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NTSB Order No. EA-6036

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 18th day of October, 2026

_____	)	
BRYAN BEDFORD, ¹	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket SE-31091
	)	
EMANUEL JARA,	)	
	)	
Respondent.	)	
_____	)	

OPINION AND ORDER

The Administrator of the Federal Aviation Administration (“Administrator” or “FAA”) appeals Administrative Law Judge V. Stuart Couch’s August 30, 2024, Written Initial Decision (“Decision”²) by which the law judge: granted respondent Emanuel Jara’s motion for judgment on partial findings; granted respondent’s appeal and reversed the FAA’s April 6, 2022,

¹ The original caption for this matter was *Billy Nolen, Acting Administrator, Federal Aviation Administration v. Emanuel Jara*.

² A copy of the law judge’s Decision is attached.

Emergency Order of Revocation against respondent (“Emergency Order”³); and, ordered the Administrator to return respondent’s mechanic certificate.⁴ The law judge held that the Administrator had not demonstrated by a preponderance of the credible, probative, and reliable evidence that respondent committed the violations charged in the Emergency Order.⁵

1. Background

A. Facts

On January 10, 2022, respondent Emanuel Jara, a certificated mechanic employed by Endeavor Air, Inc. (“Endeavor Air”), was instructed by his supervisor, John Wolfe, to submit to a random drug and alcohol test.⁶ Mr. Wolfe provided respondent with a testing authorization form and a drug test custody control form and instructed respondent to proceed to a testing site.⁷ Respondent proceeded to Advantage Occupational Medicine (“AOM”), an authorized testing site, and presented the forms to the staff.⁸ The operative printed language on the testing authorization form stated as follows: “Please comply with the following **DOT (FAA)** testing requirements: ****** DRUG AND ALCOHOL ******.”⁹ After receiving guidance from an AOM receptionist, respondent proceeded to the testing area and handed the testing authorization form to Tiffany DeMarco, an AOM medical assistant.¹⁰ As the word “alcohol” on the testing authorization form was lined through, Ms. DeMarco administered a urinalysis drug test but not

³ Respondent waived the emergency procedures on April 15, 2022.

⁴ Decision at 11.

⁵ *Id.*

⁶ Decision at 10; Administrator’s Appeal Br. at 3; Tr. at 28-32.

⁷ Decision at 10; Administrator’s Appeal Br. at 3; Tr. at 28-32.

⁸ Decision at 10; Administrator’s Appeal Br. at 3.

⁹ Exh. A-2 (emphasis original).

¹⁰ Decision at 10; Administrator’s Appeal Br. at 4; Tr. at 81,88.

an alcohol test.¹¹ The Administrator attributed the lining through of the word “alcohol” on the testing authorization form to respondent and determined that respondent thereby refused to submit to an alcohol test.¹²

B. Emergency Order

On April 6, 2022, the Administrator issued the Emergency Order revoking respondent’s Mechanic Certificate No. 3834678, with Airframe and Powerplant ratings alleging: (1) At approximately 7:45 a.m. on January 10, 2022, respondent reported to work for Endeavor Air; (2) At approximately 10:15 a.m., Endeavor Air management directed respondent to submit to an FAA-required random drug and alcohol test and provided respondent a testing authorization form specifying that respondent was to undergo both drug and alcohol testing; (3) When Endeavor Air management provided respondent with the testing authorization form it did not have the word “alcohol” lined through; (4) At approximately 10:49 a.m., respondent reported to the collection testing site and provided the collector with the testing authorization form; (5) The testing authorization form respondent provided the collector had the word “alcohol” lined through; (6) Because the word “alcohol” on the testing authorization form apparently was lined out sometime between the time respondent received it from Endeavor Air management and the time respondent reported for random testing, that “supports the presumption that [respondent] lined through the word ‘alcohol’ or caused the word ‘alcohol’ to be lined through”; (7) As a result, respondent failed to cooperate with the requirement to undergo alcohol testing and did not submit to an FAA-required random alcohol test.¹³

¹¹ Exh. A-2; Decision at 10; Administrator’s Appeal Br. at 4; Tr. at 81, 88.

¹² Administrator’s Appeal Br. at 1-2; Emergency Order.

¹³ Emergency Order at 1-2.

The Administrator further alleged that respondent thereby violated the Federal Aviation Regulations (“FARs”) by failing to complete a required alcohol test because respondent’s conduct constituted a refusal to submit to a required alcohol test under 49 C.F.R. § 40.191(a)(7) and 14 C.F.R. § 120.7(o).¹⁴

C. Procedural History

Respondent timely appealed the Emergency Order on April 15, 2022, and waived the Board’s emergency procedures. On April 18, 2022, the Administrator filed the Emergency Order as the complaint, and respondent filed an answer the same day. The Administrator amended the complaint to correct FARs citations on October 17, 2023, and respondent filed an amended answer on October 26, 2023. The law judge held a virtual hearing on August 21, 2024. At the conclusion of the Administrator’s case-in-chief at the hearing, respondent moved for judgment on partial findings under Federal Rules of Civil Procedure (FRCP) Rule 52(c). The law judge granted respondent’s motion, thereby concluding the hearing.¹⁵

D. Law Judge’s Decision

The law judge issued his Decision on August 30, 2024, pursuant to FRCP Rule 52(a)(1) governing judgment on partial findings, which requires that the law judge find the facts specially and state the conclusions of law separately.¹⁶ The Decision states that the law judge considered all documentary and testimonial evidence presented prior to granting respondent’s motion for

¹⁴ Emergency Order at 2. Under 14 C.F.R. § 120.7(l), a “refusal to submit” to an alcohol test means that an individual has engaged in conduct including but not limited to that described in 49 C.F.R. § 40.261; under 49 C.F.R. § 40.261(a)(7), an individual refuses to take an alcohol test if that individual fails to cooperate with any part of the testing process.

¹⁵ Decision at 2.

¹⁶ *Id.*

judgment on partial findings.¹⁷ The law judge heard testimony under oath from five witnesses called by the Administrator during the FAA's case-in-chief: John Wolfe, Victoria Young-Klatt, Cassandra Sevier, Tiffany DeMarco, and Patty Sibley.¹⁸

1. John Wolfe, Endeavor Air Heavy Check Manager

John Wolfe testified that he is a heavy check manager for Endeavor Air.¹⁹ He stated that his memory was vague regarding the circumstances surrounding respondent's drug and alcohol testing on January 10, 2022.²⁰ After further questioning regarding his prior written statement dated February 3, 2022, a sufficient evidentiary foundation existed to allow him to read that statement into the record.²¹ Through that statement he indicated that he received an email on January 10, 2022, from Endeavor Air's human resources (HR) program administrator Patty Sibley indicating that respondent was selected to "do a drug and alcohol random test."²² Mr. Wolfe stated that respondent reported to work that day at approximately 7:45 a.m.²³ Mr. Wolfe further stated that he "printed off the notice... that [respondent] was selected for the random test," and he then "signed the form, dated it, and time stamped it at 10:15 [a.m.];" he gave respondent the testing authorization form, and respondent "signed and dated it, and time stamped the form while [Mr. Wolfe] was in the office."²⁴ Mr. Wolfe stated that he also provided

¹⁷ Decision at 2.

¹⁸ Decision at 2-6.

¹⁹ Tr. at 23-24.

²⁰ Tr. at 24-28.

²¹ Ex. A-1; Tr. at 28-30.

²² Tr. at 28.

