

SERVED: February 10, 2015

NTSB Order No. EA-5739

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 6th day of February, 2015

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19750
v.)	
)	
DURAID A. ZAIA,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

The Administrator appeals the decision of Administrative Law Judge Patrick G. Geraghty, issued January 14, 2015.¹ By that decision, the law judge dismissed the Administrator’s case against respondent under the doctrine of laches without making a

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

determination as to whether respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying a medical certificate application.² We deny the Administrator's appeal.

A. *Facts*

Respondent, who was born in Iraq, first came to the United States at age 19 in 1991. He eventually opened his own business. Because he is not fluent in the English language, he always has employed an assistant to help him read and review documents and forms written in English. As a standard practice, he has his assistant fill out all his paperwork, including legal and financial documents, such as his Federal Aviation Administration (FAA) medical certificate application.³

In 2009, respondent started taking flying lessons. According to respondent, on May 15, 2009, he, with the help of his then-assistant, Cynthia Aguilar, filled out an Application for a Medical Certificate and Student Pilot Certificate.⁴ Respondent stated he signed the application but Ms. Aguilar filled out most of the form for him. Respondent testified Ms. Aguilar asked him about medical conditions but never asked him any questions regarding nontraffic convictions.⁵ At the time, he testified Ms. Aguilar did not know respondent had a nontraffic conviction in March 2009. In filling out the application, Ms. Aguilar marked the "no" box for question 18.w.⁶ Question 18.w. inquires as to whether an airman has a "[h]istory of nontraffic conviction(s)

² The pertinent portion of section 67.403(a)(1) prohibits a person from making fraudulent or intentionally false statements on an application for a medical certificate. 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 prejudiced the party against whom relief is sought." Black's Law Dictionary 891 (8th ed. 2004).

³ Tr. 27, 32-34.

⁴ Exh. A-1 at 19.

⁵ Tr. 35-36.

⁶ Exh. A-1 at 14.

(misdemeanors or felonies)”. After being served with the emergency revocation order in this case in December 2014, respondent stated he attempted to contact Ms. Aguilar to testify on his behalf at the hearing; however, he discovered Ms. Aguilar left the country in 2011, returning to Brazil or Argentina.⁷

On June 12, 2014, respondent reapplied for a medical certificate. Similar to his practice in 2009, respondent completed the application with the help of his current assistant, Amber Foley.⁸ Unlike Ms. Aguilar, Ms. Foley knew of respondent’s 2009 conviction. In the 2014 application, he indicated “yes” to question 18.w.⁹ Notwithstanding this response, on June 17, 2014, after reviewing respondent’s application, an FAA aviation medical examiner issued respondent’s medical certificate.¹⁰

B. Procedural Background

The Administrator issued the emergency revocation order,¹¹ which became the complaint in this case, on December 18, 2014, alleging respondent violated 14 C.F.R. § 67.403(a)(1) by answering “no” to question 18.w. on his 2009 medical certificate application and revoking his airmen and medical certificates. The case proceeded to hearing before the law judge on January 14, 2015. Respondent admitted his answer to question 18.w. on the medical application

⁷ Tr. 39.

⁸ Tr. 60. Exh. A-1 at 5.

⁹ Exh. A-1 at 5.

¹⁰ Id. at 6.

¹¹ This case proceeds pursuant to the Administrator’s authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board’s Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52–821.57.

was incorrect but denied it was intentionally false. Respondent also raised the affirmative defense of the doctrine of laches.

C. Law Judge's Ruling on the Affirmative Defense and Oral Initial Decision

At the conclusion of the hearing, the law judge dismissed the Administrator's emergency order holding the case was precluded under the doctrine of laches. During the hearing, the law judge articulated respondent's burden of proof under the doctrine, stating, "the line of cases with respect to laches or—is essentially, the burden of proof is to show actual prejudice" and "it would be prejudice to be able to defend himself."¹² The law judge asked the Administrator's counsel to explain the reason for the FAA's 5½-year delay between May 2009 and December 2014. The Administrator's counsel responded the delay was explained in Exhibit R-1, the Administrator's response to interrogatories.

