

SERVED: February 25, 2014

NTSB Order No. EA-5706

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 day 25th of February, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19394
v.)	
)	
SCOTT LOUIS HERMANCE,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued June 27, 2013.¹ By that decision, the law judge determined the Administrator proved respondent lacked the qualifications necessary to hold a first-class, second-class, or third-class medical certificate, based on the presence of cocaine metabolites in respondent's urine

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

when respondent underwent a random drug test pursuant to Department of Transportation regulations.² We deny respondent's appeal.

A. Facts

Respondent was employed as a pilot for Frontier Airlines, an air carrier authorized to conduct operations under 14 C.F.R. part 121. Respondent reported for work on July 25, 2012, while in Denver, Colorado, to perform safety sensitive functions as a flight crewmember, and submitted to a random split sample collection of his urine. Respondent initialed both vials containing his urine. Drug tests performed by Quest Diagnostics, and later by LabCorp of America, indicated respondent's urine tested positive for the cocaine metabolite.

At a hearing on June 27, 2013, respondent provided the testimony of several witnesses from Frontier Airlines, all of whom knew respondent and testified he had an exemplary reputation at the airline. Respondent's wife of 10 years also testified that she had never observed respondent use any drugs and was shocked at the positive test result. Lastly, respondent testified in his own defense, and asserted he had no idea how his urine contained cocaine metabolite, because he had never used it. Respondent met with his regular doctor several times after receiving the news of his positive test result, and inquired how his urine could have returned a positive test result. Respondent testified neither he nor his doctor could speculate how his urine contained evidence of cocaine metabolite.

² As the basis for the Administrator's revocation order, the document listed 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), which 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. In addition, the order included citations to DOT drug testing regulations at 49 C.F.R. § 40.85 and FAA drug testing regulations at 14 C.F.R. § 120.7(m), which both name cocaine as a prohibited substance; and 14 C.F.R. parts 40 and 120, which specify which employees are subject to random drug tests. In this regard, the order stated 14 C.F.R. § 120.105 requires employees who perform safety sensitive functions to undergo random drug testing.

The Administrator's attorney relied on the records of respondent's drug test results and on the Board's jurisprudence in arguing the law judge should affirm the Administrator's emergency revocation order but offered no additional evidence in support of the order.

B. *Procedural Background*

The Administrator issued the emergency revocation order on November 26, 2012.³ The order alleged the facts discussed *supra*. The order further stated cocaine is a prohibited substance, and the positive drug test result rendered respondent unqualified to hold his certificates, including his first-class medical certificate, airline transport pilot (ATP) certificate, and flight instructor certificate.

Following the order, which the Administrator filed as the complaint for this case, respondent appealed. The Administrator filed a motion for summary judgment, based on respondent's admission that his urine tested positive for cocaine metabolite. The law judge granted the motion, but only to the extent the Administrator had established a *prima facie* case, based on respondent's admissions. The law judge ordered a hearing, to allow respondent the opportunity to present and argue any affirmative defenses he sought to assert.⁴

C. *Law Judge's Initial Decision*

Following the conclusion of the June 27, 2013 hearing, the law judge issued an oral initial decision, in which he stated Board jurisprudence, as affirmed by the United States Court of Appeals for the Sixth Circuit, established the defense of unknown ingestion was not a

³ Respondent subsequently waived the applicability of emergency procedures normally relevant to immediately effective orders.

⁴ The law judge instructed the parties respondent would have the burden to prove his affirmative defenses. Tr. 6.

“reasonable medical explanation” under DOT drug testing regulations.⁵ The law judge determined respondent’s witnesses, who testified concerning respondent’s character and reputation, and the respondent himself, were credible. However, the law judge stated none of the witnesses offered an explanation or reasonable theory concerning how respondent’s tested urine specimen contained cocaine metabolites. As a result, the law judge determined respondent failed to fulfill his burden of proving his affirmative defense. The law judge emphasized respondent was the holder of an ATP certificate, and therefore expected to exercise the highest degree of care, judgment, and responsibility. Based on these determinations, the law judge affirmed the Administrator’s order.

