

SERVED: June 15, 2017

NTSB Order No. EA- 5817

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, 2017

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-30366
)	
FAN CHI TSENG,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued May 11, 2017.¹ By that decision, the law judge determined the Administrator

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

proved respondent violated 14 C.F.R. § 67.403(a)(1)² and (c).³ The law judge affirmed the Administrator's revocation of respondent's student pilot certificate and first-class airman medical certificate in accordance with § 67.403(b)⁴ and (c). We deny respondent's appeal.

A. Facts

Respondent is currently a student pilot at Universal Air Academy in El Monte, California.⁵ While respondent's native language is Chinese, he can read, write, and speak English.⁶ Respondent was a student and lived in the United States from 2003 to 2010.⁷ On September 18, 2007, respondent was arrested for driving under the influence (DUI) in Santa Clara, California.⁸ At the time of his arrest, respondent's blood alcohol content (BAC) was .20%.⁹ Respondent pleaded no contest and was convicted of "driving with a blood alcohol level of 0.08 or more" on March 3, 2008.¹⁰ Then, the California Department of Motor Vehicles suspended respondent's driver's license.¹¹

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

³ The pertinent portion of § 67.403(c)(1) states that an incorrect statement, upon which the Federal Aviation Administration relied, made in support of an application for a medical certificate may serve as the basis for suspending or revoking a medical certificate.

⁴ The pertinent portion of § 67.403(b) states that a violation of § 67.403(a) is a basis for suspending or revoking all airman, ground instructor, and medical certificates and ratings held by that person.

⁵ Exh. A-8 at 1, Tr. 90.

⁶ Tr. 67, 90.

⁷ Tr. 90.

⁸ Compl. ¶ 2; Answer ¶ 2; Exh. A-4.

⁹ Exh. A-4 at 19; Tr. 26-27.

¹⁰ Compl. ¶ 3; Answer ¶ 3; Exh. A-4.

¹¹ Exh. A-5 at 2, 4.

On June 23, 2016, respondent applied for and was subsequently issued a first-class airman medical certificate by an Aviation Medical Examiner (AME), authorized by the Federal Aviation Administration (FAA), located in Taipei, Taiwan.¹² To complete the medical certificate application, respondent used a computer in the AME's office to establish an account in the FAA's online system called MedXPress.¹³ Respondent testified that a nurse then completed the application for him.¹⁴ In filling out the application, the nurse marked the "no" box for question 18v of FAA Form 8500-8, Application for Airman Medical Certificate and Student Pilot Certificate.¹⁵ Question 18v inquires as follows:

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

Respondent's electronic signature appeared on the application, certifying all statements and answers provided in the application were complete and true.¹⁶

B. *Procedural History*

On April 18, 2017, the Administrator issued an emergency order of revocation, which became the complaint in this case, revoking respondent's student pilot certificate and airman medical certificate. The complaint alleged respondent violated 14 C.F.R. § 67.403(a)(1) by intentionally falsifying his answer to question 18v in his June 23, 2016 application, by answering

¹² Compl. ¶ 4; Answer ¶ 4; Exhs. A-6 at 3, 8; A-8 at 1.

¹³ Tr. 67, 70; see also <https://medxpress.faa.gov/medxpress>.

¹⁴ Tr. 71-72.

¹⁵ Answer ¶¶ 5-6; Exh. A-6 at 3.

¹⁶ Exh. A-6 at 3.

“no” when he had, in fact, been arrested and convicted for DUI on September 18, 2007, and March 3, 2008, respectively.¹⁷ In addition, the complaint noted that, alternatively, 14 C.F.R. § 67.403(c) provides for suspension or revocation of respondent’s airman medical certificate based on his incorrect statement in the medical certificate application upon which the FAA relied.

On April 27, 2017, respondent timely filed a notice of appeal, and the law judge conducted a hearing on May 10-11, 2017. Special Agent Cristina Johnson and Regional Flight Surgeon and Manager for Aerospace Medicine for the Alaska Region, Marcel Dionne, M.D., testified on behalf of the Administrator. Respondent testified on his own behalf. Henry Yang and Chia-Liang Hung, airmen who applied for and were subsequently issued medical certificates at the same AME’s office as respondent, testified on behalf of respondent. Senior AME James Little, Jr., M.D., also testified on behalf of respondent.

At the hearing, Special Agent Johnson testified that the Transportation Security Administration notified her office that a flight training screening revealed respondent’s DUI.¹⁸ To investigate, she testified that she requested and reviewed: respondent’s California driving record that revealed respondent’s driver’s license was suspended; the police report concerning the DUI; and the court record that revealed respondent had a BAC of .20% at the time of the arrest.¹⁹ Special Agent Johnson further testified that she reviewed respondent’s June 2016 application, revealing a “no” response to question 18v and certifying all statements and answers provided were true.²⁰ Special Agent Johnson explained that she issued a letter of investigation

¹⁷ Compl. ¶¶ 2-6.

¹⁸ Tr. 21-22; see also Exh. A-1.

¹⁹ Tr. 24-28; see also Exh. A-4 at 19.

²⁰ Tr. 28-30.

(LOI) to respondent as a result of her investigation.²¹ She testified that, in response to the LOI, respondent indicated a nurse helped him set up a MedXPress account and then completed the application for him.²²

Dr. Dionne testified as an expert witness in aviation medicine and the FAA medical certification process.²³ Dr. Dionne testified about the MedXPress system applicants use to complete their medical certificate applications, indicating respondent's June 2016 application was completed using MedXPress.²⁴ Dr. Dionne explained that MedXPress's terms of service appear when an applicant initially goes to the website to register for a MedXPress account, and that the applicant must agree to the terms prior to proceeding to the application.²⁵ Dr. Dionne testified that MedXPress contains instructions that clarify questions on the medical certificate application, indicate that the applicant airman or pilot must fill out the application, and provide a notice regarding intentional falsification.²⁶

Dr. Dionne opined that the airman medical certification process is important because it ensures that the airman meets the FAA's medical standards.²⁷ Dr. Dionne explained that an applicant's DUI or other alcohol-related motor vehicle incident history is relevant in determining whether an applicant meets the requirements to receive a medical certificate because it may

²¹ Tr. 30-31.

²² Tr. 31-33.

²³ Tr. 42.

²⁴ Tr. 43-44.

²⁵ Tr. 44-47; Exh. A-15.

²⁶ Tr. 47-49; Exh. A-14.

²⁷ Tr. 42.

illustrate that the applicant has a history of alcohol dependence or abuse.²⁸ Concerning a “yes” response to question 18v when an applicant had a DUI, Dr. Dionne explained that the Guide for Aviation Medical Examiners (AME Guide) requires an AME to obtain additional information regarding the disclosed DUI.²⁹ Dr. Dionne explained that the AME Guide contains criteria that requires an AME to defer certification to the FAA when the applicant “registers a blood alcohol level of .15% or higher.”³⁰ He opined that, had respondent disclosed his DUI on his application, the AME would have been required to obtain additional information about the DUI and respondent’s BAC of .20% would require a deferral of his certification to the FAA and a substance abuse evaluation.³¹ Lastly, Dr. Dionne opined that, if an unqualified airman received a medical certificate, the pilot could be a threat to his/her personal health or to the safety of the aviation environment if he/she has a medical condition that affects his/her ability to fly the aircraft or safely operate in the National Airspace System.³²

Respondent testified about his experience at the AME’s office, and stated that when he arrived for his appointment, he inquired with the nurses about how his DUI history would impact his application, but that they could not provide any information.³³ Concerning the medical certificate application, respondent testified that he was a first-time applicant and explained that a

²⁸ Tr. 49-50.

²⁹ Tr. 50-51; see also Exh. A-12 at 8-9.

³⁰ Tr. 51-52; see also Exh. A-12 at 9.

³¹ Tr. 53-54.

³² Tr. 42-43.