²³ *Id.*

²⁴ Tr. at 29.

respondent with a copy of the federal drug testing custody and control form to provide to the testing site.²⁵

Mr. Wolfe stated that he provided directions to respondent for two of the testing facilities in the area and instructed respondent to report to the one closest to Endeavor Air.²⁶ Mr. Wolfe stated that respondent left for the test and then sent a text message to Mr. Wolfe at 10:30 a.m. stating the nearest lab was “full” and requesting Mr. Wolfe’s permission to proceed to next nearest site, which Mr. Wolfe granted.²⁷ Approximately 30 to 45 minutes later, respondent sent Mr. Wolfe a text message stating that the test was completed and asking for permission to stop for lunch on the way back to Endeavor Air.²⁸ Mr. Wolfe stated that upon respondent’s return, Mr. Wolfe asked respondent for the signed copies of the federal drug testing custody and control form as well as the testing authorization form that both Mr. Wolfe and respondent had signed, dated, and time stamped.²⁹ Mr. Wolfe stated that respondent provided the federal drug testing custody and control form but did not provide the testing authorization form.³⁰ Mr. Wolfe stated that, after asking why he did not have the testing authorization form, respondent replied that the facility “stated they had to keep it.”³¹ Mr. Wolfe testified that he then provided a scanned copy of the federal drug test custody and control form to Ms. Sibley and allowed respondent to keep the original.³²

²⁵ *Id.*

²⁶ Tr. at 29-30.

²⁷ Tr. at 30.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

On cross-examination, Mr. Wolfe testified that Laura Schmidt, an official with Endeavor Air's HR department asked him to prepare his written statement.³³ He explained that, as a maintenance supervisor, he had received training to detect intoxication in the workplace and make a reasonable suspicion determination if necessary.³⁴ Mr. Wolfe testified that he did not recall smelling alcohol on respondent's breath or noticing any physical signs associated with alcohol use, nor did he recall whether respondent's speech was slurred or his eyes were bloodshot.³⁵

In response to questions from the law judge, Mr. Wolfe testified that he never saw the word "alcohol" lined through on the testing authorization form.³⁶ Mr. Wolfe testified that he first learned that the word "alcohol" had been lined through sometime later when Ms. Sibley emailed Mr. Wolfe about it after she had received the testing authorization form from AOM.³⁷ When the law judge inquired whether he asked respondent about who lined out the word "alcohol" on the form, Mr. Wolfe stated: "I believe we had a discussion on that, and [respondent] denied anything."³⁸ Mr. Wolfe testified that he did not have any personal knowledge of who lined out the word "alcohol" on the testing authorization form.³⁹

2. Victoria Young-Klatt, AOM Receptionist

Victoria Young-Klatt (Ms. Young) testified that in January 2022, she was working as a receptionist for Bridgeport Express Care, which collaborates with AOM.⁴⁰ Ms. Young explained

³³ Tr. at 31.

³⁴ Tr. at 31-34.

³⁵ Tr. at 34-36.

³⁶ Tr. at 36.

³⁷ Tr. at 36-37.

³⁸ *Id.*

³⁹ Tr. at 37-38.

⁴⁰ Tr. at 40.

that her role at AOM was to check in people reporting to the clinic for drug screens and physicals.⁴¹ She stated that she has no recollection of respondent and does not recognize his name or otherwise remember him at all.⁴² She testified as to the usual practice in the clinic for individuals reporting for a drug screen or a physical.⁴³ She stated that after an individual arrived at the front desk, she would ask for the individual's date of birth and verify the individual's name.⁴⁴ Ms. Young testified that for individuals who had not visited the clinic before, she sometimes would open the door and show them the way to the testing part of the clinic.⁴⁵ She stated that usually a nurse would lead individuals from the reception area back to the clinic.⁴⁶ She testified that in January 2022, COVID 19 protocols prevented her from taking paperwork directly from individuals in the reception area.⁴⁷ She stated that she would not tell the collector what type of test the person was there to have completed.⁴⁸ She also denied ever marking or lining out any words on testing authorization forms.⁴⁹

On cross-examination, Ms. Young testified that someone in the drug department would decide what type of test to administer.⁵⁰ She confirmed that she has no recollection of respondent and that, at the time in question, there were at least three people working in the reception area in the clinic who could have checked in respondent.⁵¹ She denied ever seeing anyone mark out

⁴¹ Tr. at 40-41.

⁴² Tr. at 40.

⁴³ Tr. at 40-45.

⁴⁴ Tr. at 43.

⁴⁵ Tr. at 42-43.

⁴⁶ Tr. at 41.

⁴⁷ Tr. at 44.

⁴⁸ *Id.*

⁴⁹ Tr. at 45.

⁵⁰ Tr. at 45-46.

⁵¹ Tr. at 45-47.

words on the testing authorization forms used.⁵² In response to a question from the law judge, Ms. Young testified that if she did see a word lined out on a testing authorization form, there would be no reason for her to alert the employees in the back of the clinic.⁵³

3. Cassandra Sevier, AOM Drug and Alcohol Department Manager

Cassandra Sevier testified that she is a manager in the drug and alcohol department for AOM.⁵⁴ She stated that Tiffany DeMarco is an employee of AOM who has worked for Ms. Sevier for approximately three years.⁵⁵ Ms. Sevier testified that she has no independent recollection of respondent visiting the clinic in January 2022, and she denied ever seeing the testing authorization form before respondent was tested.⁵⁶ She testified that it would never be appropriate for testing staff to line out anything on a testing authorization form.⁵⁷ She stated that she first learned about the claim that respondent lined out the word “alcohol” on his testing authorization form when Patty Sibley from Endeavor Air’s HR department contacted her.⁵⁸

Ms. Sevier testified that Ms. Sibley called and asked her to write a message on the testing authorization form regarding the lining out of the word “alcohol” if the collector, Ms. DeMarco, agreed that the message was accurate.⁵⁹ Ms. Sevier stated that Ms. Sibley told her what to write and that she had no independent knowledge about the issue of who lined out the word “alcohol” prior to making the handwritten notation.⁶⁰ The handwritten notation reads “the alcohol

⁵² Tr. at 46-47.

⁵³ Tr. at 47-48.

⁵⁴ Tr. at 51-52.

⁵⁵ Tr. at 52.

⁵⁶ *Id.*

⁵⁷ Tr. at 52-53.

⁵⁸ Tr. at 53.

⁵⁹ Tr. at 54, 63.

⁶⁰ Tr. at 63-65.

instruction was marked out when donor arrived @ testing site.”⁶¹ She also testified that she made the notation before speaking to Ms. DeMarco to confirm that Ms. DeMarco agreed that the statement was accurate.⁶²

On cross-examination, Ms. Sevier testified that Ms. DeMarco was trained by MedExpress, and she denied that she ever saw or spoke with respondent on January 10, 2022.⁶³ Ms. Sevier stated that she was not involved with respondent’s check-in at the clinic, and that in fact she was not working that day because she was out sick.⁶⁴ She testified that she was not part of respondent’s check-in process in any capacity, and she admitted that she does not know what respondent’s testing authorization form looked like when he provided it upon checking in at the clinic.⁶⁵ Ms. Sevier stated that she does not have firsthand knowledge whether the receptionist lined through anything on the testing authorization form when respondent checked in.⁶⁶ She confirmed that she did not speak to Ms. DeMarco about respondent’s test until after Ms. Sibley contacted the clinic, and she stated that she does not know if the word “alcohol” was lined out on the testing authorization form when Ms. DeMarco completed respondent’s urine drug collection test.⁶⁷ She stated that she discussed respondent’s test with Ms. Sibley at some point between January 10 and January 13, 2022, but that she does not recall the exact date.⁶⁸ She testified that Ms. Sibley asked her whether the alcohol test was performed.⁶⁹ Ms. Sevier stated that she replied

⁶¹ Ex. A-4.

⁶² Tr. at 65.

⁶³ Tr. at 67-68.

⁶⁴ Tr. at 68-73.

⁶⁵ Tr. at 70-73.

⁶⁶ Tr. at 72-74.

⁶⁷ Tr. at 69-71.

⁶⁸ Tr. at 72-73.