D. Issues on Appeal

In his appeal of the initial decision, respondent argues the law judge erred in holding the Gabbard case prohibits the law judge from finding respondent’s affirmative defense was sufficient. In this regard, respondent argues the law judge determined respondent’s testimony was credible; therefore, respondent’s defense of unknown ingestion should function to prove he is qualified to hold a certificate. Respondent further contends the law judge erred in finding 49 C.F.R. § 40.137 precluded a law judge from determining whether a legitimate medical explanation existed for a respondent’s positive drug test result. Finally, respondent asserts the law judge erred in citing the Pilot’s Bill of Rights⁶ and Martin v. Occupational Safety & Health Review Commission.⁷ Respondent contends Congress eliminated *all* deference to the

⁵ Initial Decision at 79 (citing Administrator v. Gabbard, NTSB Order No. EA-5293 (2007), *aff’d* Gabbard v. FAA, 532 F.3d 563 (6th Cir. 2008); Administrator v. Swaters, NTSB Order No. EA-5400 (2008); Administrator v. Kalberg, NTSB Order No. EA-5240 (2006)).

⁶ Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012).

⁷ 499 U.S. 144, 149 (1991).

Administrator's interpretation of the Federal Aviation Regulations (FAR) in the Pilot's Bill of Rights, and therefore, Martin is inapposite because, he argues, it stands for the fact that an agency that has the obligation to review appeals need not defer to the enforcement agency's interpretations. Based on these assertions, respondent urges us to reverse the law judge's decision.

2. *Decision*

In accordance with our well-established jurisprudence, we review this case *de novo*.⁸

A. *Respondent's Affirmative Defense of Unknown Ingestion*

Based on the parties' stipulations, the law judge determined the Administrator had established a *prima facie* case. The undisputed facts included the events of July 25, 2012, as described in the Administrator's complaint: respondent properly submitted to a random drug test in Denver, and both samples of respondent's urine for the split sample test returned a positive result for cocaine metabolites. Respondent's admission of these facts indicated the Administrator fulfilled the *prima facie* burden of proving respondent was not qualified to hold a medical certificate.

By denying the Administrator's motion for summary judgment to accept evidence concerning any affirmative defenses respondent sought to offer, the burden shifted to respondent to prove such an affirmative defense by a preponderance of evidence.⁹ Overall, our analysis of an affirmative defense inquiry consists of two steps: a determination of whether the defense is

⁸ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991).

⁹ Administrator v. Tsegaye, NTSB Order No. EA-4205 at 5-6 (1994) (stating once the Administrator establishes a *prima facie* case, the burden shifts to the respondent, who has the opportunity to prove an affirmative defense excuses his conduct).

legally justifiable to excuse the respondent's conduct, if proved, and a determination of whether the respondent factually proved the defense by a preponderance of the evidence. An affirmative defense, if proven, can excuse a respondent's admitted violation. We have held in asserting such a defense, a respondent must fulfill the burden of proving the factual basis for the affirmative defense, as well as the legal justification.¹⁰

Respondents may articulate affirmative defenses they believe legally justify their violations; however, the Board may reject such defenses upon determining the defense does not serve to justify the violation. For example, in Administrator v. Kooistra,¹¹ the respondent advanced the defense of fatigue, arguing his considerable fatigue when operating a Polar Air Cargo flight in a Boeing 747-400F departing from Los Angeles, California, and arriving in Seoul, South Korea, excused his significant operational errors in landing the aircraft. We determined, in Kooistra, fatigue was not a legally justified affirmative defense.

If the Board accepts the legal justification for the affirmative defense, the Board then examines whether the respondent has fulfilled the burden of factually proving the affirmative defense. For example, respondents may contend their equipment failed during a flight and this equipment failure should excuse a violation. Unless the respondent, in articulating such a defense, can prove such an equipment failure by a preponderance of the evidence, we will reject the defense for the admitted violation.¹²

¹⁰ Administrator v. Donohue, et al., NTSB Order No. EA-5314 at 9 (2007).

¹¹ NTSB Order No. EA-5588 at 9 (2011).

¹² Administrator v. Schwarzman, NTSB Order No. EA-5468 at 11-12 (2009); Administrator v. Winton, NTSB Order No. EA-5415 (2008). Similarly, we have rejected the application of the defense a respondent reasonably relied upon certificated mechanics when the respondent fails to prove, by a preponderance of the evidence, such reliance was reasonable.

