

SERVED: June 17, 2015

NTSB Order No. EA-5750

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 15th day of June, 2015

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19715
v.)	
)	
GEORGE EDWIN MATTHEWS, JR.)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the decision of Administrative Law Judge Stephen R. Woody, issued December 11, 2014.¹ By that decision, the law judge affirmed the Administrator’s complaint against respondent for violating 14 C.F.R. § 67.403(a)(1) by intentionally falsifying a medical

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

certificate application, and revoked all airman and medical certificates.² We deny respondent's appeal.

A. *Facts*

Respondent, who holds airline transport pilot and flight instructor certificates, applied for a renewal of his first-class medical certificate on April 16, 2014. Respondent was employed as an independent contractor who worked overseas conducting oil and gas exploration flights, and became aware that his current medical certificate had become illegible and tattered. Respondent, therefore, elected to apply for a renewal. In his April 16, 2014 application, respondent checked "yes" in response to question 18v, which states:

Medical History – HAVE YOU EVER IN YOUR LIFE... HAD ANY OF THE FOLLOWING? ... History of (1) any arrest(s) and/or conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any arrest(s) and/or conviction(s) and/or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges, or which resulted in attendance at an educational or rehabilitation program.³

In the explanation section that follows question 18v, respondent did not include his most recent arrest for driving under the influence of alcohol (DUI), which occurred on April 10, 2014, in Oregon. Instead, he wrote "previously reported, no change."⁴ This explanation referred to respondent's 2007 arrest and conviction of DUI, which occurred in Nevada.⁵ Respondent had

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

³ Compl. at ¶ 4.

⁴ Exh. A-2; tr. 26-27.

⁵ Tr. 28, 62-63. The record establishes respondent's blood alcohol content at the time of his 2007 arrest was 0.102 percent. Tr. 28.

self-reported the 2007 DUI to the FAA Civil Aviation Security Division within 60 days, as required under 49 C.F.R. § 61.15(e).⁶

Respondent's blood alcohol content at the time of his arrest on April 10, 2014 was 0.21 percent, which the FAA's expert witness testified could indicate a tolerance to alcohol. Upon being arrested in Oregon on April 10, 2014, respondent retained the services of Attorney Michael Romano to seek counsel with regard to a DUI "diversion program" unique to the state of Oregon. Attorney Romano, who testified telephonically at the hearing in the case *sub judice*, stated he did not inform respondent whether respondent would be eligible for the diversion program. The program only is available to first-time DUI offenders, and Attorney Romano was unaware of respondent's 2007 arrest for DUI in Nevada. Attorney Romano testified he only explained the program to respondent, rather than opining as to its applicability.⁷

B. *Procedural Background*

The Administrator issued the emergency order of revocation,⁸ which became the complaint in this case, on August 27, 2014, alleging respondent violated 14 C.F.R. § 67.403(a)(1) by failing to list his April 10, 2014 arrest for DUI on his April 16, 2014 medical certificate application. The order demanded revocation of his airmen and medical certificates. The case proceeded to hearing before the law judge on December 10, 2014. Respondent admitted his explanation for his answer to question 18v on the medical application was incorrect but averred it was simply a mistake and not intentionally false. Respondent argued he believed he was eligible for the Oregon DUI diversion program, under which his April 10, 2014 DUI arrest

⁶ Exh. A-3 at 115.

⁷ Tr. 99-100.

⁸ Respondent subsequently waived the applicability of the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52–821.57.

would be expunged from his record upon his successful completion of the program. He, therefore, contended he did not need to report the arrest on the medical certificate application he completed six days after the arrest.

C. Law Judge's Oral Initial Decision

In his oral initial decision on December 11, 2014, the law judge affirmed the FAA's emergency order and revocation. The law judge summarized the three-prong standard for intentional falsification: 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.⁹ The law judge stated the only prong of the intentional falsification standard in dispute was the third prong.

The law judge acknowledged, in intentional falsification analysis, our jurisprudence requires the law judge assess a respondent's credibility in evaluating whether the Administrator has fulfilled the third prong of the test. In this regard, the law judge summarized respondent's testimony concerning the DUI diversion program. The law judge also recounted the relevant portions of the testimony of respondent's attorney, whom respondent had retained to represent him for the DUI charge and counsel him with regard to applying for the diversion program. The law judge determined respondent's testimony lacked credibility. The law judge found "simply not credible" respondent's contention that "despite an experienced DUI attorney not being able to tell him that he was eligible for the diversion program, he nonetheless concluded he was eligible and that he did not need to report his arrest [six] days earlier because [the arrest] would eventually be expunged."¹⁰ The law judge further explained his adverse credibility determination

⁹ Initial Decision at 160 (referring to Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)).

¹⁰ Initial Decision at 163.

in stating respondent's assertion that he concluded his April 10, 2014 arrest was his first offense, after he knew he had been arrested and convicted of a DUI charge in Nevada in 2007, defied credibility. Respondent testified he believed his Montana driving record, which did not show the 2007 Nevada DUI arrest or conviction, was the only record he needed to consider for purposes of Oregon's DUI diversion program. The law judge determined this contention "simply defie[d] belief."¹¹ The law judge found respondent knew his April 10, 2014 DUI arrest had not been expunged from his record, yet he "failed to seek advice from his DUI attorney, his longstanding aviation medical examiner or others, such as friends with whom he had consulted previously regarding whether he should report the arrest."¹² The law judge determined such a decision further demonstrated respondent's lack of credibility.

D. Issues on Appeal

On appeal, respondent continues to assert he "simply made a mistake" in not reporting his April 10, 2014 arrest for DUI on his April 16, 2014 medical certificate application.¹³ He contends the law judge erred in "disregarding the totality of Attorney Romano's testimony that [respondent's] confusion about the status of his Oregon arrest and DUI [d]iversion [p]rogram had a legitimate basis in fact and law."¹⁴ Respondent also argues the law judge erred in concluding respondent's testimony and that of Attorney Romano contradicts the assertions respondent made in his amended answer to the complaint.¹⁵ Respondent also asserts the law judge erred in "failing

¹¹ Id.

