

SERVED: August 12, 2014

NTSB Order No. EA-5727

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 8th day of August, 2014

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19505
v.)	
)	
ROBERT JOHN REPETTO,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued December 18, 2013.¹ By that decision, the law judge affirmed the

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

Administrator's emergency order,² finding respondent violated 14 C.F.R. § 67.413³ when he failed to provide information concerning his medical history to the Administrator, in response to the Administrator's request. The law judge ordered suspension of respondent's second class medical certificate until respondent produces the requested information. We deny respondent's appeal.

A. *Facts*

On February 4, 2009, an aviation medical examiner issued a second class medical certificate to respondent upon respondent's completion of a medical examination. On the application for the medical certificate, respondent answered "yes" to Question 18(v), indicating he previously had reported a charge of driving under the influence (DUI) of alcohol in 2004. On July 13, 2010, respondent was arrested for another "alcohol-related incident."⁴ On October 5, 2010, the Administrator's Deputy Regional Flight Surgeon requested respondent provide a substance abuse evaluation to the Administrator to determine whether respondent fulfilled the eligibility standards for a medical certificate. On June 30, 2011, the Administrator's Regional

² Respondent waived the applicability of the Board's expedited procedures normally applicable to emergency cases. 49 C.F.R. part 821, subpart I.

³ Section 67.413(a) requires applicants to furnish to the Administrator "additional medical information or history [that the Administrator determines] is necessary" to discern whether an applicant fulfills the medical standards required to hold a medical certificate. In addition, § 67.413(a)(2) requires applicants "[a]uthorize any clinic, hospital, physician, or other person to release to the [Administrator] all available information or records concerning that history." Paragraph (b) of § 67.413 provides the penalty for failure to comply with these requirements: the Administrator may "suspend, modify, or revoke" the respondent's medical certificate, or, in the case of an applicant, deny the application. Paragraph (c) of § 67.413 provides, in cases in which the Administrator has suspended, modified, or revoked the medical certificate under paragraph (b), the suspension or modification will remain in effect until the respondent makes available the requested information, history, or authorization to the Administrator and until the Administrator determines the respondent fulfills the medical standards set forth in 14 C.F.R. part 67.

⁴ Compl. at ¶ 5.

Flight Surgeon for the Eastern Regional Medical Office notified respondent that he did not meet the medical standards under 14 C.F.R. § 67.107(a)(4). Shortly thereafter, on July 12, 2011, respondent requested reconsideration of this determination. In considering this request for reconsideration and to determine whether respondent would be eligible for a special issuance of a medical certificate, on November 8, 2011, and again on February 16, 2012, the Administrator's Manager of the Medical Appeals Branch requested respondent provide "actual clinical records of [respondent's] treatment" for alcohol use at Princeton House Behavioral Health.

On March 23, 2012, the Federal Air Surgeon denied respondent's application for a medical certificate, based on respondent's failure to produce records from Princeton House. This denial resulted in an appeal, which was the subject of NTSB Order No. EA-5682 (October 23, 2013). In that Opinion and Order, we affirmed the law judge's finding that the Administrator's request for the records from Princeton House was reasonable; therefore, respondent's refusal to provide the records and a release to permit the Administrator to access the records constituted a violation of 14 C.F.R. § 67.413.

In the present case, the Administrator issued an order, dated June 6, 2013, suspending respondent's second class medical and any other medical certificates respondent holds, pending respondent's provision of a signed release permitting the Administrator's access to respondent's records at Princeton House.⁵ Respondent appealed the order, after which the Administrator filed a motion for summary judgment. The law judge ordered oral argument on the Administrator's motion.

⁵ The Administrator's denial of respondent's medical certificate application in EA-5682 "d[id] not capture any other certificates." Tr. 25. Therefore, the Administrator issued the order suspending the certificate, which is at issue in the case *sub judice*.

B. *Law Judge Oral Initial Decision*

The law judge determined respondent violated 14 C.F.R. § 67.413, based on his failure to provide records, and a signed release for records, from Princeton House to the Administrator. The law judge noted the record did not contain any correspondence from Princeton House indicating such records do not exist. The law judge dismissed respondent's argument that the Administrator had sufficient information to make a determination concerning his medical certificate application, because the Administrator already had found respondent ineligible to hold an air traffic controller (ATC) certificate. The law judge cited NTSB Order No. EA-5682, in which we stated the requirements for ATC certificates under FAA Order 3930.3A are distinct from those applicable to medical certificates under 14 C.F.R. part 67. The law judge also determined mediation and arbitration that occurred in respondent's labor dispute concerning his ATC employment were irrelevant to the issue of whether respondent should hold a medical certificate under part 67.

Additionally, the law judge concluded neither the stale complaint rule nor the doctrine of *laches* precluded the Administrator's pursuit of this case. First, the law judge determined the stale complaint rule did not preclude the Administrator from pursuing the case, specifically finding the Administrator's complaint set forth factual allegations supporting the alleged lack of qualifications. In addition under the doctrine of *laches*, the law judge found respondent failed to show how the delay caused an actual prejudice to his defense; in particular, the law judge stated respondent produced no evidence showing prejudice, but only asserted former employees of Princeton House would not be available to testify.