In the case *sub judice*, we find the law judge correctly applied Gabbard v. FAA. In Gabbard, the respondent asserted his inadvertent consumption of cocaine via a cocaine-laced cigarette amounted to a legitimate medical explanation under DOT regulations. The Court of Appeals for the Sixth Circuit rejected this argument, and specifically held such unintended ingestion did not amount to a legitimate medical explanation. Specifically, the Court applied the DOT regulation that describes legitimate medical explanations: “[w]hile the regulations require medical review officers—physicians responsible for receiving and reviewing laboratory results generated by an employer’s drug-testing program—to consider ‘legitimate medical explanations’ for positive test results, see 49 C.F.R. § 40.137(b), they define ‘legitimate’ explanations restrictively.”¹³ The Court quoted 49 C.F.R. § 40.151(d), which specifically and categorically rejects the defense of unknown ingestion:

For example, an employee may tell [medical review officers (MROs)] that someone slipped amphetamines into her drink at a party [or] that she unknowingly ingested a marijuana brownie....MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, *such stories do not present a legitimate medical explanation*. Consequently, [MROs] must not declare a test as negative based on an explanation of this kind.¹⁴

Board jurisprudence is consistent with this rejection of unknown ingestion as a legitimate medical explanation for a positive drug test result. As the law judge noted, in both Administrator v. Kalberg¹⁵ and Administrator v. Swaters,¹⁶ the Board declined to consider the respondent’s inadvertent, unintended ingestion as an excuse for positive drug test results.

¹³ Gabbard v. FAA, 532 F.3d 563, 566 (6th Cir. 2008).

¹⁴ Id. (emphasis added by Court). Section 40.151 is titled, “What are MROs prohibited from doing as part of the verification process?”

¹⁵ NTSB Order No. EA-5240 (2006).

¹⁶ NTSB Order No. EA-5400 (2008).

Respondent seeks to distinguish his defense of unknown ingestion from Gabbard, Kalberg, and Swaters by asserting the law judge determined his testimony was credible. Respondent argues the case at issue is one of first impression, because no prior Board opinion has determined the validity of the affirmative defense of unknown ingestion in light of a favorable credibility determination by a law judge. We reject this argument for two reasons. First, the law judge did not credit respondent's testimony in its entirety concerning the argument respondent never ingested cocaine. Instead, the law judge only determined credible respondent's testimony that he met with his family physician in an attempt to discern how the cocaine metabolite got into his urine.¹⁷ Second, to prove a respondent lacks the qualifications necessary to hold a medical certificate as provided in 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), the Administrator need not prove respondent knowingly intended to consume a prohibited substance.

For the foregoing reasons, we find the facts of this case and respondent's arguments in support of his appeal are not distinguishable from Gabbard and other cases in which we have rejected affirmative defenses regarding unknown ingestion of a prohibited substance. Nevertheless, we believe the law judge proceeded appropriately in ordering a hearing concerning respondent's affirmative defenses, because the hearing allowed respondent the full opportunity to offer evidence to support a legitimate medical explanation, if one existed.

B. Application of 49 C.F.R. § 40.137

Respondent contends the law judge also erred in finding 49 C.F.R. § 40.137 precluded him from determining respondent's alleged unknown ingestion of cocaine amounted to a

¹⁷ Initial Decision at 80 (stating, "the testimony of [r]espondent himself I find was credible, that he made efforts to find a cause, but none of his witnesses, including the doctor and himself, were ever able to offer any type of explanation, even unintentional ingestion.").

legitimate medical explanation. Section 40.137 is titled, “[o]n what basis does the MRO verify test results involving marijuana, cocaine, amphetamines, or PCP?” Concerning this regulation, the law judge stated:

The [r]egulation that gives guidance in this proceeding is also taken and relied upon by the Board found in 49 CFR [§] 40.137, which states, in Subparagraph (c), that the employee, in this case [r]espondent, has the burden of proving that a legitimate medical explanation exists and he must present that to the MRO at the time of his interview.¹⁸

Later in his initial decision, the law judge again mentioned § 40.137 in describing the Kalberg opinion and order.¹⁹ The law judge correctly recognized the Board’s opinion in Kalberg cited § 40.137 in rejecting the respondent’s defense of “inadvertent or passive ingestion.”²⁰

Respondent contends the law judge’s citation to and description of § 40.137 functions to preclude law judges from considering potentially legitimate medical explanations. We disagree. The law judge did not err in his summary of §§ 40.137 and 40.151, but correctly described Kalberg and the Sixth Circuit’s opinion in Gabbard, both of which stated §§ 40.137 and 40.151 require the MRO to reject the defense of unknown ingestion. The law judge allowed respondent to present evidence, in the form of several witnesses who testified concerning respondent’s character and reputation, at the hearing. However, the law judge determined such evidence did not suffice to establish respondent never ingested cocaine or proffered a legitimate medical explanation for the presence of the metabolite in his urine.

