

SERVED: May 2, 2012

NTSB Order No. EA-5627

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 1st day of May, 2012

_____)	
MICHAEL P. HUERTA,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19100
v.)	
)	
VYATCHESLAV MASHADOV,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued September 20, 2011.¹ By that decision, the law judge determined

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

respondent violated 14 C.F.R. §§ 67.403(a)(1)² and 61.15(e).³ The law judge ordered revocation of respondent's commercial pilot certificate, second-class airman medical certificate and any other certificates respondent holds. We grant respondent's appeal concerning the section 67.403(a)(1) charge.⁴

A. Facts

Respondent first applied for a Federal Aviation Administration (FAA) medical certificate in 2002, and applied at three-year intervals thereafter. On January 4, 2008, respondent was convicted of driving while impaired (DWI) in Kings County Court of New York. As a result of the conviction, the New York Department of Motor Vehicles suspended respondent's driver's license for 90 days. Respondent did not report the conviction to the FAA within 60 days, as section 61.15(e) requires. On December 17, 2010, respondent applied for a second-class medical certificate. Among several other questions, the medical certificate application asks the following at question 18.v:

HAVE YOU EVER IN YOUR LIFE ... HAD ANY OF THE FOLLOWING? ...
Convictions and/or Administrative Action History, History of (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) history of any arrest(s) and/or conviction(s) and/or administrative action(s) involving an offense(s) which resulted in denial, suspension, cancellation, or revocation of driving privileges, or which resulted in attendance at an educational or rehabilitation program.

Respondent answered "no" in response to this question.

² The pertinent portion of section 67.403(a)(1) prohibits a person from making fraudulent or intentionally false statements on an application for a medical certificate.

³ The pertinent portion of § 61.15(e) states, "[e]ach person holding a certificate issued under this part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division ... not later than 60 days after the motor vehicle action."

⁴ Respondent does not contest the law judge's finding that he violated § 61.15(e).

B. *Procedural Background*

The Administrator issued an emergency revocation order,⁵ which became the complaint in this case, on May 18, 2011, alleging respondent violated 14 C.F.R. § 67.403(a)(1) by answering “no” to question 18.v. on his 2010 medical application and violated § 61.15(e) by failing to report his DWI conviction to the FAA within the prescribed 60-day timeframe. The case proceeded to hearing on September 20, 2011. At the hearing, respondent admitted he did not report the DWI conviction in accordance with section 61.15(e). Tr. at 82-83. Respondent also stated he automatically responded “no” to each question on the medical certificate application. Tr. at 86.

C. *Law Judge Oral Initial Decision*

At the conclusion of the hearing, the law judge found respondent intentionally falsified the application at issue. The law judge stated respondent had incorrectly completed the application, and lacked the care, judgment, and responsibility he should have exercised in completing the application. The law judge found the Administrator had proven the three necessary prongs of the intentional falsification standard. The law judge also concluded respondent did not report the DWI conviction to the FAA in accordance with section 61.15(e). Oral Initial Decision at 124.

D. *Issues on Appeal*

Respondent appeals the law judge’s decision, on three bases. First, respondent argues the Administrator failed to seek admission of respondent’s medical file, which contains the alleged falsified application, into evidence at the hearing. Therefore, respondent argues the Administrator failed to fulfill the burden of presenting a *prima facie* case. Respondent further

⁵ Respondent waived the expedited procedures normally applicable to emergency cases.

contends the law judge found him credible, and the Administrator failed to establish respondent had the intent to answer question 18.v falsely. Finally, respondent argues the Administrator's medical witness indicated question 18.v was not material to the Administrator's decision concerning whether to issue a medical certificate.