C. *Issues on Appeal*

Respondent raises three main issues on appeal. Respondent contends the Board's stale complaint rule and the doctrine of *laches* precluded this action. In addition to these arguments, respondent asserts the law judge erred in refusing to consider the "mediation arbitration award" disposing of respondent's labor dispute as an air traffic controller.

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.⁶

1. *Stale Complaint Rule*

The Board's stale complaint rule permits a respondent to move to dismiss allegations in a complaint occurring more than six months prior to the Administrator advising a respondent of the reasons for the proposed action.⁷ When the complaint specifically alleges a respondent lacks the qualifications necessary to hold a certificate, and supports this allegation with relevant facts, the six-month deadline does not apply.

In the complaint of the case *sub judice*, the Administrator stated he was "unable to determine [respondent's] current qualifications to hold a Second Class Medical Certificate."⁸ The complaint described respondent's failure to provide records the Administrator requested concerning respondent's treatment for alcohol dependency. Based on these allegations, the law judge found the six-month deadline of the stale complaint rule did not apply; therefore, the case was not subject to dismissal pursuant to § 821.33(b). We agree. The Administrator issued a

⁶ 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).

⁷ 49 C.F.R. § 821.33.

⁸ Compl. at 3.

second class medical certificate to respondent in February 2009, notwithstanding respondent's disclosure of an alcohol-related event. In June 2011, respondent reported a 2010 DUI incident on his application for a second class medical certificate.⁹ Following the June 2011 application, the Administrator requested records concerning respondent's treatment for alcoholism at Princeton House. Respondent failed to provide such records; therefore, the Administrator denied the application.¹⁰ On June 6, 2013, the Administrator issued the order at issue in this case.

The law judge found the stale complaint rule did not apply because the Administrator's complaint sufficiently alleged a basis for questioning respondent's current qualifications. We agree with this determination, as it is consistent with Board jurisprudence.¹¹ Respondent's refusal to provide records from Princeton House, where he admits he received treatment after two alcohol-related events, calls into question his qualifications to hold a second class medical certificate.

2. *Doctrine of Laches*

Respondent also contends the doctrine of *laches* precludes the Administrator from bringing this case. The doctrine of *laches* is an equitable doctrine "by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has

⁹ Medical certificates must be renewed on a periodic basis; hence, respondent was subject to the application process again. See 14 C.F.R. § 61.23(d).

¹⁰ Petition of Repetto, NTSB Order No. EA-5682 (2013) (affirming the Administrator's denial of medical certificate).

¹¹ See, e.g., Administrator v. Sanchez et al., NTSB Order No. EA-5326 at 6 n.6 (2007) (stating the stale complaint rule did not apply, as the Administrator had alleged a lack of qualifications in requesting reexamination of respondents' qualifications to hold their airframe and powerplant certificates); accord Administrator v. Shelton, NTSB Order No. EA-4339 at 5-6 (1995) (holding the stale complaint rule did not apply to an appeal of the Administrator's request for reexamination of respondent's inspection authorization, and stating "the six-month limitation does not apply to cases such as this one which raise a legitimate question about the respondent's qualifications").

prejudiced the party against whom relief is sought.”¹² A respondent must fulfill a two-part test in order to prevail in a *laches* defense: he or she must show the delay resulted in actual prejudice, and the Administrator lacked diligence in pursuing the case.¹³

First, respondent does not allege the Administrator lacked diligence in pursuing the case. He does not deny the Administrator requested medical records from him twice, and waited for him to reply with the records. Second, as the law judge found, respondent’s statement that the delay caused him actual prejudice is speculative at best. Respondent contends any records from Princeton House concerning his treatment likely no longer exist, because his treatment occurred in 2004. Respondent asserts staff at Princeton House likely has changed, and he is therefore unable to locate witnesses. He does not suggest what, if any, information such witnesses would provide to explain why he has not provided a release to the Administrator permitting the Administrator’s access to his records. Overall, respondent has failed to fulfill either prong of the *laches* defense.

3. *Arbitration Award*

We also affirm the law judge’s determination that the mediated arbitration award disposing of respondent’s labor dispute regarding his ATC employment is irrelevant. In our Opinion and Order disposing of respondent’s appeal of the Administrator’s denial of his petition for a medical certificate, we held evidence concerning the award was irrelevant.¹⁴ In addition,

¹² Black’s Law Dictionary 953 (9th ed. 2009).

¹³ Administrator v. Tinlin and White, NTSB Order No. EA-5658 at 7-8 (2013) (citing Manin v. Nat’l Transp. Safety Bd., 627 F.3d 1239, 1241 (D.C. Cir. 2011)).