⁶⁹ *Id.*

it was not.⁷⁰ She further testified that other staff in the clinic had access to the testing authorization form between January 10 and when it was evidently faxed to Endeavor Air on January 13, 2022.⁷¹ She stated that she neither knows if the testing authorization form was altered in that time nor whether anyone in the clinic made the alteration.⁷²

In response to questions from the law judge, Ms. Sevier testified that she has seen testing authorization forms with either the word “alcohol” or the word “drug” lined out in cases other than respondent’s.⁷³ She testified that if a testing authorization form comes in with a line through one of the words, then the lab does not perform the corresponding test.⁷⁴ She also stated that there is never any reason why someone on the staff would line out either word on the testing authorization form.⁷⁵

4. Tiffany DeMarco, AOM Test Sample Collector

Tiffany DeMarco testified that she is a certified drug and alcohol test sample collector and works for AOM.⁷⁶ She stated she has performed between 15 and 30 tests every day for the prior 12 years.⁷⁷ She stated she does not have a recollection of respondent or conducting his test in January 2022.⁷⁸ When shown the testing authorization form with the handwritten notation, Ms. DeMarco confirmed that the document contains her signature but that she did not write the handwritten notation on the document.⁷⁹ She testified that Ms. Sevier asked her if she marked

⁷⁰ Tr. at 69-70.

⁷¹ Tr. at 70-75.

⁷² Tr. at 74.

⁷³ Tr. at 76-78.

⁷⁴ Tr. at 77.

⁷⁵ *Id.*

⁷⁶ Tr. at 81.

⁷⁷ *Id.*

⁷⁸ Tr. at 81-82.

⁷⁹ Tr. at 82-85.

out the word “alcohol” on the form, and that she replied she did not.⁸⁰ She stated that she signed the handwritten notation on the testing authorization form on January 25, 2022.⁸¹ Ms. DeMarco testified that the word “alcohol” must have been lined through before she received it because she otherwise would have conducted the standard breathalyzer test for alcohol detection.⁸² She stated that she has no other recollection regarding the handwritten notation other than that it contains her signature.⁸³

On cross-examination, Ms. DeMarco testified that she did not receive a saliva or breath specimen from respondent because it was not ordered on the testing authorization form, and that she only performs the test that is requested on the testing authorization form.⁸⁴ She confirmed that respondent was cooperative and that she is the staff member who would have allowed him to leave the clinic.⁸⁵ She denied that she was responsible for conducting the check-in of respondent at the clinic and that she does not know who the receptionist was on that day.⁸⁶ She testified that she does not know who received the testing authorization form or if that person lined through the word “alcohol” on the form.⁸⁷ She also stated that she does not know whether there were any words lined out on the testing authorization form when respondent entered the clinic or whether there were any markers available in the clinic that might have been used to cross out the word

⁸⁰ Tr. at 85-87.

⁸¹ Tr. at 85.

⁸² Tr. at 86-88.

⁸³ Tr. at 86.

⁸⁴ Tr. at 88-89.

⁸⁵ Tr. at 89.

⁸⁶ Tr. at 89-90.

⁸⁷ Tr. at 90-91.

“alcohol.”⁸⁸ She confirmed that she does not know who marked out the word “alcohol” on the testing authorization form.⁸⁹

In response to questions from the law judge, Ms. DeMarco testified that the word “alcohol” was not lined through after she administered the drug test to respondent because she would have administered the breathalyzer test if “alcohol” had not been lined through on the form.⁹⁰ She stated that she has seen words lined through on testing authorization forms before, but that it was the company requesting the test who had done so as opposed to someone at the collection site.⁹¹

5. Patty Sibley, Endeavor Air Designated Employee Representative

Patricia Sibley testified that she is a Designated Employee Representative (DER) for Endeavor Air and has been there for the prior seven years.⁹² She stated she has no independent recollection of the events related to respondent’s testing on January 10, 2022.⁹³ She confirmed that she reported respondent’s alcohol test to the FAA as a refusal.⁹⁴ She testified that she based this report on an investigation conducted by Endeavor Air’s HR department.⁹⁵ She testified that she does not know what information was collected in this investigation, how it was conducted, or the contents of the investigation.⁹⁶

⁸⁸ Tr. at 91.

⁸⁹ *Id.*

⁹⁰ Tr. at 100.

⁹¹ Tr. at 101.

⁹² Tr. at 106.

⁹³ *Id.*

⁹⁴ Tr. at 117, 124.

⁹⁵ Tr. at 120-121.

⁹⁶ Tr. at 121.

On cross-examination, Ms. Sibley confirmed that she does not know who marked out the word “alcohol” on the testing authorization form.⁹⁷ She stated she does not recall seeing either respondent or the testing authorization form on January 10, 2022.⁹⁸ She admitted that she did not see a copy of the testing authorization form respondent received from Mr. Wolfe that day, and that she only reviewed the testing authorization form she later received from the AOM clinic.⁹⁹ She stated that she does not have any knowledge about respondent lining through the word “alcohol” to alter the testing authorization form.¹⁰⁰

In response to a question from the law judge, Ms. Sibley confirmed that she asked the clinic to put the handwritten statement, “the alcohol instruction was marked out when donor arrived @ testing site,” on the testing authorization form.¹⁰¹ She stated that she would have asked for the notation to be made at the top of the testing authorization form before the investigation by HR was complete.¹⁰² On redirect examination, FAA counsel asked Ms. Sibley whether she considered the statement in the handwritten notation to be her own statement or that of the AOM collector, and she replied that she considered it to be the AOM collector’s statement.¹⁰³

At the conclusion of the Administrator’s case in chief, the law judge granted respondent’s motion for partial findings, made pursuant to FRCP 52. By written decision dated August 30, 2024, the law judge detailed his findings of fact and conclusions of law.

⁹⁷ Tr. at 125.

⁹⁸ *Id.*

⁹⁹ Tr. at 125-126.

¹⁰⁰ Tr. at 128.

¹⁰¹ Tr. at 130-131.

¹⁰² Tr. at 131.

¹⁰³ Tr. at 132-133.

6. Findings of Fact

The law judge found the testimony of each of the five witnesses to be credible, though the weight he gave was affected by “vague memories” due to the passage of time. He found that respondent was employed by Endeavor Air on January 10, 2022, when he was directed to submit to an FAA-required random drug and alcohol test and provided with the testing authorization form specifying he was to undergo both drug and alcohol testing.¹⁰⁴ He found that Mr. Wolfe did not detect any odor of alcohol on respondent’s breath, bloodshot eyes, or observe other indicia of intoxication when he gave him the authorization form.¹⁰⁵ He further found that Mr. Wolfe had received Department of Transportation training to detect intoxication of employees.¹⁰⁶ The law judge concluded that respondent reported to the collection testing site at AOM and provided the receptionist with the testing authorization form, but the identity of the receptionist is unknown.¹⁰⁷ He found that between the time respondent received the testing authorization form from Mr. Wolfe and before he submitted to a drug test collected by Tiffany DeMarco, (the certified drug and alcohol test sample collector), it appears someone lined out the word “alcohol” on the testing authorization form.¹⁰⁸ He found that it is possible someone lined out the word “alcohol” after respondent left the clinic, but unlikely because Ms. DeMarco assumes she would have conducted both a drug and alcohol test if the word “alcohol” was not lined out.¹⁰⁹ The law

¹⁰⁴ Decision at 10.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

judge determined that respondent was polite and complied with all of the instructions given to him by Ms. DeMarco and that he departed the clinic after she told him he was free to leave.¹¹⁰