2. Decision

We find respondent's medical file, including the medical application at issue, was not admitted into evidence at the hearing. Since the record before us fails to contain the very document the Administrator alleges respondent falsified, we will not affirm the Administrator's order. While we consider the Federal Rules of Evidence—including the “best evidence rule”—to be only instructive in these proceedings,⁶ the fact that the Administrator would bring an intentional falsification case attempting to revoke all of respondent's certificates, yet not move to admit the very document the Administrator accuses respondent of falsifying, strains credulity. Due process demands we not overlook this error, despite the fact the record contains certain hearsay references to the document as well as some admissions by respondent. When the case turns on an alleged falsified document, it is imperative the Administrator produce that document

⁶ See 49 C.F.R. § 821.38; see also, e.g., Administrator v. Creighton, NTSB Order No. EA-5561 at 22 (2010); Administrator v. Wallace and Global Air Charter of Kentucky, NTSB Order No. EA-5461 at 15 (2009) (citing Administrator v. Ferguson, NTSB Order No. EA-5360 at 10-11 (2008) and Pet. of Neihans, NTSB Order No. EA-5166 at 9 n.9 (2005)). We historically have recognized our practice of refraining from strict adherence to the Federal Rules of Evidence to be beneficial to the parties:

Questions regarding the admissibility of evidence are considered in the light of what is necessary to achieve a fair and just result for the parties, without slavish adherence to the intricate and often cumbersome rules of jury trial evidence. This helps provide the speed and flexibility which set administrative hearings apart from regular judicial proceedings.

Administrator v. Donart, 2 NTSB 1, 2-3 (1973) (rejecting strict application of the best evidence rule).

to meet his burden of proof or provide good cause for why the Administrator could not produce the document.

Given our resolution of this appeal based upon respondent's evidentiary argument, we need not reach the other issues respondent raises. We find the Administrator met his burden of proof as to the failure to report the DWI under section 61.15(e). Since the parties stipulate a 60-day suspension of respondent's certificates is the appropriate sanction for this violation, we affirm that penalty.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;
2. The law judge's decision is reversed, in part; and
3. Only so much of the sanction that includes the Administrator's 60-day suspension of respondent's airman certificates is affirmed.⁷

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

⁷ The record indicates respondent surrendered his certificate on May 18, 2011, in response to the Administrator's emergency order.

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. *
*
VYATCHESLAV MASHADOV, *
*
Respondent. *
* * * * *

Docket No.: SE-19100
JUDGE FOWLER

General Services Administration
26 Federal Plaza
Courtroom 238
New York, New York 10278

Tuesday,
September 20, 2011

The above-entitled matter came on for hearing, pursuant
to Notice, at 10:00 a.m.

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

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE FOWLER: This has been a proceeding before the National Transportation Safety Board held pursuant to the provisions of the Federal Aviation Act of 1959, as that Act was subsequently amended, on the appeal of Vyatcheslav Mashadov issued on an appeal of an Emergency Order of Revocation, dated May 18, 2011, which seeks to revoke Respondent Mashadov's commercial pilot certificate, second-class airman medical certificate and any other medical certificates or airman certificates held by Respondent Mashadov.

I have reviewed the testimony and the evidence as well as the documentary exhibits adduced during the course of this proceeding. We have had on behalf of the Administrator two witnesses: Mrs. Janice Harris, a special agent from Federal

1 Aviation Administration; and Dr. Steven Silberman, who is in
2 charge of medical certification of the FAA in Oklahoma City.

3 The Administrator's order of revocation is duly
4 promulgated pursuant to the National Transportation Safety Board's
5 Rules of Practice in Air Safety Proceedings. The Office of
6 Aeronautical Center Counsel issued this Emergency Order of
7 Revocation on the aforesaid date that I have said just a moment
8 ago.

9 DISCUSSION

10 As I mentioned, the Administrator had two witnesses plus
11 13 documentary exhibits, all of which were duly admitted into the
12 hearing record. The Respondent's case consisted of testimony of
13 the Respondent himself. Let me say that I have reviewed all of
14 the testimony, coupled with the documentary exhibits as they were
15 proffered during the course of this proceeding, and it is my
16 determination and conclusion that the Administrator has
17 successfully proven by a reasonable preponderance of the
18 substantial, reliable and probative evidence all of the
19 allegations set forth in his Emergency Order of Revocation.