¹⁴ NTSB Order No. EA-5682 at 16-17 (stating the Administrator’s decision concerning respondent’s ATC medical certificate, for which the Administrator did not demand the Princeton House records, was subject to a standard distinct from the standard applicable to airman medical certificate applications).

respondent's attorney acknowledged the law judge was not bound by the arbitrator's determinations, or his decision to proceed with the arbitration award in the absence of records concerning respondent's treatment at Princeton House.¹⁵

Respondent contends the award, dated October 4, 2013, would "resolve the question of [respondent's] fitness for ATC duty and ability to be issued an unrestricted Second Class FAA Medical."¹⁶ This is not accurate. The award does not mention respondent's ability to receive an unrestricted second class medical certificate. Instead, the award states respondent must submit to a medical examination, "for the purpose of evaluating whether he is currently alcohol dependent."¹⁷ If the medical expert examining respondent determines respondent is currently alcohol dependent, then the Administrator may "re-issue the Agency Treatment and Rehabilitation Plan (TRP) ... and require [respondent] to complete the TRP before he can be reinstated to his Air Traffic Control duties."¹⁸ Such a resolution is irrelevant to the issue in this case. The issue in this case is the reasonableness of the Administrator's request for records from Princeton House concerning respondent's treatment for alcohol dependency. Therefore, the law judge's exclusion of evidence regarding the arbitration award was proper.

¹⁵ Tr. 33, 37.

¹⁶ Appeal Br. at 12.

¹⁷ In the Matter of Nat'l Air Traffic Controllers Assoc. AFL-CIO and Fed. Aviation Admin., Grievance No. 11-ACY-14 (Oct. 4, 2013) at 2.

¹⁸ Id. at 3.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's emergency suspension of respondent's second class medical certificate shall continue until such time as respondent provides information the Administrator requested under 14 C.F.R. § 67.413.

HART, Acting 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.

ROBERT J. REPETTO

Respondent.

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Docket No.: SE-19505
JUDGE WOODY

Department of Education
490 L'Enfant Plaza East, S.W.
2nd Floor, Suite 2100-A
Washington, D.C. 20024

Wednesday,
December 18, 2013

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

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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Office of the Regional Counsel
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On behalf of the Respondent:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE WOODY: This is day 2 of our hearing on motions related to the case of Respondent Robert Repetto. This has been a proceeding before the National Transportation and Safety Board held pursuant to the provisions of 49 United States Code, Section 44709.

The case is captioned as Michael P. Huerta, Administrator, Federal Aviation Administration, Complainant, versus Robert John Repetto, Respondent. The case number is SE-19505.

The proceeding was conducted in accordance with the provisions of the Act, the Board's Rules of Practice, and the pertinent sections of the Administrative Procedure Act. Federal Rules of Evidence and the Rules of Civil Procedure are applicable to this proceeding.

Respondent is represented by Mr. Joseph Michael Lamonaca, Esquire. The Administrator is represented by Mr. Christian Lewerenz, Esquire, of the Eastern Region regional counsel's office. Respondent Robert J. Repetto was present in the courtroom throughout the proceedings.

1 An on-the-record proceeding was held pursuant to notice
2 issued on November 8th, 2013. The purpose of the on-the-record
3 proceeding was to hear oral arguments on a number of outstanding
4 motions in this case. Primarily, arguments were heard relative to
5 the Administrator's Motion for Summary Judgment, as amended.

6 There were actually several related motions or
7 pleadings. First, there was an initial Motion for Summary
8 Judgment filed by the Administrator on September 16th, 2013.
9 Respondent's response to the motion was filed on September 30th,
10 2013. Then on October 10th, 2013, Respondent filed a motion for
11 leave to amend his response to the motion for summary judgment and
12 to enlarge discovery. Following a return to work after the
13 government shutdown in October 2013, the Administrator filed an
14 Amended Motion for Summary Judgment on November 4th, 2013.
15 Respondent's response to that Amended Motion for Summary Judgment
16 is dated November 18th, 2013.

17 Now, as noted at the end of yesterday's session, the
18 motion to enlarge discovery has essentially been withdrawn at this
19 point, and I will not address that in my decision.

20 In addition, in his answer to the complaint, Respondent
21 raised two affirmative defenses, those being stale complaint and
22 laches. Argument was heard relative to those affirmative defenses
23 as well, which I treated as motions to dismiss.

24 My decision today will address each of these matters in
25 turn.

1 DISCUSSION

2 First, with respect to the Motion for Summary Judgment,
3 as amended, the complaint alleges a violation of 14 C.F.R.,
4 Section 67.413, which provides, in section --

5 (a) Whenever the Administrator finds that additional
6 medical information or history is necessary to determine whether
7 you meet medical standards required to hold a medical certificate,
8 you must (1) furnish that information to the FAA, or (2) authorize
9 any clinic, hospital, physician, or other person to release to the
10 FAA all available information or records concerning that history.

11 (b) If you fail to provide the requested medical
12 information or history, or to authorize its release, the FAA may
13 suspend, modify, or revoke your medical certificate or, in the
14 case of an applicant, deny the application for medical
15 certificate.

16 And (c), if your medical certificate is suspended,
17 modified, or revoked under paragraph (b) of this section, that
18 suspension or modification remains in effect until you provide the
19 requested information, history, or authorization to the FAA, and
20 until the FAA determines that you meet the medical standards set
21 forth in this part.