The law judge also found that the identity of who lined out the word “alcohol” on the testing authorization form is unknown.¹¹¹ He found that the handwritten notation on the testing authorization form by Cassandra Sevier (the AOM manager in the drug and alcohol department) and signed by Ms. DeMarco was made 15 days after respondent was tested in the clinic, and that this was done in response to a request by the DER at Endeavor Air, Patty Sibley.¹¹² He further found that Ms. Sibley requested this notation in response to an investigation conducted by Endeavor Air’s HR department.¹¹³ Finally, the law judge found that the circumstances of the HR investigation, or the contents of any report based on it, are unknown.¹¹⁴ The law judge summarized these findings of fact as follows: “there are too many unknowns in the evidence presented by the Administrator for the Court to conclude, by a preponderance of the credible, probative, and reliable evidence, that the respondent was responsible for lining out the word ‘alcohol’ on the [testing] authorization form.”¹¹⁵

7. Conclusions of Law

The law judge concluded that the FAA did not meet its burden of proof, as the Administrator’s evidence did not establish that, because the word “alcohol” was lined through, respondent failed to cooperate with the requirement to undergo alcohol testing and did not

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Decision at 11 (citing Amended Complaint at ¶ 5(f)).

submit to an FAA-required random alcohol test.¹¹⁶ The law judge further concluded that the responsible collector, Ms. DeMarco, excused respondent from further testing after he submitted a urine sample, and therefore respondent's actions "did not constitute a refusal" to take the alcohol test.¹¹⁷

E. Issues on Appeal

On appeal, the Administrator argues that the law judge's decision was erroneous because the Administrator proved by a preponderance of the credible (and credited) testimony that the testing authorization form was provided to respondent unaltered with language requiring an alcohol test, that no one but respondent had possession of the form until he provided it to the collector, and that the form respondent provided to the collector had been altered to strike out the requirement for alcohol testing.¹¹⁸ The Administrator argues that "the only reasonable inference" was that respondent "had struck out the language."¹¹⁹ The Administrator asserts that, because the law judge "unreasonably resolved this inference against the Administrator contrary to the preponderance-of-the-evidence standard," the law judge's Decision should be reversed and the matter remanded to allow respondent to present his defense and "for any further rebuttal by the Administrator."¹²⁰

Respondent argues that the Administrator's appeal should be denied because the Administrator was fully heard at the hearing and the law judge "made a properly supported

¹¹⁶ Decision at 11 (citing Amended Complaint at ¶ 5(g)). The Board concurs that the Administrator bore the burden of proof in this case under 49 C.F.R. § 821.32, which states that "[i]n proceedings under 49 U.S.C. 44709, the burden of proof shall be upon the Administrator."

¹¹⁷ Decision at 11 (citing *Administrator v. Rojas*, NTSB Order No. EA-5496 at 14 (2009)).

¹¹⁸ Administrator's Appeal Br. at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.*

dispositive finding of fact” on the evidence presented by the Administrator regarding whether respondent lined through or caused to be lined through the word “alcohol” on the testing authorization form.¹²¹ Respondent argues that because this finding of fact was both properly supported and dispositive, the law judge did not err by granting respondent’s motion for judgment on partial findings at the close of the Administrator’s case.¹²²

2. Board Decision

A. Standard of Review

On appeal, we review the law judge’s decision *de novo*, as our precedent requires.¹²³ We consider whether the law judge’s findings of fact are supported by a preponderance of reliable, probative, and substantial evidence and whether the law judge’s legal conclusions are in accordance with applicable law, precedent, and policy.¹²⁴ We defer to the law judge’s credibility determinations unless we find them to be arbitrary and capricious.¹²⁵ A law judge’s credibility determinations should be based explicitly on factual findings in the record in order to establish the determinations are not arbitrary and capricious.¹²⁶ Where there is conflicting testimony, the law judge must deduce which witness is more credible and give weight to that testimony.¹²⁷

¹²¹ Respondent’s Reply Br. at 2.

¹²² Respondent’s Reply Br. at 20-22.

¹²³ *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).

¹²⁴ 49 C.F.R. § 821.49(a).

¹²⁵ *Administrator v. Porco*, NTSB Order No. EA-5591 at 14-15 (2011) (citing *Administrator v. Smith*, 5 N.T.S.B. 1560, 1563 (1986)).

¹²⁶ *Administrator v. Kolodziejczyk*, NTSB Order No. EA-5909 at 59 (2021) (citing *Dillmon v. NTSB*, 588 F.3d 1085, 1094 (D.C. Cir. 2009), and *Administrator v. Reynolds*, NTSB Order No. EA-5641 at 8 (2012)).

¹²⁷ *Acting Administrator v. Smith*, NTSB Order No. EA-3558 at 5 (1992) (citing *Administrator v. Smith*, 5 NTSB 1560, 1563 (1987)).

Regarding the preponderance of the evidence standard, we have held that this burden of proof is met when “there is sufficient reliable evidence to support a conclusion to the degree that the conclusion is more likely than not.”¹²⁸

B. The Law Judge’s Decision Accords with the Preponderance of the Evidence Standard

For the reasons set forth below, we conclude that the law judge’s findings of fact are supported by a preponderance of the reliable, probative, and substantial evidence. We further conclude that the law judge’s legal conclusions are in accordance with applicable law, precedent and policy.

1. Findings of Fact Supported by Preponderance of Reliable, Probative, and Substantial Evidence

As detailed above in Section I.D.6, the law judge made explicit findings of fact to support his ruling granting respondent’s motion for judgment on partial findings, and these findings were based on the totality of the evidence available. In so ruling, the law judge necessarily concluded that the FAA had not met its evidentiary burden to prove the facts alleged in the Complaint by a preponderance of the evidence. Reviewing this case as a whole *de novo*, while according the law judge’s credibility determinations the deference required under our precedent, we conclude that the law judge’s ruling on respondent’s motion for judgment on partial findings should be upheld.

The law judge’s credibility determinations constitute the foundation of his findings of fact. As acknowledged above, we defer to these determinations unless we find them to be arbitrary and capricious.¹²⁹ This deference reflects the fact that “law judges are in the best

¹²⁸ *Administrator v. Painter*, 7 N.T.S.B. 59, 61 n. 5 (1990).

¹²⁹ *Administrator v. Porco*, NTSB Order No. EA-5591 at 14-15 (2011) (citing *Administrator v. Smith*, 5 N.T.S.B. 1560, 1563 (1986)).

position to evaluate witness' demeanor and conduct during live testimony.”¹³⁰ In the course of this hearing, the law judge ruled on objections from counsel for both parties, evaluated the credibility of each of the five witnesses, and questioned each witness himself to clarify certain aspects of their testimony.¹³¹ The law judge explicitly found the testimonies of all five witnesses credible, stating that each witness appeared “forthright and responsive to questions by both parties and the Court.”¹³² The law judge qualified this, however, and observed that “all the witnesses' testimonies were affected by the passage of time, namely two years and seven months which had elapsed since the respondent's test occurred on January 10, 2022.”¹³³ The law judge further noted that this “does have some impact on the weight their testimony is afforded on the specific question as to who lined through the word ‘alcohol’ on the respondent's authorization form.”¹³⁴ Simply put, there is nothing in the record before us to indicate that the law judge determined the credibility of the witnesses in an arbitrary or capricious manner. Therefore, our review on appeal incorporates and is logically constrained by the law judge's credibility determinations.

Furthermore, our evaluation of the non-testimonial evidence buttresses our conclusion that the law judge's ruling should be upheld. Mr. Wolfe did not “specifically testify whether or not he saw the word alcohol lined out on the authorization form when he provided it” to respondent.¹³⁵ The testing authorization form containing the addition of a handwritten notation does not establish that it is more likely than not respondent lined through the word “alcohol” in

¹³⁰ *Administrator v. Porco*, NTSB Order No. EA-5591 at 15 (citing numerous cases).

¹³¹ Decision at 1-6.