20 This is a case involving an alleged false statement by
21 Respondent Mashadov. This is the paramount, central and
22 overriding question to be decided in this proceeding. But to me
23 there's a larger question here, I think, that bears on the
24 ultimate determination that I'm about to make. As a commercially
25 ticket airman and pilot, Respondent Mashadov is charged always to

1 exercise a highest degree of care, judgment and responsibility.
2 We certainly had a lack of that, it is my determination, in this
3 proceeding.

4 It is true that Respondent Mashadov is of Russian
5 origin. But he apparently, to all see, hear and listen to him as
6 we have here today during the course of this proceeding, and as
7 counsel for the Administrator has stated, he can read and write
8 the English language and seems to be fairly well versed in the
9 English language. So this apparently is no barrier his being --
10 or his having, let's put it that way, a lack of understanding as
11 to the rules, regulations, et cetera, of the Federal Aviation
12 Administration.

13 The Respondent Mashadov is no neophyte here. He has
14 applied for and received on four separate occasions medical
15 certificates that he filled out, showing that this is not a new
16 procedure to him on December 17, 2010, when he applied for a
17 second-class medical certificate. The question is, as I mentioned
18 earlier, did he use the proper care and judgment and
19 responsibility?

20 But even before we get to that, he has demonstrated that
21 as of his arrest and conviction on January 4, 2008, for a DWI
22 arrest and conviction, which he did not report within the 60-day
23 required time limit under Section 61.15(e), which is required that
24 all vehicular arrests or convictions or anything involving drugs
25 and alcohol must be registered with the Aviation Security Division

1 of the Federal Aviation Administration within 60 days following an
2 occurrence. Respondent Mashadov didn't do this and, as set forth
3 in Administrator's Exhibit A-7, he stated in a letter to
4 Mrs. Janice Harris he forgot. It happened in 2008. December 17,
5 2010, when he applied for a second-class medical certificate he
6 stated he didn't really read the questions. He rushed through it.
7 He answered them automatically.

8 In recalling his testimony from the witness stand, I
9 would deem him to be straightforward, frank and candid. He said
10 he did not pay attention and it was an automatic response, a
11 reflex, when he answered all the questions under section 18v on
12 that medical certification form no, no, no, no, no, no, no,
13 including the one that we're here for today, whether he had ever
14 been arrested or convicted, so forth. Here again, as I mentioned
15 earlier, it was a lack of care, judgment and responsibility.

16 Now, I've written a number of cases. The Board has
17 decided, sometimes by the aid and assistance of the federal
18 circuit courts, involving false statements that in fact a
19 respondent must know what he's doing. He must be cognizant of
20 what the questions are asking so he can put down the correct and
21 proper answer. That is not present in this case. We know that
22 from the *Hart* procedure, which is our main modus operandi in this
23 case, there must be a false representation in reference to a
24 material fact upon which the FAA depends upon and the FAA must
25 prove that a pilot, here the Respondent, had knowledge of the

1 falsity when he answered all these questions on 18v. Respondent
2 Mashadov certainly knew that he had been arrested and convicted on
3 January 4, 2008, and yet he answered in the negative when he made
4 this application on December 17, 2010, which shows an absolute
5 lack of care, judgment and responsibility.

6 The Board has held in cases of this type the
7 Administrator may utilize circumstantial evidence to prove
8 allegations as we have here. There's no question Respondent's
9 answer to the apropos question 18v was false. It certainly was
10 material, and certainly the evidence proves overwhelmingly that
11 the FAA relied upon it.

12 Let me just say that I find very credible -- I give
13 great credibility to the Administrator's two witnesses.
14 Mrs. Janice Harris, who is a special agent in Oklahoma City for
15 security purposes, she received knowledge of Respondent Mashadov's
16 arrest and conviction of 2008 and wrote him, accordingly contacted
17 him and he responded with a letter I think is exemplified in
18 Administrator's A-7. Mrs. Harris's contact is set forth in
19 Administrator's A-6, where she determined there had been an
20 alcohol arrest and conviction. It was not reported and she went
21 into action and this ultimately resulted in the Emergency Order of
22 Revocation, which is why we're all here today in this proceeding.