¹² Id. at 164-65.

¹³ Appeal Br. at 6.

¹⁴ Id. at 10.

¹⁵ Specifically, respondent stated in his amended answer that, "respondent was arrested, and to the best of his knowledge and belief was advised as early as April 12th, 2014, that the Oregon

to consider the compressed time constraints [respondent] was under between the April 10, 2014 DUI and the April 16, 2014 [m]edical [a]pplication.”¹⁶ Respondent further contends the law judge should not have concluded respondent’s “legal and factual conclusions about the status of his 2007 DUI arrest and conviction implied he had knowingly committed fraud on his April 2014 application.”¹⁷ Finally, respondent contends the charge in the Administrator’s complaint violates the Tenth Amendment of the United States Constitution.¹⁸

2. *Decision*

On appeal, we review the law judge’s decision *de novo*, as our precedent requires.¹⁹

A. *Intentional Falsification*

The law judge correctly applied the three-prong standard in Hart v. McLucas, concluding only the third prong was in dispute.²⁰ Analysis of this prong depends on a credibility determination concerning whether respondent intended to falsify an answer on the medical

diversion program would include expungement of any arrest, and/or conviction.” Amended Answer at ¶ 2. Respondent further stated at the time he completed his application, “he was under the clear legal impression that . . . pursuant to Oregon law, the April 10, 2014 DUI, arrest and any subsequent conviction would be expunged under the diversion program.” Id. at ¶ 10.

¹⁶ Id. at 15.

¹⁷ Id. at 16.

¹⁸ The Tenth Amendment provides, “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.

¹⁹ 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).

²⁰ Supra note 9.

certificate application.²¹ We defer to the credibility findings of our law judges in the absence of a showing such findings are arbitrary and capricious.²² Our review of the record does not support a finding that his credibility determinations were arbitrary and capricious, and we note that on appeal, respondent does not challenge the law judge's credibility determinations.

To resolve respondent's arguments regarding his affirmative defense of mistake, we do not find persuasive respondent's contention the law judge erred in disregarding Attorney Romano's testimony. The law judge explicitly summarized the testimony and found it contradicted respondent's contentions. Attorney Romano did not advise respondent whether respondent would qualify for the DUI diversion program, and even if he suggested respondent would be able to participate in the program, it was incumbent upon respondent to determine whether the program would excuse him from reporting the arrest on his medical certificate application. Neither the medical application nor its written instructions mention potential participation in such a program as an excuse for reporting an arrest. Attorney Romano's testimony did not bolster respondent's case. If respondent was confused about the program and its potential effect on the answers he provided on his medical certificate application, he should have inquired of the FAA, rather than expecting Attorney Romano, who does not represent

²¹ Administrator v. Dillmon, NTSB Order No. EA-5528 at 11 (2010) (stating a determination of a respondent's subjective understanding of a question on the medical certificate application is critical to determining whether the respondent intentionally falsified the application); Administrator v. Singleton, NTSB Order No. EA-5529 (2010) (stating a law judge must make credibility determinations in intentional falsification cases); see also Administrator v. Reynolds, NTSB Order No. EA-5641 at 8 (2012).

²² Administrator v. Porco, NTSB Order No. EA-5591 at 13-20 (2011), aff'd, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam).

clients in airman certificate enforcement action cases,²³ to inform respondent of the program's effect on his medical certificate application.

We further find unpersuasive respondent's contention the law judge erred in summarizing respondent's amended answer to the complaint. In the amended answer, respondent suggested he "honestly and mistakenly believed the arrest and any subsequent conviction would be expunged under the Oregon DUI diversion program," and that such an impression arose from his discussion about the diversion program with Attorney Romano.²⁴ At the hearing, the testimony of both Attorney Romano and respondent did not imply respondent honestly believed an arrest and conviction would be expunged under the DUI diversion program in Oregon. Respondent's argument that the law judge somehow incorrectly summarized this fact is without merit.

Even assuming, *arguendo*, the law judge's summary of this testimony and respondent's amended answer was erroneous, the law judge's decision still would stand undisturbed. The law judge provided several bases for making a credibility determination adverse to respondent,²⁵ and in determining respondent's affirmative defenses were meritless.²⁶

With regard to the allegation that the law judge failed "to consider the time constraints" between respondent's April 10, 2014 arrest for DUI and his April 16, 2014 application for a

²³ Tr. 94-95, 102.

²⁴ Initial Decision at 161; Amended Answer at ¶¶ 11-12.

²⁵ Initial Decision at 162.

²⁶ *Id.* at 163-64. Respondent had alleged he was entitled to dismissal of his case under the Pilot's Bill of Rights, which required the FAA to undertake a review of the medical certificate application in the interest of improving the application's clarity. Pub. L. 112-153 § 4, 126 Stat. 1159 (August 3, 2012). In addition, respondent listed eight defenses under the heading "MISTAKE" in his amended answer. Respondent listed these defenses as "affirmative defenses," although they are all based on the contention he did not intend to falsify his answer to question 18v; rather, that he believed he simply made a mistake because he misunderstood the potential applicability of the DUI diversion program.

medical certificate, we conclude the law judge did not err. The compressed period of time between April 10 and April 16, 2014, does not excuse respondent's false answer. Respondent elected to renew his medical certificate early.²⁷ Respondent could have contacted the FAA or his aviation medical examiner for a determination as to whether the diversion program might excuse the need to report his April 10 arrest, and he could have delayed his submission of the application until he was certain as to the correct answer. The fact that only six days elapsed between his arrest for DUI and the day he completed and submitted his medical certificate application demonstrates a disregard to ensure the accuracy of his answers on the application, without a determination as to his eligibility for the diversion program and as to whether the diversion program would excuse him from reporting the arrest at all.

