SERVED: February 27, 2012

NTSB Order No. EA-5618

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 23rd day of February, 2012

MICHAEL P. HUERTA, Acting Administrator, Federal Aviation Administration, Complainant, v. PATRICIO E. ZUMARRAGA, Respondent.	)	Docket SE-19043

OPINION AND ORDER

1. *Background*

Respondent appeals the oral initial decision of Administrative Law Judge Alfonso J. Montaño, issued on July 7, 2011.[1] By that decision, the law judge affirmed the Administrator's

[1] A copy of the oral initial decision is attached.

emergency order[2] based on respondent's alleged violation of 14 C.F.R. § 120.33(b)[3] and found respondent not qualified to hold an airman certificate under 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2).[4] As a result of his findings, the law judge revoked respondent's air transport pilot (ATP), certified flight instructor (CFI), private pilot, and first-class medical certificates as well as any other airman certificates which respondent held. We deny respondent's appeal.

A. *Facts*

Respondent, an Ecuadorian national, was employed by Shuttle America (part of Republic Airlines) as a first officer. On November 18, 2010, Shuttle America's assistant chief pilot informed respondent he needed to report for a random drug test. Respondent reported for testing and provided a urine sample. The sample was sent to LabCorp for testing.[5] LabCorp ran an immunoassay test[6] on respondent's sample which tested presumptively positive for benzoylecgonine ("BE" for short—the metabolite of cocaine). LabCorp then ran a gas

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[2] Respondent subsequently waived the procedures applicable in emergency proceedings.

[3] Section 120.33(b) states, "[n]o certificate holder or operator may knowingly use any individual to perform, nor may any individual perform for a certificate holder or an operator, either directly or by contract, any function listed in subpart E of this part while that individual has a prohibited drug, as defined in this part, in his or her system."

[4] These sections provide no one may hold a first-class, second-class, or third-class medical certificate if the individual has a verified positive drug test result on a Department of Transportation (DOT) drug test within the prior two years.

[5] LabCorp provided laboratory testing services for Shuttle America.

[6] An immunoassay test is a common test used to initially screen urine samples for drugs. If a sample tests presumptively positive, then the sample is sent on for further, more sensitive, confirmatory testing.

chromatography-mass spectrometry (GC-MS)[7] test on the sample. The GC-MS test confirmed the sample was positive for BE at a level of 1,670 nanograms per milliliter (ng/mL).[8] See generally Exh. A-21. On November 22, 2010, the Shuttle America medical review officer (MRO) informed respondent of the positive drug test and asked respondent if he would like the sample retested. Respondent denied using cocaine and requested the sample be retested. The sample was retested using GC-MS at Quest Diagnostics and confirmed positive at a level of 1,803 ng/mL on November 30, 2010. See generally Exh. A-22. As a result of the positive drug test, Shuttle America terminated respondent's employment on December 1, 2010.

On February 14, 2011, the Administrator issued an emergency order revoking respondent's ATP and first-class medical certificates. The Administrator amended the order to include revocation of respondent's CFI and private pilot certificates as well as any other airman certificates and reissued the order as the complaint in this case. In his answer, respondent admitted the vast majority of the allegations but raised the affirmative defense of unknowing ingestion. After the law judge denied cross-motions for summary judgment, the case proceeded to hearing on July 6-7, 2011.

B. *Hearing*

At the hearing, the Administrator submitted 24 exhibits and called no witnesses. Respondent testified on his own behalf and called two expert witnesses—a clinical and forensic psychiatrist, Dr. David Davis, and a forensic toxicologist, Dr. John Vasiliades. Respondent did

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[7] GC-MS is a testing method using a combination of gas-liquid chromatography and mass spectrometry to identify different substances within a test sample. GC-MS is widely heralded as the "gold standard" for forensic substance identification because it is used to positively identify the actual presence of a particular substance in a given sample.

[8] The DOT confirmatory test cutoff concentration for BE is 100 ng/mL. Cutoff levels are established to ensure false positives are not reported.

not dispute the validity of the test results, the chain of custody, or the testing procedures; but instead attempted to raise his affirmative defense.

Respondent testified he traveled to and from Ecuador five to six times a month to visit his family. Tr. at 44. In July or August 2010, he claimed he purchased a package of mate de coca tea in an open-air market in Ecuador but noted it was the same brand he normally purchased in the supermarket in Ecuador. He frequently drank coca tea, beginning as a child in Ecuador, and did not know the tea could contain cocaine. On this single occasion, respondent brought the coca tea back into the United States with him. Tr. at 51.

On November 17, 2010, between 8:30 pm and 10:00 pm, respondent testified he went to the Starbucks in Dulles International Airport in Washington, DC, and got a pastry and cup of hot water for tea. He used a tea packet of his coca tea. Subsequent to drinking the tea, respondent flew as first officer on a Shuttle America flight from Dulles to Buffalo, New York, and then from Buffalo to Chicago, Illinois. He rode as a passenger from Chicago back to his home station of Atlanta. Upon arriving in Atlanta, respondent received notification of his selection for the random drug test and immediately reported for testing.

After receiving the notification of the positive drug test, respondent contacted his union representative who recommended respondent list out the food he had eaten for several days prior to the test. This list contains very generic entries such as “cafeteria” and “food at the terminal” but does list two specific entries for tea—on November 15 and 17. Exh. R-1 at 2. Respondent testified his roommate, a chemistry doctoral student, informed respondent the coca tea could have caused the positive drug test result.