22 So that is the underlying provision pertinent to the
23 Motion for Summary Judgment, as amended.

24 Now, with respect to the Motion for Summary Judgment, as
25 amended, the Administrator suggests, and Respondent agreed, that

1 there are two issues presented for resolution: (1) whether the
2 Administrator's request for additional medical information under
3 14 C.F.R., Section 67.413 was reasonable; and (2) whether the
4 Respondent provided the requested information.

5 The Administrator argues no final decision has been made
6 with respect to Respondent's continued eligibility for an airman
7 medical certificate nor could one be made until such time as
8 Respondent complies with the request for additional medical
9 information.

10 Respondent argues that the request for records is not
11 reasonable, and further argues that a letter from the Federal Air
12 Surgeon, dated June 7th, 2011, demonstrates that a determination
13 has already been made as to his eligibility for an airman medical
14 certificate. He asserts that letter, which addressed Respondent's
15 medical clearance to perform air traffic control specialist, or
16 ATC, duties should be imported into this proceeding and treated as
17 a final determination that Respondent is not qualified to hold an
18 airman medical certificate.

19 Now, the Administrator's specific request for medical
20 records is contained in two letters addressed to the Respondent.
21 The first is a November 8th, 2011, letter sent to Respondent by
22 James R. DeVoll, M.D., M.P.H., who is the manager, Medical Appeals
23 Branch, Medical Specialties Division, Office of Aerospace
24 Medicine. In that letter, Dr. DeVoll informed Respondent that he
25 reviewed the information contained in Respondent's agency medical

1 file in support of his application of February 8th, 2011, for a
2 second-class airman medical certificate, and a request for review
3 by the Federal Air Surgeon. The letter indicates that, quote, "We
4 need additional information in order to determine your eligibility
5 for special issuance under 14 C.F.R. 67.401."

6 The letter specifically requests that Respondent have
7 Princeton House Behavioral Health, or Princeton House, send
8 directly to them records of all evaluations, treatments, whether
9 inpatient or outpatient, rehabilitation, recovery, aftercare, or
10 any other services provided by Princeton House, to include, but
11 not limited to, years 2004 through the present. The letter also
12 requested Respondent provide a signed and dated release
13 authorizing the FAA Office of Aerospace Medicine staff, and the
14 clinical or administrative staff at Princeton House to discuss all
15 aspects of Respondent's case.

16 The second letter is dated February 16th, 2012. In that
17 letter, Dr. DeVoll informed Respondent that they had received a
18 letter from Respondent's attorney on November 17th, 2011. In the
19 letter, Mr. Lamonaca attached a letter from Natalie Edmond of
20 Princeton House, dated December 19th, 2006, that confirmed
21 Respondent's treatment during the period of October 20th [sic],
22 2004 through December 2nd, 2004.

23 Dr. DeVoll informed Respondent that the letter did not
24 meet the requirement of the original request for the actual
25 clinical records of Respondent's treatment at Princeton House.

1 Dr. DeVoll explained that the information in Respondent's medical
2 filed indicated he was arrested for driving while intoxicated on
3 October 8th, 2004, and toxicology analysis of October 22nd, 2004,
4 reported positive for alcohol at 0.306 weight/percent volume.

5 The information also indicated that in addition to
6 voluntarily seeking treatment at Princeton House, he was required
7 to complete an intoxicated driver program. His driving privileges
8 were suspended for 9 months, and for a period he was required to
9 use an interlock device.

10 A letter from Vija Mangulis of November 29, 2004, states
11 that Respondent underwent 6 weeks of intensive outpatient therapy
12 to, among other things, establish and maintain sobriety.

13 Respondent sent a letter on November 29, 2006, to the
14 FAA stating that he had completely quit drinking and it suggested
15 a plan of recovery. However, on July 13th, 2010, he had an
16 alcohol-related event resulting in arrest, indicating that
17 Respondent was not maintaining sobriety.

18 The letter further indicated that the February 8th, 2011
19 application for a second-class airman medical certificate will be
20 used to determine his qualifications for an unrestricted medical
21 certificate or eligibility for a special issuance.

22 The letter suggested the information requested regarding
23 treatment at Princeton House is reasonable and relevant to clarify
24 Respondent's diagnosis and his qualifications for an airman
25 medical certificate.

1 The letter again requested the information outlined in
2 the previous letter and informed Respondent that if the
3 information was not received within 30 days, the FAA will have no
4 alternative except to deny his application, in accordance with
5 Section 67.413(a).

6 The February 16th letter from Dr. DeVoll again asked
7 Respondent to have Princeton House Behavioral Health send the
8 records directly to the FAA, and again requested a signed and
9 dated release from the Respondent.

10 Respondent did not provide the requested records or the
11 release, and the Administrator issued a final denial of his
12 application.

13 Respondent submitted a petition appealing the denial,
14 which was the subject of a hearing in January 2013. At the
15 conclusion of that hearing, Judge Montaña issued a decision
16 wherein he determined the records request was reasonable, and the
17 respondent had failed to provide the requested records or release.
18 Thus, he granted the Administrator's Motion for Summary Judgment.

19 Respondent appealed Judge Montaña's decision to the full
20 Board, who on October 23rd, 2013, affirmed Judge Montaña's
21 decision.