23 So, while the evidence, while it's thorough as well as
24 circumstantial, it is my determination that the care, judgment and
25 responsibility lacking on the part of Respondent Mashadov here in

1 not reporting his arrest and conviction, and certainly answering
2 no on his application of December 17, 2010, which is a second-
3 class medical certification, that he does lack the qualities to
4 acquire of a pilot, and I'm going to -- I know you get the drift
5 of my determination by this time. I'm going to make my findings
6 of fact and conclusions of law accordingly.

7 We know that the 12 numbered paragraphs constituting the
8 Administrator's Emergency Order of Revocation, the first six of
9 those paragraphs: Paragraph 1, 2, 3, 4, 5 and 6, all have been
10 admitted and agreed to and testified to by the Respondent as well
11 as the Administrator's witnesses.

12 Paragraph 7, states: On the above-mentioned
13 application, in response to item 18v, Medical History, Have you
14 ever in your life had any of the following: Arrest, conviction,
15 and administrative action, et cetera. And we know the answer to
16 that was no. It was false. Respondent was possessed of the
17 knowledge that it was false at that time. He may have been
18 certainly not -- he certainly was not as conscientious as he
19 should have been of a pilot exercising at all times due care and
20 responsibility. He did not apply himself well to that answer and
21 he answered no. At this time, today, I'm sure he would answer yes
22 pertaining to the proper answer to that question required by
23 question 18v.

24 8, the paragraph is, "Incident" -- well, I've covered
25 paragraphs 2 through 6. Those are all admitted by the Respondent

1 pertaining to the arrest and conviction.

2 And the Administrator certainly would say that by a
3 preponderance of the reliable, probative evidence he's proven that
4 this information that he sought to extract from the Respondent on
5 the medical application of December 17, 2010, was material. The
6 FAA relied upon it and the fact that this answer being false, that
7 certainly at the time Respondent should have known it was false
8 and he possibly would have known, as his original answer to that
9 question was possibly because he had rushed through, answered the
10 question 18v automatically, not taking the conscientious effort,
11 care, and diligence that he should have exercised at that time.

12 Paragraph 12 of the order reads that Respondent
13 certified that the above-described entries were complete and true
14 knowing that said entries of certifications were false, where it
15 may be a false question here. I believe the Administrator has
16 successfully proven by a fair and reasonable preponderance and put
17 the burden by his prima facie case upon the Respondent. The
18 Respondent did not reply to question 18v because of lack of care,
19 judgment and responsibility.

20 I might add that the witnesses of the Administrator,
21 Mrs. Janice Harris, special agent for the FAA, her testimony was
22 very credible and sufficient in all respects to bring about the --
23 of this case. The second witness, Dr. Warren Steven Silberman, in
24 charge of the FAA's medical certification in Oklahoma City, I
25 found him to be extremely credible, as I did Mrs. Harris.

1 Dr. Silberman gave us a great wealth of information pertaining to
2 cases of this type, and particularly what the FAA is doing and
3 attempting to do to rectify any misunderstanding or confusion in
4 airmen's minds when they approach question 18v, which has been
5 quite a, to use street parlance, hot item in the FAA annals in the
6 last two to three years. Dr. Silberman, as I said, was quite
7 persuasive and he has reviewed, based on his testimony, thousands
8 of applications, many of which involving alleged false statements.

9 If I may digress a moment, it's interesting to know how
10 18v is used by the FAA, other than the medical aspects, also to
11 determine, according to Dr. Silberman, whether a person has a
12 problem with alcohol or drugs, which is a very important
13 overriding consideration in today's times.