³³ Tr. 69-70.

nurse directed him to a computer in the AME's office to establish a MedXPress account.³⁴

Respondent denied ever seeing the terms of service when he established his account.³⁵

Respondent testified that, after establishing his MedXPress account, he stood next to the nurse as she sat at the computer and completed and submitted the application without asking him any questions.³⁶ Respondent testified that while he understood that he was applying for an FAA airman medical certificate, he did not read the application, did not review the answers that the nurse entered, and did not electronically sign the application.³⁷ Respondent admitted that the answer to question 18v on his medical certificate application was false, but stated that he did not intend to falsify his medical certificate application.³⁸ After the application was complete, he went through the medical examination portion with the nurses and AME, and no one asked him about any DUI history.³⁹ Respondent testified that, had the nurse asked him if he ever had an arrest or conviction for DUI, he would have responded "yes," but he would not have remembered his BAC.⁴⁰ Respondent testified that he disclosed his DUI on his Student M1 Visa application.⁴¹

³⁴ Tr. 67, 70-71, 74. Respondent explained that to establish his MedXPress account he filled in his name and email address; received a confirmation email on his phone with a temporary password; and created a permanent password. Tr. 70-71; Exh. R-4.

³⁵ Tr. 88.

³⁶ Tr. 71, 76, 98-101, 105; MedXPress confirmation emails reflect that respondent's application was completed in 12 minutes, including the time it took respondent to establish his MedXPress account. Exhs. R-4, R-5.

³⁷ Tr. 75-76, 84, 89, 91.

³⁸ Tr. 76, 84, 92.

³⁹ Tr. 78-79, 102-03.

⁴⁰ Tr. 72, 79, 82-84.

⁴¹ Tr. 79-82. Respondent applied for a Student M1 Visa in October 2016, 4 months after he applied for and received his medical certificate. Exhs. R-1, R-2, A-8 at 1.

Henry Hao Yang and Chia-Liang Hung testified on behalf of respondent. Messrs. Yang and Hung testified that they applied for medical certificates in the same AME's office as the respondent in Taipei, Taiwan.⁴² Messrs. Yang and Hung explained that, to complete the application, they first established MedXPress accounts on computers in the AME's office, a nurse then completed their applications by orally asking them the application questions in Chinese and entering the answers based on their responses.⁴³ Mr. Yang testified that the nurse did not ask any questions about DUIs.⁴⁴ Messrs. Yang and Hung admitted that they do not have any DUIs.⁴⁵

Dr. Little testified as an expert witness in the process and issuance of medical certificates by AMEs.⁴⁶ Dr. Little testified that an applicant should complete their own application, not an employee in the AME's office, and that he would not permit any of his staff to fill out an applicant's application.⁴⁷ He opined that an experienced applicant takes approximately 30 minutes to complete the application, and "significantly longer than that" for a first-time applicant.⁴⁸ Dr. Little further opined that an application completed in less than 15 minutes would

⁴² Tr. 108, 117. Messrs. Yang and Hung applied on March 3, 2016 and August 24, 2016, respectively. Tr. 109, 113. MedXPress confirmation emails reflect that Mr. Yang's application was completed in 9 minutes, and Mr. Hung's application was completed in 13 minutes. Tr. 109-12, 121-11; Exhs. R-6, R-7, R-8, R-9.

⁴³ Tr. 108, 112, 117-20, 124-25; Exh. R-6.

⁴⁴ Tr. 112.

⁴⁵ Tr. 114, 123.

⁴⁶ Tr. 133.

⁴⁷ Tr. 138.

⁴⁸ Tr. 137-38.

indicate that the individual had significant experience with the application or that the individual did not read the questions.⁴⁹

Dr. Little testified that if a DUI occurs more than 5 years prior to the application date, the AME is not required to obtain the DUI records, but that he would ask the applicant for additional information about the DUI such as: the surrounding circumstances; what happened; if an accident was involved; the final disposition of the case; whether there was court-ordered treatment; and what, if any, were the penalties.⁵⁰ Dr. Little further testified that the AME Guide requires that certification be deferred to the FAA when a reported BAC is greater than .15%, and the FAA reviews the records and makes a determination regarding whether or not to issue the medical certificate.⁵¹ Dr. Little testified that, concerning a DUI more than 5 years prior to the application date, if the applicant did not know his/her BAC and there was no other indicia in the application to suggest a history of substance abuse, an AME could issue the medical certificate without deferral to the FAA.⁵² Dr. Little opined that, in his experience, the FAA would give him permission to issue a medical certificate for an individual with a single DUI 9 years ago, BAC of .20%, and no other aggravating factors.⁵³

C. Law Judge's Oral Initial Decision

On May 11, 2017, the law judge issued an oral initial decision determining the Administrator proved the regulatory violations as alleged by a preponderance of reliable and

⁴⁹ Tr. 138-39, 145.

⁵⁰ Tr. 141-42.

⁵¹ Tr. 142, 144.

⁵² Tr. 143.

⁵³ Tr. 144-45, 151.

probative evidence.⁵⁴ In making this determination, the law judge summarized the regulatory violations alleged in the complaint, noted respondent's admissions in his Answer, summarized witness testimony and relevant exhibits, and explained his assessment of the evidence in terms of the three prongs of the Hart v. McLucas⁵⁵ intentional falsification test, whereby 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.⁵⁶

The law judge indicated that respondent conceded that the Administrator met the first prong of the Hart v. McLucas test.⁵⁷ The law judge additionally noted that respondent's Answer, the documentary evidence, and testimony from respondent and Special Agent Johnson confirm that respondent was arrested for DUI in 2007 and convicted of "driving with a blood alcohol level of .08 or higher" in 2008.⁵⁸ As a result, the law judge concluded that respondent's "no" response to question 18v was false, and the Administrator met the first prong of the test.⁵⁹

In determining whether the Administrator met the second prong of the test, the law judge noted that respondent's counsel stipulated during his closing arguments that the false representation was material.⁶⁰ The law judge also noted that despite that stipulation, respondent's counsel contended that the Administrator did not fulfill this prong of the test because Dr. Little testified that respondent's remote history of DUI would likely not have been a barrier to

⁵⁴ Initial Decision at 195.

⁵⁵ 535 F.2d 516, 519 (9th Cir. 1976).

⁵⁶ Initial Decision at 172-96.

⁵⁷ Id. at 187-88.

⁵⁸ Id.

⁵⁹ Id. at 188.

⁶⁰ Id.; see also Tr. 164.

respondent's medical certification.⁶¹ To support his finding that the false representation is material, the law judge quoted Administrator v. Krings,⁶² "materiality is established by virtue of the fact that [the information] sought in a form used by the Administrator to determine an applicant's qualifications to hold an airman medical certificate."⁶³ The law judge additionally noted that the testimony of Drs. Dionne and Little established the materiality of the false representation.⁶⁴ The law judge concluded the false representation was material, thus finding that the Administrator met the second prong of the test.⁶⁵

Concerning the third prong of the test, the law judge noted that respondent admitted he did not read or answer the application questions and concluded inconsistencies as to what occurred at the AME's office "undermined the credibility of respondent's testimony that he had no opportunity for input in the completion of his MedXPress application."⁶⁶ The law judge pointed out that, in his Answer, respondent asserted that the nurse read the application questions to him and completed the application based on his answers; yet, respondent testified that the nurse did not read any questions to him before completing the application.⁶⁷ The law judge also noted that respondent's testimony was not entirely consistent with the testimony of Messrs. Hung

⁶¹ Initial Decision at 188.

⁶² NTSB Order No. EA-3908 at 5 (1993).

⁶³ Initial Decision at 188.

⁶⁴ Id. at 188-89.

⁶⁵ Id. at 189.

⁶⁶ Id. at 190-91.

⁶⁷ Id. at 191-92; see also Answer at ¶ 3.

and Yang that the nurses asked them medical questions when completing their applications in MedXPress.⁶⁸

The law judge quoted Administrator v. Boardman,⁶⁹ “An [airman] having acted in a manner that could be viewed as evincing a willful disregard for the truth by not reading the questions on a medical certificate application should be determined to have intended that whatever answer he gave be utilized in review of his qualifications.”⁷⁰ Citing the Board’s precedent in Boardman and Administrator v. Cooper,⁷¹ the law judge stated, those cases hold “that failure to read a question before answering it renders the entire certificate application process pointless, and does not provide a defense to the charge of intentional falsification under [§] 67.403(a)(1).”⁷² The law judge found respondent “went a step beyond the respondents in the Boardman and Cooper cases” and “totally abdicated his responsibility to personally complete the medical application and certify the truth and completeness of the answers provided” because he did not read question 18v; he logged into MedXPress and allowed his personal credentials to be used to submit the application on his behalf; he did not read any of the questions; and he did not review any of the answers to the questions.⁷³ As a result, the law judge determined respondent could not now argue that he lacked the intent to give false information.⁷⁴

⁶⁸ Initial Decision at 191.