Respondent's contention the law judge should not have concluded respondent's "legal and factual conclusions about the status of his 2007 DUI implied he had knowingly committed fraud on his April 2014 application" is without merit. We agree with the law judge's assessment concerning respondent's report of the 2007 arrest on nine separate medical certificate applications he filed since April 2008. In an April 22, 2007 letter to the FAA Aerospace Medical Certification Division, respondent wrote, "I was wrong in thinking I wasn't required to make a report unless proven guilty as my case has not yet gone to trial."²⁸ This acknowledgment demonstrates respondent knew he needed to report "a DUI citation."²⁹ Such knowledge directly impugns respondent's argument that he believed potential eligibility to participate in the

²⁷ Id. at 153 (law judge's summary of testimony of Dr. Penny Giovanetti, manager of the Medical Officer Branch and deputy manager of the Aerospace Medicine Certification Division, Civil Aerospace Medicine Institute, who stated respondent's medical certificate would have expired at the end of May 2014).

²⁸ Exh. A-3 at 115.

²⁹ Id.

diversion program might excuse his report of an arrest for DUI occurring only six days prior to his completion of his medical certificate.

B. Tenth Amendment

Respondent claims the United States Constitution's Tenth Amendment precludes the Administrator from taking action against his certificates based on his intentionally false answer to question 18v. In this regard, respondent asserts, "there are no uniform laws or regulations covering all of the fifty State's [sic] DUI legal provisions."³⁰ Respondent's relief, if any, concerning an alleged Tenth Amendment violation lies with a Federal court, not the Board as we lack jurisdiction to review Constitutional issues.³¹ In reviewing appeals of aviation certificate enforcement actions, our jurisdiction is limited, discrete and specific.³² Therefore, as we lack jurisdiction, we decline to consider the substance of respondent's argument that the Administrator's charge violated the Tenth Amendment.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's decision affirming the Administrator's complaint and revocation of all respondent's airmen and medical certificates is affirmed.

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT and WEENER, Members of the Board, concurred in the above opinion and order.

³⁰ Appeal Br. at 19-20.

³¹ See, e.g., Administrator v. Beauchamin, NTSB Order No. EA-4371 (1995) (stating, "It is well established that we have no authority to rule on challenges to the constitutionality of a regulation," and citing Watson v. NTSB, 513 F.2d 1081, 1082 (9th Cir.1975); Administrator v. Boardman, NTSB Order No. EA-3523 at 10 (1992); and Administrator v. Ewing, 1 NTSB 1192, 1194 (1971)).

³² 49 U.S.C. § 1133.

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. *

GEORGE EDWIN MATTHEWS, JR., *

Respondent. *

* * * * *

Docket No.: SE-19715
JUDGE WOODY

Department of Education
400 L'Enfant Plaza East, S.W.
Second Floor Hearing Room
Washington, D.C. 20594

Thursday,
December 11, 2014

The above-entitled matter came on for hearing, pursuant
to Notice, at 11:00 a.m.

BEFORE: STEPHEN R. WOODY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

LADONNA DOUGLAS, Esq.
Federal Aviation Administration
Office of the Chief Counsel
6500 S. MacArthur
Oklahoma City, Oklahoma 73125
405-954-3296

On behalf of the Respondent:

JOSEPH M. LAMONACA, Esq.
755 North Monroe Street
Media, Pennsylvania 19003
610-558-3376

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ORAL INITIAL DECISION AND ORDER

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ADMINISTRATIVE LAW JUDGE WOODY: This has been a proceeding under the provisions of 49 United States Code, Section 44709 and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board.

This matter has been heard before this administrative law judge and as provided by the Board's Rules. I've elected to issue an Oral Initial Decision in this matter.

Pursuant to notice, this matter came on for hearing on December 10th and 11th, 2014, in Washington D.C. The Administrator was represented by one of his staff counsel, LaDonna Douglas, of the Aeronautical Center Counsel's Office. Respondent was represented by Mr. Joseph Lamonaca.

Parties were afforded a full opportunity to offer evidence, to call, examine and cross-examine witnesses and make arguments in support of their respective positions. I will not discuss all of the evidence in detail. I have however considered

1 all of the evidence, both oral and documentary. That which I do
2 not specifically mention is viewed by me as being corroborative or
3 is not materially affecting the outcome of this decision.

4 DISCUSSION

5 The Respondent, George E. Matthews, Jr., has appealed
6 the Administrator's Emergency Order of Revocation dated August 27,
7 2014. Pursuant to the Board's Rules the Administrator filed a
8 copy of that order on September 3rd, 2014, which serves as the
9 complaint in this case. Respondent subsequently waived his right
10 to an expedited proceeding in this matter.

11 The Administrator ordered the emergency revocation of
12 Respondent's airline transport pilot certificate, flight
13 instructor certificate, first-class medical certificate, and any
14 other airman or medical certificate held by Respondent based on
15 Respondent's violation of Federal Aviation Regulations, Section
16 67.403(a)(1). And more specifically, the complaint alleges that
17 Respondent made or caused to be made a fraudulent or intentionally
18 false statement on an application for a medical certificate dated
19 April 16, 2014. And, further, even if the statement provided on
20 the application for medical certificate is determined not to be
21 intentionally false or fraudulent, the information provided was
22 nonetheless incorrect and thereby provide a basis for suspension
23 or revocation of Respondent's medical certificate under Federal
24 Aviation Regulations, Section 67.403(c)(1).

25 In his answer to the Administrator's complaint,

1 Respondent admitted paragraphs 1 and 3. With respect to paragraph
2 5, Respondent admitted it in part and denied it in part. As
3 Respondent has admitted to those allegations or portions of
4 allegations, those matters are deemed as established for purposes
5 of this decision.

6 Respondent denied paragraphs 4, 7, 8 and 9, and with
7 respect to allegations 2 and 6, Respondent indicated he was unable
8 to answer the allegations or that the allegations required no
9 responsive answer. Thus, those allegations will be treated as
10 denied for purposes of this decision.

11 The Administrator moved for the admission of Exhibits
12 A-1 through A-13, which were admitted into evidence without
13 objection. Respondent moved for admission of Exhibits R-1 and
14 R-2, which were also admitted without objection.