22 Subsequent to Judge Montaña's decision and prior to the
23 Board's action on appeal, on June 6, 2013, the Administrator
24 issued the Emergency Order of Suspension of Respondent's February
25 4th, 2009 second-class airman medical certificate, which is the

1 subject of this appeal. That airman medical certificate was
2 issued after the 2004 DUI and treatment at Princeton House, but
3 prior to the second alcohol incident in July 2010. The February
4 4th, 2009 airman medical certificate was not addressed during the
5 earlier hearing process.

6 This matter before me presents similar issues and
7 arguments to those considered with respect to the earlier
8 application, with the suspension order based upon the same request
9 by Dr. DeVoll for the Princeton House records and also his request
10 for a release authorization from Respondent.

11 However, at the outset it is important to note that I am
12 not bound in any manner by Judge Montaña's earlier decision with
13 respect to the reasonableness of the request. This is a separate
14 matter and my decision here will be made independently based upon
15 the matters presented for my consideration.

16 I would note that the parties have stipulated that the
17 Board's decision on the Respondent's appeal is currently pending
18 appeal to the United States District Court for the District of
19 Columbia. However, no request has been made for a stay of the
20 Board's order pending judicial review, which, pursuant to Section
21 821.64(b) of the Board's Rules of Practice in Air Safety
22 Proceedings, would have been required to be filed within 15 days
23 of service of the Board's order.

24 Now, the Administrator argues that the medical
25 information requested is highly relevant to the Administrator's

1 consideration of Respondent's continued qualification for an
2 airman medical certificate. The Respondent is required to provide
3 those records under 14 C.F.R. 67.413, and the underlying statutory
4 authority in 44 United States Code, Section 44709, which requires
5 the Administrator, after investigation, to make medical
6 certification decisions, not leave it to the airman to decide what
7 medical information is reasonable and relevant for the Federal Air
8 Surgeon to consider.

9 The Administrator cites the case of Petition of Woznik,
10 which is NTSB Order EA-3726, which held that the FAA's request for
11 medical information is reasonably premised on what might assist
12 the Administrator in determining the airman's medical
13 qualification.

14 The Administrator suggests that if the Respondent has
15 his way, the Federal Air Surgeon would be expected to make a
16 certification decision following Respondent's second alcohol-
17 related arrest with incomplete medical history regarding his
18 fairly lengthy treatment at Princeton House following his first
19 arrest with a blood alcohol content that revealed possible
20 increased tolerance at the time. The Administrator argues that a
21 review of all the records requested from Princeton House would be
22 relevant to assist the Administrator in determining Respondent's
23 continued medical qualification and the request for the records is
24 reasonable.

25 The Administrator asserts that to make a favorable

1 certification without complete records under the circumstances of
2 this case would be contrary to the interest of aviation safety.
3 Conversely, it will be irresponsible and contrary to the authority
4 conferred on the Administrator to make an adverse certification
5 decision based on incomplete information.

6 The Administrator contends that Respondent has not
7 provided the requested medical information, nor did Respondent
8 provide the requested release so that the Administrator could
9 obtain the requested records and discuss those records with the
10 staff of Princeton House. And Respondent has conceded as much.
11 What has been provided, as an attachment to the answer to the
12 complaint in this matter, is an affidavit from the Respondent
13 stating that he requested the records in person from Princeton
14 House and was advised the records did not exist.

15 The Administrator filed a sworn affidavit from
16 Dr. DeVoll as an attachment to the Amended Motion for Summary
17 Judgment stating he conducted a search of Respondent's blue ribbon
18 medical file. Dr. DeVoll indicates that his search revealed
19 Respondent's airman medical file contained two documents from
20 Princeton House, which were both letters from a case manager, one
21 dated November 29th, 2004, which states Respondent started an
22 intensive outpatient program on October 20th, 2004, and was
23 scheduled to complete it on December 2nd, 2004. The second letter
24 dated December 19th, 2006, merely acknowledges the dates of the
25 Respondent's intensive outpatient program.

1 There has been no correspondence from Princeton House
2 confirming that the records do not exist, and Respondent has
3 refused to provide a signed release to allow the Administrator to
4 review any treatment records and to discuss his evaluation and
5 treatment with clinical or administrative staff at Princeton
6 House.

7 Thus, based on the positions of the parties, including
8 the concessions of Respondent, I conclude that there is only one
9 issue to be addressed here, and that is the issue of whether the
10 Administrator's request for the records from Princeton House
11 Behavioral Health was reasonable.

12 Respondent argues that the request for the Princeton
13 House records is unreasonable and unnecessary since a decision
14 regarding his substance abuse or dependence, and in turn his lack
15 of qualification to hold a medical certificate has already been
16 made. In support of his argument he cites a June 7th, 2011,
17 letter from the Federal Air Surgeon affirming the Regional Flight
18 Surgeon's finding that Respondent is medically incapacitated to
19 perform ATC duties.