The law judge concluded respondent put on undisputed evidence Ms. Aguilar had returned to South America and respondent had tried to contact people who knew her in order to obtain her testimony at the hearing.¹³ The law judge reasoned her testimony could have been used to verify respondent's testimony or explain why she did not expressly ask respondent questions about his conviction history in addition to asking questions about his medical history.¹⁴ The law judge expressly held,

[T]here's definite testimony from [r]espondent as to how things are done, and here's a witness [Ms. Aguilar] who was actually involved in this situation who's no longer available. And it's not disputed. And I have a 5-year delay. And the testimony is, is that if this had been brought up in 2010 or in the first 2 years, she would have been available. **So that's prejudice.** There is a witness who has

¹² Tr. 97.

¹³ Tr. 101-02.

¹⁴ Tr. 102.

pertinent testimony in this case who is no longer available because we've delayed 5½ years.¹⁵

The law judge gave Administrator's counsel the opportunity to explain the 5½-year delay but the following exchange occurred:

ALJ: Well, no. You've offered no evidence to justify this [delay].

Administrator's counsel: I recognize that, Your Honor.

ALJ: Well, then I'm faced with nothing, other than the fact that there's a claim of prejudice. **They've shown to me actual prejudice that they have a—what would be a percipient witness.** This is not some bystander. This is someone who was actively engaged in what we're discussing here **who is no longer available because we have a delay of 5½ ... years.**¹⁶

The law judge found Ms. Aguilar was a percipient witness because she filled out the application at issue. In particular, she filled out the boxes dealing with question 18. He also noted she would have been available as a witness had the Administrator brought the case against respondent in 2010 or 2011—a 2½-year period. He expressly found the Administrator failed “to expeditiously prosecute th[e] action against [r]espondent.”¹⁷ He concluded this delay caused actual prejudice to respondent and dismissed the case under the doctrine of laches.¹⁸

D. Issues on Appeal

The Administrator appeals the law judge's decision arguing the law judge erred in dismissing the case under the doctrine of laches. The United States Court of Appeals for the District of Columbia Circuit has defined the doctrine as “an equitable defense that applies where there is (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice

¹⁵ Tr. 103 (emphasis added).

¹⁶ Tr. 104 (emphasis added).

¹⁷ Tr. 107.

¹⁸ Tr. 104, 106-07.

to the party asserting the defense.”¹⁹ The Administrator additionally argues even assuming Ms. Aguilar’s testimony would corroborate respondent’s testimony, no actual prejudice exists as her testimony simply would support a finding of respondent’s willful disregard of the truth of the answers on his medical certificate application. The Administrator further contends the law judge did not explicitly apply the correct laches standard because the “order” section of the law judge’s decision is very concise, and does not mention actual prejudice.

2. Decision

On appeal, we review the law judge’s decision *de novo*, as our precedent requires.²⁰

A. Doctrine of Laches

The Administrator argues the law judge erred in dismissing this case under the doctrine of laches because no actual prejudice existed. In our Manin opinion following remand from the United States Court of Appeals for the District of Columbia Circuit, we indicated we would evaluate a laches defense on the basis of whether the respondent asserting the defense had established he or she suffered actual prejudice as a result of the delay.²¹ As explained below, we find the record establishes the Administrator lacked diligence in pursuing action against respondent, and this delay resulted in actual prejudice to respondent’s defense.

¹⁹ Manin v. Nat’l Transp. Safety Bd., 627 F.3d 1239, 1241 (D.C. Cir. 2011) (quoting Pro Football, Inc. v. Harjo, 565 F.3d 880, 882 (D.C. Cir. 2009)), see also Administrator v. Tinlin and White, NTSB Order No. EA-5658 (2013).

²⁰ 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); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge’s findings).

²¹ Administrator v. Manin, NTSB Order No. EA-5586 (2011); see also Administrator v. Wells, 7 NTSB 1247, 1249-50 (1991); Administrator v. Peterson, 6 N.T.S.B. 1306, 1307 n.8 (1989).

1. *Lack of Diligence*

We find the facts in the record before us show a clear lack of diligence on the part of the FAA in pursuing this case.

During discovery for the case *sub judice*, the Administrator's counsel provided the following responses to respondent's request for admissions:²²

1. You were aware on or about April 21, 2010 that respondent, holder of a private pilot certificate, had been convicted of a felony on or about March 25, 2009.

Admit.