The plain language of § 40.137 establishes the respondent maintains the burden of proving a legitimate medical explanation. Indeed, the relevant part of the section states, “[t]he

¹⁸ Initial Decision at 71.

¹⁹ Supra note 15.

²⁰ Initial Decision at 78.

employee has the burden of proof that a legitimate medical explanation exists. The employee must present information meeting this burden at the time of the verification interview.”²¹ With regard to legitimate medical explanations, 49 C.F.R. § 40.151 does not provide a listing of potentially legitimate medical explanations, but instead sets forth specific defenses MROs must reject during a post-test interview. This list of unacceptable medical explanations in § 40.151 specifically includes unknown ingestion, as the Gabbard court recognized.²² Given the plain language of §§ 40.137 and 40.151, and the obvious applicability of those sections to the facts of this case, we do not believe the law judge erred in citing those regulations.

Respondent also argues the sections do not provide sufficient discretion to MROs, who work on behalf of the Administrator, or NTSB administrative law judges in determining whether a respondent has presented a legitimate medical explanation. To the extent respondent contends the regulations are discriminating, arbitrary and capricious, or otherwise unenforceable, this Board is not the appropriate venue to entertain such an appeal.²³

C. Deference to the Administrator’s Interpretations of the FAR

Lastly, respondent contends the law judge erred in citing the Pilot’s Bill of Rights²⁴ and Martin v. Occupational Safety & Health Review Commission.²⁵ Respondent argues the Pilot’s Bill of Rights eliminated all deference to the Administrator’s interpretation of the FAR, and

²¹ 49 C.F.R. § 40.137(c).

²² See supra notes 13 and 14, and surrounding text.

²³ Administrator v. Lybyer, NTSB Order No. EA-4822 at 4 (2000) (citing Administrator v. Kralej, NTSB Order No. EA-4581 at 2 (1997) and Administrator v. Lloyd, 1 NTSB 1826, 1828 (1972)); see also Administrator v. Jablon, NTSB Order No. EA-5460 at 12 n.5 (2009) (citing 5 U.S.C. § 702).

²⁴ Supra note 6.

²⁵ Supra note 7.

therefore, Martin is inapplicable. In the case *sub judice*, the Administrator did not offer any interpretations, because such interpretations were unnecessary; the plain text of 49 C.F.R. § 40.137 and 40.151, as they apply to this case, did not need interpretation. In addition, the law judge did not make statements concerning the Pilot's Bill of Rights or Martin in his oral initial decision, but instead engaged in some colloquies with the attorneys at the hearing concerning his reading of the Pilot's Bill of Rights and the applicability of Martin. These comments were not part of the law judge's decision, and need not be analyzed on appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's order is affirmed.

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

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

* * * * *

In the matter of: *

MICHAEL P. HUERTA, *
ADMINISTRATOR, *
FEDERAL AVIATION ADMINISTRATION, *

Complainant, *

v. *

Docket No.: SE-19394
JUDGE GERAGHTY

SCOTT LOUIS HERMANCE, *

Respondent. *

* * * * *

U.S. Customs House
721 19th Street, Courtroom 423
Denver, Colorado

Thursday,
June 27, 2013

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

BEFORE: PATRICK G. GERAGHTY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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Federal Aviation Administration
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the Appeal of Scott L. Hermance from an Emergency Order of Revocation which seeks to revoke his Airman Medical Certificate and any and all Airman Certificates held by him. The emergency provisions of the Board's Rules are waived and, therefore, although this proceeds on the basis of the Emergency Order of Revocation by the

DISCUSSION

1
2 Complainant seeks the revocation of Respondent's Airman
3 Medical Certificate and Airmen Certificates based upon the finding
4 by the Complaint that the circumstances establish that the
5 Respondent no longer meets the medical standards as provided by
6 Section 67.107(b)(2) of the Federal Aviation Regulations. I
7 simply note that that provision I have cited carries over for all
8 subsequent classes of airmen medical certification, that is,
9 Second and Third Class. The 107 applies to issuance of First
10 Class Airmen Medical Certificates. That Regulation specifies that
11 an airmen may not have and must have no substance abuse within the
12 preceding 2 years, which is then defined in Subparagraph (2) as a
13 verified positive drug test result.