¹³² Decision at 7.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

order to avoid being tested. The handwritten note was signed by Ms. DeMarco 15 days after respondent reported to the testing site.¹³⁶ Ms. Sevier testified that she was the person who wrote the note and that she did so only at the request of Ms. Sibley, the DER for Endeavor Air.¹³⁷ Ms. Sevier further testified that she wrote out the note on a separate piece of paper.¹³⁸ After confirming with Ms. DeMarco that she did not line through the word “alcohol,” Ms. Sevier wrote the note on the top corner of the testing authorization form and then had Ms. DeMarco sign it.¹³⁹ Ms. Sibley confirmed that she requested Ms. Sevier provide some record from AOM regarding why respondent did not submit to an alcohol test, but that she made this request based on an investigation conducted by Endeavor Air’s HR department.¹⁴⁰ Neither the investigation report nor testimony from the investigator was produced or offered as evidence. Whether or not this information would have proved dispositive is purely speculative. In short, the evidence submitted by the Administrator was insufficient to meet his burden to prove by a preponderance of the evidence the violations as alleged.

2. Legal Conclusions in Accordance with Applicable Law, Precedent, and Policy

As detailed above in Section I.D.7, the law judge concluded that the facts did not support the Administrator’s assertion that respondent violated the FARs in the manner that he conducted himself on the morning in question. We concur that the evidence offered by the Administrator, given the analytical parameters discussed above, fails to establish that it is more likely than not respondent lined through the word “alcohol” on his testing authorization form and thereby

¹³⁶ Decision at 7-8.

¹³⁷ Decision at 8.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

refused to submit to a test required of an employee holding his safety position in the aviation industry.

C. Conclusion

After thorough review of the appellate record, including the arguments set forth by the parties, and in light of the deference afforded the law judge's credibility determinations, we find that the law judge properly granted respondent's motion for judgment on partial findings at the close of the Administrator's case-in-chief at the hearing.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's Decision is affirmed.

HOMENDY, Chairwoman; CHAPMAN and DELEEUEW, Members of the Board, concurred in the above opinion and order.

Served: August 30, 2024

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

MICHAEL G. WHITAKER, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

EMANUEL JARA,

Respondent.

Docket No.: SE-31091

WRITTEN INITIAL DECISION

This is a proceeding before the National Transportation Safety Board (“Board”) pursuant to 49 U.S.C. §§ 44709(d) and 46105(c) on the appeal of Emanuel Jara (“the respondent”) from an emergency order of revocation issued by the Federal Aviation Administration (“FAA” or “Administrator”). The parties are represented by counsels David Kessler for the Administrator and Tony Jobe for the respondent.

For the reasons explained below, the Court granted the respondent’s motion for judgment on partial findings under Federal Rule of Civil Procedure 52(c) at the conclusion of the Administrator’s case in chief. As such, the Court granted the respondent’s appeal and reversed the Administrator’s Complaint.¹

I. Procedural history

On April 6, 2022, the FAA issued an emergency order of revocation of the respondent’s mechanic certificate. On April 15, 2022, the respondent, through counsel, appealed the FAA’s order of revocation and waived the applicability of the accelerated time limits via email. On April 18, 2022, the Administrator filed the order of revocation as the Complaint in these proceedings, and the respondent filed his Answer the same day. The Complaint was amended on October 17, 2023, and an Amended Answer was filed on October 26, 2023. The parties conducted discovery and obtained depositions of the respondent and other witnesses from a related civil action, *Emanuel Jara v. West Virginia Mobile Drug Testing, Inc., et al.*, No.

¹ The Court’s decision was announced in open court on August 21, 2024. This written decision is submitted in compliance with Federal Rule of Civil Procedure 52(a). *See* Fed. R. Civ. P. 52(c). The Administrator’s notice of appeal will be due 10 days from the service of this written initial decision. *See* 49 C.F.R. § 821.47(a).

1:2023cv00032 (N.D. W. Va. Mar. 31, 2023). Prehearing conferences were held with the parties on October 16, 2023; January 29, 2024; and August 2, 2024; and the Court ultimately scheduled a virtual hearing to begin on August 21, 2024. The Court has issued several orders to resolve the numerous motions filed in this case, which are all adopted and incorporated by reference.²

After the conclusion of the Administrator's case in chief on August 21, 2024, the respondent, through counsel, moved for judgment on partial findings. *See* Fed. R. Civ. P. 52(c). The Court received arguments from the parties on the evidence before granting the respondent's motion. This decision is submitted to satisfy the requirement for the Court to find the facts specially and state its conclusions of law separately. *See* Fed. R. Civ. P. 52(a)(1).

II. Evidence presented

The 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. The Court considered all the evidence presented by the parties, both testimonial and documentary. That evidence which is not specifically mentioned below is either corroborative or does not materially affect the disposition of the issues presented. The Court takes judicial notice of the relevant regulations and cases that were cited in the Amended Complaint and the formal pleadings of the parties.

A. Documentary evidence

The Court has considered all the documentary evidence submitted by the parties that was admitted to the record at the hearing: Administrator's Exhibits A-1, A-2, A-4, and the respondent's Exhibit R-2. Administrator's Exhibit A-3 (for identification) was not admitted to the record after objection by the respondent for the reasons stated on the record. It is designated "for identification" and is included with the record to assist in appellate review. The contents of all documents were articulated by the parties for the record.

B. Testimonial evidence

The Court heard testimony under oath from five witnesses called by the Administrator during the FAA's case in chief: John Wolfe, Victoria Young, Cassandra Sevier, Tiffany DeMarco, and Patty Sibley. The following is a summary of the testimony presented. Other aspects of the testimonial evidence are reflected in the Court's analysis below. The remainder of the testimony is contained in the verbatim transcript of the hearing conducted on August 21, 2024.

1. John Wolfe

John Wolfe testified he is a heavy check manager for Endeavor Air Incorporated. His

² *See* Minute Order of November 21, 2023; Order Denying Respondent's Motion to Compel Discovery of January 10, 2024; Minute Order of February 6, 2024; Order Granting Motion to Continue of April 23, 2024; Order Denying Respondent's Motion for Summary Judgment of June 11, 2024; Scheduling Order of June 24, 2024; and Minute Order of August 1, 2024.

memory is vague about the circumstances surrounding the respondent's drug and alcohol testing on January 10, 2022. After laying the foundation for a past recollection recorded, the witness read his prior statement into the record. Exhibit A-1; Fed. R. Evid. 803(5).

On cross-examination, the witness testified he was asked to prepare his written statement by Laura Schmidt, an official with Endeavor Air in their human resources ("HR") department. The witness testified that, as a maintenance supervisor, he has received training to detect intoxication in the workplace and make a reasonable suspicion determination if necessary. There are specific protocols he is meant to follow if detects signs of intoxication of an employee under his supervision, to include having another senior staff member confirm his observation. When he encountered the respondent on January 10, 2022, the witness did not recall smelling alcohol on the respondent's breath, whether his speech was slurred, if his eyes were bloodshot, or notice any physical signs associated with alcohol use.

In response to questions from the Court, the witness testified he never saw the word "alcohol" lined out on the authorization form. He first learned this occurred sometime later when Patty Sibley emailed him about it after she received the form from the testing site. The witness testified he did ask the respondent who lined out the word alcohol on the form, and the respondent denied that he did it. The witness testified he does not have any personal knowledge of who lined out the word alcohol on the authorization form.

2. Victoria Young-Klatt

The witness testified that in January 2022 she was working as a receptionist for Bridgeport Express Care in Bridgeport, West Virginia, which collaborates with Advantage Occupational Medicine. Her role was to check in people reporting to the clinic for drug screens and physicals. She has no recollection of the respondent, does not recognize his name, or remember him at all. She testified as to the usual practice in the clinic for individuals reporting for a drug screen or a physical. After the individual would appear at the front desk, she would ask for their date of birth to locate their name in a computer database, then verify their name. For individuals who had not visited the clinic before, she sometimes would open the door and show them the way to the testing part of the clinic. She said usually a nurse would lead individuals from the reception area back to the clinic. She testified that in January 2022, based upon protocols dealing with the Covid 19 pandemic, she never took forms from people at the reception area. She would not tell the collector what type of test the person was there to have completed. She denied ever marking or lining out any words on the authorization forms.