15 The Administrator presented the testimony of Special
16 Agent Dustin Rollins, Dr. Penny Giovanetti, and Michael G. Romano,
17 Esquire.

18 Special Agent Rollins is a security specialist at the
19 Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma.
20 He's been a security specialist with the FAA for 6 months. Prior
21 to that he was a criminal investigator with the DEA for 4-1/2
22 years and a Norman, Oklahoma police officer for 4 years. In all,
23 he has approximately 9 years of investigative experience.

24 He was assigned to investigate Respondent following an
25 NDR hit in May of 2014. The investigation was related to

1 Respondent's alleged violation of Federal Aviation Regulations,
2 which I may refer to as FAR, Section 67.403(a) for failing to
3 report a DUI arrest in Oregon on his application for medical
4 certificate dated April 16, 2014, and that's at Exhibit A-2.

5 Special Agent Rollins obtained copies of records from
6 the State of Oregon, which are at Exhibit A-8, which reflect
7 Respondent's arrest in Redmond, Oregon on April 10, 2014, for
8 driving under the influence of intoxicants with blood alcohol
9 content level of .21 percent.

10 Respondent also has a 2007 arrest and conviction for DUI
11 in Nevada, as reflected in Exhibit A-5. That arrest and
12 conviction was first reported on Respondent's April 2008 medical
13 application and has been reported on each application since
14 reflecting no change. Exhibit A-4 shows that Respondent has had a
15 total of 33 prior medical certificate applications and the past 9
16 have included reporting of his 2007 DUI.

17 Agent Rollins sent Respondent a letter of investigation,
18 or an LOI, on June 13th, 2014, indicating that Agent Rollins was
19 investigating Respondent's failure to disclose an alcohol incident
20 on his medical application form, which is Exhibit A-9. Page 7 of
21 that exhibit is Respondent's response to the LOI, in which he
22 indicated that he should have sought counsel prior to renewing his
23 medical. Respondent did not provide a copy of his fee agreement
24 with Mr. Romano at that time.

25 Exhibit A-10 is the guidelines for the Oregon DUI

1 diversion program that Agent Rollins obtained from the Internet.
2 The eligibility criteria includes the fact that an individual must
3 have no DUI conviction in the past 10 years. Agent Rollins also
4 viewed Attorney Romano's website, which includes similar
5 information on the Oregon DUI diversion program.

6 Exhibit A-11 includes FAA sanction guidelines, which
7 calls for revocation of all airman and medical certificates for
8 intentionally false entries on a medical certificate application.

9 Agent Rollins agreed that Respondent's LOI response,
10 that he should have sought counsel before renewing, could possibly
11 be read more than one way. He did not attempt to clarify that
12 statement in any way.

13 Agent Rollins did not contact Attorney Romano, was not
14 privy to discussions Attorney Romano may have had with Respondent,
15 does not know what advice was given by Mr. Romano, and does not
16 know what Respondent's understanding of Mr. Romano's advice might
17 have been.

18 Agent Rollins stated that he did not look into or obtain
19 copies of Respondent's Montana DMV driver's records and did not
20 believe information regarding his Montana driver's license was
21 pertinent since arrest occurred in Oregon.

22 Next, Dr. Penny Giovanetti testified she works for the
23 FAA at the Mike Monroney Aeronautical Center in Oklahoma City.
24 She is the branch manager for the Medical Officer Branch, also
25 serves as the deputy division manager for the Aeromedical

1 Certification Division, which is responsible for medical
2 certification process. She has 28 years' experience in aerospace
3 medicine. Her education, experience and qualifications are more
4 fully set forth in her curriculum vitae, which is in Exhibit A-12.
5 She was qualified as an expert in aviation medicine.

6 Dr. Giovanetti is familiar with the airman medical
7 certification process, which is directly related to aviation
8 safety. She's familiar with question 18 on the application and
9 all its subparts. The data provided on the application is
10 critical, as any yes answers trigger further exploration of the
11 individual's pertinent history. The applicant would have to
12 provide a detailed explanation in regarding the background and
13 pertinent information related to any yes answer.

14 The aviation medical examiner relies on the answers to
15 question 18, including question 18v, or Victor, to determine what
16 action to take on the application. Potential alcohol or substance
17 abuse is a significant concern since it reflects on an airman's
18 qualifications to safely operate an aircraft. Unless the
19 applicant provides an honest and complete disclosure on the
20 application, there is no opportunity to make a complete and
21 accurate evaluation.

22 She reviewed Respondent's certified airman medical
23 records at Exhibit A-3. The record shows an arrest for DUI on
24 April 10, 2014, also includes a medical application form that was
25 submitted on April 16, 2014. Question 18v on the application was

1 marked yes and "previously reported, no change." The record also
2 contains a DUI conviction in 2007 which had been reported on prior
3 medical applications in the same manner.

4 She also reviewed a letter submitted to the FAA on
5 April 22, 2007, from Respondent, which indicated he failed to
6 report his February 2007 DUI arrest and action on his March 2007
7 medical application while the matter was still pending, but
8 learned that he should have reported otherwise and submitted the
9 letter to rectify his mistake.

10 Dr. Giovanetti indicated the second DUI is significant
11 for several reasons. First, an AME is required to defer an
12 application involving a second DUI. Since the second DUI arrest
13 was not reported here, the AME issued the medical certificate
14 based solely on the prior history previously reported.

15 Also, an additional DUI generally warrants further
16 evaluation. And here the increased blood alcohol content level
17 from the first test, which was approximately .10 percent, to the
18 second DUI arrest where it was .21 percent is also a red flag.
19 That increase may demonstrate an increased tolerance for alcohol
20 which may be consistent with long-term use or abuse. Further, an
21 individual may not recognize a pattern of abuse, so it's more
22 critical for the AME to interrogate the applicant and gather
23 additional information.