⁶⁹ NTSB Order No. EA-4515 at 4 (1996).

⁷⁰ Initial Decision at 192.

⁷¹ NTSB Order No. EA-5538 (2010), aff’d sub nom. Cooper v. Nat’l Transp. Safety Bd., 660 F.3d 476 (D.C. Cir. 2011).

⁷² Initial Decision at 192.

⁷³ Id. at 192-93.

⁷⁴ Id. at 193.

The law judge rejected respondent's affirmative defense of reasonable reliance and explained that respondent "ha[d] the independent obligation to fill out and certify his medical application as true and complete[.]" and he admitted to standing next to the nurse at the computer, but did not follow along the application questions or attempt to input the information himself.⁷⁵ The law judge reasoned:

even accepting that the medical application process in [the Taiwan] clinic is somewhat flawed does not, in my estimation, excuse the fact that [r]espondent, by failing to even read the application, completely abdicated his responsibility to ensure that the information submitted, and upon which his medical qualification was to be determined, is true and complete.⁷⁶

The law judge concluded that the Administrator met the third prong of the test consistent with our precedent in Boardman and Cooper.⁷⁷

The law judge found that the Administrator proved all the allegations in the complaint by a preponderance of the evidence and that respondent violated § 67.403(a)(1) and (c).⁷⁸ With regard to the sanction, the law judge noted that Board precedent establishes revocation is the appropriate sanction for intentional falsification.⁷⁹

D. Issues on Appeal

Respondent argues that question 18v is not material because, had he answered question 18v truthfully and disclosed his DUI, it would not have resulted in a denial of his medical certificate application. Respondent further argues that he did not have knowledge of the false representation since a nurse completed and submitted his application. Respondent contends he

⁷⁵ Id. at 193-94.

⁷⁶ Id. at 194.

⁷⁷ Id. at 195.

⁷⁸ Id.

⁷⁹ Id. at 195-97.

did not intend to falsify his application because he was never asked the question and, as a first-time applicant, he reasonably relied on the nurse at the AME's office to direct him through the application process. Lastly, respondent argues revocation is not the appropriate sanction for this case.

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.⁸⁰

A. *Intentional Falsification*

We apply the three-prong test articulated in Hart v. McLucas in intentional falsification cases. 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.⁸¹ Respondent admitted that his answer to question 18v was false; therefore, the parties do not contest the first prong of the test.⁸²

With regard to the second prong of the test, respondent contends that even if he had disclosed his DUI at the time of his application, the AME could have still issued a medical certificate.⁸³ This argument is without merit. We have long held that a false statement is material if it has the "natural tendency to influence, or [is] capable of influencing a decision of the

⁸⁰ 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 NTSB 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

⁸¹ *Supra* n. 55.

⁸² Tr. 92.

⁸³ Appeal Br. 9. Respondent's brief did not include page numbers. Citations to pages in respondent's brief treat the first page of the brief that includes the case caption as page 1.

Administrator.”⁸⁴ In Administrator v. Taylor, the Board stated, “whether the AME would have issued the medical certificate if the application properly was completed is not the relevant issue here. Respondent, by not answering the question correctly, effectively prevented the AME from engaging in such a determination.”⁸⁵ In the case *sub judice*, Dr. Dionne testified that question 18v is important because it aids FAA-designated AMEs in determining whether the applicant meets the medical standards for a medical certificate.⁸⁶ Indeed, an FAA-designated AME issued respondent a medical certificate based, in part, on respondent’s June 2016 medical certificate application which included the incorrect answer to question 18v. We therefore find that the Administrator has fulfilled the second prong of the test.

Concerning the third prong of the test, the Board will infer that a respondent has knowledge of the falsity of the fact when a respondent admits that he or she did not read the questions on a medical certificate application in accordance with the willful disregard standard articulated in Boardman, Cooper, and Taylor. In Boardman, the Board stated:

It seems to us that an airman who, knowing [that the Administrator relies on the accuracy of answers on a medical certificate application], tenders an application that turns out to have a wrong answer to one or more of many questions he freely chose not even to read, much less to thoughtfully answer, cannot reasonably argue that he lacked the intent to give false information, for the submission of inaccurate information is a natural and foreseeable consequence of completing an application in a manner that essentially guarantees its unreliability.”⁸⁷

⁸⁴ Administrator v. Cassis, 4 NTSB 555 (1982), recon. denied, 4 NTSB 562 (1983), aff’d, Cassis v. Helms, Admr., FAA, et al., 737 F.2d 545 (6th Cir. 1984), Hinson v. Bielecki, NTSB Order No. EA-4222 (1994).

⁸⁵ NTSB Order No. EA-5611 at 4 (2012), aff’d sub nom. Taylor v. Huerta, 723 F.3d 210 (D.C. Cir. 2013); see also Cooper, *supra* n. 71 at 485 (finding that notwithstanding the AME’s subsequent determination that the undisclosed DUI did not disqualify respondent from medical certificate, “the Board could reasonably conclude that such a sequence of events is not the regime contemplated by the FAA in promulgating section 67.403(a)(1).”).

⁸⁶ Tr. 49-50.

⁸⁷ *Supra* n. 69 at 3-4.

In addition, the Court of Appeals for the District of Columbia Circuit asserted that “[a] defense of deliberate inattention fails where the applicant is attesting to events about which he has actual knowledge.”⁸⁸

Citing Administrator v. Sue,⁸⁹ respondent argues that intentional falsification “specifically requires that [r]espondent has actual knowledge of a false statement, and that it is not enough that a respondent should have known that an entry was false.”⁹⁰ Respondent contends that, since the nurse completed his application and did not ask him question 18v or about his DUI, he did not have knowledge of the false representation since he never read the question or reviewed the answers prior to her submitting the application.⁹¹

We find respondent’s reliance on Sue is inapposite. In Sue, the respondent testified that he reviewed the questions on the medical certificate application, he read the question asking for traffic conviction information, and he concluded his previous driving-while-intoxicated convictions were not pertinent.⁹² In the case *sub judice*, however, it is undisputed that respondent did not read the questions on the medical certificate application. In intentional falsification cases where a respondent fails to read a question on the application, we will apply a willful disregard standard.

In Boardman, Cooper, and Taylor, we asserted that a failure to read a question before answering it renders the entire medical certificate process pointless, and does not provide a

⁸⁸ Taylor, *supra* n. 85 at 213 (quoting Cooper, *supra* n. 71 at 484).

⁸⁹ NTSB Order No. EA-3877 at 3 (1993).

⁹⁰ Appeal Br. 7-8.

⁹¹ Id. 2, 7-8.

⁹² *Supra* n. 89 at 3-4.

defense to a charge of § 67.403(a)(1). In the case *sub judice*, respondent freely chose not to read question 18v. Respondent knew he had been arrested and convicted of DUI at the time of his application; in fact, he testified that he asked about his DUI history when he entered the AME's office, and that the nurses indicated that they did not know how it would impact his application. While respondent contends that his state of mind was neither fraudulent nor intentionally false,⁹³ under the willful disregard standard, we find that respondent's failure to read question 18v does not establish a defense to allegations that respondent made knowingly false entries on his medical certificate application.

Respondent argues that the facts of his case are different from typical medical certificate revocation cases for DUI because a nurse completed and submitted respondent's application.⁹⁴ We disagree. As acknowledged in his testimony, respondent, similar to the respondents in Cooper and Boardman, admits he did not read question 18v.⁹⁵ Respondent, just like the respondent in Cooper, contends that had he read the question, he would have checked "yes."⁹⁶ Respondent, also like the respondent in Cooper, knew he had been arrested at the time he completed his application. Lastly, just as in Cooper, respondent testified that he did not read the instructions that accompanied the application. We decline to draw a distinction between an airman who does not read the application questions or review the answers while completing their own application,

⁹³ Appeal Br. 8. Respondent also asserts his mind "was one of full disclosure" because he disclosed his DUI on his 2016 Student M1 Visa application. Appeal Br. 8-9; Exh. A-8 at 7, 9. Respondent's state of mind when completing an entirely different application is irrelevant to the case *sub judice*.

⁹⁴ Appeal Br. 1-2.

⁹⁵ Tr. 91.

⁹⁶ Appeal Br. 2.

and an airman who does not read the questions or review the answers while allowing someone else to complete their application.