2. You determined on or about April 21, 2010 that respondent had made a false or fraudulent statement on his Airmen Medical Certificate application dated May 15, 2009. **Admit, in part. A preliminary determination was made on or about February 23, 2012.**

3. You never sent [] respondent any correspondence from the time of your April 21, 2010 discovery of the 2009 felony conviction until April 12, 2012, when you sent a certified LOI. **Admit, in part. No other correspondence relating to the investigation was sent to respondent during that period.**

4. You never sent [] respondent any correspondence between your 2012 LOI, which was "returned to sender," and April 14, 2014, when you sent another LOI. **Admit, in part. No other correspondence relating to the investigation was sent to respondent during that period.**

5. You never sent [] respondent an Order of Revocation, emergency or otherwise, until the instant Order, dated December 9, 2014. **Admit.**

6. You issued a Third Class Medical certificate to respondent on or about June 17, 2014, issued, in part, upon an Airmen Medical Certificate application dated June 16 [sic], 2014. **Admit; the Administrator, through a designee, issued the certificate.**

7. [R]espondent's Airmen Medical Certificate application dated June 16 [sic], 2014, contained a "yes" mark to question 18.w. **Admit.**

Additionally, the Administrator's counsel answered "[n]o witness" in response to respondent's request for the Administrator to identify witnesses the FAA intended to call to

²² Exh. R-1 at 1-2.

testify regarding the delay of more than four years from the FAA's discovery of respondent's conviction to service of the emergency order in this case.²³

The Administrator's response to interrogatories admitted the FAA knew of respondent's conviction in April 2010 but inexplicably took no action even to request a certified (or "blue ribbon") copy of respondent's airman medical file until February 2012.²⁴ At the hearing, the Administrator's counsel conceded the Administrator offered no evidence to explain the delay.²⁵ Furthermore, the Administrator's appeal brief contains no alleged rationale to explain the 5½-year delay. Therefore, we conclude the Administrator failed to pursue diligently this case against respondent.

2. Actual Prejudice

In his appeal brief, the Administrator's counsel asserts the law judge dismissed the complaint "without making a finding of actual prejudice to respondent."²⁶ To begin, as noted above, we review our law judge's decisions *de novo*. After thoroughly reviewing this record *de novo*, we too find respondent suffered actual prejudice in his ability to defend against this action caused by the loss of a percipient witness.

To the extent the Administrator's counsel appears to argue we should only consider pages 107-108 of the record to constitute the law judge's ruling on this affirmative defense, we find this argument disingenuous and misleading. As noted above, the law judge specifically and

²³ Id. at 5.

²⁴ Exh. R-1 at 1, Exh. A-1 at 17-18.

²⁵ Tr. 104.

²⁶ Appeal Br. at 1, 22.

repeatedly determined respondent suffered actual prejudice from the loss of this percipient witness.²⁷ We affirm the law judge's findings here.

At the hearing, respondent asserted he suffered actual prejudice, in the form of loss of key witness testimony, as a result of the Administrator's lengthy delay in pursuing the case against him. For example, respondent argued Ms. Aguilar would testify she failed to read, line by line, every question on the application to respondent. As the law judge concluded, Ms. Aguilar's testimony could have been used to verify respondent's testimony or explain why she did not expressly ask respondent questions about his conviction history in addition to asking questions about his medical history. Respondent asserted his practice was to have individuals assist him in reviewing legal documents and forms because of his limitations in reading English text. He presented two witnesses at the hearing, Ms. Foley and Raymond Barno, a licensed interpreter, who both testified it was standard practice for respondent to rely on others to assist him in reviewing these types of documents.

We find Ms. Aguilar's testimony would have been essential for the law judge to determine whether respondent intentionally falsified his medical certificate application because our law judges are obligated to assess a respondent's subjective understanding and state of mind in determining whether a respondent intentionally falsified a document.²⁸ We long have adhered to a three-prong test. The Administrator must prove an airman: (1) made a false representation, (2) in reference to a material fact, and (3) with knowledge of the falsity of the fact.²⁹ We defer to

²⁷ We note, in the record, the law judge made reference to the terms "actual prejudice" or "prejudice" on six occasions during his ruling on the doctrine of laches issue. See, tr. 102, 103, 104, 106, and 107.

²⁸ Administrator v. Dillmon, NTSB Order No. EA-5528 (2010).

²⁹ Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)).

our law judge's credibility findings concerning a respondent's subjective understanding of a question unless those findings are arbitrary and capricious.³⁰

In the case *sub judice*, hearing and observing Ms. Aguilar's testimony would be critical to the law judge's assessment of whether respondent's testimony was credible. Ms. Aguilar's testimony would have provided key insight into respondent's subjective state of mind and whether he had intent to falsify his medical certificate application. Ms. Aguilar was the individual who filled in the vast majority of the information on respondent's application and yet she was unavailable to testify, due to the lengthy delay. Therefore, we affirm the law judge's determination that respondent suffered actual prejudice from the Administrator's delay to diligently pursue this case.

