SERVED: June 17, 2015

NTSB Order No. EA-5750

DIVERSION PROGRAM CASE

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of June, 2015

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

OPINION AND ORDER

1. ***Background***

Respondent appeals the decision of Administrative Law Judge Stephen R. Woody, issued December 11, 2014.[1] By that decision, the law judge affirmed the Administrator's complaint against respondent for violating 14 C.F.R. § 67.403(a)(1) by intentionally falsifying a medical

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

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

A. *Facts*

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

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

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

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

[3] Compl. at ¶ 4.

[4] Exh. A-2; tr. 26-27.

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

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

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

B. *Procedural Background*

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

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[6] Exh. A-3 at 115.

[7] Tr. 99-100.

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

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

C. *Law Judge's Oral Initial Decision*

In his oral initial decision on December 11, 2014, the law judge affirmed the FAA's emergency order and revocation. The law judge summarized the three-prong standard for intentional falsification: the Administrator must prove an airman (1) made a false representation, (2) in reference to a material fact, and (3) with knowledge of the falsity of the fact.[9] The law judge stated the only prong of the intentional falsification standard in dispute was the third prong.

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

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

[10] Initial Decision at 163.

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

D. *Issues on Appeal*

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

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[11] Id.

[12] Id. at 164-65.

[13] Appeal Br. at 6.

[14] Id. at 10.

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

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

2. *Decision*

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

A. *Intentional Falsification*

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

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

[16] Id. at 15.

[17] Id. at 16.

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

[19] Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

[20] Supra note 9.

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

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

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

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

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

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

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

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

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[23] Tr. 94-95, 102.

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

[25] Initial Decision at 162.

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

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

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

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

[28] Exh. A-3 at 115.

[29] Id.

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

B. *Tenth Amendment*

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

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

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

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

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[30] Appeal Br. at 19-20.

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

[32] 49 U.S.C. § 1133.