In February 2011, respondent mailed several tea packets to Dr. Vasiliades for testing. Using GC-MS, Dr. Vasiliades found the packets tested positive for cocaine at a level of

1.9 ng/g.[9] Dr. Vasiliades also reviewed an affidavit from respondent, dated May 31, 2011, detailing respondent's ingestion of this coca tea.[10] Dr. Vasiliades concluded to a reasonable degree of forensic certainty the level of cocaine in respondent's urine sample was consistent with him consuming coca tea 24-48 hours prior to testing but also conceded the result was consistent with respondent ingesting cocaine at some point prior to testing.[11]

On April 6, 2011, respondent met with Dr. Davis for a drug testing evaluation. Based upon this evaluation, Dr. Davis found no evidence respondent was abusing drugs and believed respondent's story about ingesting the coca tea. Tr. at 91, Exh. R-4. In reaching his conclusion,

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[9] Dr. Vasiliades noted ingesting 2-5 ng of cocaine could result in a positive drug test at a level similar to respondent's level. Tr. at 135.

[10] This affidavit was not introduced into evidence but, based upon Dr. Vasiliades's testimony, it appears respondent's affidavit contained similar assertions as respondent's testimony at the hearing.

[11] On cross-examination, Dr. Vasiliades testified,

> Q. Okay. Now you indicated that you'd looked at some of these studies, and you were saying that there are a number of assumptions and variables that you had to make but that this conclusion that [respondent's] story is not inconsistent with the test results that you were giving?
>
> A. Yes.
>
> Q. Okay. Is it also possible -- it would also not be inconsistent with those test results for him to have consumed cocaine earlier, would it not?
>
> A. Of course. The urinalysis program does not tell you when they consumed it or how much they consumed.
>
> Q. Okay. And would --
>
> A. I'm not finished yet.
>
> Q. I'm sorry.
>
> A. The urinalysis program does not tell you when you consumed it or how much; you just have a urine [sic] of positive.

Tr. at 120.

Dr. Davis relied on his face-to-face interview with respondent, the laboratory data, and a database form, but did not interview respondent's family, friends, or roommate. Tr. at 94-5.

C. *Law Judge's Oral Initial Decision*

The law judge found respondent violated 14 C.F.R. § 120.33(b), and found respondent not qualified to hold an airman certificate under 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2). As a result, the law judge revoked respondent's ATP, CFI, private pilot, first-class medical, and any other airman certificates which respondent might hold. In his oral initial decision, the law judge stated he denied the cross-motions for summary judgment because "[r]espondent should have the opportunity to present his affirmative defense. I further found that the case involved issues of fact and credibility upon which I felt I should hear testimony." Initial Decision at 158. After a detailed discussion of his factual findings based upon a review of the evidence, the law judge made a credibility determination adverse to respondent. He noted the threshold issues for him to decide were whether respondent ingested mate de coca tea on November 17, 2010, and whether the positive drug test resulted from the ingestion of that tea. He found respondent failed to prove either of these issues by a preponderance of the evidence and therefore found respondent failed to carry his burden to prove the affirmative defense. Id. at 171. Having held respondent did not prove his affirmative defense, the law judge noted he need not reach respondent's challenge to the Administrator strict liability interpretation of § 120.33(b).[12]

D. *Respondent's Issues on Appeal*

Respondent appealed the law judge's decision to the Board. Respondent essentially

[12] At the hearing, the Administrator argued § 120.33 was a strict liability offense such that it was irrelevant whether a respondent intentionally or accidentally ingested a controlled substance—either act would result in a finding of a violation and revocation.

raises three issues on appeal. He asserts the law judge abused his discretion by entering a decision adverse to respondent absent substantial evidence. He argues the Administrator's strict liability policy on a positive drug test result improperly precludes the affirmative defense of unknowing ingestion and as a result, the policy bears no rationale relationship to an enumerated safety purpose behind the drug testing program. Finally, he claims the sanction of revocation violates his Constitutional right to due process.

2. *Decision*

A. *Respondent's Affirmative Defense*

We find the law judge—in carefully evaluating the evidence before him and making credibility determinations based upon his findings of fact—did not err in concluding respondent failed to carry his burden of proving the affirmative defense of unknowing ingestion. In Administrator v. Porco,[13] we reaffirmed our long-held standard of review regarding deference to our law judges' credibility findings: we will defer to the credibility findings of law judges in the absence of a showing such findings are arbitrary and capricious.[14] In Porco, we also discussed the law judge's credibility determination should be based explicitly upon factual findings in the record.[15]

We find the law judge's credibility determination in this case was not arbitrary and capricious. As the law judge noted in support of his adverse credibility determination, the only evidence supporting respondent's coca tea story was respondent's own uncorroborated testimony. While Dr. Davis and Dr. Vasiliades found respondent's story credible, the law judge

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[13] NTSB Order No. EA-5591 (2011).

[14] Id. at 20; see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Jones, 3 NTSB 3649 (1981).

[15] Id. at 28-29.

correctly noted it was the law judge's duty to be the arbiter of respondent' credibility, stating,

> I had the opportunity to observe [respondent's] demeanor during the hearing. I have observed him under direct, cross-examination, and based on my review of all of the evidence and testimony before me and my observations of the [r]espondent, I cannot share Dr. Vasiliades' or Dr. Davis's opinion. I do not find [respondent] to be credible.