B. *Intentional Falsification*

The Administrator contends respondent's failure to read the application proves he intentionally falsified it. In Administrator v. Boardman,³¹ Administrator v. Cooper,³² and Administrator v. Taylor,³³ the respondents testified they simply did not read the application and answered the questions in the same manner as on previous applications. In those cases, we held a failure to read a question before answering it renders the entire medical certificate application process pointless, and does not provide a defense to a charge of § 67.403(a)(1). In Cooper v. NTSB, the D.C. Circuit affirmed this analysis, noting "[b]ecause the willful disregard standard

³⁰ Administrator v. Porco, NTSB Order No. EA-5591 at 5 (2011), aff'd, 472 Fed.Appx. 2 (D.C. Cir. 2012).

³¹ NTSB Order No. EA-4515 (1996).

³² NTSB Order No. EA-5538 (2010), aff'd, 660 F.3d 476 (D.C. Cir. 2011).

³³ NTSB Order No. EA-5611 (2012), aff'd, 723 F.3d 210 (D.C. Cir. 2013).

articulated in Administrator v. Boardman,³⁴ and endorsed by the FAA is a reasonable interpretation of the regulation, the Board's deference to the FAA's interpretation of its regulation was not arbitrary or capricious, an abuse of discretion, or contrary to law.”³⁵

We do not agree with the Administrator's assessment that this case is so cut and dry. We find Cooper, Taylor, and Boardman distinguishable from the case *sub judice*. In this case, Ms. Aguilar's testimony is percipient to a determination on the issue of intentional falsification. Based upon his testimony at the hearing, respondent, unlike the respondents in Cooper and Taylor, was attempting to read and understand the application, using Ms. Aguilar to assist him. However, without Ms. Aguilar's testimony, it is impossible for us to know how much of the application respondent heard and understood, or whether he exhibited a willful disregard for what the application said.

Furthermore, the fact that the Administrator attempts to concede what Ms. Aguilar's testimony *might have been* does not foreclose this issue. The law judge still needed to hear her testimony, first-hand, because it was relevant to respondent's state of mind under Dillmon. The Administrator cannot simply foreclose the need for this testimony by arguing that the potential testimony is undisputed. The testimony of Ms. Aguilar was essential to a determination in this regard.

In making his argument, the Administrator asks us to prejudge which legal theory to apply in this case without having all the facts necessary to reach the proper legal conclusion. We conclude the sole reason for the failure to have this necessary evidence is the 5½-year delay, on the part of the Administrator, in bringing this case against respondent. We find respondent met

³⁴ NTSB Order No. EA-4515 (1996).

³⁵ 660 F.3d 476, 478 (D.C. Cir. 2011).

his burden of proof to show the Administrator lacked diligence in pursuing this action against him and that this delay resulted in actual prejudice to the defense of his case. Under the doctrine of laches and in the interest of justice, we dismiss this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's decision dismissing the case under the doctrine of laches is affirmed.

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

1 ADMINISTRATIVE LAW JUDGE GERAGHTY: I know what the
2 effect of the revocation would be.

3 MR. HARRIS: So those clearly are prejudice that is a
4 result of -- a direct result of the extended delay. There has
5 never been an explanation. There has been no evidence by the
6 Administrator as to why there was a delay, as to why something
7 wasn't -- as soon as they found out about it. And we're stuck
8 with what we have, which is something that happened in 2009. And
9 here we are dealing with it in 2015. I think that's an inordinate
10 delay that has inured to detriment and to prejudice of the
11 Respondent.

12 I would want to say one thing really quickly as to the
13 sanction table and just point out that in looking at the sanction
14 table, they talk about controlled substance violation, mandatory
15 revocation; counterfeit parts, mandatory revocation. When they
16 talk about intentionally false or fraudulent, they only talk about
17 revocation, not some mandatory revocation. I think that's --

18 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, Board
19 precedent is any falsification goes to lack of qualification and
20 verification. But anyway --

21 MR. HARRIS: That's my case, Your Honor.

22 ADMINISTRATIVE LAW JUDGE GERAGHTY: Rebuttal?

23 REBUTTAL CLOSING ARGUMENT ON BEHALF OF THE ADMINISTRATOR

24 MR. TERASAKI: Thank you, Your Honor. I'm not sure what
25 order I'm going to address these, but let's go ahead and try that.