14 It is also further alleged that by reason of the
15 circumstances stipulated to in the Complaint, that such
16 demonstrates that the Respondent has demonstrated a lack of
17 qualifications through a failure to exhibit the required degree of
18 care, judgment and responsibility that one would expect of the
19 holder of an Airline Transport Pilot Certificate and one engaged
20 in common carriage. As it was conceded, that the Complainant had
21 established a prima facie case, as the Board has repeatedly held
22 that where the Administrator has made a prima facie showing, the
23 Respondent has the burden of proving his affirmative defenses by a
24 preponderance of the evidence. And also that the Complainant has
25 no duty to rebut any of the affirmative defenses that the

1 Respondent may have raised.

2 I simply cite to Administrator vs. Tsegaye, Order EA-
3 4205, a 1994 case. The Regulation that gives guidance in this
4 proceeding is also taken and relied upon by the Board found in 49
5 CFR Section 40.137, which states, in Subparagraph (c), that the
6 employee, in this case the Respondent, has the burden of proving
7 that a legitimate medical explanation exists and he must present
8 that to the MRO at the time of his interview.

9 It goes on further in that specific Regulation to
10 discuss legitimate medical explanations, particularly with foreign
11 medications that may have been prescribed. Also of impact is the
12 Regulation in 40.151 in Subparagraph (d), which cautions the MRO
13 that it is not his function to consider explanations of confirmed
14 positive test results that would not, even if true, constitute a
15 legitimate medical explanation. And it goes on to discuss several
16 types, such as a Mickey Finn, to use that terminology, or unknown
17 ingestion of a marijuana brownie and slipping somebody a laced
18 cigarette, those sort of explanations are not considered as
19 legitimate medical explanations.

20 So with that as background, I turn to the Respondent's
21 presentation in this proceeding. Respondent called telephonically
22 Dr. Alan Ruff. Dr. Ruff testified that he had seen the Respondent
23 as a patient and has known him since about May of 2008. However,
24 although indicating that the Respondent had consulted with
25 Dr. Ruff subsequent to the Respondent's positive drug test,

1 inquiring from the Doctor as to whether any of the medications or
2 other things that the Respondent had been exposed to could cause a
3 positive drug test result for cocaine, Dr. Ruff in his testimony
4 stated, although the Respondent was and did appear concerned and
5 was trying to find out a cause, that he, Dr. Ruff, could not come
6 to any conclusion as to a cause, meaning a cause for the positive
7 drug test.

8 Ms. Jakalyn Peter is employed by Frontier Airlines and
9 she is in Human Resources apparently. She was being asked in her
10 testimony as to personnel records and has known the Respondent as
11 an employee with Frontier. Ms. Peter indicates that she has
12 knowledge in areas of operations of crews, resource and labor
13 issues within the airlines and knows the Respondent as a captain
14 at Frontier Airlines.

15 She testified that, to her knowledge, Respondent had an
16 excellent reputation with his peers, with check pilots, and that
17 she personally, upon her knowledge, had no information about any
18 use by the Respondent of illegal drugs and had no knowledge, based
19 on her observations of the Respondent, as to possible illegal drug
20 use and that she, in her words, was surprised when she found out
21 that the Respondent had tested positive for the presence of
22 illegal drugs. On cross-examination she conceded that she had no
23 idea as to what would have caused a positive drug test result and
24 that since she was not with him 24 hours day, she had no idea what
25 the Respondent did in his off hours.

1 Captain Jason Ingalls was called on behalf of the
2 Respondent and indicated that, to his knowledge, having known him,
3 that the Respondent, in the words of Captain Ingalls, Respondent
4 is a go-to guy. He has not known anyone to say anything about the
5 Respondent other than the Respondent is an exemplary pilot. On
6 July 24 of 2012, Captain Ingalls apparently gave a proficiency
7 check ride to the Respondent, which was in all aspects a
8 satisfactory check ride.

9 Captain Ingalls also indicated that he is involved in
10 the drug testing program at Frontier, apparently since its
11 inception, and based upon everything that he, Captain Ingalls,
12 knew, that he never saw any red flags concerning the Respondent
13 with regards to possible drug use by the Respondent and that there
14 was nothing negative about the Respondent in the Respondent's
15 personnel file. On cross-examination he indicated he only had
16 seen the Respondent one time socially and was not, obviously, in a
17 position to say what the Respondent did 24 hours a day or in his
18 free time.

19 Captain Peterson also was called to testify on behalf of
20 the Respondent. Captain Peterson apparently has been a chief
21 pilot, a check airman, and has known the Respondent through such
22 association at Frontier Airlines. Captain Peterson indicated he
23 had never heard anything negative about the Respondent. Captain
24 Peterson indicated he was also involved in the drug program and,
25 upon his knowledge, had never known the Respondent to use illegal

1 drugs nor had he ever received any complaints from any others
2 about the Respondent's activities. On cross-examination Captain
3 Peterson conceded that he could not say what could have caused the
4 positive test result that was experienced by the Respondent.