Initial Decision at 169. The law judge supported his credibility determination with explicit facts and evidence from the record, including the following:

- The only evidence respondent purchased coca tea in Ecuador and brought it to the United States in July or August 2010 was respondent's uncorroborated testimony.
    - The law judge found not credible respondent's claim he drank the coca tea since childhood and frequently bought it and drank it when in Ecuador, but only brought the tea into the United States on this single occasion. Id. at 167, 169, 170
    - Respondent claimed he purchased the tea in July or August but admitted traveling to Ecuador after learning of the positive drug test, thus, creating the possibility he purchased the coca tea after learning of his positive drug test. Id. at 166-167, 169.
- Respondent provided uncorroborated testimony he consumed coca tea on November 17, 2010 at Dulles Airport.
    - Respondent did not call any witness who saw him drink the coca tea on that, or **any** other occasion. Id. at 170.
    - On the list of food and drink he prepared for his union, the only specific food item listed on the sheet was tea on two occasions. No other food item was listed specifically by name. Id. at 169, 170.
- Respondent's roommate, who purportedly did this coca tea research for respondent, did not testify at the hearing. Id. at 170.
- Respondent called no witness to testify he did not use drugs or to testify, in general, about his good character and integrity. Id. at 170-171.
- The law judge found "Dr. Davis's testimony and opinion to be lacking in any real psychiatric or medical substance. He basically believed [respondent's] story and he found [respondent] as neither a chronic or even occasional drug abuser." Id. at 164.
    - In preparing his medical evaluation, Dr. Davis did not interview respondent's family, friends, or the roommate who purportedly provided the coca tea research to respondent. Id. at 164.[16]

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[16] We also note Dr. Davis's testimony indicated he formulated his conclusion by his face-to-face interview with respondent, the laboratory data, and a database form. Notably absent from his consideration were respondent's medical records and any sort of personality or psychiatric

- Dr. Davis noted respondent's lack of knowledge of the association between coco leaves and cocaine naïve but took no action to follow up on that response. Id. at 164.

- Dr. Vasiliades formed his opinion of respondent's credibility upon reviewing respondent's written affidavit but never personally spoke to respondent. Id. at 166.

- Dr. Vasiliades "testified that while the test results were consistent with someone who had ingested coca tea, the results were also consistent with someone who used cocaine. He testified that the test will not provide information as to what form or how much cocaine had been consumed." Id. at 166.

We find each of these findings by the law judge supported by a preponderance of reliable, probative, and substantial evidence. The law judge made his credibility determination and tied it to specific findings of fact, as required by Porco. In reviewing all the evidence presented at the hearing, we find the law judge's credibility finding was not arbitrary and capricious.

In his brief, respondent repeatedly claims his evidence was unrebutted by the Administrator, seeming to imply the law judge must accept respondent's evidence as fact absent the Administrator affirmatively putting on a rebuttal case to respondent's case-in-chief. This argument misunderstands the concept of a respondent's burden of proof with regard to an affirmative defense. In the government's case-in-chief, the Administrator bears the burden of proving the prima facie case. In the case *sub judice*, respondent conceded the Administrator proved his prima facie case through the Administrator's exhibits and respondent's prehearing admissions. At that point, the burden shifted to respondent to prove his affirmative defense by a preponderance of the evidence. The Administrator need not put on a rebuttal case. Here, even absent a rebuttal case, the law judge found respondent failed to carry his burden with respect to his affirmative defense. We agree with the law judge's determination.

(..continued)
testing which might show prior drug use or indicate whether respondent was being deceptive in his responses to Dr. Davis.

2. *The Administrator's Legal Interpretation of § 120.33(b)*

By denying the cross-motions for summary judgment, we find the law judge properly protected respondent's substantive due process rights. The law judge allowed this case to proceed to hearing so respondent could have a full and fair opportunity to present his affirmative defense. However, having concluded respondent failed to carry his burden of proof as to his affirmative defense, we, like the law judge, find it unnecessary to reach respondent's argument that the Administrator's strict liability interpretation of § 120.33(b) barred a defense of unknowing ingestion and thus, is arbitrary and capricious.

3. *Sanction*

Finally, with regard to sanction, respondent makes a Constitutional argument that a sanction of revocation violates his right to due process. We lack jurisdiction to review the constitutionality of regulations and statutes.[17] However, we have jurisdiction to review the appropriateness of the sanction in each case before us. Both the federal regulations and the Administrator's Sanction Guidance Table clearly state revocation is the appropriate sanction for a confirmed positive drug test.[18] The Administrator fulfilled the standard under Administrator v. Peacon, entitling deference to the Administrator's choice of sanction.[19] While we consider

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[17] See Administrator v. Lybyer, NTSB Order No. EA-4822 (2000) ("we do not have jurisdiction to review the constitutionality of regulations issued by the Administrator or the Secretary of the Department of Transportation"). See also Administrator v. Kraley, NTSB Order No. EA-4581 at 2 (1997) (citing Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972) ("the Board lacks the authority to rule on the constitutional validity of regulations promulgated by the Administrator")).

[18] FAA Order 2150.3B, Appendix B, Figure B-5-v (2), available at http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/17213.

[19] NTSB Order No. EA-4607 at 2 (1997) (stating, "where the Administrator establishes before the law judge the existence of validly adopted written policy guidelines, the law judge must

aggravating and mitigating factors in evaluating an imposed sanction, respondent did not articulate any mitigating factors counseling in favor of reducing the sanction.[20]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The law judge's oral initial decision is affirmed.

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

(..continued)
impose a sanction that falls within the range of sanctions suggested therein, unless he finds that application of the guidelines by the Administrator was arbitrary, capricious, or otherwise not in accordance with law").