24 Dr. Giovanetti opined Respondent is aware of the
25 standard for indicating "previously reported" on a medical

1 application form since he had been using that reporting standard
2 since 2008 with respect to his 2007 DUI.

3 The applicant is required to report an arrest or
4 suspension of driving privileges. Dr. Giovanetti stated the
5 purpose or purposes of reporting on the medical application form
6 are quite different from disposition through the legal process.
7 Any arrest, suspension or revocation of driving privileges, or
8 attendance at an educational or rehabilitation program must be
9 reported on the form. She stated whether an individual is
10 ultimately found not guilty or what the legal outcome of the case
11 may be is unimportant as it relates to the initial reporting and
12 medical evaluation, although it may be important to the later
13 evaluation of qualifications.

14 Dr. Giovanetti stated that Respondent was not required
15 to renew his second-class medical certificate in April of 2014,
16 since it would not have expired until the end of May; however, if
17 he chose to complete a new medical, he was still required to
18 report accurately and completely on the application, even if he
19 still had a current medical.

20 I found both Dr. Giovanetti and Special Agent Rollins to
21 be very knowledgeable and credible witnesses.

22 Next, Respondent presented the testimony of Michael
23 Romano, Esquire, and of Respondent, George Matthews, Jr.

24 Respondent testified first. He testified that he has
25 resided in Oregon on and off for the past 5 years with his

1 significant other or his girlfriend, as he referred to her
2 interchangeably. Despite residing in Oregon, he has no Oregon
3 driver's license but maintains a Montana driver's license.

4 He graduated high school in Nebraska and has
5 approximately 2 years of college but no degree. He obtained his
6 private pilot's certificate in 1980, and prior to this April 2014
7 incident was self-employed as a contract pilot flying part 91
8 operations for oil and gas exploration companies overseas.

9 Respondent testified that he was charged with and
10 convicted of DUI in Nevada in 2007 based on an arrest that
11 occurred while he was passing through Nevada on his way to Texas.
12 He did not initially report the February 2007 DUI arrest and
13 administrative action taken against his driving privileges by the
14 state of Nevada on his March 2007 medical certificate application,
15 but in April of 2007 he voluntarily reported the matter in a
16 letter to the FAA.

17 Aside from his 2007 and 2014 DUI matters, he indicated
18 he has no other arrests. Aside from this matter, he also
19 indicated he has no prior FAA enforcement actions on his record.

20 In April 2014, Respondent was drinking on a plane during
21 a return flight on a rotation home. When his anticipated ride was
22 not at the airport, he attempted to drive home and was arrested
23 for DUI, taken to the station and charged, and eventually released
24 to his girlfriend.

25 He looked for an attorney the next day, calling DUI

1 specialists from the web or the phone book. He initially reached
2 primarily voicemails or secretaries, and then he received a call
3 back from Mr. Michael Romano. Mr. Romano generally explained the
4 Oregon DUI diversion program and that it pertained to first-time
5 offenders only.

6 Respondent indicated he had no other conversations with
7 Mr. Romano prior to his medical application on April 16, 2014.
8 Mr. Matthews indicated that he had recently checked his Montana
9 driving record and there was no record of his 2007 DUI arrest or
10 conviction, nor was his driver's license ever suspended or revoked
11 in his home state. Therefore, he stated he believed that this was
12 his first offense. He indicated he believed this despite the fact
13 that he had been reporting his DUI conviction to the FAA
14 consistently since 2007 and despite the fact that he had first
15 reported in April of 2007 the administrative action taken against
16 his driving privileges by the state of Nevada.

17 He admitted that he had reported his 2007 DUI conviction
18 on nine consecutive medical applications, even though there was no
19 record of the conviction or driving privileges action on his
20 Montana driver's record.

21 Mr. Matthews testified that when he answered question
22 18v on his April 16, 2014, application he believed he did not have
23 to report his recent DUI arrest. He believed the arrest would not
24 be a part of his record pursuant to the Oregon DUI diversion
25 program.

1 Respondent testified that he discussed the diversion
2 program only in general terms with Mr. Romano prior to his April
3 16th medical application. Mr. Romano did not tell Respondent he
4 was not eligible for the diversion program nor did he tell
5 Respondent he would be eligible for the program. According to
6 Respondent, he came to that conclusion on his own after talking
7 with a number of attorneys over the weekend.

8 Mr. Matthews also indicated one of the attorneys he
9 spoke to indicated he may be eligible for the DUI diversion
10 program so long as the Oregon courts did not find a record of his
11 prior DUI conviction. He was unsure of which attorney may have
12 provided that advice.

13 Mr. Matthews indicated it was only after his April 16,
14 2014 application that he learned he was not eligible for Oregon's
15 DUI diversion program because of his 2007 DUI conviction. He
16 stated he was stunned when Oregon found records of his conviction.

17 Respondent initially testified that he did not tell
18 Mr. Romano about his 2007 DUI conviction prior to April 16, 2014.
19 He subsequently testified that he may have advised Mr. Romano
20 about his prior DUI and then later that he must have informed
21 Mr. Romano of it. Still later in response to his counsel's
22 question, he indicated he did not inform Mr. Romano about his 2007
23 DUI conviction prior to April 16, 2014, but did so only later
24 during more specific conversations about the DUI diversion
25 program.

1 Respondent indicated he did not ask Mr. Romano about
2 question 18v because Mr. Romano indicated he was not an aviation
3 guy.

4 Mr. Matthews agreed that he had been arrested for DUI on
5 April 10, 2014, and that he understood that he had been arrested.

6 Mr. Matthews emphasized that he was not required to
7 apply for a new medical certificate on April 16th but did so only
8 because his existing medical certificate had become faded and
9 cannot be read easily.

10 Mr. Michael Romano testified telephonically. He is an
11 attorney in Oregon. He was retained by Respondent to represent
12 Respondent on the DUI charge in April of 2014. Mr. Romano has
13 been admitted to practice law since 2000, first as a prosecuting
14 attorney and now in private practice since 2006. His practice
15 consists of about a 50/50 split between family law and DUI
16 representation. He estimates that he has represented several
17 hundred DUI clients since 2006.