5 Captain Kohlel was also called by the Respondent
6 indicating he has known the Respondent since about 1998
7 apparently. They were roommates in a shared domicile here in
8 Denver, Colorado with apparently two other individuals, so four
9 people in this house. Captain Kohlel indicated that he had never
10 seen the Respondent use illegal drugs, and that he, Captain
11 Kohlel, would consider the Respondent's attitude towards illegal
12 drugs or the use thereof to be zero tolerance. In his view, the
13 Respondent was a solid pilot.

14 As to the reputation of the Respondent, that the
15 Respondent, to Captain Kuhlel's knowledge, was well liked in the
16 Frontier pilot group; however, again, on cross-examination,
17 conceding that he was not with the Respondent 24 hours a day, but
18 he did point out at least one incident concerning one of the
19 roommates having marijuana present and the Respondent kicking that
20 individual out of the shared household on that same day.

21 Mrs. Michele Zeier is the wife of the Respondent and has
22 known the Respondent from association at Frontier and has known
23 him for, I believe, about 10 years. They reside together here in
24 Colorado, and she indicates that he has been an exemplary husband
25 and they have a tranquil household. She testified she has never

1 seen him to use illegal drugs and has never heard in her
2 association at Frontier of anyone else stating that the Respondent
3 has participated in illegal drug use. As to his reputation, she
4 testified that Respondent's reputation was excellent among the
5 individuals of the employees at Frontier, that the Respondent is
6 an excellent husband with an excellent reputation.

7 As to the efforts that the Respondent made subsequent to
8 the positive test result, Ms. Zeier indicated that and backed up
9 the Respondent's testimony, which I will discuss, and Dr. Ruff's
10 testimony about Respondent's efforts to find causation for the
11 positive test result. Mrs. Zeier indicated that she had had some
12 medical problem, I believe a tumor, that she was taking some
13 unspecified experimental drug, but she testified that the
14 Respondent had disclosed this to Dr. Ruff in an effort to possibly
15 find a cause. But referring back to Dr. Ruff's testimony, which
16 would include this on Ms. Zeier's testimony, Dr. Ruff, as he
17 stated in his direct testimony, was never able to come to any
18 conclusion as to a cause for the positive test result.

19 The Respondent was a Captain with Frontier Airlines. He
20 is currently self-employed. With Frontier he was also a Check
21 Airman, apparently also a Ground Instructor. He went through a
22 long list of his educational background in aviation beginning in,
23 apparently, about 1992 and indicated that he did possess a Private
24 Pilot, Commercial Pilot Airman Certificates, Multi-engine Land
25 Instrument Rating, and rated in 737 and Airbus, and, of course,

1 holds an Airline Transport Pilot Certificate of which would be,
2 obviously, a requisite as a captain with a commercial carrier like
3 Frontier Airlines.

4 On the Respondent's testimony he has no criminal
5 background, no prior violation history with the Federal Aviation
6 Administration. Respondent discussed his activities beginning
7 with the day prior to the random drug test which he undertook on
8 July 25 of 2012. He was apparently flying from Denver to Seattle,
9 a turnaround back to Denver. On the flight up to Seattle there
10 apparently were two occupants on the jump seats, a Frontier pilot
11 and a check Federal Aviation Administration Air Safety Inspector.
12 A 40-minute turnaround in Seattle and a fly back to Denver and
13 then apparently also over to Kansas City with an RON, remain
14 overnight, in Kansas City to bring an airplane back to Denver.

15 Respondent flew the aircraft from Kansas City back to
16 Denver. At that time he was apparently advised that he had been
17 selected for a random drug test. He complied with the direction
18 to undergo that test and that about a week later, and that does
19 show in the records, the test on the 25th and the interview with
20 the MRO on 1 August, in which a positive test result was
21 confirmed, indicating positive for cocaine.

22 From the Respondent's testimony, that information from
23 the MRO, he said, "I was blown away." Subsequently, as he
24 testified, he tried to determine a cause and has no idea how such
25 substance was in his system. He testified as to his contacts with

1 Dr. Ruff, which I have already discussed. He also testified that
2 he contacted some pharmacists, nutritionists, raised the questions
3 with Dr. Ruff and was never, on Respondent's testimony, able to
4 come up with an explanation for the presence of the cocaine in his
5 system, a positive drug test. So essentially any cause is
6 unknown.