[20] See Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010) (recon. denied, NTSB Order No. EA-5522 (2010)).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

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* * * * * * * * * * * * * * * * * *
In the matter of:                  *
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J. RANDOLPH BABBITT                *
ADMINISTRATOR,                     *
Federal Aviation Administration,   *
                                   *
                  Complainant,     *
     v.                            *    Docket No.:  SE-19043
                                   *    JUDGE MONTAÑO
PATRICIO E. ZUMARRAGA,             *
                                   *
                  Respondent.      *
* * * * * * * * * * * * * * * * * *
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U.S. Tax Court
Russell Federal Building &
Courthouse
75 Spring Street, 11th Floor
Atlanta, Georgia

Thursday,
July 7, 2011

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

BEFORE: ALFONSO J. MONTAÑO,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

GLENN L. BROWN
Senior Attorney
Office of the Regional Counsel
Federal Aviation Administration
Great Lakes Region
2300 East Devon Avenue
Des Plaines, Illinois 60018
(847) 294-7313

On behalf of the Respondent:

PETER C. LOWN, ESQ.
112 Chip Place, Suite 100
Stockbridge, Georgia 30281
(404) 520-0171
(404) 506-9149 (Fax)
peter@lownpc.com

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9 ORAL INITIAL DECISION AND ORDER
10 ADMINISTRATIVE LAW JUDGE MONTAÑO: This has been a
11 proceeding under the provisions of 49 USC Section 44709, formerly
12 Section 609, of the Federal Aviation Act and the provisions of the
13 Rules of Practice in Air Safety Proceedings of the National
14 Transportation Safety Board. Patricio Zumarraga, the Respondent,
15 appealed the Administrator's February 14, 2011, Emergency Order of
16 Revocation. On February 18, 2011, the Administrator filed an
17 Amended Emergency Order of Revocation, which pursuant to Section
18 1821.31(a) of the Board's Rules, serves as the complaint in this
19 case.
20 The Administrator ordered the revocation of
21 Mr. Zumarraga's airline transport pilot certificate, his flight
22 instructor certificate, his private pilot certificate, his first-
23 class airman medical certificate and any other medical
24 certificates he held. The Administrator's order was based on his
25 findings that Mr. Zumarraga violated Section 120.33(b) of the

1 Federal Aviation Regulations in that he performed a safety-
2 sensitive function on a scheduled passenger-carrying commercial
3 air flight when he had cocaine in his system. The Administrator
4 further found that in accordance with Section 67.107(b)(2),
5 67.207(b)(2), and 67.307(b)(2), that Mr. Zumarraga did not meet
6 the standards to hold any class of FAA medical certificate.
7 As I mentioned, this case was initiated as an emergency
8 case. Mr. Zumarraga waived the emergency status of the case and
9 this case then proceeded to hearing and the matter has been heard
10 before me, this Administrative Law Judge. And as provided by the
11 Rules, I have elected to issue an Initial Oral Decision in this
12 matter.
13 Pursuant to notice in this matter, this matter came on
14 for trial on July 6th and 7th, 2011, in Atlanta, Georgia. The
15 Administrator was represented by one of his staff counsel, Senior
16 Attorney Glenn L. Brown of the Great Lakes Region, Federal
17 Aviation Administration. Mr. Zumarraga was represented by
18 Mr. Peter C. Lown, Esquire. The parties were afforded full
19 opportunity to offer evidence, to call, examine and cross-examine
20 witnesses and make arguments in support of their respective
21 positions. Mr. Zumarraga has been present in the courtroom
22 throughout the proceedings in this matter.
23 In this decision I will not discuss all of the evidence
24 in detail. I have, however, considered all of the evidence. That
25 which I do not specifically mention is viewed by me as being

1 corroborative and does not materially affect the outcome of this
2 decision.
3 As to the agreements in this case, Mr. Zumarraga filed
4 an amended answer to the Administrator's complaint in which he
5 admitted the allegations in paragraphs 1 through 23. As the
6 Respondent has admitted those allegations, they are deemed as
7 established for the purpose of this decision. Respondent denied
8 the allegations in paragraphs 24 and 25. Respondent raised an
9 affirmative defense that he unknowingly and unintentionally was
10 exposed to cocaine when he consumed Herbi mate de coca tea on
11 November 17, 2010.
12 I note for the record that the Administrator filed a
13 motion for summary judgment, which was received in my office on
14 May 18, 2011. The Respondent filed a reply argument. Respondent
15 raised an affirmative defense and should have an opportunity to
16 present his case. Further, Respondent argued that because the
17 affirmative defense was uncontroverted, he was entitled to summary
18 judgment as well.
19 Having considered the motions and relevant case law, I
20 denied both motions. I found that the Respondent should have the
21 opportunity to present his affirmative defense. I further found
22 that the case involved issues of fact and credibility upon which I
23 felt I should hear testimony and cross-examination in order for me
24 to make a decision in this matter.
25 As to the exhibits in this case, the Administrator moved

1 for the admission of exhibits which have been marked and admitted
2 as A-1 through A-24. They were admitted into evidence without
3 objection from the Respondent. Respondent moved for the admission
4 of Exhibits R-1 through R-5. The Administrator objected to R-4,
5 the independent medical evaluation prepared by Dr. Dave McAllister
6 Davis. I admitted that report over the objection of the
7 Administrator.
8 As to the testimony in this case, the Administrator did
9 not present the testimony of any witnesses in his case in chief.
10 Counsel for the Administrator offered documentary evidence in the
11 form of exhibits to establish his case. Karen Leamon, Program
12 Manager, FAA Office of Aerospace Medicine Drug Abatement Division,
13 served as the Administrator's technical expert at counsel table.
14 Two other FAA witnesses were present in the courtroom but did not
15 testify.
16 Mr. Zumarraga testified on his own behalf and also
17 presented the expert testimony of Dr. Dave McAllister Davis and
18 Dr. John Vasiliades. I will discuss their testimony as it relates
19 to the issues I must decide in this case.
20 DISCUSSION
21 As to my discussion of the evidence, the Administrator
22 argues this is a brutally simple case. He argues that the
23 Administrator does not concede that the Respondent's positive
24 random drug test was the result of the ingestion of herbal mate de
25 coca tea. He argues that a positive drug test for cocaine

