony of FAA Special Agent Brenda Lee Smith and Police Officer Steven Templin pertaining to respondent’s erratic driving, her intoxicated appearance and bizarre physical behavior with Officer Templin at the scene, and the subsequent arrest of respondent by Officer Templin for drunken driving. Special Agent Smith’s testimony was candid, forthright and

Nevertheless, it was — and remains — the determination of the undersigned that respondent's answer to Question 18.v. on the November 19, 2010 medical certificate application was not an intentionally false answer, but, rather, an *incorrect* answer based upon a misunderstanding by her of her reporting obligations due to erroneous legal advice from counsel that had been given to her earlier. See Tr. 200.³ The undersigned has determined that respondent was credible to the extent that she testified as to receiving such erroneous legal advice and relying thereon in providing her answer to that question, and has, accordingly, determined that said answer was neither fraudulent nor intentionally false.⁴

Thus, where the OID contains a finding that respondent was in violation of FAR § 67.403(a)(1) (Tr. 203), the OID was erroneous. The undersigned determined, and continues to find, that respondent's "Yes" answer, with the explanation "Previously reported – DUI," in response to Question 18.v. on the medical certificate application she completed on November 19, 2010 was not made with fraudulent intent or knowledge that it was false at the time it was made. Accordingly, she cannot be found to have violated § 67.403(a)(1) when she entered that response on her November 19, 2010 application for medical certification.

However, as is noted above, said response to Question 18.v. was an incorrect statement made in support of that application, and respondent was issued a first-class medical certificate based, in part, on that information. Consequently, FAR § 67.403(c)(1) — which requires the suspension or revocation of that medical certificate for the making of an incorrect statement on an application for such certification — applies. Because the incorrect statement at issue here failed to disclose a recent alcohol-related motor vehicle action, and such an action is highly relevant to an evaluation of an individual's qualifications to hold an airman medical certificate, the undersigned believes that revocation is the appropriate sanction to be imposed in this matter.

Accordingly, the undersigned makes the following amended findings of fact:

1. On March 24, 2010, respondent was arrested incident to an alcohol related motor vehicle offense in the State of Pennsylvania.
2. On June 25, 2010, respondent's driver's license was suspended by the Pennsylvania Department of Transportation for a chemical test refusal related to her March 24, 2010 alcohol-related motor vehicle incident.

relevant concerning respondent's March 24, 2010 drunken driving arrest, her subsequent driver's license suspension on June 25, 2010 and her non-disclosure of the arrest and driver's license suspension on the November 19, 2010 medical certificate application.

³ Respondent's response of "Previously reported – DUI," in the space provided for Explanations to her "Yes" answer to Question 18.v. on the November 19, 2010 application for medical certification referred to an incident occurring in 2002, which she reported on an earlier medical certificate application.

⁴ The undersigned further notes that respondent repeatedly and consistently denied at the hearing that her driver's license had been suspended as a result of the March 24, 2010 motor vehicle incident.

3. On or about November 19, 2010, respondent applied for and was issued a first-class airman medical certificate.

4. On that medical certificate application, respondent was asked, in Question 18.v., whether she had ever in her life had any: (1) arrests or convictions involving driving while intoxicated, while impaired or while under the influence of alcohol or a drug; or (2) convictions or administrative actions involving an offense or offenses which resulted in the denial, suspension, cancellation or revocation of driving privileges, or which resulted in attendance at an educational or rehabilitation program. In response to that question, respondent answered "Yes," and entered in the space provided for Explanations, "Previously reported – DUI."

5. That response was not correct because respondent did not report her March 24, 2010 alcohol-related motor vehicle arrest or her June 25, 2010 Pennsylvania driver's license suspension any prior application she made for airman medical certification.

6. However, respondent did not, at the time she entered that incorrect response on the November 19, 2010 medical certificate application, make that entry with either fraudulent intent or knowledge of its falsity.

7. The FAA relied upon the information respondent provided in response to Question 18.v. on that application in issuing a first-class airman medical certificate to her, and issued her that certificate without regard to her March 24, 2010 alcohol-related motor vehicle arrest or her June 25, 2010 Pennsylvania driver's license suspension.

On the basis of those amended findings of fact, the undersigned makes the following amended conclusions of law:

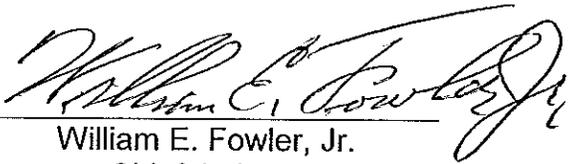
1. Respondent did not violate FAR § 67.403(a)(1) when she provided her response to Question 18.v. on the application for airman medical certification she completed on November 19, 2010.