20 He argues, as he did at his prior hearing, that the
21 standards and process for evaluating eligibility for airman and
22 ATC medical certificates are the same. He argues that the airman
23 and ATC medical certificates are one and the same, and suggests
24 the June 7th, 2011 memorandum indicating Respondent was found
25 medically incapacitated to perform ATC duties should be deemed a

1 denial of his eligibility for an airman medical certificate in
2 this matter. He further suggests based on this deemed denial, a
3 hearing should be held to determine Respondent's continued
4 eligibility for an airman medical certificate.

5 Respondent also again argues that no additional
6 Princeton House documents were required to find him medically
7 incapacitated to perform his ATC duties; thus, no additional
8 Princeton House documents are necessary to determine his
9 eligibility for an airman medical certificate, and the request for
10 such documents is, therefore, unreasonable.

11 The Administrator argues that the evaluations under Part
12 67 and the evaluation conducted for ATC second-class employment
13 medical qualifications are not the same and do not entail the same
14 evaluation methods or criterion, or the same motivation or
15 potential outcomes, for that matter. The Administrator cites the
16 fact that ATC medicals are governed by FAA Order 3930.3A, while
17 airman medical standards are governed by 14 C.F.R Part 67.

18 The Administrator cites the Board's discussions of this
19 issue in the prior action. There the Board found, as I do here,
20 that FAA Order 3930.3A and Part 67 have similar but different
21 processes and standards. The Board discussed the understandable
22 differences between FAA Order 3930.3A and 14 C.F.R. Part 67, and
23 the fundamental distinctions between the duties of airmen and air
24 traffic controllers.

25 Respondent noted that the Board's October 23rd, 2013

1 decision has been appealed to the U.S. District Court. However,
2 the Board's decision has not been stayed pending appeal, and thus,
3 has become final. Now, given this, Respondent may well be
4 collaterally estopped from again arguing a number of the same
5 issues conclusively dealt with by the Board in its earlier
6 decision.

7 Respondent has suggested that the Board's decision could
8 be overturned on appeal. While that may be a possibility, I
9 nonetheless find the Board's evaluation and logic on this issue to
10 be quite persuasive and well supported. Conversely, Respondent
11 again based his position largely on the fact that the medical
12 application forms are the same and the medical evaluation was
13 conducted by the same AME. However, he was unable to cite to any
14 authority contrary to that identified by the Administrator or
15 discussed by the Board in its decision which would support his
16 position.

17 I found the arguments of the Administrator and the
18 discussion of the Board as to the differing standards and
19 processes to be more compelling and convincing than Respondent's
20 unsupported assertion that the two standards are the same.

21 Respondent also urges me to consider the mediated
22 arbitration award and the arbitrator's supplemental order as an
23 indicator that the request for the Princeton House records is
24 unreasonable. The supplemental order indicates that after
25 considering arguments of the parties, additional Princeton House

1 records will not be considered by the independent medical
2 evaluator tasked with determining whether Respondent is currently
3 alcohol dependent for the purpose of the arbitration related to
4 his ATC employment action.

5 Respondent concedes that the ATC employment action and
6 ongoing arbitration are separate and distinct from the current
7 aviation enforcement matter and that I am not bound by the
8 decisions of the arbitrator, just as the arbitrator is not bound
9 by any decisions related to this or the prior enforcement action
10 decision. Nonetheless, he asks me to consider those documents.

11 As noted above, the standards and processes are
12 different for evaluating medical capacity to perform ATC duties
13 and eligibility to hold an airman medical certificate. So too,
14 the processes and standards for initiating and reviewing an
15 enforcement action on an airman medical certificate are separate
16 and distinct from those in place for challenging employment
17 actions related to medical capacity to perform ATC duties.

18 Furthermore, I have no familiarity with the employment
19 related processes or standards, nor do I have any awareness of the
20 basis upon which the arbitrator may have made any particular
21 decision in the ongoing arbitration matter, and that is as it
22 should be.

23 For those reasons I find that the mediation arbitration
24 award and supplemental order, I find those to be irrelevant for my
25 consideration here.

1 Aside from Respondent's arguments regarding stale
2 complaint and laches, which I will address shortly, Respondent
3 also suggests that the passage of time between when the
4 Administrator became aware of the July 2010 alcohol incident and
5 when action was taken to suspend his airman medical certificate
6 make the request unreasonable. He argues there was no good reason
7 for the Administrator not taking action earlier.

8 The Administrator offered that it is an unusual
9 situation to have an airman with a current unexpired medical
10 certificate apply for a second medical certificate before the
11 first is expired; thus, the existing airman medical certificate
12 was not immediately discovered. In addition, there was some
13 expectation of compliance on the records request up to and even
14 after the initial decision by Judge Montaña. This also
15 contributed to the delay in taking action against the 2009 airman
16 medical certificate.

17 While I find the Administrator's explanation for why the
18 existing airman medical certificate was not discovered or acted
19 upon immediately to be somewhat understandable, that certainly
20 does not fully excuse the delay in moving forward more quickly
21 with this certificate action. However, I do not find the passage
22 of time alone enough to render the request unreasonable.