14 So then, ladies and gentlemen, based on my total review
15 of all the witnesses' testimony, coupled with the documentary
16 exhibits -- if there's anything I didn't mention thus far it's
17 only because they're either corroborative of the Administrator's
18 case and tend to further substantiate what I've already set forth
19 and discussed. So I will proceed to make the following specific
20 findings of fact and conclusions of law.

21 FINDINGS OF FACT AND CONCLUSIONS OF LAW

22 As I mentioned earlier, the first six paragraphs of the
23 Administrator's Emergency Order of Revocation, dated May 18, 2011,
24 have been admitted by the Respondent, Mr. Mashadov, so we don't
25 have to discuss those.

1 Paragraph 7, in response to the question of the
2 Respondent has he ever had an arrest, conviction or administrative
3 action, the Administrator -- the credibility of their witnesses,
4 both Dr. Silberman and Mrs. Harris, in my estimation who by a fair
5 and reasonable preponderance of the probative evidence, that the
6 Administrator has proven that this statement when it was made,
7 when his answer was made, the answer of no, was a false statement,
8 that it was a material statement and relied upon by the FAA. And
9 the lack of due care, judgment and responsibility, the automatic
10 reading and dispensing of this question at the time by the
11 Respondent is why this false statement that he made was made.

12 And the Administrator's case is quite credible. And I
13 think that Dr. Silberman and Mrs. Harris were very, very in depth
14 and helpful in their testimony, which confirmed what the
15 Administrator has alleged here, that the entries entered by the
16 Respondent, his entry and certifications were false. And
17 therefore, thereby, the Respondent has admitted his failure to
18 report the arrest and conviction of January 4, 2008. And it is my
19 finding that with due care, he should have known that his answer
20 was false. It is my finding that it was false, once again,
21 material, in other words, relied upon by the FAA and with intent
22 and knowledge of the falsity by the Respondent. And I've found
23 the Administrator's alleged that the Respondent lacks the degree
24 and care and judgment and responsibility required of the holder of
25 a commercial pilot certificate, and I so find based on the

1 APPEAL

2 ADMINISTRATIVE LAW JUDGE FOWLER: Now, on the issue of
3 appeal. Either party to this proceeding may appeal the Judge's
4 Oral Initial Decision. The appellant shall file his notice of
5 appeal -- the notice of appeal, should file it in 10 days after
6 the date of the decision, which is August -- I'm sorry, September
7 20, 2011. An original and three copies of the notice of appeal
8 must be filed with the National Transportation Safety Board,
9 Office of Administrative Law Judges, 490 L'Enfant Plaza East,
10 S.W., Washington, D.C. 20594.

11 In order for the party making the appeal, in order for
12 it to be perfected, he must file a brief in support of the appeal
13 within 50 days after the date of the initial decision was
14 rendered. The Board may dismiss appeals on its motion or the
15 motion of another party when the party who has filed a notice of
16 appeal fails to perfect the appeal by filing a timely appeal
17 brief.

18 Gentleman, those of you who are interested in appealing,
19 I have a copy of our appeal section and I will hand it to you if
20 you deem it to be necessary and so forth.

21 Off the record.

22 (Off the record.)

23 (On the record.)

24 ADMINISTRATIVE LAW JUDGE FOWLER: Let the record
25 indicate that the Respondent, counsel for the Respondent have not

1 -- cannot state with a reasonable degree of certainty as to
2 whether or not a notice of appeal will be filed with the Judge's
3 Oral Initial Decision issued this date of September 27th -- I'm
4 sorry, September 20th, 2011.

5 If there's nothing further at this time, we'll have the
6 hearing closed, but before we go off the record, I would like to
7 thank both counsel for their extremely intelligent and diligent
8 and well as erudite efforts on behalf of their respective clients.
9 Thank you all very much. We stand adjourned.

10 MR. STANDELL: Thank you, Your Honor.

11 (Whereupon, at 3:25 p.m., the hearing in the above-
12 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: Vyatcheslav Mashadov
DOCKET NUMBER: SE-19100
PLACE: New York, NY
DATE: September 20, 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.

Sussy Morehouse
Official Reporter