2. Because respondent's response to Question 18.v. on that medical certificate application was incorrect, FAR § 67.403(c)(1) is applicable.

3. Safety in air commerce or air transportation and the public interest requires the revocation of respondent's first-class medical certificate under FAR § 67.403(c)(1).

THEREFORE, IT IS ORDERED that the Oral Initial Decision, issued on June 15, 2011, is modified and supplemented as set forth above, and the Administrator's order of revocation, as amended on June 6, 2010, is AFFIRMED insofar as it found that safety in air commerce or air transportation and the public interest require the revocation of respondent's first-class airman medical certificate under § 67.403(c)(1) of the Federal Aviation Regulations, and REVERSED insofar as it found that respondent violated § 403(a)(1) of the Federal Aviation Regulations and that a revocation of respondent's airline transport pilot, flight instructor and first-class medical certificates is warranted under § 67.403(b)(1) of the Federal Aviation Regulations.⁵

Entered this 30 day of June 2011, at Washington, D.C.



William E. Fowler, Jr.
Chief Judge

⁵ In NTSB Order EA-5589 at 6, the Board specified that the parties, if they elect to, are to file:
Notices of appeal from this supplemental order by no later than July 1, 2011.
Appeal briefs by no later than July 6, 2011.
Reply briefs by no later than July 11, 2011.

All such filings are to be made *directly to the Board's Office of General Counsel*, pursuant to that Order (at 7).

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

* * * * *

In the matter of: *

J. RANDOLPH BABBITT, *
ADMINISTRATOR, *
Federal Aviation Administration, *

Complainant, *

v. *

Docket No.: SE-19097

JUDGE FOWLER

ROBERTA LYNN PORCO, *

Respondent. *

* * * * *

U.S. Tax Court
U.S. Custom House
200 Chestnut Street
Courtroom 300
Philadelphia, Pennsylvania

Wednesday,
June 15, 2011

The above-entitled matter came on for hearing, pursuant
to Notice, at 10:14 a.m.

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

APPEARANCES:

On behalf of the Administrator:

JAMES M. WEBSTER
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On behalf of the Respondent:

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(302) 388-2621

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE FOWLER: This has been a

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proceeding before the National Transportation Safety Board held

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pursuant to the provisions of the Federal Aviation Act of 1958, as

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that act was subsequently amended, on the appeal of Roberta Lynn

24

Porco from an Emergency Order of Revocation dated May 12, 2011,

25

which seeks to revoke the airline transport pilot certificate,

1 flight instructor certificate, and first-class medical
2 certificate, and the Administrator says in his order, or any other
3 airman certificates that the Respondent may hold.

4 The Administrator's Emergency Order of Revocation duly
5 promulgated by the National Transportation Safety Board Rules of
6 Practice in Air Safety Proceedings was issued by the Office of
7 Aeronautical Center counsel of the Aeronautical Center in Oklahoma
8 City, Oklahoma.

9 This matter has been heard before this United States
10 Administrative Law Judge, and under the Board's Rules of Practice
11 as they are provided, this is an emergency proceeding in Section
12 821.56 of the Board's Rules of Practice dealing with emergency
13 proceedings. As apropos here, and accordingly it is mandatory
14 that as the Judge in this proceeding, I issue an Oral Initial
15 Decision forthwith at this time.

16 Following notice to the parties, this matter came on to
17 trial on June 15, 2011. The Respondent was present at all times
18 and was very ably represented by Joseph Lamonaca, Esquire. The
19 Administrator was likewise very ably represented during the course
20 of this proceeding by James Webster, Esquire, of the FAA's
21 Regional Counsel's office.

22 Both parties have been afforded the opportunity to offer
23 evidence, to call examine, and cross-examine witnesses. In
24 addition, the parties were afforded the opportunity to make final
25 argument in support of their respective positions.

1 I have reviewed the testimony and the evidence in this
2 proceeding, which has consisted of four witnesses who have
3 testified on behalf of the Administrator: Special Agent Brenda
4 Smith, of the FAA; Dr. Schwendeman, who is a designated medical
5 examiner. The third witness was Gilbert Byerly, who was a witness
6 to the erratic driving habits and intoxication of Respondent Porco
7 on the date of March 24, 2010. Then we had the fourth and last
8 witness of the Administrator, Officer Steven Templin, a police
9 officer with the Shaler Police Department in Pennsylvania.