23 Reasonableness must be considered in the context of the
24 entirety of the circumstances, including the fact that the
25 Administrator repeatedly requested the Princeton House records

1 beginning shortly after discovering the July 2010 incident.
2 Although not specifically related to this certificate action, the
3 requests were in relation to the same medical qualifications
4 issue. That fact, in conjunction with the explanation in
5 Dr. DeVoll's letters and affidavit, and Dr. Berry's affidavit
6 describing why the records are necessary to the Administrator's
7 determination, support a finding that the request was reasonable.

8 In sum, I find the Administrator's request that
9 Respondent provide additional medical records from Princeton House
10 to be relevant and reasonable. The request is relevant to what
11 appears to be Respondent's possible ongoing alcohol problems.
12 Records of clinical evaluations and treatment records from
13 Princeton House would assist the Administrator in determining the
14 Respondent's medical qualification and continuing eligibility for
15 an airman medical certificate. Thus, I find the Administrator's
16 request for the additional records from Princeton House to be
17 reasonable.

18 Respondent has also asserted as affirmative defenses
19 that the complaint should be barred by the stale complaint rule
20 and/or the doctrine of laches. Since these are raised by
21 Respondent as affirmative defenses the burden is upon Respondent
22 to establish the affirmative defenses by a preponderance of
23 evidence.

24 With respect to the stale complaint rule, Section 821.33
25 of the Board's Rules of Practice, or Rule 33, provides that a

1 complaint is subject to dismissal as stale if it sets forth
2 allegations of offenses which occurred more than 6 months prior to
3 the Administrator's advising the Respondent as to reasons for the
4 proposed action under 49 United States Code, Section 44709(c),
5 unless the Administrator either establishes good cause for the
6 delay in providing such notice or presents an issue of lack of
7 qualification upon the part of the certificate holder in question.

8 Consistent with the plain language of the rule, the
9 Board has consistently held that where a legitimate issue of lack
10 of qualifications is raised, the complaint is not subject to
11 dismissal under the Board's stale complaint rule.

12 Here, the issue raised by the complaint is the
13 Respondent's continued eligibility to hold an airman medical
14 certificate, in other words, his medical qualifications. Although
15 a final determination has not yet been made in that regard, I find
16 that the complaint raises a legitimate issue of lack of medical
17 qualifications. I do not find compelling Respondent's argument
18 that an issue of lack of qualifications cannot be legitimately
19 raised absent a final determination on his eligibility to hold a
20 medical certificate.

21 I would also note that the suggestion that a final
22 determination has not yet been made and therefore no legitimate
23 issue of lack of qualifications is possible is completely contrary
24 to Respondent's earlier argument that a final determination on his
25 airman medical certificate was made by virtue of the decision

1 regarding his medical incapacity to perform ATC duties.

2 I further find in conformity with the Board's decisions
3 in Administrator v. Armstrong, at NTSB Order EA-5269 -- it's a
4 2012 case -- and NTSB Order EA-5660, a 2013 case, wherein
5 reconsideration was denied, and also Administrator v. Ducote, NTSB
6 Order EA-5664, a 2013 case, that the complaint is pled with
7 sufficient specificity to demonstrate on its face that a
8 legitimate issue of lack of qualifications exists.

9 The Administrator did specify the factual basis for the
10 allegations in the complaint. The allegations set forth the
11 specific incidents that form the basis of the request for
12 additional medical information, the various written requests for
13 the information, the need for such information so the
14 determination can be made regarding his continued eligibility for
15 an airman medical certificate, and the denial of a previous
16 application for medical certification as a result of his refusal
17 to provide such information.

18 Given these findings, and consistent with Board
19 precedent, I conclude that dismissal of the Administrator's
20 complaint as stale under Rule 33 is not warranted.

21 With respect to the doctrine of laches, Board and court
22 precedent has recognized the affirmative defenses of laches may be
23 available even when the stale complaint rule is inapplicable.
24 That's consistent with Manin v. NTSB, and the cite for that is 627
25 F.3d 1239, and also Administrator v. Tinlin and White, NTSB Order

1 EA-5658, a 2013 case.

2 In Manin, the United States Court of Appeals for the
3 D.C. Circuit defined the doctrine as an equitable doctrine that
4 applies where there is: (1) lack of diligence by the party against
5 whom the defense is asserted; and (2) prejudice to the party
6 asserting the defense. In Manin the court indicated consideration
7 of the laches defense is required if an airman could establish
8 actual prejudice in his defense which is attributable to the
9 Administrator's delay.

10 Here, Respondent argues that the complaint should be
11 barred because the records are no longer available and potential
12 witnesses no longer work for Princeton House and will be unable to
13 testify regarding Respondent's treatment there.

14 First, I would note that there is no evidence beyond
15 Respondent's affidavit that the Princeton House records do not
16 exist. There is no affidavit or other correspondence from a
17 representative of Princeton House confirming that the records do
18 not exist, nor is there any evidence indicating current or former
19 employees are unavailable and/or unable to provide information
20 regarding Respondent's evaluation and treatment there.

21 This is the case primarily, if not entirely, because
22 Respondent has refused to sign the requested release authorizing
23 Princeton House to disclose his records and discuss his treatment
24 at that facility. While the passage of time may arguably
25 establish a lack of diligence on the part of the Administrator,

1 the Respondent has failed to meet his burden of establishing that
2 actual prejudice in his ability to defend against the
3 Administrator's certificate action exists as a result of the
4 delay.