18 Mr. Romano's notes indicate Respondent's initial
19 consultation occurred on April 11, 2014, and that he signed -- he
20 being the Respondent, signed the engagement letter on April 15th
21 hiring Mr. Romano.

22 On initial consultation, Mr. Romano indicated he
23 discusses general eligibility criteria, including a requirement
24 for no DUI convictions in the past 15 years as that relates to the
25 Oregon DUI diversion program. If a client advises Mr. Romano of a

1 prior DUI conviction, Mr. Romano advises the client that he or she
2 is probably not eligible for the DUI diversion program but they
3 will have to look into the matter further. Mr. Romano stated that
4 he avoids initially telling prospective clients definitively
5 whether or not they're eligible for the DUI diversion program
6 since there are a number of factors that may influence that
7 eligibility.

8 Mr. Romano's records of his consultation with
9 Mr. Matthews indicate a DUI in 2007 from Nevada. Mr. Romano's
10 recollection was that he did not discuss with Mr. Matthews his
11 renewal of his medical certificate. Mr. Romano opined that there
12 was not sufficient time to do so since typically initial
13 consultations are only about 30 minutes.

14 Mr. Romano indicated that Mr. Matthews has been a
15 pleasure to work with and that he has had no reason to question
16 his veracity or credibility, although he cannot say the same for
17 many of his clients.

18 Having discussed the testimony, I'll now discuss that as
19 it pertains to the remaining evidence and the allegations in this
20 case.

21 Turning first to the asserted affirmative defense based
22 upon the Pilot's Bill of Rights, in this case Respondent has
23 raised an affirmative defense based upon the Pilot's Bill of
24 Rights and argues that in passing the Pilot's Bill of Rights,
25 Congress asked for a review and revision of the medical

1 application form. Although Respondent suggests in his answer to
2 question 18v on the application in particular lacks clarity and is
3 subject to misinterpretation, he has presented no evidence or put
4 forth any argument to support such a contention here. Respondent
5 testified not that he misunderstood the question on 18v but that
6 he believed that his DUI arrest would be expunged under the Oregon
7 DUI diversion program.

8 Beyond the fact that Respondent has presented no
9 evidence or articulated any cogent argument to support this
10 asserted affirmative defense, I would simply note that Congress
11 merely directed in the Pilot's Bill of Rights that an assessment
12 be made of the medical certification process and the associated
13 forms and standards, and certainly I do not find that the language
14 in the Pilot's Bill of Rights establishes any black letter law,
15 and I've been presented no evidence nor am I aware of any changes
16 in statutory or regulatory guidance that would dictate a departure
17 from Board precedent. Until and unless such changes to the law or
18 regulations are enacted, I must reply on the established Board
19 precedent in making my determination.

20 Based on the foregoing I would find -- or I do find that
21 Respondent has not established by a preponderance of evidence an
22 affirmative defense based upon the Pilot's Bill of Rights.

23 Now, turning to the alleged intentional falsification
24 violation. With respect to the alleged violation of Federal
25 Aviation Regulations, Section 67.403(a)(1), the elements of an

1 intentionally false statement are: (1) a false representation;
2 (2) in reference to a material fact; and (3) made with knowledge
3 of its falsity. And those elements, of course, are based upon the
4 seminal case of *Hart v. McLucas*. That's at 535 F.2d 516, 519 (9th
5 Cir. 1976), and there have been a long line of cases interpreting
6 and applying that standard.

7 Respondent through counsel conceded during argument that
8 the Administrator has met the first two prongs of the *Hart v.*
9 *McLucas* intentional falsification test, narrowing the issues for
10 my consideration solely to the third prong of the test. In other
11 words, Respondent does not contest the falsity of the information
12 provided in response to question 18v on the application for
13 medical certificate that was completed on April 16, 2014. The
14 documentary evidence and Respondent's testimony further supports
15 that stipulation. Nor does Respondent contest that the incorrect
16 information he provided was material and relied upon by the FAA
17 when issuing the medical certificate for which he applied, which
18 is consistent with Dr. Giovanetti's testimony. Therefore, I find
19 that the information provided by Mr. Matthews in response to
20 question 18v on the application for medical certificate was both
21 false and material.

22 The last element, knowledge of the falsity of the
23 representation, is the critical issue to be decided in this case.
24 Question of knowledge of the falsity of the information provided
25 turns on the credibility of Respondent's explanation regarding his

1 response to question 18v on the medical application.

2 Respondent has raised a mistake as an affirmative
3 defense in this matter. Specifically he argues that he provided
4 an incorrect but not intentionally false statement in his response
5 when he failed to report his April 10, 2014, DUI arrest in
6 response to question 18v.

7 There is no question Respondent was arrested for DUI on
8 April 10, 2014, as documented in Exhibit 8 and admitted by
9 Respondent in his answer to the complaint and during his testimony
10 during the hearing, nor is there a question that Respondent knew
11 he had been arrested for DUI on that date. Respondent suggests in
12 his answer to the complaint that he honestly and mistakenly
13 believed the arrest and any subsequent conviction would be
14 expunged under the Oregon DUI diversion program. His answer to
15 the complaint further suggests this information regarding the
16 diversion program came from Attorney Michael Romano.

17 Contrary to that suggestion, his testimony during the
18 hearing indicated that Respondent was not told by Mr. Romano
19 whether he would or would not be eligible for the diversion
20 program. This is an area where I found Respondent to be less than
21 forthcoming in his testimony, first suggesting that Attorney
22 Romano did not tell him that he was not eligible for the diversion
23 program, and then only on further questioning admitting that his
24 attorney also did not tell him that he would be eligible. On the
25 other hand, Mr. Romano testified that had he been made aware of a

1 prior DUI conviction, he would advise his client that he probably
2 would not be eligible for the diversion program but he would not
3 provide a definitive answer either way initially.