10 All of the Administrator's witnesses testified copiously
11 and in depth, very candid and forthright. I have believed and
12 accepted the overwhelming majority of those four witnesses'
13 testimony.

14 The Respondent had one witness, the Respondent herself,
15 Ms. Porco, and no exhibits.

16 As I stated, I have reviewed the testimony and evidence
17 in this proceeding, which has consisted of the five witnesses,
18 including the Respondent, coupled with the four of the
19 Administrator. And the Administrator had seven exhibits, all duly
20 admitted into the record as it's presently constituted. And it is
21 my finding and conclusion, final determination that the
22 Administrator has proven the charges as set forth in the
23 Administrator's Emergency Order of Revocation of May 12th, 2011,
24 by a fair and reasonable preponderance of the reliable,
25 substantial and probative evidence.

1 We have had in-depth discussions in this case involving
2 intoxication of the Respondent, refusal to take a chemical alcohol
3 analysis, erratic driving, and two eyewitnesses: Mr. Byerly and
4 Ms. Tunstall, which doesn't happen too often in cases of this
5 type.

6 I would have to say one of the affirmative defenses of
7 the Respondent was a stale complaint or, some people would say,
8 laches. I have reviewed the total evidence, what we had here and
9 as well as in the docket file in this case, and I would have to
10 deny that that affirmative defense is valid. I believe the
11 Federal Aviation Administrator acted as soon as he could based on
12 the evidence that he had.

13 The evidence is very, very credible by Special Agent
14 Brenda Smith and Officer Templin of the Shaler Police Department,
15 who testified in depth, absolutely, no question, based on the
16 evidence that has been adduced before me during the course of this
17 proceeding -- the evidence adduced before me that erratic driving
18 habits, intoxication, refusal to take a chemical alcoholic
19 analysis test are all proven by a more than needed or necessary
20 quantum of evidence during the course of the presentation of the
21 Administrator's case.

22 Much has been made over the term "arrest" in this
23 proceeding. It is my determination and final analysis that I
24 cannot and will not reject out of hand the testimony of Officer
25 Templin. Steven Templin testified virtually about everything we

1 needed to know where this case is concerned. The appearance, the
2 actions where the intoxication element was concerned of Respondent
3 Porco, the slurred speech, the strong smell of alcohol, and of
4 course the extremely erratic behavior of waving fists and elbows
5 at Officer Templin, who testified under oath repeatedly under
6 questions of both counsel here as well as questions from myself,
7 that he arrested the Respondent Porco in this proceeding.

8 This is a federal proceeding. We are not bound or have
9 to acknowledge by state or local regulations, unless, of course,
10 they are overwhelming pertinent and relevant, which I do not deem
11 them so. And as I said earlier, I will not reject the testimony
12 of Officer Templin in this regard.

13 We have a great deal of candor, veracity, truthfulness
14 and honesty involved in this proceeding where Ms. Porco is
15 concerned. This case is strange in that on one medical
16 application of the year 2002, she fully responded and wrote out
17 that she had a DUI -- maybe I misspoke -- DUI, DWI arrest and
18 conviction. Whereas on this application that we have before us of
19 March 24, 2010, she reported that she had previously reported, but
20 she did not particularly specify, lay out and pinpoint her arrest
21 of March 24, 2010, and that her driver's license was suspended by
22 the Department of -- well, at least it was appeared to be
23 suspended by the Department of Transportation of the state of
24 Pennsylvania.

25 The Respondent in this proceeding is an airline

1 transport-rated pilot, and as such is held to the highest degree
2 of care, judgment and responsibility. Respondent on the witness
3 stand, it is my determination and conclusion, in response to both
4 counsels' questions and some of the questions I put to her was
5 less than candid, forthright, and responsive, even though she had
6 heard the testimony of all the Administrator's witnesses.

7 Her basic premise was that she didn't know that she had
8 to report the drunken driving arrest of March 24, 2010. And as
9 the Judge in this proceeding it is my mandatory duty, as the
10 National Transportation Safety Board, as well as the Ninth Circuit
11 of the United States District Court, the D.C. Circuit of the U.S.
12 District Court, has said that the credibility findings of the
13 administrative law judge cannot be ignored or pushed aside, must
14 be taken into account. And that's what I'm going to do where this
15 proceeding is concerned.