On cross-examination, the witness testified someone in the drug department would decide what type of test to administer. She confirmed that she has no recollection of the respondent. At the time in question, she testified there were at least three people working in the reception area of the clinic that could have checked the respondent in. She denied ever seeing anyone mark out words on the authorization forms used.

In response to a question from the Court, the witness testified that if she did see a word lined out on the authorization form there would be no reason for her to alert the employees in the back of the clinic.

3. Cassandra Sevier

The witness testified that she is a manager in the drug and alcohol department for Advantage Occupational Medicine. Tiffany DeMarco is an employee and has worked for her approximately three years. The witness has no independent recollection of the respondent visiting the clinic in January 2022, and denies ever seeing the authorization form before he was tested. She testified that it would never be appropriate to line out anything on an authorization form. She first learned about the claim that the respondent lined out the word alcohol on his authorization form when she was contacted by Patty Sibley.

The witness was shown Exhibit A-4. The witness testified Ms. Sibley from Endeavor Air called, and asked her to write the message on the top right corner of the exhibit if the collector Ms. DeMarco agreed that is what happened. Tr. at 63-65. The witness was told what to write by Ms. Sibley, and had no independent knowledge about the issue of who lined out the word alcohol before she made the handwritten notation. The notation was made before she spoke with Ms. DeMarco. The witness testified that it is not acceptable in the clinic to mark out anything on an authorization form, and collectors are instructed to follow the instructions on the authorization form.

On cross-examination, the witness testified that Ms. DeMarco was trained by MedExpress. She denied that she ever saw or spoke with the respondent on January 10, 2022. She was not involved with his check-in at the clinic, and in fact was not working that day because she was out sick with the Covid virus. She was not part of the respondent's check-in process that day in any way, and admitted she does not know what his authorization form looked like when he provided it at check in to the clinic. She does not have firsthand knowledge whether the receptionist marked on the authorize form when the respondent checked in.

The witness testified that she did not speak to Ms. DeMarco about the respondent's test until after Ms. Sibley called the clinic. The witness does not know if the word alcohol was lined out on the form when Ms. DeMarco completed the respondent's urine drug collection test. The witness discussed the respondent's test with Ms. Sibley between January 10-13, 2022. Ms. Sibley asked the witness whether the alcohol test was performed, and she replied it was not. She does not remember the exact date this telephone call occurred.

The witness testified that other persons in the clinic had access to the authorization form between January 10 and when it was apparently faxed to Endeavor Air on January 13, 2022, although she does not know if the form was altered between those dates. She denies she is the one who marked out the word alcohol on the authorization form, or that she has knowledge of anybody else in the clinic who did it.

In response to questions from the Court, the witness testified that she has seen an authorization form with the words alcohol or drug lined out in cases other than this one. She testified that if a form comes in with a line through one of the words, then they do not perform the test. She also testified that there is never any reason why someone on the staff would line out either the words drug or alcohol on the authorization form.

4. *Tiffany DeMarco*

The witness testified she is a certified drug and alcohol collector and works for Advantage Occupational Medicine. She has performed between 15 and 30 alcohol or drug tests every day for the past 12 years. She does not recall the respondent or conducting his test in January 2022.

When shown the authorization form with the handwritten note, the witness confirmed that the document contains her signature but that she did not write the other notation on it. The witness testified that Cassandra Sevier asked her if she marked out the word “alcohol” on the authorization form, and she said she did not. She signed the handwritten note on the authorization form on January 25, 2022. The witness testified the authorization must have been marked out before she received it, otherwise she would have conducted the breathalyzer test. She has no other recollection about the handwritten notation other than it contains her signature. The witness testified that she is not the one who lined out the word alcohol on the authorization form.

On cross-examination, the witness testified that she did not receive a saliva or breath specimen from the respondent because it was not needed on the authorization form. She performs only the test that is requested on the authorization form. She recalled the respondent was cooperative and complied with all of her directions, and that she is the one who allowed him to leave the clinic. The witness denied that she was responsible for conducting the check-in of the respondent at the clinic and does not know who the receptionist was that day. She did not see the respondent check in to the clinic. The witness testified she does not know who received the authorization form or if they are the ones who lined out the word alcohol on it. She does not know whether there were any words lined out on the authorization form when the respondent entered the clinic. She is not sure whether there are any “sharpie” markers available in the clinic. The witness testified she does not know who marked out the word alcohol on the authorization form.

In response to questions from the Court, the witness testified that the word alcohol was not lined out after she administered the drug test to the respondent because she would have given him a breathalyzer test if it was not marked out on the form. She has seen things marked out on authorization forms before, but it was the company requesting the test and not someone at the collection site.

5. *Patty Sibley*

The witness testified that she is the Designated Employee Representative (“DER”) for Endeavor Air Incorporated for the past seven years. She has no independent recollection of the events related to the respondent’s drug and alcohol testing on January 10, 2022. The witness confirmed that she reported the respondent’s alcohol test to the FAA as a refusal. She based this report on an investigation conducted by Laura Schmidt from the HR department for Endeavor Air Incorporated. The witness testified that she does not know what information was collected in this investigation, how it was conducted, or the contents of the investigation, because she has never reviewed it. Tr. at 120-22.

On cross-examination, the witness confirmed that she does not know who marked out the word alcohol on the authorization form. She does not recall seeing either the respondent or the authorization form on January 10, 2022. The witness admitted that she did see a copy of the authorization form the respondent received from Mr. Wolfe that day, and only reviewed the one she later received from the clinic. She does not have any knowledge about the respondent marking out the word alcohol to change the authorization form.

In response to a question from the Court, the witness confirmed that she asked the clinic to put the handwritten statement on the authorization form. She would have asked for the notation to be made at the top of the authorization form before the investigation by HR was complete. Tr. at 131. When asked by FAA counsel whether she considered the handwritten statement to be her own statement, or that of the collector, she answered that she considered it to be the collector's statement.

III. Alleged Federal Aviation Regulation violations

In the interest of aviation safety, the FAA is required to establish a program requiring air carriers to conduct random testing of covered employees responsible for safety-sensitive functions for the use of alcohol in violation of law or a United States Government regulation. 49 U.S.C. § 45102(a)(1). Under the Federal Aviation Regulations ("FARs"), a covered employee must not refuse to submit to any alcohol test required under the alcohol testing program requirements applicable to Title 14, Code of Federal Regulations, part 120. *See* 14 C.F.R. § 120.37(f).

A. Contentions of the parties

In its Amended Complaint, the FAA alleges that the respondent refused to submit to a random alcohol test under 14 C.F.R. § 120.7(l) because he failed to cooperate with any part of the testing process under 49 C.F.R. § 40.261(a)(7). Specifically, the FAA alleges that the respondent tampered with the notification/authorization form provided by his employer, Endeavor Air, Inc. ("Endeavor Air" or "EAI"), by lining out the word "alcohol" before he gave it to the collection testing site. The FAA further alleges that grounds for revocation of the respondent's airman certificate exist under 14 C.F.R. § 120.15(b)(2) due to his refusal to submit to a drug or alcohol test as required.

The respondent, through counsel, admits in his Answer that he was a covered employee of Endeavor Air to perform a safety-sensitive function of aircraft maintenance and preventive maintenance, and therefore subject to random drug and alcohol testing under 14 C.F.R. §§ 120.7(f) and 120.105(e). He also admits that Endeavor Air provided him a notification/authorization form for him to undergo both drug and alcohol testing, but denies he is the one who lined out the word "alcohol" on the form. He therefore denies that he failed to cooperate with the requirement to undergo alcohol testing, or in any way failed to submit to an FAA-required random alcohol test. The respondent disputes he committed any of the alleged violations.