1 metabolite is all that really matters in this case. It is
2 irrelevant if the cocaine metabolite was a result of the
3 inadvertent ingestion of coca tea or the actual use of cocaine.
4 It is irrelevant according to the Administrator if a pilot is a
5 cocaine user or a coca tea user. Neither meet the standards to
6 hold any class of FAA medical certificate.
7 According to the Administrator it is irrelevant and
8 immaterial whether the cocaine metabolites were from an
9 inadvertent coca tea ingestion or the recreational use of cocaine
10 if the pilot was performing a safety-sensitive function with the
11 metabolite in his or her system. If the metabolite is in his or
12 her system, they have violated Section 120.33(b) of the Federal
13 Aviation Regulations. That is, of course, unless he or she has a
14 legitimate medical explanation for the metabolite being in their
15 system. And I believe that counsel for the Administrator argued
16 that the regulations really don't care where the metabolite came
17 from.
18 Respondent, on the other hand, argues that a positive
19 random drug test in this case was a result of the inadvertent and
20 unknowing ingestion of cocaine through the use of mate de coca
21 tea. Respondent argues that certainly the regulations were not
22 intended to punish a person who's not a drug abuser or user but is
23 only a person who ingested tea that he did not know contained
24 cocaine. Respondent maintains that the application of the policy
25 concluding that the Respondent does not meet the standards to hold

1 an airman medical certificate is unsupported by the medical
2 evidence and under the facts of this case, Respondent argues, that
3 it's not rationally related to the specific policy or the purpose
4 of the policy. He further argues that the conclusion that the
5 Respondent lacks the qualifications to be the holder of any airman
6 or airman medical certificate under the facts of this case is not
7 rationally related to any purpose or policy in the furtherance of
8 maintaining air safety and therefore violates the Respondent's
9 substantive due process.
10 Those are constitutional arguments which have been noted
11 for the record and are part of this record. The issues I must
12 decide, the first issues that I must decide is whether or not the
13 Administrator has proven his prima facie case. And then I must
14 look as if the Administrator has proven his prima facie case, then
15 I address whether or not the Respondent has proven his affirmative
16 defense.
17 Let me address the first issue, whether or not the
18 Administrator has proven his prima facie case. The Administrator
19 has filed his documentary evidence to prove the allegations in
20 this complaint and they have been admitted into evidence without
21 objection from the Respondent. The Respondent has admitted
22 allegations 1 through 23 in this case. He denies allegation
23 number 24, that he does not meet the standards to hold an airman
24 medical certificate due to his verified positive result on the
25 DOT, Department of Transportation, drug test.

1 He also denies allegation 24, that by reason of the
2 verified positive results of the drug test that he lacks the
3 qualifications to be the holder of any airman or airman medical
4 certificate. Respondent does not dispute the Administrator has
5 proven that the Respondent's random drug test resulted in verified
6 findings that it was positive for cocaine. The Respondent does
7 not dispute this finding, but rather argues his affirmative
8 defense that Respondent was unknowingly and unintentionally
9 exposed to cocaine when he consumed the mate de coca tea on
10 November 17, 2010. Respondent has not argued in this courtroom
11 that the Administrator has not proven its prima facie case.
12 Based on the evidence and arguments advanced by the
13 Administrator and the admissions by the Respondent, I find that
14 the Administrator has proven a prima facie case by a preponderance
15 of probative, reliable and credible evidence. In so finding, I
16 now turn to the issue that has consumed all of the time in this
17 proceeding or the majority of the time in this proceeding, as to
18 whether or not Respondent has proven his affirmative defense by a
19 preponderance of evidence.
20 As noted, the Respondent maintains that he unknowingly
21 and unintentionally was exposed to cocaine when he consumed the
22 Herbi de mate coca tea on November 17, 2010. This is the
23 threshold issue I must decide, is whether Respondent ingested
24 Herbi de mate coca tea, one, and whether the positive drug test
25 for cocaine metabolites was the result of that ingestion. If I

1 find in favor of the Respondent on those issues, then I must then
2 determine if that evidence establishes a legally sufficient
3 defense as to the operational violations in this case.
4 The threshold question presents factual and credibility
5 issues. I will start my discussion with the witnesses presented
6 by the Respondent.
7 Dr. Dave McAllister Davis was qualified as an expert in
8 clinical and forensic psychiatrist. He has practiced psychiatry
9 for 40 years and is a consultant for numerous drug abuse and
10 prevention programs. He testified that he evaluated Mr. Zumarraga
11 on April 6, 2011, four months after the positive drug test. He
12 testified that Mr. Zumarraga agreed to random urine testing for
13 drugs as part of his evaluation, which the results of which were
14 all negative.
15 Dr. Davis testified that he found Mr. Zumarraga's
16 explanation for his positive drug test resulting from the
17 ingestion of Herbi de mata coca tea to be believable. He
18 testified that he essentially found no evidence that Mr. Zumarraga
19 was either a chronic or occasional drug abuser. He was also of
20 the opinion that Respondent's ingestion of cocaine was unwitting
21 and unintentional.
22 On cross-examination he testified that he did not speak
23 to Mr. Zumarraga's family, friends or colleagues, or question them
24 about possible drug use by the Respondent. He testified that in
25 many cases he does speak to family, friends and colleagues to