We find the Administrator fulfilled all three prongs of the Hart v. McLucas intentional falsification test by a preponderance of the evidence.⁹⁷

B. *Reasonable Reliance*

Our doctrine of reasonable reliance is one of narrow applicability.⁹⁸ In Administrator v. Fay and Takacs,⁹⁹ the Board held if a particular task is the responsibility of another, and “if the [pilot-in-command] has no independent obligation ... *or* ability to ascertain the information, and if the captain has no reason to question the other’s performance, then and only then will no violation be found.”¹⁰⁰

In the case *sub judice*, respondent argues he did not falsify the answer to question 18v because the nurse never asked him the question, and he reasonably relied upon the nurse at the AME’s office who told the applicants what to do and how to do it.¹⁰¹ We disagree. Respondent, as the applicant, had an independent obligation to fill out and certify the medical application as true and complete. The terms of service and instructions for MedXPress make it clear that the applicant must complete the application fully and certify its accuracy.¹⁰² In this regard, the instructions for MedXPress specify, an “[a]pplicant must fill in completely numbers 1 through 20

⁹⁷ While respondent makes much of the fact that the Administrator did not call the AME in question, Dr. Jian Shiu, to testify, our decision is based solely upon the testimony and evidence in the record. See Appeal Br. 4.

⁹⁸ Administrator v. Jacquet, NTSB Order No. EA-5616 at 5 (2012).

⁹⁹ NTSB Order No. EA-3501 (1992).

¹⁰⁰ Id. at 10 (emphasis in original).

¹⁰¹ Appeal Br. 5.

¹⁰² Exhs. A-14 at 1, A-15 at 3.

of the application.”¹⁰³ Block 20 of the application requires an applicant to certify “that all statements and answers provided by me on this application form are complete and true to the best of my knowledge....”¹⁰⁴ In addition, respondent could have ascertained the information required to be submitted with the application because he stood next to the nurse while she completed his application.¹⁰⁵ Therefore, we do not agree with respondent's argument that his reliance upon the nurse who completed the application was reasonable under the circumstances, or that it excuses his culpability in failing to read question 18v and the response provided.

C. Sanction

Respondent argues that revocation is not appropriate sanction in the case *sub judice*.¹⁰⁶ Respondent further contends that any suspension of respondent's medical certificate is moot because the FAA conducted a full investigation and did not find any alcohol abuse since respondent's DUI.¹⁰⁷ We find the law judge did not err in affirming the sanction of revocation. Consistent with the Board's jurisprudence, revocation is the appropriate sanction for intentional falsification cases.¹⁰⁸ We find that nothing in this case warrants departure from our precedent concerning the sanction.

¹⁰³ Exh. A-14 at 1.

¹⁰⁴ Exh. A-6 at 3. MedXPress instructions for Block 20 also state, “If you are satisfied that all information is accurate to the best of your knowledge, click on the ‘Submit’ button. An application may only be submitted once ... Make sure that your application is complete and accurate before you submit it.” Exh. A-14 at 6.

¹⁰⁵ Tr. 75-76.

¹⁰⁶ Appeal Br. 10.

¹⁰⁷ Id.

¹⁰⁸ See, e.g., Administrator v. Byrd, NTSB Order No. EA-5782 (2016).

ACCORDINGLY, IT IS ORDER THAT:

1. Respondent's appeal is denied;
2. The law judge's oral initial decision is affirmed; and
3. The Administrator's revocation of respondent's student pilot and airman medical certificate is affirmed.

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

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

* * * * *

In the matter of: *

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

Complainant, *

v. *

Docket No.: SE-30366
JUDGE WOODY

FAN-CHI TSENG, *

Respondent. *

* * * * *

National Labor Relations Board
888 South Figueroa Street
Courtroom 901, 9th Floor
Los Angeles, California 90017

Thursday,
May 11, 2017

The above-entitled matter came on for hearing, pursuant
to notice, at 9:15 a.m.

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

CHARLES RALEY, ESQ.
Federal Aviation Administration
Office of the Chief Counsel Operations
15000 Aviation Boulevard
Lawndale, California 90261
charles.raley@faa.gov

On behalf of the Respondent:

SCOTT W. WILLIAMS, ESQ.
Aviation Attorney
299 W. Hillcrest Drive
Thousand Oaks, CA 91360
Tel: 805-778-0206
SWilliams@SmallBusinessLaw.Org

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ORAL INITIAL DECISION AND ORDER

JUDGE WOODY: This is a proceeding under the provisions of 49 United States Code § 44709 and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. Pursuant to notice, this matter came on for hearing on May 10 and 11, 2017, in Los Angeles, California, and as required by the Board's rules in emergency cases, I am issuing an oral initial decision.

The Administrator was represented by one of the staff counsel, Charles Raley, Esquire, of the FAA Enforcement Division, Western Team. Respondent was present throughout the proceedings and represented by Scott Williams, Esquire. Parties were afforded a full opportunity to offer evidence, to call, examine and cross-examine witnesses, and to make arguments in support of their respective positions.

I will not discuss all of the evidence in detail. I have, however, considered all the evidence, both oral and documentary. That which I do not specifically mention is viewed by me as being corroborative or as not materially affecting the outcome of the decision.

Respondent, Fan-Chi Tseng, has appealed the Administrator's Emergency Order of Revocation, dated April 18, 2017. Pursuant to the Board's rules, the Administrator filed a copy of that order on May 1st, 2017, which serves as the complaint in this case.

1 The Administrator ordered the emergency revocation of
2 Respondent's combined first class medical and student pilot
3 certificate, based on Respondent's alleged violation of Federal
4 Aviation Regulation § 67.403(a)(1). The complaint alleges that
5 Respondent made, or caused to be made, an intentionally false
6 statement on an application for a medical certificate, dated
7 June 23rd, 2016; more specifically, that he answered "no" to
8 question 18(v) on his medical application when he should have
9 answered "yes" because he had been arrested on September 18, 2007,
10 by the Santa Clara Sheriff's Office and charged with driving under
11 the influence, or DUI, and on March 3rd, 2008, he was convicted by
12 the Superior Court of California with driving with a blood alcohol
13 content of .08 or more. And further, the complaint alleged that
14 even if the statement provided on the application for medical
15 certificate was determined not to be intentionally false or
16 fraudulent, the information provide was, nonetheless, incorrect
17 and thereby provides a basis for suspension or revocation of
18 Respondent's medical certificate, under Federal Aviation
19 Regulation § 67.403(c)(1).

20 Respondent admitted paragraphs 1 through 4 of the complaint,
21 and paragraph 10, to the extent he admits he certified the entries
22 on the application to be complete and true. As he has admitted
23 those allegations or portions of allegations, they are deemed as
24 established for the purpose of this decision. Respondent denied
25 paragraphs 5 through 9 and that portion of paragraph 10 related to

1 Respondent's knowledge that the entries or certifications on the
2 medical application form was false.

3 Administrator's Exhibits A-1, A-2, A-4 through A-6, A-8, A-9,
4 A-11, A-12, A-14 and A-15 were admitted into evidence; Respond-
5 ent's Exhibits R-1 through R-10 were admitted into evidence. The
6 Administrator presented the testimony of Agent Cristina Johnson
7 and Dr. Marcel Dionne.

8 Special Agent Cristina Johnson testified that she's employed
9 as an investigator in the FAA Security Investigation Division.
10 She's been employed there for approximately 15 years, and by the
11 FAA approximately 20 years. As part of her duties with the FAA,
12 she investigates alcohol and drug-related motor vehicle incidents
13 involving certificate orders.

14 She noted she was assigned to investigate Respondent after
15 her office received notice from TSA that a flight training
16 screening revealed that he had been arrested for DUI in September
17 2007 in California. She identified Exhibit A-1 as the referral
18 from TSA. She identified Exhibit A-2 as Respondent's airman
19 certification file, showing he had been issued a first class
20 medical and student pilot certificate.

21 Agent Johnson noted that she had also ordered court records
22 related to Respondent's arrest and conviction, which she identi-
23 fied as Exhibit A-4, as well as DMV driving records from the State
24 of California, which were at Exhibit A-5. Court records show
25 Respondent's total impairment at the time of his arrest as .20

1 blood alcohol content and showed that he pled no contest and was
2 convicted of driving with a blood alcohol level of .08 or greater.
3 His driving record shows his driver's license was suspended as a
4 result of his DUI arrest and conviction.

