

"record of traffic convictions") on six² applications for airman medical certification, in that he did not disclose that he had been convicted on May 17, 1984, of driving while impaired (DWI).³

The law judge found that respondent had thereby violated 14 C.F.R. 67.20(a)(1).⁴ He upheld the revocation of respondent's first class medical certificate, but modified the period of suspension of his airline transport pilot certificate from 90 days, as requested by the Administrator, to 30 days.⁵

Respondent's arguments on appeal fall into three general categories: 1) arguments pertaining to the admission of

² Although the law judge described this case as involving only four falsified applications (Tr. 165, 166, 168-9), the evidence established, and the law judge ultimately held (at Tr. 169-70), that respondent made intentionally false statements on six applications. We note that the complaint in this case addressed the first four applications (dated October 22, 1985, November 7, 1986, May 4, 1987, and November 5, 1987) in a separate series of allegations from the subsequent two applications (dated November 8, 1988, and July 24, 1989). Respondent did not disclose his 1984 DWI conviction on any of the six applications, but on the two later applications he did disclose a 1988 DWI conviction.

³ The complaint alleged, in error, that respondent failed to check "yes" to item 21v. ("record of traffic convictions") on the first four applications listed in the complaint. In fact, respondent did check "yes" on those applications, but he listed only a 1985 speeding ticket in the "Remarks" section, and failed to disclose his 1984 DWI conviction.

⁴ Section 67.20(a)(1) provides as follows:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made --

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

⁵ The Administrator has not appealed from this reduction in sanction.

respondent's airman medical records into evidence; 2) other evidentiary challenges; and 3) the law judge's findings of intentional falsification and suspension of his pilot certificate. For the reasons that follow, we reject all of respondent's arguments, and affirm the initial decision.

1. Admission of respondent's medical records.

Respondent challenges the law judge's receipt into evidence of Exhibit A-5, a certified copy of respondent's airman medical records on file with the FAA's Aeromedical Certification Division because, according to respondent, these records contain confidential and sensitive material which was not necessary to the Administrator's case. In this connection, respondent has also moved to expunge Exhibit A-5 from the record, and to substitute the name "John Doe" for respondent's name in the caption of this case.

At the hearing, counsel for the Administrator made clear that he was offering Exhibit A-5 into evidence only for the relevant medical applications contained therein.⁶ (Tr. 32.) Although respondent's counsel objected at that time to the introduction of the additional material contained in Exhibit A-5 (i.e., psychiatric and other information relating to respondent's participation in an alcohol monitoring program which allows him to retain his airman medical certification in spite of his

⁶ Exhibit A-5 contains two of the six applications referenced in the complaint (those dated November 8, 1988, and July 24, 1989). Exhibit A-4 contains the other four applications.

history of alcoholism), he acknowledged that he might rely on that very material in his affirmative defense. (Tr. 32.) In our judgment, it was well within the law judge's discretion to admit Exhibit A-5 in its entirety. We recognize that, since respondent ultimately chose not to use that additional material in his defense, its existence in the record is somewhat gratuitous. However, the admission of extraneous material is not reversible error so long as the record contains substantial, reliable, and probative evidence in support of the initial decision. Petition of Ewing, 1 NTSB 1192, 1198 (1971).⁷

Finally, we deny respondent's motion to substitute the name "John Doe" for his in the caption of this case. The issue of whether respondent should be accorded anonymity was not litigated below, and we have previously held that such determinations should not be made in the first instance at the appeal stage. Administrator v. Esposito, NTSB Order No. EA-3696 at 4 (1992). Furthermore, as we noted in Esposito, most of our cases decided under a pseudonym involve medical disqualifications, and no public interest is served by publishing the names of individuals who suffer from medical conditions that disqualify them from certification. However, the public interest is served by publishing the names of individuals who, like respondent in this case, violate the Federal Aviation Regulations. Id. at 4 n. 5.

⁷ Regarding respondent's asserted privacy concerns, we note that he attached to his pre-hearing motion for summary judgment several of the psychiatric documents he now seeks to shield from public disclosure.

2. Additional evidentiary challenges.

Respondent further claims that he was denied a fair trial in that: A) the Administrator presented a surprise expert witness, and this witness, Dr. Barton Pakull, gave improper opinion testimony regarding whether respondent understood the import of the question he falsely answered; B) he was denied access to the FAA's enforcement investigative file, contrary to Rule 612 of the Federal Rules of Evidence; and C) the law judge excluded from evidence an internal FAA memorandum discussing the alleged vagueness of the airman medical application form, contrary to Rule 801(d)(2) of the Federal Rules of Evidence.

A. Dr. Pakull's testimony. The Administrator does not dispute that he failed to list Dr. Pakull (or any expert witness, for that matter) in response to respondent's pre-trial discovery request for a witness list.⁸ While we strongly disapprove of the Administrator's incomplete discovery response, respondent has not shown how he was prejudiced by Dr. Pakull's "surprise" testimony.