4 At the hearing Respondent stated that he drew his own
5 conclusion after consulting a number of attorneys. Respondent's
6 testimony and that of Mr. Romano contradicts the assertions that
7 he made in his pleadings in answer to the complaint.

8 Nor could Respondent make up his mind about whether he
9 had or had not told Attorney Romano about his 2007 DUI conviction
10 prior to completing the medical application on April 16, 2014.
11 His testimony was very inconsistent on that issue, initially
12 indicating he did not believe he had informed Mr. Romano, then
13 that he must have, and still later that he had not informed him
14 until after submitting the medical application.

15 It appears from Mr. Romano's notes that Respondent did
16 make Attorney Romano aware of his 2007 DUI conviction, and it
17 seems unlikely that Respondent would not mention the prior
18 conviction given his own testimony that Mr. Romano had advised him
19 the diversion program was for first offenders only.

20 Respondent's answers were not only inconsistent, but I
21 also found him to be evasive during questioning, significantly
22 undermining his credibility.

23 Regardless of whether he did or did not inform
24 Attorney Romano of his 2007 DUI conviction prior to April 16,
25 2014, one thing that is clear based on the testimony of both

1 Mr. Romano and Respondent is that Attorney Romano did not advise
2 Mr. Matthews that he would be eligible for the diversion program
3 and Mr. Matthews did not rely on such advice in concluding that
4 his record would be expunged and that he did not have to report
5 the arrest on his medical application.

6 Respondent's assertion that despite an experienced DUI
7 attorney not being able to tell him that he was eligible for the
8 diversion program, he nonetheless concluded he was eligible and
9 that he did not need to report his arrest 6 days earlier because
10 it would eventually be expunged is simply not credible.

11 Also incredible is Respondent's contention that he
12 concluded the April 2010 [sic] DUI arrest and citation was his
13 first offense and thus that he was eligible for the first offender
14 Oregon diversion program, despite his prior DUI conviction, simply
15 because his Montana driver's record did not include record of his
16 2007 DUI arrest, conviction, or driving privilege revocation from
17 the state of Nevada.

18 This is especially unbelievable given that he first
19 reported his loss of Nevada driving privileges in April of 2007
20 and has been reporting his 2007 DUI conviction in Nevada on every
21 medical application since 2008, all despite there being no record
22 of arrest or conviction in his Montana driving records and no
23 action against his Montana driver's license. Again, his
24 explanation simply defies belief.

25 His alternative explanation regarding his conclusion

1 that he could qualify for the first offender diversion program is
2 equally concerning. He testified that he was advised by an
3 unidentified attorney that so long as the Oregon courts did not
4 learn of his 2007 DUI conviction he could qualify as a first
5 offender.

6 Setting aside for the moment that this acknowledges his
7 earlier DUI conviction and contradicts his assertion that he
8 believed this was his first offense because there was no record of
9 the 2007 DUI in his Montana driving records, in essence,
10 Respondent insinuates that he would be willing to withhold or at
11 the very least not divulge information regarding his prior DUI
12 conviction to the Oregon judicial system for his own benefit, that
13 is, to meet the eligibility requirements for the diversion
14 program, yet he would have me accept his assurances that he would
15 not and did not knowingly falsify or fail to report information
16 regarding his April 10, 2014, DUI arrest on his April 16 medical
17 application also for his own benefit; in other words, to avoid
18 possible denial, or at minimum, deferral of his medical
19 certificate.

20 Further, even if I were to accept the notion that
21 Respondent believed that he would at some point be determined
22 eligible for the diversion program in Oregon, what is
23 uncontroverted is that when he filled out the medical application
24 on April 16, 2014, he knew that he had not been determined
25 eligible, had not completed any portion of the diversion program,

1 and the April 10th DUI arrest had not been expunged from his
2 record, nor did he seek the advice of his DUI attorney, his
3 longstanding aviation medical examiner or others, such as friends
4 with whom he had consulted previously regarding whether he should
5 report the arrest.

6 The suggestion that an experienced airline transport
7 pilot and flight instructor certificate holder such as
8 Mr. Matthews, and one who has a lengthy and ongoing experience
9 reporting his earlier DUI arrest and conviction on multiple
10 medical certificate applications, honestly believed that he did
11 not have to report his DUI arrest from 6 days earlier on his
12 medical application based on a highly speculative possibility that
13 he might at some point qualify for Oregon's DUI diversion program
14 and might at some point successfully complete the diversion
15 program and might then have the arrest and any conviction expunged
16 from his records is completely lacking in credibility.

17 In sum, I found Mr. Matthews to be evasive and less than
18 forthcoming during testimony, his testimony to be inconsistent and
19 contradictory in his assertions regarding the Oregon DUI diversion
20 program, and his knowledge of the falsity of his answer to
21 question 18v on his April 16, 2014 medical application to be
22 lacking in credibility. Based on the foregoing, I find that the
23 misrepresentations made by Mr. Matthews on his April 16, 2014
24 application for medical certificate was made with knowledge of its
25 falsity.

1 Having found that the Administrator has established all
2 the elements of intentional falsification by a preponderance of
3 evidence, I further conclude, consistent with the discussions and
4 evidence discussed above, that the Respondent has failed to
5 establish the affirmative defense of mistake.

6 Based on the foregoing, I find that the Administrator
7 has proven all of the allegations numbered 1 through 9 in the
8 Administrator's complaint by a preponderance of the reliable,
9 probative and credible evidence. I further find that Respondent,
10 George E. Matthews, Jr., violated Section 67.403(a)(1) of the
11 Federal Aviation Regulations in that he made an intentionally
12 false statement on an application for medical certificate dated
13 April 16, 2014.

14 Having so found, I now turn to the sanction proposed by
15 the Administrator in this case. On August 3, 2012, Public Law
16 112-153, known as the Pilot's Bill of Rights, was signed into law
17 by the President. The law applies to all cases before the
18 National Transportation Safety Board involving reviews of actions
19 of the Administrator of the Federal Aviation Administration to
20 deny airmen medical certificates under 49 United States Code
21 Section 44703, or to amend, modify, suspend or revoke airman
22 certificates under 49 United States Code Section 44709.