B. Analysis

Federal Rule of Civil Procedure 52(c) provides that, in a nonjury trial, if a party has been fully heard on an issue and the court finds against the party on that issue, “the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.” Fed. R. Civ. P. 52(c). Rule 52(a)(1) requires the Court to “find the facts specially and state its conclusions of law separately” in an opinion or a memorandum of decision. The requirement that a court support its decision with findings of fact and conclusions of law under Rule 52(a) does not require it “to recite every piece of evidence supporting its findings or to sort through testimony of each witness” in reaching its decision. *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir. 1993).

1. *Witness credibility*

A law judge’s credibility determinations should be based explicitly on factual findings in the record in order to establish the determinations are not arbitrary and capricious. *Administrator v. Kolodziejczyk*, NTSB Order No. EA-5909 at 59 (2021) (citing *Dillmon v. NTSB*, 588 F.3d 1085, 1094 (D.C. Cir. 2009), and *Administrator v. Reynolds*, NTSB Order No. EA-5641 at 8 (2012)). Where there is conflicting testimony, the law judge must deduce which witness is more credible and therefore, give weight to that testimony. *Acting Administrator v. Smith*, NTSB Order No. EA-3558 at 5 (1992) (citing *Administrator v. Smith*, 5 NTSB 1560, 1563 (1987)).

Based upon the record presented, the Court finds that the testimonies of witnesses Wolfe, Young, Sevier, DeMarco, and Sibley were all credible. Each witness appeared forthright and responsive to questions by both parties and the Court. However, the Court observes that all the witnesses’ testimonies were affected by the passage of time, namely two years and seven months which elapsed since the respondent’s test occurred on January 10, 2022. While the vague memories of all the witnesses does not necessarily detract from their credibility per se, it does have some impact on the weight their testimony is afforded on the specific question as to who lined through the word “alcohol” on the respondent’s authorization form.

2. *Administrator’s circumstantial evidence claim*

The Administrator offered two authorization forms that were admitted into evidence without objection. The first one indicates the respondent was informed he had to submit to a random drug and alcohol test by his supervisor, John Wolfe, on the morning of January 10, 2022. Exh. A-2. The word “alcohol” is lined through with what appeared to be a black marker. John Wolfe’s past recollection recorded was read into the record as his testimony at trial. Exh. A-1; Fed. R. Evid. 803(5). However, the Court notes that Mr. Wolfe did not specifically testify whether or not he saw the word alcohol lined out on the authorization form when he provided it to the respondent.

The second authorization form is identical to the first with the addition of a handwritten note in the top right corner of the form. Exh. A-4. This note states “as per request, the alcohol instruction was marked out when donor arrived @ testing site.” The note was signed by Tiffany

DeMarco on January 25, 2022. Cassandra Sevier testified she is the one who wrote the note at the request of Patty Sibley, the DER for Endeavor Air. She further testified that she wrote out the note on a separate piece of paper. After confirming with Ms. DeMarco that she did not line out the word alcohol on the authorization form, Ms. Sevier wrote the note on the top corner of the authorization form and had Ms. DeMarco sign it. During cross-examination, Ms. Sevier conceded that anyone could have had access to the authorization form between the date of the test on January 10, and when the clinic was apparently contacted by Endeavor Air on January 13, 2022.

Ms. DeMarco testified she did not line out the word alcohol on the authorization form. She believes someone else lined it out before she reviewed it, otherwise she would have performed both the drug and alcohol tests with the respondent. The first she knew there was a problem was after she was contacted by Ms. Sevier sometime after the respondent was tested in the clinic.

In her testimony, Ms. Sibley confirmed that she requested Ms. Sevier at Advantage Occupational Medicine to provide some record regarding why the respondent did not submit to an alcohol test as directed. She stated the reason for her request was based upon an investigation conducted by the HR department at Endeavor Air, ostensibly by Laura Schmidt. Ms. Sevier testified she has no recollection of how that investigation was conducted, who was involved with it, or whether it was memorialized in a report.³

The Administrator has long conceded there is no direct evidence that the respondent lined out the word “alcohol” on the authorization form. Administrator’s Response in Opposition to Respondent’s Motion for Summary Judgement filed on January 25, 2024, at 2.⁴ Board precedent allows for the Administrator to sustain his burden of proof by relying on circumstantial evidence. *See Administrator v. Fullerton*, NTSB Order No. EA-5866 at 14-15 (2020) (citations omitted); *Administrator v. Tan*, NTSB Order No. EA-5032 at 5-6 (2003).

The Administrator contends that circumstantial evidence proves it was the respondent who lined out the word “alcohol” on the authorization form, based upon the following logic: (1) the respondent would have motive not to take an alcohol test *if* he had been out drinking the night before; (2) the respondent’s supervisor John Wolfe recalls that the word “alcohol” was not lined out on the authorization form when he first gave it to the respondent; (3) the practice of the unknown receptionist at Advantage Occupational Medicine would have been to escort the respondent from the front window of the clinic back to meet a collector in the testing area; and

³ Ms. Schmidt was not called as a witness at trial, nor is there any indication she has been deposed in the related civil case. Counsel for the Administrator concedes that, notwithstanding over two years of litigation in this case, no such investigation report prepared by Endeavor Air’s HR department has ever been provided to the FAA as evidence in these proceedings.

⁴ “While Respondent is correct that there is no *direct* evidence such as an eyewitness, recording, or confession, the [respondent’s] repeated assertions about direct evidence effectively concedes that there is circumstantial evidence that he crossed out the word ‘alcohol’ on his testing form. And, indeed, the Administrator will present circumstantial evidence that it was the Respondent who altered his drug testing form, not a receptionist as the [respondent] alleges.” (emphasis in original).

(4) the respondent must have lined out the word “alcohol” before he gave the form to Tiffany DeMarco because she did not have him perform an alcohol test.

While the Court acknowledges some portions of the Administrator’s chain of logic are supported by the evidence, it respectfully declines to make the leap required to conclude it was the respondent who altered the authorization form. As a predicate matter, there is no evidence in the record that the respondent drank alcohol the night before he reported for work the next morning, or whether he was under the influence of alcohol while at work. In fact, the Administrator did not enter any motive evidence at all.⁵

The most significant piece missing from the Administrator’s puzzle is the identity of the receptionist who met the respondent at the front window of the clinic on the morning of January 10, 2022, despite the Administrator’s earlier representation to the Court that it was Ms. Victoria Young. *See* Administrator’s Amended Response in Opposition to Respondent’s Motion for Summary Judgment filed on April 1, 2024.⁶ This representation by the Administrator turned out to be untrue. The record reflects that before trial the Administrator was on notice Ms. Young was equivocal as to whether she was the receptionist on duty, and did not recall anything at all involving the respondent on the day of the test. *Id.*, Motion Exh. A-1 at ¶¶ 8, 9, 10, 11, 12, 15, 17. Despite this notice, the Administrator still relies on Ms. Young’s testimony as circumstantial evidence that an unknown receptionist employed by Advantage Occupational Medicine was not responsible for lining out the word “alcohol” on the authorization form, and thereby proving that the respondent was the sole culprit. The Court gives very little weight to Ms. Young-Klatt’s testimony about what another unnamed receptionist may or may not have done after encountering the respondent in the clinic on January 10, 2022.