Indeed, we view his testimony as largely unnecessary to the law judge's determination that respondent made intentionally false statements on his applications.⁹ Any claim that respondent was prejudiced by Dr. Pakull's appearance is further undercut by the fact that respondent had attempted unsuccessfully to subpoena Dr.

⁸ The Administrator asserts in his reply brief that this failure was not deliberate, but was merely an oversight by the FAA's trial attorney.

⁹ It appears that Dr. Pakull was called by the Administrator primarily to establish the materiality of the respondent's false statements, a matter not seriously open to dispute.

Pakull as his own witness. Accordingly, Dr. Pakull's appearance (and availability for cross-examination by respondent) could be viewed as a benefit to respondent.

Respondent also challenges Dr. Pakull's non-medical (and we think, essentially speculative) testimony that, in his opinion, respondent understood question 21 v, to which he gave incorrect answers. (Tr. 94, 110.) Although the law judge indicates that Dr. Pakull and FAA Inspector Robert Payette¹⁰ made the Administrator's case "very strong," we do not think that that comment need be read to suggest that he improperly relied on their opinions as to what respondent knew at the time he made the false answers, or that the law judge did not independently evaluate respondent's credibility on this matter. Indeed, their testimony on this point added nothing to the Administrator's case since respondent himself admitted, and strong circumstantial evidence in the record confirms, that he read and understood the question. (Tr. 134.) We thus view the law judge's approving comments as no more than an indication that he agreed with the rationale expressed by both Inspector Payette and Dr. Pakull: respondent clearly understood what sort of information was sought by question 21v since he consistently checked "yes," and listed a speeding ticket and (on his 1988 and 1989 applications) his 1988 DWI conviction. (See Tr. 60, 67, 69, 94, 110.)

¹⁰ Inspector Payette (the FAA security inspector who investigated this case) also testified that, in his opinion, respondent understood question 21v. (Tr. 67, 69.)

B. Enforcement investigative report. Assuming that respondent was denied access to some part of the FAA's enforcement investigative file in this case,¹¹ this provides no basis for reversal of the initial decision, as respondent has not shown how he was prejudiced by such a denial. Respondent's reliance on Rule 612 of the Federal Rules of Evidence (FRE) is inapposite since those rules do not apply to our proceedings.¹² We note, in any event, that FRE Rule 612 only requires disclosure of documents which -- unlike the report here at issue -- are used to refresh a witness's recollection while on the stand, a standard the law judge indicated he would enforce. (Tr. 46.)

C. FAA's internal memorandum. Contrary to respondent's assertion, he was not entitled to have admitted into evidence an internal FAA memorandum pertaining to the alleged vagueness of the application form here at issue, his citation to FRE Rule 801(d)(2) notwithstanding. As noted above, the Federal Rules of Evidence do not apply to the Board's proceedings. Furthermore, FRE Rule 801(d)(2) simply defines an admission by a party opponent¹³ as non-hearsay -- it does not necessarily require

¹¹ Discovery documents in the case docket appear to indicate that respondent was provided with what the Administrator therein described as all "releasable" portions of the investigative report. (See Administrator's Response to Respondent's First Notice to Produce, answer 3.) Also, counsel for the Administrator stated at the hearing that most of the investigative report was introduced into evidence. (Tr. 46-7.)

¹² Administrator v. Henry, 5 NTSB 858, 860 n. 8 (1985).

¹³ We express no opinion as to whether the rejected memorandum constitutes an admission of any sort by the FAA.

admission of such a document, as there may be other grounds for its rejection.

In rejecting the memorandum, the law judge noted that nobody would be prejudiced by its exclusion from evidence because the concerns expressed therein had been "rectified" in the FAA's newly-revised application form, a copy of which the law judge admitted into evidence as Exhibit R-2. (Tr. 113-4.) Thus, the law judge essentially found that the memorandum was cumulative. Furthermore, even if the memorandum had been admitted into evidence it would have had no impact on the outcome of this case, as the key issue in a falsification case such as this one is not whether the question at issue could be considered vague in some general sense, but rather, whether the individual involved understood the question and knew he was answering falsely. Respondent has not established error in the law judge's conclusion that he did.

3. Findings of intentional falsification and sanction.

Respondent also challenges the law judge's findings that he made intentionally false statements on his medical applications, asserting that the question he falsely answered is fundamentally ambiguous (citing United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991)),¹⁴ and that there is no evidence he had actual knowledge of the falsity of his answers. Respondent also asserts

¹⁴ In Manapat, the Eleventh Circuit held, in a 2 to 1 decision, that the question here at issue was so fundamentally ambiguous as to preclude a conviction under 18 U.S.C. § 1001 as a matter of law.

that a suspension of his pilot certificate is contrary to public policy and safety and to what respondent characterizes as the "rehabilitative" purposes of the alcohol monitoring program in which he is participating.