1 First of all, I think under the Hart v. McLucas
2 standard, we've shown all three prongs. Actually, they were
3 admitted, so the showing wasn't much of an effort.

4 Counsel refers to the reasonableness of Respondent's
5 reliance on others to fill out the forms for the Respondent and
6 then show him where to sign. And he says as far as they know,
7 that hasn't caused a problem other than in this instance of the
8 May 2009 application. Well, we don't know. Has anybody ever gone
9 back and looked at the dozens of --

10 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, but that goes
11 into supposition. That's his testimony. It hasn't caused any
12 other problems as far as he knows.

13 MR. TERASAKI: We submit that that's speculation at
14 best. Respondent admits that he did not go item by item through
15 section 18 of the application, even though he saw that there was
16 lots of information and there were lots of boxes to check yes or
17 no on. So was that a reasonable reliance on Ms. Aguilar, when she
18 asked him the limited number of questions that she did? Was it
19 reasonable to rely on her filling out that application when that
20 -- those were the circumstances?

21 Now, counsel has made the argument that her
22 unavailability -- she apparently has gone back to South America.
23 Her unavailability means that they don't have her today to explain
24 why, why she didn't ask him more detailed questions dealing with
25 section 18. Your Honor, we submit that the why really isn't that

1 relevant. The fact is, she didn't, and he relied on that. She
2 marked all the nos in section 18, and he signed the application.
3 So I'm not sure where that would get them if they even had
4 Ms. Aguilar on the stand today to explain why.

5 Your Honor, counsel has referred to the Tinlin and White
6 and the Manin case in terms of the doctrine of laches. I don't
7 think we have an expiration of evidence issue here for the reason
8 I just explained. I'm not sure what Ms. Aguilar could ask --

9 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, I --

10 MR. TERASAKI: -- or tell us.

11 ADMINISTRATIVE LAW JUDGE GERAGHTY: We have a 5-year
12 delay in the bringing of this action. And, you know, there is
13 Board precedent that the Board looks askance at any usage by the
14 FAA of classifying something as an emergency action to obviate the
15 fact that the case can't be brought because of the Board's stale
16 complaint rule. So there has to be some explanation to me what
17 happened between May of 2009 and December 2014. That's --

18 MR. TERASAKI: Well, that is just -- excuse me.

19 ADMINISTRATIVE LAW JUDGE GERAGHTY: -- 5½ years.

20 MR. TERASAKI: Yeah. That is addressed in R-1, Your
21 Honor, in the responses to the interrogatories.

22 But getting back to the expiration --

23 ADMINISTRATIVE LAW JUDGE GERAGHTY: No, I would like an
24 answer to that. That is -- that's an affirmative defense. They
25 put on evidence that Ms. Aguilar is somewhere in South America,

1 Brazil or Argentina. That hasn't been disputed.

2 It's also not disputed that he called around to people
3 that might have known her, where she is, and nobody knows other
4 than she's not in this country. She could have been called as a
5 witness. Now, exactly what testimony -- if nothing else, could
6 have, I would assume, for the sake of argument, arguendo, that she
7 would support the testimony that she simply checked all the boxes.
8 That would be verification. Also verification of that's the usual
9 way that he handles all his business. And also could have
10 testified as to the thing I brought up, why she didn't
11 differentiate between medical history and items 18v and (w). So
12 there was some testimony that she could have offered.

13 MR. TERASAKI: Your Honor, she could have offered some
14 testimony that would have supported what he said today.

15 ADMINISTRATIVE LAW JUDGE GERAGHTY: Yeah. Well -- yeah,
16 but the thing is, I've got to look -- he's the one claiming
17 prejudice. Why is there a 5-year delay?

18 MR. TERASAKI: Your Honor, that is addressed in
19 R-1.

20 ADMINISTRATIVE LAW JUDGE GERAGHTY: No. There has to be
21 an -- why was there a 5-year delay?

22 MR. TERASAKI: Well, obviously I don't have anything on
23 the evidentiary record to address that.

24 ADMINISTRATIVE LAW JUDGE GERAGHTY: But, you know, the
25 Administrator had the answer and they saw as an affirmative

1 defense, item 12 -- I mean, this isn't -- there's one, two, three,
2 four -- four lines of affirmative defense with a citation to Board
3 precedent. I would think that you should have been prepared to
4 rebut that; you know, we had a delay because we didn't find out
5 about this until October of 2014 because whatever.