1 question them about drug use, but he did not do so in this case.
2 When questioned by the Administrator's counsel as to why he did
3 not talk to friends, colleagues and family members, he responded
4 he did not have any particular reason for not doing so.
5 Dr. Davis acknowledged that his independent medical
6 evaluation indicated that he found Respondent's lack of knowledge
7 relative to the association between coca leaves and cocaine to be
8 naive. In response to my questions, Dr. Davis admitted that he
9 based his opinion in this case upon his belief in Respondent's
10 credibility and Respondent's version of events. He testified that
11 Mr. Zumarraga did not present as a drug user and seemed mature,
12 although he did indicate that as relative to certain issues,
13 specifically cocaine and coca leaves, he was naive. He did not
14 rely upon any other medical or psychiatric evidence. Basically,
15 his opinion was based on his belief in Mr. Zumarraga's
16 credibility.
17 I found Dr. Davis's testimony and opinion to be lacking
18 in any real psychiatric or medical substance. He basically
19 believed Mr. Zumarraga's story and he found Mr. Zumarraga as
20 neither a chronic or even occasional drug abuser. He did not seek
21 any other opinions from family, friends or colleagues as to
22 Mr. Zumarraga's past or present drug abuse, so I cannot accept his
23 opinion as to the Respondent's credibility as I must make my own
24 credibility determinations based on all of the evidence before me.
25 I give Dr. Davis's opinion very minimum weight based on the

1 evidence that I heard from Dr. Davis.

2 Dr. John Vasiliades then testified for Respondent. He
3 is qualified as an expert in toxicology, forensic toxicology and
4 was so qualified without the objection of the Administrator. He
5 testified that the issues of the use of coca teas and positive
6 drug test has been an issue for many years and there is medical
7 literature addressing the issue. He testified that he received
8 samples of the mate de coca tea from Mr. Zumarraga. He forwarded
9 one tea bag to ExperTox, Inc. for gas chromatography and mass
10 spectrometry testing and that was found to be positive for cocaine
11 with a concentration of 1.19 milligrams per gram. The other tea
12 bag was tested for cocaine by thin layer chromatography and gas
13 chromatography and was also found positive for cocaine.

14 He testified that he read the affidavit of Mr. Zummaraga
15 dated May 31, 2011, and based on the lab test findings and
16 Respondent's affidavit, he opined within a reasonable degree
17 forensic toxicological certainty that Mr. Zumarraga's explanation
18 as to how he ingested cocaine appeared credible and consistent
19 with the test results. He also opined that the coca tea was
20 unwittingly, unknown consumed and was of insufficient quantity for
21 Mr. Zumarraga to feel its effects.

22 On cross-examination Dr. Vasiliades admitted that he was
23 not familiar with the Department of Transportation drug testing
24 program or protocols or policies and that his laboratory nor
25 ExperTox were Health and Human Services certified laboratories.

1 He testified that while the test results were consistent with
2 someone who had ingested coca tea, the results were also
3 consistent with someone who used cocaine. He testified that the
4 test will not provide information as to what form or how much
5 cocaine had been consumed. Again, he testified that he based his
6 opinion upon reading Mr. Zumarraga's affidavit and finding that,
7 as he stated, it appeared to be credible.
8 I found that Dr. Vasiliades' testimony to be objective
9 and credible as to the description of the testing and laboratory
10 results. I have also found his testimony credible when he
11 testified that results would be consistent with coca tea ingestion
12 or the use of cocaine. I cannot accept his opinion as to the
13 credibility of Mr. Zumarraga; that's the purpose of this hearing,
14 for me to gauge credibility and make my own determinations.
15 Again, he did not speak to Mr. Zumarraga, but only reviewed his
16 written affidavit.
17 I now turn to the testimony of Mr. Zumarraga. He
18 testified that he is an Ecuadorian national living in the United
19 States. He traveled to Ecuador four or five times a month to see
20 his family prior to being terminated from employment in December
21 of 2010. He had an apartment in Atlanta he shared with a
22 roommate. He testified that he has friends and acquaintances in
23 Atlanta.
24 As to the matters in issue, he testified that he
25 purchased the mate de coca tea in an open market in Ecuador in

1 July or August of 2010. He testified that it is the same brand
2 that is sold in supermarkets in Ecuador and he further testified
3 that it is the brand name that he usually purchases for use. He
4 read and translated the print on the box of tea bags provided by
5 counsel and testified that the contents of a tea bag, as described
6 on the box of tea, was that the contents was dry coca leaves. He
7 testified that there was nothing in the packaging that indicated
8 that it contained cocaine.
9 Mr. Zumarraga testified that he brought the tea bags
10 back with him from Ecuador and he testified that he was reasonably
11 certain that he declared the tea on his customs form. He
12 testified he drank the coca tea since he was a child and is widely
13 consumed in Ecuador for medical or medicinal purposes.
14 Mr. Zumarraga testified that on November 17th, he flew
15 as first officer on a Shuttle America flight from Chicago to
16 Dulles International. At Dulles he bought a pastry at Starbucks,
17 obtained a cup of hot water and then made the mate de coca tea.
18 He then flew as a crew member from Dulles to Buffalo where he
19 spent the night. On November 18th, he flew as a crew member from
20 Buffalo to Chicago, then flew deadhead or as a passenger from
21 Chicago to Atlanta where he was informed that he was to take a
22 random drug test.
23 He provided a urine sample as requested without
24 hesitation. He was notified of the positive test results by
25 Dr. Hartenbaum. He testified that the physician requested that he