16 The candor of the Respondent in this proceeding is
17 vital. It is of the utmost importance, and I don't think there's
18 anyone in this room, including both counsel, who are not surprised
19 during the course of her testimony at some of the answers that
20 Respondent Porco gave in response to valid material and relevant
21 questions addressed to her. So it would not be stretching the
22 point to say that it is my final determination, conclusion her
23 lack of candor as an airline transport rated pilot, was extremely
24 noticeable. And as the Judge in this proceeding I am taking that
25 into account.

1 It is my determination that in response to Section
2 47.403(b), Federal Aviation Regulations, a false statement in and
3 on an application for a medical certificate is a basis for
4 revocation of the airline transport pilot certificate, flight
5 instructor certificate, first class medical certificate, et
6 cetera. And that's what we have here. I do not believe it was an
7 intentional false statement on the part of the Respondent, but it
8 was a false statement in view that she -- certainly it was
9 incumbent upon her to have the knowledge of an airline transport
10 rated pilot, an experienced pilot flying in excess of 10 years, to
11 have knowledge of the pertinent FAA rules and regulations. The
12 testimony of Special Agent Brenda Smith and Officer Templin, I
13 think is very important in this regard, and I am making my
14 findings accordingly.

15 There is a somewhat regrettable aspect of this case.
16 Apparently, if she is to be believed, she was given some wrong, if
17 not erroneous, advice by her earlier counsel that this issue of
18 arrest or summons, or however you want to deem it, was not apropos
19 for the moment in future and present FAA proceedings where her
20 certificates were concerned. As I stated earlier, she made some
21 attempt 2002 to be truthful and honest and mentioned an arrest and
22 conviction at that time. The same cannot be said where the arrest
23 and conviction, March 24, 2010, is concerned.

24 So that, ladies and gentlemen, the FAA had a duty here,
25 which they proceeded to pursue. As I stated earlier, they were

1 taking into account all those circumstances, were diligent. It
2 took some while, but based on my determination of all of the
3 evidence, testimony and documentary exhibits, they were
4 successful, and I will make the following specific findings of
5 fact and conclusions of law accordingly.

6 FINDINGS OF FACT AND CONCLUSIONS OF LAW

7 1. The Respondent, Roberta Lynn Porco, is currently the
8 holder of airline transport pilot and flight instructor
9 certificates number 003157462. Respondent admits and I find that
10 accordingly.

11 2. Respondent admits and it is found that on or about
12 March 24, 2010, Respondent Porco was arrested incident to an
13 alcohol-related motor vehicle offense in the state of
14 Pennsylvania.

15 3. The Respondent admits and it is found that on or
16 about November 19, 2010, Respondent applied for and was issued a
17 first-class medical certificate.

18 4. The Respondent admits and it is found that she was
19 asked, have you ever on the above-mentioned applications, in
20 response to item 18v, medical history, have you ever in your life
21 had any of the following convictions or administrative action
22 histories: history of (1) any arrest or conviction involving
23 driving while intoxicated or while impaired or while under the
24 influence of alcohol or a drug; or a history of any arrest,
25 conviction or administrative action involving an offense which

1 resulted in the denial, suspension, cancellation or revocation of
2 driving privileges, which resulted in attendance at an educational
3 or rehabilitation program? The Respondent answered yes and in the
4 explanation, previously reported a DUI.

5 5. Respondent admits and it is found that incident to
6 paragraphs -- the proceeding paragraphs, your answer to item 18v
7 on the application was not correct in that your March 24, 2010
8 arrest and June 25, 2010 Pennsylvania driver's license suspension
9 had not been reported on any prior medical application.

10 The Respondent admits and it is found, and incident to
11 paragraphs 6, 7, and 8, the Federal Aviation Administration relied
12 upon the information Respondent provided in response to item 18v
13 on the application.

14 6. It is found that incident to the prior paragraphs,
15 Respondent's answer to item 18v, while not fraudulent, was false.

16 7. It is found that incident to paragraphs above, the
17 information Respondent provided in response to item 18v was
18 material in that an airman medical certificate was issued without
19 consideration of your actions as described in findings in
20 paragraphs 2 and 3 of this Emergency Order of Revocation.

21 8. It is found that by reason of the application form
22 referenced above, the Respondent certified that all answers were
23 complete and true, despite the fact that that entry was false.

24 By reason of the foregoing facts and circumstances, it
25 is my finding, 9, that pursuant to Section 47.403(a)(1) -- am I

1 correct, Mr. Webster, is that the section you're charging her?