5 Agent Johnson identified Exhibit A-6 as Respondent's certi-
6 fied blue ribbon medical file, showing Respondent's electronically
7 signed June 23, 2016 medical application form at page 3. She
8 noted Respondent's "no" response to question 18(v), despite his
9 2007 arrest for DUI and 2008 conviction for driving with a blood
10 alcohol level of .08 or higher. She also noted the form was
11 electronically signed by Respondent in Item 20, certifying that
12 the information provided was true and complete to the best of his
13 knowledge.

14 Agent Johnson identified Exhibit A-8 as the letter of inves-
15 tigation, or LOI, that she sent to Respondent, and his January
16 2017 written response to the LOI wherein Respondent noted that
17 after he set up the account and provided his e-mail address, the
18 rest of the application was done by the front desk nurse. Agent
19 Johnson noted she contacted the aviation medical examiner, or AME,
20 in Taiwan and learned nothing that contradicted Respondent's
21 password-certified electronic signature in Item 20 of the
22 application, so she forwarded the investigative file to legal
23 counsel for review and decision regarding enforcement action.

24 Under cross-examination, Agent Johnson agreed that Respondent
25 pled guilty to driving with a blood alcohol level of .08 or

1 greater, not to an impairment level of .20. She also agreed that
2 the electronic signature on the medical application demonstrates
3 only that someone with Respondent's e-mail address and password
4 electronically signed the application. She stated she was not
5 present and did not know who made the key strokes.

6 Next, Dr. Marcel Dionne testified that he is the Regional
7 Flight Surgeon and Manager for Aerospace Medicine for the Alaskan
8 Region of the FAA. Part of his duties in that position is to
9 review medical applications for certification; the bulk of those
10 reviews are for applications that have been deferred from AMEs,
11 but he also does quality reviews of certificates that have been
12 issued by AMEs. He's also responsible for performing examinations
13 on FAA pilots and air traffic controllers in the Alaska Region.

14 He has worked for the FAA for approximately two years, after
15 a prior career in private practice and the United States Air
16 Force. His education, experience, certifications, and profession-
17 al associations are more fully set forth in his CV at Exhibit A-
18 11. He was recognized as an expert in aviation medicine and the
19 FAA medical certification process.

20 Dr. Dionne explained the importance of the medical applica-
21 tion and the certification process in ensuring that airmen meet
22 the medical standards established by the FAA. He also explained
23 that if the information supplied by an applicant is not accurate
24 and complete, then an unqualified applicant could be issued a
25 certificate, which presents a danger to aviation safety.

1 He briefly explained the online MedXpress application pro-
2 cess, wherein the airmen fills out the online application, and
3 obtains a confirmation number, which he supplies to the AME; the
4 AME reviews the application, conducts the medical examination,
5 enters additional information into the system, and either issues
6 or defers the issuance of the medical certificate. He identified
7 A-6, page 3, as Respondent's medical application submitted through
8 MedXPress, dated June 23rd, 2016.

9 Dr. Dionne also explained that MedXPress has terms of service
10 associated with it that come up immediately when registering for a
11 MedXPress account, which he noted would be seen before answering
12 any questions and filling out the application. He identified
13 Exhibit A-15 as those terms of service, which notes, on page 3,
14 that the applicant is responsible for his own registration and
15 password and for maintaining confidentiality of the information
16 and password, and may not let any other person use his registra-
17 tion and password. He also noted there are instructions built
18 into the MedXPress application, which an individual can reference
19 if he has any questions about a particular item on the applica-
20 tion. He identified Exhibit A-14 as a copy of those instructions,
21 which states on page 1 that the applicant must fill in the appli-
22 cation completely and provides a notice regarding intentional
23 falsification.

24 Dr. Dionne observed the importance of the information
25 regarding alcohol incidents in response to question 18(v), as the

1 information provided is weighed in determining whether an airman
2 meets medical standards. He testified that a "yes" response to
3 question 18(v) results in the AME gathering additional pertinent
4 information, such as the circumstances surrounding the incident;
5 where and when it occurred; any conviction or other disposition of
6 the action; the blood alcohol content level; driver's license or
7 driving privileges administrative actions; any other arrests,
8 convictions, or incidents; any substance abuse history; current
9 alcohol use, etc. He noted that the level of impairment is very
10 important because it may be indicative of substance abuse and may
11 require deferral of the certificate.

12 He identified Exhibit A-12 as an excerpt from the AME guide,
13 in particular page 9, which requires a detailed history for all
14 first-time reports of arrests, convictions, and/or administrative
15 actions for alcohol-related incidents. He also noted that the
16 deferral criteria, at the bottom of page 9, requires an AME to
17 defer certification for any arrest, conviction, or administrative
18 action for which the applicant's blood alcohol content level was
19 .15 or higher, and that the arrest itself is sufficient to require
20 deferral, regardless of conviction and disposition. He observed
21 that any blood alcohol level above .15 is concerning for alcohol
22 abuse or dependence.

23 He opined that had Respondent answered "yes" to question
24 18(v), that the AME should have gathered a detailed history,
25 including asking the blood alcohol content level, and if the blood

1 alcohol content of .20 was revealed, then deferral would have been
2 required and a substance abuse evaluation would have been indi-
3 cated. He further opined that had the .20 blood alcohol level
4 been revealed, the AME should have gotten copies of the court and
5 arrest records, even though the incident was more than five years
6 prior. Dr. Dionne concluded that because question 18(v) was
7 answered incorrectly and the arrest and conviction were not
8 reported, the AME, and thus the agency, did not have enough
9 information to make a qualified judgment about Respondent's
10 eligibility for certification.

11 On cross-examination, Dr. Dionne stated that the more common
12 practice is for the applicant to fill out the MedXPress applica-
13 tion and then present the confirmation number to the AME; however,
14 he also stated it is not unusual for the applicant to begin the
15 MedXPress process at the time of the medical exam. He agreed that
16 he was not present when Respondent completed the application in
17 Taiwan, and he did not observe the actions of the nurse.

18 He noted that the amount of time it takes an applicant to
19 register for MedXPress and go through the complete process can
20 vary, depending on the experience of the applicant and medical
21 history, etc. He noted that he has seen it done as quickly as 15
22 minutes by very experienced applicants with an uncomplicated
23 medical history.

24 Dr. Dionne agreed that the AME guide explicitly requires
25 obtaining court records only for an alcohol-related arrest or

1 conviction in the past five years and that there is no automatic
2 deferral for a single DUI that occurred more than five years
3 prior. However, a deferral is required if the blood alcohol
4 content level is above .15.

5 He conceded that the AME guide does not explicitly require
6 deferral or collection of court records if the DUI was nine years
7 prior, and the applicant does not remember the blood alcohol
8 content level. He observed that the AME should gather a detailed
9 history, including perhaps the court and arrest records, in order
10 to assess the applicant's qualifications to be issued a certifi-
11 cate. Dr. Dionne stated that, without the blood alcohol content
12 level being reported, the deferral criteria could not be properly
13 addressed.

14 Respondent testified on his own behalf and called Henry Yang,
15 Liang Hung, and Dr. James Little as witnesses. Respondent testi-
16 fied that he speaks, reads and writes English, but Chinese is his
17 native language.

18 He stated that in June 2016, he went to Dr. Chui's clinic in
19 Taiwan to obtain his FAA medical certificate. He noted he did not
20 go into MedXPress or fill out the application prior to going to
21 the clinic for the exam. He testified he was told by the nurse at
22 the front desk to go into MedXPress to register.

23 He stated he input his name and e-mail address, and then
24 received a confirmation e-mail on his phone, with a temporary
25 password, which he received at 10:26 p.m., according to an e-mail

1 at Exhibit R-4. He was told he had to establish a permanent
2 password, which he said he did. He said he was told by the nurse
3 they needed to go through the medical history quickly because they
4 had a busy day.

5 He testified that the nurse completed everything on the
6 application and that she did not ask him any questions about his
7 medical history when completing the application, and did not ask
8 him if he had any arrests or convictions for a DUI. He indicated
9 he would have answered "yes" if he had been asked.

10 He said he received a second e-mail confirming his applica-
11 tion submission at 10:38 p.m. He noted this was the first ever
12 application that he had completed and that he never reviewed the
13 printed version of the application, which is at Exhibit A-6, page
14 3. Respondent stated he did not personally sign the application
15 electronically and that he did not give the nurse his login or
16 password but rather he logged in and then the nurse took over,
17 completing the online application.