7 Respondent specifically denied that he has ever used
8 illegal drugs. He has never knowingly ingested any, had any such
9 substances in his system. He specifically denies that he has ever
10 done cocaine or has used marijuana or any other type of illicit
11 drug. He has stated that at no time prior to the test had he ever
12 taken or used cocaine.

13 That to me is the pertinent evidence in the case. As I
14 pointed out, I am constrained by the Regulation itself in 49 CFR
15 137 and 40.151 and the Board's cases, which indicate, as I have
16 already discussed, that in an instance where the Administrator has
17 established a prima facie case, which is the circumstance in the
18 instant proceeding, that the burden shifts to the airman, the
19 Respondent in this case, Mr. Hermance, to prove his affirmative
20 defenses by a preponderance of the evidence. And the
21 Administrator, the Complainant herein, has no duty to rebut those
22 affirmative defenses.

23 The affirmative defense in this case is simply that I do
24 not know and I have no explanation for the presence of the cocaine
25 in my system; that is, the positive drug test. In Administrator

1 vs. Kalberg, which is EA-5240, a 2006 case, in there the Board
2 again reiterated that the burden rests with the airman to prove
3 his affirmative defenses where a prima facie case has been
4 established. In that case, some explanations were apparently
5 offered by Respondent Kalberg and the Board pointed out that, in
6 the Board's opinion, the Respondent's uncredited explanations for
7 the presence of marijuana in his urine was insufficient to carry
8 the burden to rebut the prima facie case and it was doubtful
9 whether Respondent's exculpatory claims, even if believed, would
10 establish a legally sufficient defense to the operational
11 violations.

12 And the Board went on to point out and rely upon that 49
13 CFR 40.137 does contain the language that for the DOT drug testing
14 requirements that an explanation by an employee, or the Respondent
15 in this case, of inadvertent or passive ingestion of drugs does
16 not constitute a legitimate medical explanation that can be
17 considered by an MRO as a basis not to verify a positive drug
18 test, and also citing, as I did, to 40.151.

19 That same language was reiterated by the Board in a
20 subsequent case, Administrator vs. Swaters, EA-5400, a 2008 case,
21 in which the Board reiterated the burden was on the Respondent
22 where a prima facie case has been established to provide a
23 reasonable theory explaining the presence of the prohibited
24 metabolites in his system or in his sample, and that explanation
25 or reasonable theory must be supported by evidence establishing a

1 legitimate medical explanation, again citing to the DOT
2 Regulations, which I have already discussed, that the
3 Administrator has no burden beyond establishing a prima facie
4 case, not even to rebut any of Respondent's suppositions.

5 In the Gabbard case, which is the last one which I will
6 have reference to, Petitioner vs. FAA and the NTSB, 532 F.3d 563
7 (6th Cir. 2008). In this case, again, while indicating that
8 Gabbard never successfully raised the issue of inadvertent
9 ingestion, the Court in that case again cited to 40.137, 49 CFR,
10 pointing out that the Regulation specifically indicates that
11 unknown ingestion is not a legitimate medical explanation. That
12 is the crux language to me. There must be a legitimate medical
13 explanation and there must be a reasonable theory. Unknown is not
14 a reasonable medical explanation.

15 In my view, in all of these cases, in Swaters, in
16 Gabbard, and in Kalberg, those individuals offered some type of
17 explanation. In some cases or in most of them they were not found
18 credible. In this instance, I specifically do find that the
19 witnesses called by the Respondent were credible witnesses. Their
20 testimony was believable to the extent they gave it and, of
21 course, Dr. Ruff came across as a credible witness. But the key
22 thing is none of those witnesses were called to offer an
23 explanation or a reasonable theory for the positive test result
24 experienced by the Respondent in this instance.

25 If, as pointed out by the Gabbard case and by the

1 Board's cases which I have cited, that explanation of inadvertent
2 ingestion or being slipped a Mickey Finn or marijuana brownie are
3 not sufficient legitimate medical explanations, to me, as in this
4 case where there is no explanation at all, "unknown", so we don't
5 even have unintentional ingestion, which is rejected both by
6 Gabbard and the Board's cases. An explanation that says my
7 explanation is I have no idea, the cause is unknown, that cannot,
8 in my view, and I so find, be held as a reasonable and legitimate
9 medical explanation because it is not an explanation to say I do
10 not know. It does not explain anything and the burden is on the
11 Respondent to offer a legitimate medical explanation and a
12 reasonable theory.