23 The Pilot's Bill of Rights specifically strikes from 49
24 United States Code Section 44709 and 44710 language that in cases
25 involving amendments, modifications, suspensions or revocation of

1 airman certificates the Board is bound by all of the adopted
2 interpretations of laws and regulations the Administrator carries
3 out and of written agency policy guidance available to the public
4 relating to sanctions to be imposed under this section, unless the
5 Board finds an interpretation is arbitrary, capricious or
6 otherwise not according to the law.

7 While no longer bound to give deference to the Federal
8 Aviation Administration by statute, that agency is entitled to
9 judicial deference due all other federal agencies under the
10 Supreme Court decision in *Martin v. Occupational Safety and Health*
11 *Review Commission* at 499 U.S. 144, 111 S.Ct. 1171.

12 In applying the principles of judicial deference to the
13 interpretations of laws, regulations and policies that the
14 Administrator carries out, I must analyze and weigh the facts and
15 circumstances in each case to determine if the sanctions selected
16 by the Administrator is appropriate.

17 In the case before me, the Administrator has argued that
18 the appropriate sanction based on deference to FAA sanction
19 guidelines and past precedent is revocation of any and all airman
20 and medical certificates. The Administrator further suggests
21 revocation is appropriate in any case where, as here, the
22 violation involves an intentional falsification and goes to a lack
23 of qualifications. Also presented the testimony of Dr. Giovanetti
24 regarding the seriousness of the determination to be made under
25 the medical application process and the necessity of having full,

1 accurate and complete documentation submitted by an applicant so
2 that an informed determination can be made under that process.

3 Respondent made no argument with respect to deference
4 due to the Administrator but has argued that the evidence
5 established only that Respondent mistakenly provided a mistakenly
6 incorrect rather than intentionally false information and
7 suggested that revocation would not be appropriate under those
8 circumstances. Alternatively, Respondent argued that should I
9 find intentional falsification, a suspension rather than
10 revocation will be appropriate, or perhaps revocation of some but
11 not all airman certificates.

12 Board precedent firmly establishes that even one
13 intentional falsification compels the conclusion that the
14 falsifier lacks the necessary care, judgment and responsibility
15 required to hold any airman certificate. That precedent stems
16 from the case of *Administrator v. Berry*. That's at NTSB Order
17 EA-2689 and that was decided in 1988.

18 Since 1988, the Board has consistently found and
19 continues to find that even one intentional falsification compels
20 the conclusion that the falsifier lacks the necessary care,
21 judgment and responsibility required to hold any airman
22 certificate.

23 I find, therefore, that the sanction sought by the
24 Administrator is appropriate and warranted in the public interest
25 in air commerce and air safety; therefore, I find that the

1 Emergency Order of Revocation, the complaint herein, must be and
2 shall be affirmed as issued.

3 ORDER

4 IT IS THEREFORE ORDERED that the Emergency Order of
5 Revocation, the complaint herein, be, and hereby is, affirmed as
6 issued; that Respondent's airline transport pilot certificate,
7 flight instructor certificate, first-class medical certificate,
8 and any other airman or medical certificate held by him be, and
9 hereby are, revoked.

10 Entered this 11th day of December 2014 in Washington,
11 D.C.

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14 STEPHEN R. WOODY

15

16 Administrative Law Judge

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19 APPEAL

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21 ADMINISTRATIVE LAW JUDGE WOODY: That concludes my
22 initial decision in this matter.

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25 Now, Mr. Matthews, sir, you have the right to appeal, as
I'm sure you may have already discussed with your counsel, but you
have the right to appeal my decision if you disagree with that.
You have certain appeal rights related to that appeal and there
are timelines that apply to any appeal that you may file. I have
a written listing of those appeal rights.

1 Mr. Lamonaca, I'd ask you if you wouldn't mind to please
2 come forward. I'm going to provide you with two copies, one for
3 yourself and one for Mr. Matthews. I'm going to hand a copy of
4 that to the court reporter for the record as well.

5 Ms. Douglas, I provided a copy of the same appeal rights
6 to you yesterday so I'm assuming you don't need another copy?

7 MS. DOUGLAS: No, sir.

8 ADMINISTRATIVE LAW JUDGE WOODY: Mr. Lamonaca, do you
9 desire for me to advise Mr. Matthews further or do you intend to
10 do that?

11 MR. LAMONACA: No, I've done that already, Your Honor.
12 Thank you.

13 ADMINISTRATIVE LAW JUDGE WOODY: All right. Thank you.
14 The only thing that I would do is emphasize to you, and it's
15 listed in here, but what the timelines are for timely filing an
16 appeal. I know Mr. Lamonaca knows that, but please keep those in
17 mind. The Board is very strict on accepting timely or untimely
18 appeals. So if you desire to file an appeal, that's something
19 you'll need to keep in mind.

20 Are there any matters of an administrative nature that
21 we need to discuss from either counsel before we terminate the
22 proceedings?

23 MR. LAMONACA: No, Your Honor. As I said yesterday, I'm
24 under the full understanding that we're not under the emergency
25 rules for the appeal.

1 ADMINISTRATIVE LAW JUDGE WOODY: That's correct. We are
2 not because those have been waived. The emergency processing has
3 been waived, yes.

4 MR. LAMONACA: Thank you, sir.

5 ADMINISTRATIVE LAW JUDGE WOODY: All right. Thank you.
6 Anything from the FAA?

7 MS. DOUGLAS: No, sir, no questions.

8 ADMINISTRATIVE LAW JUDGE WOODY: All right. Thank you
9 both very much. This hearing is terminated.

10 (Whereupon, at 11:49 a.m., the hearing in the above-
11 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: George E. Matthews, Jr.

DOCKET NUMBER: SE-19715

PLACE: Washington, D.C.

DATE: December 11, 2014

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.

Stephen Grider
Official Reporter