18 He testified that, after completing the application, he began
19 the medical exam, but no one ever asked him about the DUI. He
20 also met with the doctor, who he said never asked him about the
21 DUI, alcohol-related incidents, or any questions about alcohol.

22 Respondent indicated that four months later he applied for a
23 visa and answered "yes" in response to a question on the applica-
24 tion about a DUI. He stated he had to go through a medical exam
25 as a result of his answer before he could be considered for a

1 visa. He identified Exhibits R-1 and R-2 as his visa application
2 and a record of his medical examination, respectively. Respondent
3 indicated that in June 2016, when he completed the FAA medical
4 exam, he did not remember the BAC level from his DUI arrest, and
5 if he had been asked, he would have told the doctor he did not
6 remember the blood alcohol level. He stated he never intended to
7 give false information to the FAA.

8 On cross-examination, Respondent agreed that on June 23rd,
9 2016, he understood that he was applying for an FAA medical
10 certificate and that he was providing information so the FAA could
11 make a decision about his medical qualifications. Respondent
12 stated that, although he registered his MedXPress account and set
13 up the user name and login information, and registration in
14 MedXPress requires the applicant to agree to the terms of the
15 service, he did not remember seeing the terms of service when
16 registering. He agreed he allowed the nurse to complete the
17 application for him. Respondent agreed that he read and completed
18 the visa application online but that he did not read the FAA
19 medical certificate application.

20 In reviewing Exhibit A-6, page 3, Respondent agreed it was
21 his medical application, that his e-mail address and password-
22 certified electronic signature appeared in Block 20 of the form,
23 and that the "no" answer to question 18(v) was not correct.
24 Respondent stated that he did not give the nurse his user name and
25 password but that he logged in and she then accessed the applica-

1 tion and completed it. He said he was standing next to her when
2 she completed the application.

3 On redirect examination, Respondent said he believed the
4 nurse was qualified to fill out the application, and it seemed
5 normal to him that she did so. In response to questions from me,
6 Respondent said the nurse never asked him any questions about the
7 application; she just filled out answers to the questions. He
8 also said he never hit the submit button or did anything else to
9 affirmatively submit his application.

10 He stated that, although he was standing next to the nurse
11 when she was filling out the application, he was not following
12 along on the computer, and she only talked to him about the
13 examination process and did not ask him questions about his
14 application. With respect to the doctor, Respondent said he did
15 not ask him questions on the application and that Respondent did
16 not ask the doctor about his DUI.

17 Next, Henry Yang testified that he also saw an AME in Taiwan
18 to complete an application for an FAA medical certificate and that
19 he did not register in MedXPress before going to the clinic. He
20 said that after he arrived, he was directed to the computer to
21 complete registration and obtain a temporary password. He identi-
22 fied Exhibit R-6 as the e-mail he received on March 3rd, 2016, at
23 5:28 p.m., confirming his registration and assigning a temporary
24 password. He stated that after he established a permanent pass-
25 word, the nurse then asked him questions in Chinese, and he

1 answered in Chinese as she typed in answers to complete the
2 application. He said the nurse asked medical questions but did
3 not ask him about DUI or alcohol-related incidents. After the
4 application was submitted, he said he received a second e-mail
5 confirming submission of that application, and he identified that
6 second e-mail as Exhibit R-7, which he received at 5:37 p.m., some
7 nine minutes after the first e-mail.

8 On cross-examination, Mr. Yang stated he was not present in
9 June and did not witness Respondent filling out his medical
10 application. He stated that he has not reviewed his application
11 at any time since it was submitted but that he has no history of
12 DUI or alcohol-related incidents.

13 Next Liang Hung, who referred to himself as "Andy," testified
14 that he applied for an FAA medical certificate in Taiwan in August
15 2016 and that he also did not register in MedXPress before going
16 to the clinic for his exam. He said he was told to register using
17 a computer in the office when he arrived for his appointment. He
18 identified Exhibit R-8 as an e-mail he received upon registration
19 and issuance of his temporary password, which he received on
20 August 24th, 2016, at 6:47 p.m.

21 He stated he then established a permanent password, filled
22 out some personal and some medical information, and the nurse then
23 helped him complete some medical information on the computer.
24 Once the application was complete, it was submitted, but Mr. Hung
25 could not recall if he submitted the application or if the nurse

1 did it for him. He received an e-mail confirming the application
2 was submitted at 7:00 p.m., some 13 minutes after the first
3 e-mail.

4 On cross-examination, he agreed that he was not present in
5 June and did not observe the Respondent completing his applica-
6 tion. He stated that he had not reviewed his application since
7 submitting it but that he has no history of alcohol-related
8 incidents, and the application is accurate. He stated the nurse
9 asked him medical questions when completing the application.

10 Next, Dr. James Little, Jr., testified that he's a family
11 physician in Wyoming and a senior AME, which he explained means he
12 has been designated by the FAA to issue first class medical certi-
13 ficates in addition to second and third class medical. He has
14 been a physician since 1998, an AME since 2004, and a senior AME
15 since approximately 2006. His education and experience, certifi-
16 cations, and professional associations are more fully set forth in
17 his CV, which is at Exhibit R-10. He was recognized as an expert
18 in the process and issuance of medical certificates by AMEs.

19 Dr. Little testified that he's familiar with MedXPress, which
20 he noted is the only way to apply for a medical certificate. He
21 indicated he typically asks airmen to log in and complete the
22 application before coming to his office for a medical examination,
23 but he has a computer available in case an applicant arrives
24 without having completed the application, which is also not an
25 unusual occurrence.

1 Dr. Little said, in his personal experience, the registration
2 and application process takes, on average, about 30 minutes to
3 complete. He also said he has seen it take an hour or more for
4 some first-time applicants. He indicated the applicant is
5 supposed to fill out the application, and not the medical staff.

6 Dr. Little stated he reviewed the e-mails from Exhibit R-4
7 through R-9, and his impression, given the short time indicated to
8 complete the applications, is that the applicants were either not
9 reading the questions carefully or they were very familiar with
10 the process.

11 He said if he were made aware of such short processing times
12 on MedXPress applications, he would ask the applicants how they
13 were able to review the application forms so quickly, and he would
14 ask questions about the responses on the form to try to ascertain
15 the accuracy of the responses. He also indicated that he would
16 not permit his staff to fill out an application for an airman.

17 Dr. Little said he's very familiar with the AME guide in
18 Exhibit R-3. He testified that a single DUI less than five years
19 from the application date requires an AME to obtain court and
20 arrest records, but if it was greater than five years prior,
21 obtaining those records is not required.

22 He observed on page 3, the guide indicates a single DUI
23 arrest or conviction usually is not cause for denial, provided
24 there are no other instances or indicators of substance abuse or
25 dependence. He said if a single DUI nine years prior were

1 reported to him, he would ask about the circumstances surrounding
2 the DUI and get a detailed history from the applicant, but if
3 there are no other history or indicator of substance abuse, then
4 as an AME he could issue the certificate.

5 Dr. Little indicated if the blood alcohol level were greater
6 than 0.15, then the AME must defer to the FAA. He noted he would
7 gather all pertinent information and discuss it with the FAA. The
8 FAA would make the determination whether to issue the certificate
9 or have him assess the applicant further.

10 He observed that if an applicant came into the office and
11 reported a single DUI nine years ago and could not recall his BAC
12 level, or blood alcohol level, then he is aware of no requirement
13 to gather court or arrest records. He offered that if a detailed
14 history revealed no other indicators of substance abuse or con-
15 cerning history, then the AME could issue a certificate without
16 deferral.

17 On cross-examination, Dr. Little reiterated if the time to
18 complete the application is very short, he would assume the appli-
19 cant is not carefully reading the form or that it was a very
20 experienced applicant completing the form. If an individual is
21 not reading the questions carefully or at all, then he or she
22 could click through the form very quickly.

23 Dr. Little stated that the AME is required to review the
24 answers on the form with the applicant and certify having done so;
25 however, the applicant certifies the completeness and accuracy of

1 the form in Item 20 and not the AME.

2 Dr. Little agreed that if he was aware the BAC level was .20,
3 then he must contact the FAA to discuss deferral, and further
4 agreed that it is important to have that information in order to
5 make an informed decision about medical qualification. He also
6 said if the deferral criteria is met, such as with a blood alcohol
7 level greater than .15, then the decision is the FAA's and not the
8 AME's.