6 But what I'm faced here is that there's -- there's
7 definite testimony from the Respondent as to how things are done,
8 and here's a witness who was actually involved in this situation
9 who's no longer available. And it's not disputed. And I have a
10 5-year delay. And the testimony is, is that if this had been
11 brought up in 2010 or in the first 2 years, she would have been
12 available. So that's prejudice. There is a witness who has
13 pertinent testimony in this case who is no longer available
14 because we've delayed 5½ years.

15 And I think under Board precedent, when there's a --
16 it's assembled as a stale complaint, it is incumbent upon the
17 Administrator to show that this is not stale because we only found
18 out about the mechanical deficiencies in the maintenance of this
19 aircraft because it was only brought to our attention 4 months ago
20 and we processed -- you know, they're supposed to be processed
21 expeditiously. This was not processed expeditiously. And I have
22 no explanation.

23 MR. TERASAKI: May I finish, Your Honor?

24 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, I'm asking --
25 I think the only thing that you can tell me, explain to me why the

1 Administrator was unable to bring this action in the year 2010 or
2 2011, at least within the first 2 years.

3 MR. TERASAKI: Well, my understanding is that our
4 investigating office --

5 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, no. You've
6 offered no evidence to justify this.

7 MR. TERASAKI: I recognize that, Your Honor.

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, then I'm faced
9 with nothing, other than the fact that there's a claim of
10 prejudice. They've shown to me actual prejudice that they have a
11 -- what would be a percipient witness. This is not some
12 bystander. This is someone who was actively engaged in what we're
13 discussing here who is no longer available because we have a delay
14 of 5½ half years.

15 MR. TERASAKI: Well, Your Honor, may I address that?

16 ADMINISTRATIVE LAW JUDGE GERAGHTY: Yes.

17 MR. TERASAKI: Well, Ms. Aguilar, assuming that she were
18 here, would testify in support of what Respondent testified.

19 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, yeah, but
20 that's supposition. We don't know what she would testify to.

21 MR. TERASAKI: Well, I seriously doubt she would
22 contradict Respondent. If, for example, she did contradict
23 Respondent --

24 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, yeah, but
25 you're saying -- now you're saying "if." You know, if we all

1 struck it rich on the lottery, we wouldn't have to do this
2 probably. But, you know, "if" isn't going to work. What I'm
3 faced with is, what is the explanation for a 5½-year delay. You
4 have offered no explanation. Thank you.

5 At this point, therefore, I am going to dismiss this
6 case on the basis of a failure to explain the 5½-year delay on the
7 part of the Administrator in bringing this action because of the
8 following reasons:

9 5, as shown here, is that in March of 2009 he was
10 convicted, and he made an application in May of 2009, which is the
11 application at issue. There is testimony which is uncontradicted
12 that a Ms. Aguilar is the one who actually filled out all of the
13 application, except for the top block on the application, items 1
14 through 14, which involve the name and address and birthdate and
15 those things. But then after that, as to questions particularly
16 as to medical history and Items 18w and 18v, particularly here,
17 history of nontraffic convictions, Ms. Aguilar filled all those
18 boxes by marking -- and if I look at the marks, it appears that
19 these marks are all consistent. They are made by the --
20 apparently the same person. They look to be that way.

21 And with respect to the signing of the application, it's
22 not read, and that's the testimony that stands uncontradicted.
23 And the testimony of Mr. Barno supports that this is the usual
24 procedure, and Ms. Foley also supports that.

25 Ms. Aguilar is a percipient witness. It is also

1 undisputed that she was available in the years 2010, 2011. That
2 would have been 2½ years for the Administrator to have brought
3 this action when the Respondent would have had her available to
4 testify in support of his argument as to how this was done and any
5 explanation that she might have given as to why she proceeded
6 apparently the way she did, just asked him the medical thing and
7 just check check check. I've had cases where even a respondent
8 who can read and write English simply says, hey, I saw "no," and I
9 just kept writing "no."