In Administrator v. Barghelame and Sue, NTSB Order No. EA-3430 (1991), we expressed our disagreement with the Manapat majority's conclusion that the airman medical application form was ambiguous as a matter of law, and indicated that in our view the questions relating to traffic convictions and other convictions are not confusing in any respect that would likely cause persons of ordinary intelligence to entertain any genuine doubt as to their meaning. We further stated that we do not consider the holding in Manapat to be controlling in our certificate proceedings, and we will continue to rely on our law judge's determinations as to whether a particular respondent's false answer in response to those questions was deliberate or intended to deceive.

Contrary to respondent's assertion that the law judge found that respondent "should have known" that the statements he made were false (a standard we rejected in Administrator v. Juliao, NTSB Order No. EA-3087 (1990)), the law judge's initial decision in this case contains an implicit conclusion that respondent had actual knowledge¹⁵ that he was making false statements.¹⁶ In our

¹⁵ The elements of intentional falsification are 1) a false statement, 2) in reference to a material fact, 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

view, no other conclusion is possible on this record.

Respondent conceded that he read and understood question 21v on the application (Tr. 134), and he did not dispute the inaccuracy of his answers to that question (Tr. 87). When asked why he did not disclose his 1984 DWI conviction, he stated that he did not know why. (Tr. 125, 141.) His claim that he was not sure what sort of information the question sought to elicit (Tr. 133, 135, 141) is belied by his admission that his father told him at his 1985 physical exam that he was required to disclose his speeding ticket,¹⁷ and that the aviation medical examiner who conducted his 1988 exam told him that the FAA was very interested in learning about DWI convictions. Indeed, respondent consistently answered "yes" in response to question 21v, and reported his speeding ticket as well as his 1988 DWI conviction.

In light of respondent's failure to offer any meaningful explanation for his concealment of his 1984 DWI conviction, the falsely-answered medical applications themselves constitute

(..continued)

¹⁶ After reciting the elements of intentional falsification, including "knowledge by the person involved . . . that . . . [the] statement is false" (Tr. 164), the law judge concluded that respondent had committed a serious series of violations (Tr. 168-9) and affirmed the allegations in the complaint.

¹⁷ Respondent testified that he thought "record of traffic convictions" referred only to traffic infractions such as speeding and running stop signs or red lights, and not DWI convictions. (Tr. 133-5.) Putting aside our skepticism of such an asserted belief, we note that respondent admitted he was informed at his 1988 exam by the aviation medical examiner that the FAA wanted information about DWI convictions. Accordingly, respondent's asserted earlier belief to the contrary (which arguably prevented him from having knowledge of his false statements on the four earlier applications) did not excuse his falsification of his 1988 and 1989 applications.

sufficient circumstantial proof¹⁸ of respondent's intent to falsify. Administrator v. Juliao, NTSB Order No. EA-3087 (1990).

Finally, we reject respondent's contentions that enforcement action against his pilot certificate is contrary to the interests of safety and public policy and that the Administrator's pursuit of a certificate suspension is inconsistent with the asserted "rehabilitative" goals of the alcohol monitoring program in which he is enrolled. In the first place, such action, which serves a valuable deterrent effect, is supported by our caselaw¹⁹ as well as by the FAA's published sanction policy. See Notice of enforcement policy, 54 Fed. Reg. 15144 (April 14, 1989). In the second place, such challenges are essentially attacks on the Administrator's exercise of prosecutorial discretion, an area into which we will seldom intrude.

¹⁸ It is well-established that knowledge of falsity may be inferred from circumstantial evidence. Erickson v. NTSB, 758 F.2d 285 (8th Cir. 1985); Administrator v. Monaco, NTSB Order No. EA-2835 (1988); Administrator v. Juliao, NTSB Order No. EA-3087 (1990).

¹⁹ See Administrator v. Walters, NTSB Order No. EA-3835 at 5, n. 6 (1993).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The revocation of respondent's medical certificate and the 30-day suspension of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.²⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order. Chairman VOGT submitted the following concurring statement.

²⁰ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

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Administrator v. Dowd, Notation 6159
Concurring Statement of Chairman Vogt

I would find that the law judge was in error in allowing the Administrator to call Dr. Pakull to testify as an expert witness because Dr. Pakull had not been identified in response to respondent's discovery requests. However, Dr. Pakull's testimony was completely irrelevant to the sole disputed issue of whether respondent's false statements on his medical certificate applications were made knowingly. Upon review of the record, I find no clear or consistent reason offered by the respondent to rebut the presumption that his admittedly false statements were made knowingly. See Administrator v. Juliao, NTSB Order No. EA-3087 (1990) (material false statements in medical certificate applications constitute sufficient circumstances proof of intent to falsify). Thus, reviewing the entire record and giving no weight to Dr. Pakull's testimony, I concur with the majority's holding.

C.W.V.