5 Indeed at this juncture in the proceeding, in light of
6 my finding that the request for Princeton House records was
7 reasonable, the question becomes whether Respondent was prejudiced
8 by any delay in his ability to respond to the records request.
9 Respondent could and can comply with the request by providing the
10 records requested or by supplying a signed and dated release
11 allowing the Administrator to obtain the records and/or discuss
12 his treatment with Princeton House. Even assuming the requested
13 records no longer exist, Respondent is not precluded from
14 complying with the Administrator's request.

15 Thus, I find no actual prejudice has been established
16 and that the complaint is not barred by the doctrine of laches.

17 In conclusion, under Rule 17(d) of the Board's Rules of
18 Practice in Air Safety Proceedings, which is codified at 49 C.F.R.
19 Section 821.17(d), a party may file a motion for summary judgment
20 on the basis that the pleadings and other supporting documentation
21 establish that there are no material issues of fact to be resolved
22 and the party is entitled to judgment as a matter of law.

23 The case before me presents two issues to be decided:
24 one, whether the Administrator's request for medical information
25 was reasonable; and secondly, whether the Respondent provided the

1 ADMINISTRATIVE LAW JUDGE WOODY: Now, with respect to
2 reasonableness, I would note for the record, that even if I had
3 found the Administrator's request for additional medical
4 information to be unreasonable, I would nonetheless find that
5 summary judgment is appropriate in this matter.

6 In such circumstance, I would have no authority or basis
7 upon which to make a determination as to medical qualification, as
8 no final determination has yet been made by the Administrator.
9 Although Respondent has hypothesized during argument what the
10 Administrator's decision might be, such speculation is tenuous at
11 best. The matter would need to be returned to the Administrator
12 to make a final determination on Respondent's eligibility for an
13 airman medical certificate without the benefit of the requested
14 Princeton House records.

15 As a practical matter, if I were to deem the
16 determination of medical incapacity to perform ATC duties as a
17 denial of eligibility for an airman medical certificate as
18 Respondent suggests, then I would have no complaint or allegations
19 on that specific issue before me upon which to act. The complaint
20 before me alleges only that Respondent has failed to provide
21 records reasonably requested, not that he is ineligible to
22 continue to hold an airman medical certificate, nor was Respondent
23 able to supply any citations supporting a conclusion that I have
24 the authority or jurisdiction to act in such a manner.

25

26

1 APPEAL

2 All right. That concludes my oral initial decision. At
3 this point, Mr. Repetto, I need to advise you of your appeal
4 rights. You do have the opportunity to appeal my decision. I
5 have those here in writing.

6 Mr. Lamonaca, what I would ask you to do is approach, if
7 you don't mind, so I can provide you with a copy of this.

8 Can I ask you to hand a copy of this to the
9 Administrator's counsel as well?

10 MR. LAMONACA: Certainly.

11 ADMINISTRATIVE LAW JUDGE WOODY: And I will hand a copy
12 to the court reporter for inclusion in the record, momentarily.

13 Mr. Lamonaca, do you desire for me to advise Mr. Repetto
14 orally of his appeal rights or do you intend do to that?

15 MR. LAMONACA: No, I will do that, Judge. Thank you.

16 ADMINISTRATIVE LAW JUDGE WOODY: All right. I would
17 just emphasize to you, as I do in every case, that the timelines
18 for filing the notice of appeal and supporting brief are generally
19 hard and fast, as I know you know. You're an experienced counsel,
20 but please keep those in mind if you intend to file an appeal of
21 my decision.

22 And I'm handing a copy of those written appeal rights to
23 the court reporter.

24 Gentlemen, is there anything of an administrative nature
25 that we need to discuss before we terminate the proceedings?

1 MR. LAMONACA: Nothing.

2 MR. LEWERENZ: Nothing, thank you.

3 ADMINISTRATIVE LAW JUDGE WOODY: All right.

4 Mr. Repetto, I wish you luck going forward.

5 And with that this hearing is terminated. Thank you.

6 (Off the record.)

7 (On the record.)

8 ADMINISTRATIVE LAW JUDGE WOODY: I want to go back on
9 the record.

10 One matter I intended to discuss before we went off the
11 record momentarily is obviously I think this makes our scheduled
12 hearing in February a non-issue any longer. So, unless you see
13 that differently, my intent will be to remove that from the
14 schedule in light of my ruling. Do you agree?

15 MR. LAMONACA: Agreed.

16 MR. LEWERENZ: Agreed.

17 ADMINISTRATIVE LAW JUDGE WOODY: Okay. Thank you. I
18 just wanted to clarify that on the record. Thank you, again.

19 The hearing is terminated.

20 (Whereupon, at 10:20 a.m., the hearing in the above-
21 entitled matter was adjourned.)

22

23

24

25

CERTIFICATE

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

IN THE MATTER OF: Robert J. Repetto

DOCKET NUMBER: SE-19505

PLACE: Washington, D.C.

DATE: December 18, 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.

Diane Supercyzneski
Official Reporter