Another missing piece of the Administrator’s puzzle relates to the source of information behind Ms. DeMarco’s handwritten notation on the authorization form that “the alcohol instruction was marked out when (*sic*) donor arrived @ testing site.” Exh. A-4. Ms. DeMarco’s supervisor, Cassandra Sevier, testified she is the person who wrote the handwritten notation above Ms. DeMarco’s signature on the authorization form at the request of Patty Sibley, the DER at Endeavor Air. But the language used in the notation is misleading, as Ms. DeMarco cannot attest to exactly when the word “alcohol” was marked out or who did it. Within the context of Ms. DeMarco’s testimony, the handwritten notation represents nothing more than the fact she did not mark out “alcohol” on the form. Added to the confusion is Ms. Sibley’s testimony that the HR department at Endeavor Air conducted some form of investigation -- the circumstances and results of which are unknown -- that apparently prompted her telephone call to Ms. Sevier in the first place. Despite the absence of testimony from anyone from Endeavor Air with actual knowledge about this HR investigation, much less documentary evidence in the form of some report produced by that investigation, the Administrator still claims the handwritten notation by Ms. Sevier and Ms. DeMarco on the authorization form is probative of the circumstantial fact

⁵ The Court cautions counsel for the Administrator to avoid arguing facts not in evidence in the future. *See United States v. Khatallah*, 41 F.4th 608, 636 (D.C. Cir. 2022), *cert. denied*, 143 S. Ct. 2667, 216 L. Ed. 2d 1242 (2023).

⁶ “Respondent’s Motion repeatedly claims the FAA ‘cannot prove that the receptionist is not the individual responsible for striking out the word ‘alcohol.’ ... This is false because the receptionist’s name is Victoria Young[.]”

that the respondent lined out the word “alcohol” as alleged. The Court observes the handwritten notation merely attests to Ms. DeMarco’s denial that she lined out the word alcohol, which is consistent with her trial testimony, and nothing more.

Given the state of the evidence presented, the Court is not persuaded the Administrator demonstrated sufficient circumstantial evidence to prove that the respondent, in fact, is the person who lined out the word “alcohol” on the authorization form.⁷

IV. Findings of Fact and Conclusions of Law

Based upon the evidence of record, the Court makes the following findings of fact in accordance with Federal Rule of Evidence 52(a):

1. That the respondent was employed by Endeavor Air on January 10, 2022, when he was directed to submit to an FAA-required random drug and alcohol test and provided with the testing notification/authorization form specifying he was to undergo both drug and alcohol testing.
2. That at the time he provided the respondent with the notification/authorization form, Mr. Wolfe did not detect any odor of alcohol on his breath, bloodshot eyes, or observe other indicia of intoxication. Mr. Wolfe has received Department of Transportation training to detect intoxication of employees given the nature of his work as an aviation maintenance supervisor.
3. That the respondent reported to the collection testing site at Advantage Occupational Medicine and provided the receptionist with the authorization form. The identity of the receptionist is unknown.
4. That between the time the respondent received the authorization form from Mr. Wolfe and before he submitted to a drug test collected by Tiffany DeMarco, it appears someone lined out the word “alcohol” on the authorization form. It is possible someone lined out the word “alcohol” after the respondent left the clinic, but unlikely because Ms. DeMarco assumes she would have conducted both a drug and alcohol test if the word “alcohol” was not lined out.
5. That the respondent was polite and complied with all of the instructions given to him by Ms. DeMarco and departed the clinic after she told him he was free to leave.
6. That the identity of who lined out the word “alcohol” on the authorization form is unknown.
7. That the handwritten notation by Cassandra Sevier and signed by Ms. DeMarco on the authorization form was made 15 days after the respondent was tested in the clinic, and in response to a request by Patty Sibley, the DER employed by Endeavor Air. Ms. Sibley requested this notation as a report from Advantage Occupational Medicine in response to an investigation conducted by Endeavor Air’s HR department. The circumstances of that investigation, or the contents of any report based upon it, are unknown.

⁷ The Court is mindful that it entered judgment in favor of the respondent without hearing his own testimony. Based upon past submissions of the parties related to his earlier motions for summary judgment, the Court is aware that the respondent testified at a deposition taken in the related civil case. The Court observes that if the respondent’s deposition contained incriminating evidence as to whether he was responsible for lining out the word “alcohol” on the authorization form, the Administrator could have offered it into evidence as an admission by a party opponent. *See* Fed. R. Evid. 801(d)(2)(A).

In summary, there are too many unknowns in the evidence presented by the Administrator for the Court to conclude, by a preponderance of credible, probative, and reliable evidence, that the respondent was responsible for lining out the word “alcohol” on the authorization form. *See* Amended Complaint at ¶ 5(f). The Court further concludes the Administrator’s evidence does not establish that, because the word “alcohol” was lined through, the respondent failed to cooperate with the requirement to undergo alcohol testing and did not submit to an FAA-required random alcohol test. Amended Complaint at ¶5(g). The Court also concludes that the responsible collector, Ms. DeMarco, excused the respondent from further testing after he submitted a urine sample, therefore the respondent’s actions did not constitute a refusal for the alcohol test. *See Administrator v. Rojas*, NTSB Order No. EA-5496 at 14 (2009).

Given these determinations are essential to the Administrator’s claim that the respondent refused to submit to an alcohol test as defined under 14 C.F.R. § 120.7(l) and 49 C.F.R. § 40.261, the Court concludes as a matter of law that the Administrator has not met the burden of proof to show a violation of the Federal Air Regulations by a preponderance of the evidence. Amended Complaint at ¶¶ 6, 7, 8, 9; *see* 49 C.F.R. § 821.32. The Court further concludes that in the absence of any grounds for revocation of the respondent’s mechanic certificate by the Administrator, the emergency order of revocation must be reversed and vacated. *See* 14 C.F.R. § 120.15(b)(2).

V. Conclusion

For the reasons stated above, the Court finds the Administrator has not demonstrated by a preponderance of the credible, probative, and reliable evidence that the respondent committed violation of 14 C.F.R. § 120.7(l) or 49 C.F.R. § 40.261(a)(7) as charged in the Amended Complaint. In the absence of any violations of the FARs, the Administrator’s revocation of the respondent’s Mechanic Certificate must be reversed and set aside.

Accordingly, the Court enters the following

ORDERS

IT IS ORDERED that Respondent’s motion for judgment on partial findings is GRANTED.

IT IS FURTHER ORDERED that Respondent’s appeal is GRANTED and the Administrator’s Emergency Order of Revocation dated April 6, 2022, is REVERSED.

IT IS FURTHER ORDERED that the Administrator shall return Respondent’s Mechanic Certificate to him immediately and without delay.

Entered this 30th day of August 2024, at Washington D.C.



V. STUART COUCH
Administrative Law Judge

APPEAL (WRITTEN INITIAL DECISION)

Important: All appeal-related filings described below **must** also be simultaneously served on all other parties to this proceeding.

Any party to this proceeding may appeal this written initial decision by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order) to:

National Transportation Safety Board
Office of Administrative Law Judges
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758
FAX: (202) 314-6158
E-mail: aljappeals@ntsb.gov

Please note: *The Office of Administrative Law Judges strongly prefers to receive appeals via e-mail only.* Files containing sensitive personally identifying information should not be sent via e-mail but can be submitted through the blue Submit button on the ALJ website:

<https://www.nts.gov/legal/alj/Pages/default.aspx>.

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. That brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090
E-mail: Boardappeals@ntsb.gov

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief. A brief in reply to the appeal brief may be filed by any other party directly with the Office of General Counsel within 30 days after that party was served with the appeal brief.

All papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel.

The Board directs your attention to Rules 7, 8, 43, 47, 48 and 49 of its Rules of Practice (49 C.F.R. §§ 821.7, 821.8, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Order on the following party's counsel at the address indicated, by electronic mail:

David B. Kessler, Esq.
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Mr. Emanuel Jara
c/o Respondent's Counsel by Email Only

Dated this 30th day of August 2024.

\s\ Katharine L. Primosch

KATHARINE PRIMOSCH
Office of Administrative Law Judges
National Transportation Safety Board