1 authorize a split sample, which he said he authorized.
2 Mr. Zumarraga testified he was asked by Dr. Hartenbaum if he was
3 taking medication or if he used cocaine and he answered no to both
4 questions. He was later notified by Dr. Hartenbaum that both
5 samples were positive for cocaine.
6 He testified that when he returned to his apartment in
7 Atlanta he contacted the union and spoke to the union attorney,
8 who advised him to write down everything he had consumed before
9 the drug test. The list has been admitted as Respondent's Exhibit
10 2. Mr. Zumarraga testified that he spoke to his roommate,
11 Mr. Ricardo Viteri, who was doing post-doctoral work in chemistry
12 at Georgia Tech. He testified that his roommate researched the
13 Internet and sources at Georgia Tech for Mr. Zumarraga and
14 Mr. Viteri informed Mr. Zumarraga that the coca tea could be the
15 cause of the positive drug test. Mr. Zumarraga testified that he
16 came to this conclusion on or about November 30, 2010, after he
17 received the second test result.
18 He testified that he sent the tea bags for evaluation
19 three months later for evaluation on the advice of counsel. On
20 cross-examination he testified he did not know that the cocaine
21 was derived from coca leaves at the time he was drinking the tea.
22 He did not know that they were related in any way. He testified
23 he did not know that the mate de coca tea he was consuming
24 contained cocaine. He did not have a receipt for the purchase of
25 the tea. He testified that he used the tea frequently.

1 In response to my questions, he testified that he
2 traveled to Ecuador after finding that there had been a positive
3 drug test. He also testified that he had never had any
4 conversations with any other pilots relative to food or drinks
5 that could result in a positive drug test. He also testified that
6 while he drank mate de coca tea on many occasions in the past, he
7 testified that he only brought it into the United States once, and
8 that was in July or August of 2010.
9 As to the list of food and drink he alleged to have
10 prepared at the request of the union attorney, the only food item
11 listed on that undated sheet is the consumption of tea on two
12 occasions. He testified one occasion was the consumption of
13 chamomile tea and the other was the consumption of Herbi de mate
14 coca tea.
15 As previously noted, both Dr. Davis and Dr. Vasiliades
16 based their opinions upon finding that Mr. Zumarraga's explanation
17 for his positive drug test is credible. I had the opportunity to
18 observe Mr. Zumarraga's demeanor during the hearing. I have
19 observed him under direct, cross-examination, and based on my
20 review of all of the evidence and testimony before me and my
21 observations of the Respondent, I cannot share Dr. Vasiliades' or
22 Dr. Davis's opinion. I do not find Mr. Zumarraga to be credible.
23 The only evidence before me that Mr. Zumarraga purchased
24 the mate de coca tea, brought it to the United States in July or
25 August of 2010, is Mr. Zumarraga's uncorroborated testimony.

1 Respondent has not established when the tea was purchased or
2 brought into the United States by an corroborating evidence.
3 Respondent has not established whether the tea was purchased
4 before or after Respondent's positive drug test. Mr. Zumarraga
5 testified he traveled to Ecuador after his positive drug test.
6 There is no corroborating testimony that the Respondent
7 consumed the mate de coca tea prior to and on November 17, 2010.
8 No witness or evidence has been provided to corroborate that he
9 ever drank mate de coca tea other than his self-serving testimony.
10 His undated list of things he consumed before the positive drug
11 test is not credible, as the only food or beverage he lists is
12 tea. He testified that he often drank the mate de coca tea, but
13 then testified that he imported the tea into the United States
14 only once. It is, of course, illegal to import products
15 containing cocaine into the United States.
16 Mr. Zumarraga's roommate who holds a Ph.D. in chemistry
17 did not testify as to Respondent's use of mate de coca tea, nor do
18 I have evidence as to whether or not his roommate's research for
19 scientific literature was for the purpose of explaining a positive
20 drug test result or instead searching for a defense to explain a
21 positive drug test to help his roommate who actually used cocaine.
22 Furthermore, there's been no testimony to corroborate
23 Mr. Zumarraga's assertion that he did not use cocaine on or before
24 November 17, 2010. Respondent did not call friends, family,
25 colleagues or his roommate to testify that he did not use drugs

1 and that he only drank mate de coca tea. He acknowledged that he
2 has friends and acquaintances here in Atlanta, but no one was
3 called to talk about his character or his integrity or his use or
4 nonuse of illegal drugs. Even Respondent's own witness,
5 Dr. Vasiliades, testified that his test of the tea bags provided
6 by Respondent was consistent with Respondent's claim that he
7 ingested mate de coca tea. However, it was also consistent with
8 the use of cocaine. Dr. Vasiliades found Mr. Zumarraga's
9 explanation to appear to be credible. I do not make the same
10 findings. I do not find Mr. Zumarraga's explanation to be
11 credible.
12 Based on the evidence before me, I cannot find that the
13 Respondent has proven by a preponderance of the evidence that the
14 Respondent ingested mate de coca tea on November 17, 2010, or that
15 the positive drug test in this case was the result of the
16 ingestion of Herbi de mate de coca tea. I therefore find that the
17 Respondent has not proven his affirmative defense by a
18 preponderance of evidence. I cannot rule on this first threshold
19 question in favor of the Respondent. Therefore, the other
20 questions that I would have to address, had I found in favor of
21 the Respondent, will not be addressed in this case, but certainly
22 I anticipate they will be address in other cases.
23 FINDINGS OF FACT AND CONCLUSIONS OF LAW
24 Having discussed the evidence and testimony in the case,
25 I now make findings of fact and conclusions of law.