2 MR. WEBSTER: Yes, sir, intentional falsification.

3 ADMINISTRATIVE LAW JUDGE FOWLER: Yeah.

4 Pursuant to Section 67.403(a)(1), which of course reads,
5 any fraudulent or intentionally false statement on any application
6 for a medical certificate, et cetera, et cetera, is grounds for
7 revocation of all airman certificates held by the applicant.
8 Section (b) under 47.403, which is in the Administrator's
9 Emergency Order of Revocation sets forth the commission by any
10 person of an act prohibited under paragraph (a) of this section,
11 which I've just read, is a basis for (1) suspending or revoking
12 all airman, ground instructor, and medical certificates and
13 ratings held by that person.

14 It is my determination and conclusion based on the
15 wealth of testimony coupled with the documentary exhibits that the
16 Administrator has adduced during the course of this proceeding
17 that there is substantial evidence to set forth that the
18 Administrator has validly proven under a reasonable preponderance
19 of the evidence needed to prove 67.403(a)(1) and 67.403(b).

20 It is my determination based upon the candor, or lack
21 thereof, of the Respondent and based on her duties,
22 responsibilities and care as an airline transport rated pilot of
23 some longevity, that while it may not be conclusive to say that
24 she falsified intentionally, based upon her knowledge of what she
25 was incumbent to have and to know, and based upon her appearance

1 and testimony during the course of this proceeding, it is my
2 determination that the Administrator has proven that she adduced
3 evidence, false evidence that the Administrator relied upon to its
4 detriment until the Administrator found out what the real fact of
5 the matter is where the issuance of the medical certificate, which
6 was issued to the Respondent on November 19, 2010, without her
7 reporting the knowledge that she had an arrest and charge, which
8 driving and being intoxicated and so forth.

9 My last finding is that this Judge finds that safety in
10 air commerce or air transportation in the public interest does
11 require the affirmation of the Administrator's Emergency Order of
12 Revocation, dated May 12, 2011, in view of the aforesaid
13 violations which I have cited during the course of my decision.

14 ORDER

15 IT IS ORDERED AND ADJUDGED AND DECREED that the
16 Administrator's Emergency Order of Revocation of May 12, 2011 be,
17 and the same hereby is, affirmed.

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19 _____
20 WILLIAM E. FOWLER, JR.

21 Chief Administrative Law Judge
22

23 APPEAL

24 ADMINISTRATIVE LAW JUDGE FOWLER: Either side may appeal
25 the Oral Initial Decision just issued by this Judge. A notice of

1 appeal must be filed within 2 days following today's decision of
2 June 15, 2011, and it is mandatory, pursuant to the Board's
3 practices, that a brief be submitted which sets forth the
4 objections to the Judge's Oral Initial Decision, which must be
5 filed within 5 days following the Judge's decision; otherwise, the
6 Judge's decision will become final.

7 (Off the record.)

8 (On the record.)

9 ADMINISTRATIVE LAW JUDGE FOWLER: Counsel for the
10 Respondent has indicated he will be filing a notice of appeal to
11 the Judge's Oral Initial Decision just issued. I'll set forth
12 those parameters again: 2 days from today's decision of June 15,
13 2011, the notice of appeal. And 5 days from today's date, a brief
14 in support of that appeal setting forth the objection to the
15 Judge's Oral Initial Decision.

16 If there's nothing further at this time, I would declare
17 the hearing closed. But before we go off the record, I would like
18 to thank both counsel, for their extremely diligent and erudite
19 efforts. I would like to also thank the -- well, we don't have
20 any witnesses remaining, but those who are here and who testified,
21 for their help, assistance, and cooperation during the course of
22 this proceeding.

23 (Off the record.)

24 (On the record.)

25 ADMINISTRATIVE LAW JUDGE FOWLER: The 5 days follows the

1 2 days of the notice of appeal in which the Respondent is to file
2 his brief. So he has 5 days after the 2 days in order to file
3 that brief.

4 Anything further?

5 MR. LAMONACA: Nothing further.

6 ADMINISTRATIVE LAW JUDGE FOWLER: Thank you all, ladies
7 and gentlemen. We stand adjourned.

8 (Whereupon, at 4:39 p.m., the proceedings in the above-
9 entitled matter were adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the
NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Roberta Lynn Porco

DOCKET NUMBER: SE-17169

PLACE: Philadelphia, PA

DATE: June 15, 2011

was held according to the record, and that this is the original,
complete, true and accurate transcript which has been compared to
the recording accomplished at the hearing.

Michael McCann
Official Reporter