9 On redirect, Dr. Little said his experience is that with a
10 single DUI nine years ago and no other indicators other than a
11 blood alcohol level greater than .15, the FAA has permitted
12 issuance of a certificate.

13 Having summarized the evidence and testimony, I'll now
14 discuss that evidence as it pertains to the allegations in the
15 complaint. With respect to the alleged violation of 67.403(a)(1),
16 the elements of an intentionally false statement are: (1) a false
17 representation; (2) in reference to a material fact; (3) made with
18 knowledge of its falsity. Those elements, of course, are based on
19 the case of Hart v. McLucas, which is noted by both counsel in
20 their summations. Respondent has conceded that the Administrator
21 has met at least the false representations prong in the Hart v.
22 Lucas intentional falsification test. Respondent does not contest
23 the falsity of the information provided in response to question
24 18(v) on the application for medical certificate completed on June
25 23rd 2016. Respondent's answer to the complaint, the documentary

1 evidence, and the testimony from Agent Johnson and Respondent
2 himself further support the fact that Respondent was arrested for
3 DUI on September 18, 2007, and convicted of driving with a blood
4 alcohol level of .08 or more on March 3rd, 2008, and that his "no"
5 answer to question 18(v) on the medical application was therefore
6 false.

7 The second issue is whether or not that false representation
8 was material. Under Board precedent, the misrepresentation is
9 material if it is capable of influencing a decision by the Admin-
10 istrator as to whether or not a certificate should be issued.

11 In closing argument, Respondent's counsel conceded the mate-
12 riality of the false information on the medical application and
13 indicated Respondent's stipulation to the materiality of the false
14 information provided; however, counsel has also arguably suggested
15 that Dr. Little's testimony, that the Respondent's remote history
16 of DUI in the end likely would not have been a barrier to his
17 medical certification, perhaps brought the materiality of the
18 false information supplied on the application into question.

19 As an initial matter, Board precedent makes it clear that
20 materiality is established by virtue of the fact that the informa-
21 tion is specifically sought in a form used by the Administrator to
22 determine an applicant's qualifications to hold an airman medical
23 certificate. And I cite here to the case of Administrator v.
24 Krings, NTSB Order BA-3908; it's a 1993 case. But beyond that,
25 the testimony of Dr. Dionne and even Dr. Little established the

1 materiality of the information supplied on the application. Dr.
2 Dionne noted that had the AME been informed of the DUI arrest and
3 conviction, he would have gathered the detailed history, to
4 include such information as the circumstances surrounding the
5 arrest and conviction, the sentence imposed, the history of
6 alcohol abuse and treatment, and current use. He noted that the
7 BAC level of .20 was particularly concerning as it implicated
8 potential substance misuse or abuse and would have required
9 deferral of the certificate and in his estimation a substance
10 abuse evaluation. He emphasized that Respondent was issued a
11 certificate without all the information that was needed to make an
12 informed decision regarding his eligibility for a medical certifi-
13 cate. And although Dr. Little differed somewhat on whether
14 issuance of a certificate might have been permitted by the FAA
15 without need for further evaluation, he agreed on the need to
16 gather a detailed history, and that deferral would have been
17 required had the .20 blood alcohol level been known, and that the
18 unreported information regarding the DUI arrest and conviction was
19 important to making an informed decision regarding Respondent's
20 eligibility for a medical certificate.

21 Therefore, I find that the false information provided by
22 Mr. Tseng in response to question 18(v) on the application for
23 medical certificate was also material.

24 The last element, knowledge of the falsity of the statement,
25 is the critical issue to be decided in this case. There is no

1 question that Respondent was arrested for DUI in September of 2007
2 and convicted for driving with a blood alcohol level of .08 or
3 higher in March 2008. Nor is there any question that he knew of
4 his alcohol-related arrest and conviction when the application for
5 medical certificate was completed and submitted on June 23rd,
6 2016. He conceded that fact during his testimony.

7 Respondent has suggested that he did not knowingly falsify
8 the information because he did not read the medical application
9 form, or answered the questions before certifying in Block 20 that
10 his answers were true and complete. He acknowledges that he
11 logged into MedXpress using his e-mail and password, which was
12 utilized to electronically sign and certify the accuracy and
13 completeness of his application, but suggests that a nurse at the
14 AME's office completed the application without asking any
15 questions, and submitted the application without his input or
16 assistance. He asserts reliance on the nurse as an affirmative
17 defense to the submission of materially false information on his
18 application for medical certificate.

19 With respect to what transpired at the AME's office when
20 completing the application, Respondent's testimony at the hearing
21 is somewhat inconsistent with his answer to the complaint. In
22 that written answer, the Respondent asserted that the nurse read
23 the application questions to him, listened to the responses, and
24 completed the applications for him based on his answers. He
25 further asserted that the nurse never asked him question 18(v).

1 He testified at the hearing that the nurse never read any of
2 the questions from the application to him before completing the
3 application in MedXPress and instead simply spoke with him about
4 the upcoming medical examination. His testimony is also not
5 entirely consistent with the testimony of Mr. Hung and Mr. Yang,
6 who both indicated the nurse asked them medical questions when
7 completing their application forms in MedXPress.

8 This inconsistency between Respondent's testimony at the
9 hearing and his answer to the complaint, as well as the testimony
10 of Mr. Yang and Mr. Hung, undermines the credibility of Respond-
11 ent's testimony that he had no opportunity for input in the
12 completion of his MedXPress application. Even accepting Respond-
13 ent's testimony at face value, what is abundantly clear is that
14 Respondent was aware on June 23rd, 2016, that he was applying for
15 an FAA medical certificate and that the FAA would rely on the
16 information submitted to make a decision about his medical quali-
17 fication, yet he failed to read or review any of the application
18 questions or answers before they were submitted.

19 There have been a number of cases which have examined situa-
20 tions in which Respondent fails to read and thereby answers
21 incorrectly questions on an application for medical certificate.
22 Two such cases are Administrator v. Boardman, that's NTSB order
23 EA-4515, and Administrator v. Cooper, NTSB order EA-5538, affirmed
24 at 660 F.3d 476 by the DC Circuit in 2011. In Boardman, the Board
25 stated that "It seems to us that an airman who, knowing the

1 Administrator relies on the accuracy of answers on a medical
2 certificate application, tenders an application that turns out to
3 have a wrong answer to one or more of many questions he freely
4 chose not to even read, much less to thoughtfully answer, cannot
5 reasonably argue that he lacked the intent to give false
6 information, for the submission of inaccurate information is a
7 natural and foreseeable consequence of completing an application
8 in a manner that essentially guarantees its unreliability." The
9 Board further stated, "An airman, having acted in a manner that
10 could be viewed as evincing a willful disregard for the truth by
11 not reading the questions on a medical certificate application,
12 should be determined to have intended that whatever answer he gave
13 be utilized in review of his qualifications."

14 In both Cooper and Boardman, the respondents testified they
15 simply copied answers from a previous application without reading
16 the application itself. In those cases, the Board held that
17 failure to read a question before answering it renders the entire
18 certificate application process pointless, and does not provide a
19 defense to a charge of intentional falsification under 67.403(a)
20 (1).

21 Mr. Tseng went a step beyond the respondents in the Boardman
22 and Cooper cases. Not only did he not read question 18(v) when
23 completing the June 23, 2016 application, he testified that he
24 logged into MedXpress and allowed his personal credentials to be
25 used to submit the application on his behalf; that he read none of

1 the questions and reviewed none of the answers, and, in effect,
2 totally abdicated his responsibility to personally complete the
3 medical application and certify the truth and completeness of the
4 answers provided. Consistent with the Board's decisions in Cooper
5 and Boardman, I find that, having failed to read any questions or
6 review any answers on the application, and consequently providing
7 incorrect information, Mr. Tseng cannot now argue that he lacked
8 the intent to give false information.

9 I also find Respondent's assertion of a reasonable reliance
10 defense to be misplaced here. Respondent has argued essentially
11 that the nurse did not complete her duties as required, which he
12 reasonably relied upon. That argument ignores the fact that
13 Respondent has the independent obligation to fill out and certify
14 his medical application as true and complete.

15 While he testified that he did not recall seeing the terms of
16 service from MedXPress, those terms of service must be agreed to
17 before an individual can complete registration, something which
18 Respondent admitted that he did on his own. If he chose not to
19 read those terms of service, as his counsel suggested might be the
20 case, that does not absolve him of the responsibility to comply
21 with their requirements. Similarly, the instructions accompanying
22 the application make it clear that the applying airman must
23 complete the application fully and certify its accuracy.