10 But she is now unavailable because of the delay of 5½
11 years. And there has been no explanation or justification offered
12 by the Administrator to explain why it took that long. And the
13 Board has held in the past that it is inappropriate for the
14 Administrator to bring an emergency action -- and I'm not saying
15 that as done specifically here, but it does -- it falls into that
16 category of bringing an action as an emergency action to avoid the
17 implications of the stale complaint rule where in fact it is a
18 stale complaint. And it has redounded to the prejudice of the
19 Respondent.

20 The Respondent has offered evidence which has not been
21 rebutted. I understand he has the burden of proof, the
22 Respondent, but he has offered that evidence. I have -- she was
23 there. She's the one that did this. She's a percipient witness.
24 She was available for the first 2½ years. She's not available
25 now. I've tried to find her, and she's somewhere in South

1 America. And we don't know where. Brazil or Argentina. That's
2 prejudice.

3 Therefore, I am dismissing this on the basis of the
4 failure of the Administrator to expeditiously prosecute this
5 action against the Respondent, and I find in favor of the
6 Respondent on a doctrine of laches.

7 ORAL INITIAL DECISION AND ORDER

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: Pursuant to notice,
9 this matter came on for trial on January 14, 2015 in San Diego,
10 California.

11 The Complainant was represented by his staff counsel,
12 Mr. Terasaki of the Western Pacific Region, Federal Aviation
13 Administration. The Respondent was present at all times and was
14 represented by his counsel, Mr. Charles Harris of La Mesa,
15 California.

16 Parties were afforded the opportunity to offer evidence,
17 to call and examine witnesses. In addition, the Respondent raised
18 as an affirmative defense that this case is subject to dismissal
19 under the doctrine of laches.

20 My discussion as to the burden of proof, which was with
21 the Respondent on that assertion as an affirmative defense, and my
22 finding with respect to the evidence relating to a delay of 5½
23 years in the Administrator bringing the action against the
24 Respondent results in my finding and conclusion that there has
25 been an inexcusable, at this point, delay in the bringing of this

1 action, and therefore, this action is subject to dismissal under
2 the doctrine of laches, the failure to expeditiously prosecute
3 this action against Respondent.

4 ORDER

5 IT IS THEREFORE ORDERED that this action be, and the
6 same hereby is, dismissed.

7 Entered this 14th day of January 2015 at San Diego,
8 California.

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PATRICK G. GERAGHTY

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Judge

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1 APPEAL

2 ADMINISTRATIVE LAW JUDGE GERAGHTY: Your offer?

3 MR. TERASAKI: Yes, Your Honor. As I was about to say
4 in concluding my remarks regarding prejudice and doctrine of
5 laches, is that our position is that if Ms. Aguilar had been here
6 and supported the Respondent's testimony in terms of the past
7 practice and how they filled out the 2009 application, the result
8 would be the same. If she agreed with Respondent that she filled
9 out all of section 18, he filled out the written language parts,
10 he did not read it, if she agreed with all of that, that the
11 result would be the same.

12 ADMINISTRATIVE LAW JUDGE GERAGHTY: Well, that's the
13 same argument you've made, counsel, so you can, I assume, do this
14 in your appeal brief.

15 MR. TERASAKI: Well, that's what I was about to explain
16 to you in terms of --

17 ADMINISTRATIVE LAW JUDGE GERAGHTY: Do you want the
18 appeal provisions read?

19 MR. TERASAKI: We're aware of the appeal provisions,
20 Your Honor.

21 ADMINISTRATIVE LAW JUDGE GERAGHTY: Thank you. Do you
22 want them read, Mr. Harris?

23 MR. HARRIS: No.

24 ADMINISTRATIVE LAW JUDGE GERAGHTY: The parties waive
25 the reading of the appeal provisions for emergency proceedings. I

1 just advise you this is an emergency case, as you well know,
2 Mr. Terasaki. So therefore, file your notice of appeal
3 expeditiously.

4 MR. TERASAKI: I understand.

5 ADMINISTRATIVE LAW JUDGE GERAGHTY: And we'll all be
6 illuminated by the full Board.

7 MR. TERASAKI: We hope so.

8 ADMINISTRATIVE LAW JUDGE GERAGHTY: We hope so.

9 Nothing further for the record. The proceeding is
10 closed. Thank you.

11 (Whereupon, at 12:20 p.m., the hearing in the above-
12 entitled matter was adjourned.)

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CERTIFICATE

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

IN THE MATTER OF: Duraid A. Zaia
DOCKET NUMBER: SE-19750
PLACE: San Diego, California
DATE: January 14, 2015

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.

Shonna Mowrer
Official Reporter