1 As previously noted, the Respondent has admitted the
2 allegations in paragraphs 1 through 23 of the Administrator's
3 complaint. As to allegation 24, I find that the Administrator has
4 proven by a preponderance of reliable, probative and credible
5 evidence that the Respondent does not meet the standard to hold an
6 airman medical certificate to due the verified positive result on
7 the Department of Transportation drug test.
8 As to the allegation 25, I find that the Administrator
9 has proven by a preponderance of reliable, probative and credible
10 evidence that by reasons of the foregoing items identified in the
11 complaint, Respondent lacks the qualifications to be the holder of
12 any airman or airman medical certificate.
13 As a result of the foregoing facts and circumstances, I
14 find that I have to affirm the Administrator's finding that the
15 Respondent violated Section 120.33(b) of the Federal Aviation
16 Regulations in that he performed safety-sensitive functions on a
17 scheduled passenger-carrying commercial air carrier flight when he
18 had cocaine in his system.
19 I must further affirm the Administrator's finding that
20 the Federal Air Surgeon has found, in accordance with Section
21 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) of the Federal
22 Aviation Regulations, that he does not meet the standards to hold
23 any class of FAA medical certificate.
24 Having found that the Administrator has proven the
25 specific allegations in the Administrator's complaint by a

1 preponderance of the reliable, probative and credible evidence, I
2 now turn to the sanction imposed by the Administrator in this
3 case. The Respondent has made constitutional arguments as the
4 rational relationship between the regulations and the action taken
5 by the Administrator in this case. However, as I indicated, I do
6 not have the authority to rule on constitutional issues in my
7 capacity as Administrative Law Judge and could not make a finding
8 along the lines that the Respondent would want me to make or
9 provide the remedy he requests because I simply do not have the
10 authority to do that. In this case I have ruled in favor of the
11 Administrator based on the issues of credibility on the first
12 threshold issue in this case. So I address the sanction in this
13 matter.
14 As to the appropriate sanction in this case, by statute,
15 deference is to be shown to the choice of sanction chosen by the
16 Administrator in the absence of any showing that deference is to
17 an interpretation which is arbitrary or capricious or not in
18 accordance with the law. I do not find that there has been such a
19 showing in this case. I therefore find that the sanction sought
20 by the Administrator is appropriate and warranted in the public
21 interest in air commerce and air safety. Therefore, I find that
22 the emergency order, the complaint herein, must be and shall be
23 affirmed as issued.
24
25

1 ORDER

2 IT IS ORDERED that the Emergency Order of Revocation,
3 the complaint herein, be, and is hereby, affirmed as issued.
4 The Respondent's airline transport pilot certificate
5 number 2752457, flight instructor certificate number 2752457, and
6 his private pilot certificate number 2636081, Respondent's first-
7 class airman medical certificate, as well as any other airman or
8 airman medical certificate he may hold, are revoked.
9 Furthermore, the order requires that no application for
10 a new airman or airman medical certificate shall be accepted from
11 the Respondent nor shall any certificate be issued to the
12 Respondent for a period of one year from the date of the service
13 of the Emergency Order of Revocation. That is how the
14 Administrator order reads and I affirm that order.
15 Entered this 7th day of July 2011 in Atlanta, Georgia.
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17 _____
18 ALFONSO J. MONTAÑO
19 Administrative Law Judge
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1 APPEAL

2 ADMINISTRATIVE LAW JUDGE MONTAÑO: In all of these
3 cases, and I find the beauty of the American judicial system is,
4 you have a right to an appeal. There is a right to appeal in this
5 case and I will provide the information to your counsel, and to
6 both counsel as to how they proceed with an appeal. The
7 Administrator may appeal as well.

8 Any party to these proceedings may appeal this Oral
9 Initial Decision by filing a written notice of appeal within 10
10 days after the date on which it was rendered. An original and
11 three copies of the notice of appeal must be filed with the
12 National Transportation Safety Board, Office of Administrative Law
13 Judges, Room 4704, 490 L'Enfant Plaza East, S.W. And I will
14 provide a copy of this to counsel and it will further identify the
15 issues -- how my decision can be appealed.

16 As I said, the appeal would be to the full Board. The
17 Board may agree with my decision or the Board may reverse my
18 decision. The Board may remand the decision for further hearing.
19 In any event, whatever the Board decides to do with this decision,
20 this is the decision I had to make based on the evidence before
21 me.

22 These decisions are not easy to make. They're not
23 decisions that I enjoy making as far as credibility of witnesses,
24 but they're decisions that I have been appointed as Administrative
25 Law Judge to make. And those are the decisions that I had to make

1 based on the evidence before me. Had the evidence been otherwise,
2 I would have ruled otherwise, but this is the decision I had to
3 make based on the evidence before me.
4 With that, I want to thank Mr. Zumarraga, counsel,
5 Mr. Lown, and also counsel for the Administrator for their
6 cooperation and the respect they've shown to this forum. But
7 before I go off the record, are there any questions about the
8 ruling or anything I should be concerned about with the ruling as
9 far as dates? Let me ask the Administrator as --
10 MR. BROWN: No, Your Honor.
11 ADMINISTRATIVE LAW JUDGE MONTAÑO: All right. Mr. Lown?
12 All right. Then what I will do is when I go off the
13 record I will hand this appeal sheet to the court reporter and he
14 will give it to Mr. Lown.
15 Thank you all very much. And I will go off the record
16 at this point. I hope all will have a safe trip home.
17 MR. BROWN: Thank you, Your Honor.
18 (Whereupon, at 10:15 a.m., the hearing in the above-
19 entitled matter was adjourned.)
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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Patricio E. Zumarraga

DOCKET NUMBER: SE-19043

PLACE: Atlanta, Georgia

DATE: July 7, 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.

_____

Dan Hawkins
Official Reporter