24 Beyond his independent obligation to accurately complete and
25 certify his medical application, Respondent also had the ability

1 to ascertain the information required to be submitted with the
2 application. He described standing next to the nurse while she
3 completed the application on the computer, even testifying to the
4 difference between the format of the questions he observed on
5 MedXPress and those on the completed form of 8500-8, which is at
6 Exhibit A-6, page 3; but he admittedly did not follow along with
7 the application questions or attempt to provide input to the
8 nurse.

9 And despite his testimony that he was concerned enough about
10 the DUI to ask two other nurses upon his arrival about how the DUI
11 might impact his application, and was told by them that they were
12 unfamiliar with how it might impact his application, he stated
13 that he did not raise the issue again, either with the nurse who
14 assisted with completion of the MedXPress application or the AME
15 during the medical examination process.

16 That is not to say that I find the methodology for processing
17 medical applications in the Taiwan clinic to be without flaw. It
18 seems apparent that the procedures utilized at the AME's clinic in
19 Taiwan may bear further scrutiny. However, even accepting that
20 the medical application process in that clinic is somewhat flawed,
21 does not, in my estimation, excuse the fact that Respondent, by
22 failing to even read the application, completely abdicated his
23 responsibility to ensure that the information submitted, and upon
24 which his medical qualification was to be determined, is true and
25 complete.

1 Based on the foregoing, I find that the misrepresentations
2 made by Mr. Tseng in his application for a medical certificate
3 were made with knowledge of their falsity.

4 Having found that the Administrator has established all the
5 elements of intentional falsification by a preponderance of
6 evidence, I further conclude, consistent with the discussions
7 above, that Respondent has failed to establish the affirmative
8 defense of reliance asserted in his answer to the complaint.

9 Based on the foregoing, I find that all the numbered allega-
10 tions in the complaint, paragraphs 1 through 11, are established
11 by a preponderance of reliable, probative, and credible evidence.
12 Accordingly, I further find that the evidence establishes that
13 Respondent violated 14 C.F.R. § 67.403(a)(1) by making an
14 intentionally false statement on an application for a medical
15 certificate. I also note that, had I not found the violation of
16 67.403(a)(1), I would, nonetheless, find the violation of 14
17 C.F.R. § 67.403(c) has been established by a preponderance of the
18 evidence.

19 Having found that the Administrator has proven all the
20 allegations in the complaint by a preponderance of reliable,
21 probative, and credible evidence, I now turn to the sanction
22 imposed by the Administrator in this case.

23 On August 3, 2012, Public Law 112-153, known as the Pilot's
24 Bill of Rights, was signed into law by the President and became
25 immediately effective. The Pilot's Bill of Rights specifically

1 strikes from 49 U.S.C. § 44709 to 44710 language that in cases
2 involving amendments, modifications, suspensions, and revocation
3 of airman certificates, the Board is "bound by all validly adopted
4 interpretations of laws and regulations the Administrator carries
5 out and of written agency policy guidance available to the public
6 relating to sanctions to be imposed under this section unless the
7 Board finds an interpretation is arbitrary, capricious or
8 otherwise not according to law."

9 While I'm no longer bound to give deference to the FAA by
10 statute, that agency is entitled to judicial deference due all
11 other federal administrative agencies under the Supreme Court
12 precedent of Martin v. Occupational Safety and Health Review
13 Commission; that case is at 499 U.S. 144.

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

19 In this case, the Administrator argues that the sanction,
20 based on deference to FAA sanction guidelines and past precedent,
21 is revocation of any and all airman and medical certificates. The
22 Administrator further suggests that revocation is appropriate in
23 any case where, as here, the violation involves potential falsifi-
24 cation and thus goes to a lack of qualification to hold any
25 certificate.

1 Respondent argues that revocation is not appropriate because
2 Respondent did not knowingly falsify the statement on the medical
3 application at the time it was made. He argued that any sanction
4 from this action should be no sanction, even if I should find a
5 violation of 67.403(c). He further argued that should I find
6 intentional falsification, mitigation is appropriate based on the
7 circumstance under which Respondent's application was processed in
8 the clinic in Taiwan.

9 The Board's precedent firmly establishes that even one inten-
10 tional falsification compels the conclusion that the falsifier
11 lacks the necessary care, judgment, and responsibility required to
12 hold any airman certificate. That precedent stems from the case
13 of Administrator v. Berry; it's NTSB Order EA-2689, and that was
14 decided in 1988. Since that time, the Board has found and
15 continues to find that even one intentional falsification compels
16 the conclusion that the falsifier lacks the necessary care, judg-
17 ment, and responsibility required to hold any airman certificate.

18 Considering the facts and circumstances of this case, and
19 well-established Board precedent, and giving appropriate deference
20 to the Administrator's choice of sanction, I find that the sanc-
21 tion sought by the Administrator is appropriate and warranted in
22 the public interest in air commerce and air safety. Therefore, I
23 find that the Emergency Order of Revocation and complaint herein
24 shall be affirmed as issued.

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ORDER

8 It is ordered that the Emergency Order of Revocation, the
9 complaint herein, is affirmed as issued. Respondent's combined
10 first class medical certificate and student pilot certificate are
11 hereby revoked.

12 Entered this 11th day of May 2017, Los Angeles, California.

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21 Edited on

STEPHEN R. WOODY

22 May 23, 2017

Administrative Law Judge

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APPEAL

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JUDGE WOODY: That concludes my oral initial decision.

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Mr. Tseng, as I'm sure your counsel has already talked with you about to some extent, you have certain appeal rights. If you disagree with my decision, you have the right to appeal that to the full Board and beyond that, if you so desire.

13

Counsel, I have a copy of -- a written copy of the appeal rights. I'll hand them to you. I have two copies, one for you and one for Mr. Tseng.

16

Mr. Raley, I assume you don't need a copy of that; is that right?

18

MR. RALEY: No, sir.

19

JUDGE WOODY: All right. Mr. Williams, I assume you intend to advise your client with respect to his appeal rights?

21

MR. WILLIAMS: I will, Your Honor.

22

JUDGE WOODY: All right. Thank you.

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Mr. Tseng, the one thing I will point out to you, and I'm sure your counsel is well aware of, is that because this is an emergency hearing with expedited timelines, the deadline for

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1 filing Notice of Appeal and perfecting your appeal are very short,
2 so those deadlines are something that you need to keep in mind
3 because untimely filing of appeals is not generally looked upon
4 favorably by the Board.

5 MR. WILLIAMS: And may I, for clarification, Your Honor, just
6 to avoid any possibility of doubt, the date of opinion does not
7 count as a day; day one is tomorrow, Friday; day 2 is Monday?

8 JUDGE WOODY: I believe it's two calendar days, but ---

9 MR. WILLIAMS: Their office is closed Saturday.

10 JUDGE WOODY: I understand.

11 What I would advise you of is this, because I don't want to
12 give you the wrong answer, the -- I'll go back and confirm that
13 and pass that information along to you, and you can also contact
14 our office and talk to Karen, who handles all the appeals or --
15 and she'll be able to confirm for you whether it needs to be filed
16 on a calendar day or not, and that would be -- obviously would be
17 very important.

18 Okay.

19 MR. WILLIAMS: But the other question was does the day of the
20 opinion count as a day?

21 JUDGE WOODY: It's two days after this day.

22 MR. WILLIAMS: Okay.

23 JUDGE WOODY: So it begins tomorrow.

24 MR. WILLIAMS: Good.

25 Thanks.

1 JUDGE WOODY: Are there any other questions or matters of an
2 administrative nature we need to discuss before we adjourn the
3 proceeding?

4 MR. RALEY: No, sir.

5 MR. WILLIAMS: None, Your Honor.

6 JUDGE WOODY: All right.

7 Thank you both very much.

8 I realize that this was -- we scheduled this hearing on a
9 very short timeline, so I appreciate the cooperation in making
10 this work and in cooperating during the proceeding the last couple
11 of days.

12 So thank you both very much for that.

13 All right. With that, we'll adjourn the proceedings.

14 Thank you.

15 (Whereupon, the hearing in the above-entitled matter was
16 adjourned.)

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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Fan-Chi Tseng

DOCKET NUMBER: SE-30366

PLACE: Los Angeles, California

DATE: May 11, 2017

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.

Wendy Priest, CSR 12722
Official Reporter