13 So, in this case, even though I find the Respondent's
14 witnesses to be credible to the extent that they gave their
15 testimony, and the testimony of the Respondent himself I find was
16 credible, that he made efforts to find a cause, but none of his
17 witnesses, including the doctor and himself, were ever able to
18 offer any type of explanation, even unintentional ingestion. All
19 we have is unknown ingestion.

20 I believe if one reads the decision in Gabbard and in
21 the Board's cases, that unknown is not a satisfactory explanation.
22 As the Board states in Kalberg, where the Respondent's ingestion
23 of marijuana, as it was in the Kalberg case, and I am referring to
24 the Kalberg case, was inadvertent and unknown, the Board held that
25 it is doubtful, even if you accept that it was inadvertent and

1 that he didn't know he was doing it, those exculpatory claims,
2 even if believed, and they found Mr. Kalberg's testimony as not
3 being credible, but even if they believed them, they would not
4 establish a legally sufficient defense to the findings of the
5 positive test.

6 So, in this instance, I must find, based upon the
7 evidence in front of me, that the Respondent has failed to carry
8 his burden of proof in this case in that he is required to
9 establish that there was a reasonable theory and a legally
10 sufficient medical explanation for the presence of cocaine in his
11 system. On the evidence offered in this case all we have is that
12 whatever happened is unknown. That being unknown cannot be found
13 to be a responsible theory or a reasonable legitimate medical
14 explanation. I must conclude therefore that the Respondent when
15 tested on July 25, 2012, was tested positive for the presence of
16 cocaine in his system, and that the Respondent has not been able
17 to establish a sufficient affirmative defense as to establish a
18 legitimate medical explanation for the presence of the illegal
19 substance on the random drug test.

20 It was also shown at the time the Respondent had been
21 engaged in a safety-sensitive position, was in the course of the
22 prior day and on the day of the random drug test operating for
23 Frontier Airlines. He is a holder of an Airline Transport Pilot
24 Certificate and, as the Board has repeatedly held, the holder of
25 an ATP, particularly one engaged in common carriage, commercial

1 Complaint herein, is hereby affirmed as issued.

2 Issued this 27th day of June, 2013 at Denver, Colorado.

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5 EDITED ON

PATRICK G. GERAGHTY

6 JULY 17, 2013

Administrative Law Judge

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APPEAL

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ADMINISTRATIVE LAW JUDGE GERAGHTY: Either party to this
10 Decision and Order may appeal from the Decision and Order by
11 filing with the Board within 10 days from this date a Notice of
12 Appeal. That appeal must be filed with the docket section of the
13 Office of Administrative Law Judges, National Transportation
14 Safety Board, Washington, D.C. 20594, with copies of that document
15 served upon the opposing party. The appealing party must further,
16 within 50 days of this date, support that appeal by timely filing
17 a supporting brief with the National Transportation Safety Board
18 in Washington, D.C. 20594 with the Office of the General Counsel.

19 Parties are referred to the Board's Rules of Practice,
20 the section dealing with appeals, for further information
21 concerning the appeal process and any issues reviewable by the
22 Board upon its appeal. Parties are specifically cautioned that
23 the Board takes a stringent view of the time limitations and may
24 dismiss an appeal for the untimely filing of the notice or the
25 supporting brief by even 1 day. Therefore, I caution the parties

1 that, if they need an extension, that they should request the same
2 from the Office of the General Counsel of the Board prior to the
3 expiration or the tolling of any time provision.

4 Although the emergency provision was waived, as this was
5 designated as an emergency by the Administrator, the effectiveness
6 of the Emergency Order of Revocation remains in effect during the
7 pendency of any review by the Board. If the Board does not elect
8 to review, upon its own motion or on a review by the request an
9 appeal by one of the parties, the Decision and Order shall become
10 final as provided by the Board's Rules.

11 Anything else for the record?

12 MR. LOMAZOW: No, Your Honor.

13 ADMINISTRATOR LAW JUDGE GERAGHTY: Mr. Lamonaca?

14 MR. LAMONACA: Nothing, Your Honor.

15 ADMINISTRATOR LAW JUDGE GERAGHTY: Thank you, gentlemen.

16 The proceeding is closed.

17 (Whereupon, at 12:48 p.m., the hearing in the above-
18 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: Scott Louis Hermance

DOCKET NUMBER: SE-19394

PLACE: Denver, Colorado

DATE: June 27, 2013

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.

Michele Koss
Official Reporter