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NTSB Order No. EA-4821

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 27th day of January, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15796
v.)	
)	
WAYNE E. LUGINBUHL,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., rendered after an evidentiary hearing held on December 29, 1999.¹ By that decision, the law judge dismissed the Administrator's emergency order of revocation of respondent's airline transport pilot

¹ An excerpt from the hearing transcript containing the law judge's initial decision is attached.

("ATP") certificate for allegedly violating section 61.59(a)(1), 14 CFR Part 61, of the Federal Aviation Regulations ("FAR").² We deny the appeal.

The record reveals that on or about June 5, 1999, respondent endorsed the "Instructor's Recommendation" section on the airman applications of three individuals -- Messrs. Ronald Buccarelli, Randal Byrom, and Jose Antonio DeFrietas ("the applicants") -- who were seeking to earn a Falcon 20 type rating from FAA-Designated Pilot Examiner ("DPE") James Carey.³ Respondent, who is a certified flight instructor ("CFI") and holds a Falcon 20 type rating, among other type ratings, had provided the individuals with some ground instruction, but he had not provided flight training to any of the applicants. According to the Administrator, respondent's endorsements constituted a false "attestation that he had given [each

² FAR section 61.59(a)(1) provides as follows:

§ 61.59 **Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**

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

(1) Any fraudulent or intentionally false statement on any application for a certificate, rating, or duplicate thereof, issued under this part[.]

³ Beneath the "Instructor's Recommendation" heading is the printed statement: "I have personally instructed the applicant and consider him ready to take the test." The remainder of this section of the form contains several spaces calling for information and titled "Date," "Instructor's Signature," "Certificate No.," and "Certificate Expires." On each applicant's form, respondent dated the form, printed and signed his name, and supplied his CFI certificate number and expiration date.

applicant] the flight instruction that was required for [the] type rating application under [FAR section 61.157(b)(1)]."

Respondent owns Lug's Flying Service, located at Ft. Lauderdale Executive Airport. Previously, he was an aircraft commander with the United States Coast Guard, where he acquired significant experience operating and piloting Falcon 20 series aircraft. He holds numerous type ratings, and trains pilots for type ratings in various aircraft, including the Grumman Albatross, Learjet, and Citation. He is regarded by his peers as an extremely professional and knowledgeable airman, and he is also considered to be an excellent instructor.

In April or May of 1999, one of the applicants, Mr. Buccarelli, sought respondent's opinion on a Falcon 20 aircraft he was considering acquiring. The aircraft was subsequently purchased, and respondent began providing applicants' ground instruction regarding the Falcon 20 aircraft and its operation.

Applicants, however, needed to earn their type ratings as quickly as possible so that they could operate the new aircraft, and so they contracted with Quality Aviation Training, Inc. ("QAT") because it was a training firm pre-endorsed by their insurance carrier, available on short notice, and, importantly, could provide the necessary but otherwise locally unavailable DPE services.

Respondent, who testified that he was interested in his colleagues' successful training, met with QAT's Chief Ground Instructor Everel Mastin when he arrived in June with QAT's Chief Flight Instructor James Carey, and briefed him on what he

had previously covered with the applicants. He also reviewed QAT's training syllabus and discussed it with Messrs. Mastin and Carey. Respondent continued to monitor the applicants' training with QAT, attending numerous ground training sessions and tutoring the applicants as necessary, and was aware of the details and progress of their ground instruction as well as their flight training with Mr. Carey. At the conclusion of training, even though Mr. Carey had provided an endorsement for both ground and flight instruction in each of the applicant's training records, respondent made a ground instruction endorsement in each of the applicant's logbooks.⁴ Finally, on the day of the practical exam, DPE Carey asked respondent to endorse the instructor recommendation section of each applicant's airman application and, after discussion with DPE

⁴ The Administrator claims on appeal that these endorsements, which respondent provided in self-adhesive label format and wherein he indicated that he had given the required ground instruction in preparation for the Falcon 20 type rating, were not issued by respondent until several months later at about the time the letter of investigation was issued to respondent. The testimony by Mr. Buccarelli that the Administrator cites in support of this claim, however, is not as precise on this point as she would have us accept, and the credited testimony of respondent was that he delivered the endorsements for all three applicants to Mr. Buccarelli's office at the time the airman applications were being filled out. See Hearing Transcript ("Tr.") at 70; 223-224. Nor, we think, has the Administrator demonstrated that respondent's endorsements were inaccurate. In any event, in the context of the Administrator's complaint which only alleges a false attestation about having provided required flight instruction, these issues are irrelevant when considered with due regard for the legal standards at issue in an intentional falsification case and in the face of the law judge's credibility determinations in favor of respondent.

Carey, he did so.⁵

Respondent testified that he thought it was permissible to sign the forms' "Instructor Recommendation" on behalf of each applicant because he provided each with Falcon 20 ground instruction, was familiar with their flying skills, actively monitored and thought highly of their ground and flight training with QAT, and, on that basis, "considered them ready to take the test."⁶ Tr. at 240. Messrs. Buccarelli and Byrom, who were called by the Administrator, and several witnesses called by respondent, including an FAA inspector from the Ft. Lauderdale Flight Standards District Office ("FSDO") not associated with the enforcement investigation, provided very positive testimony

⁵ Respondent testified as follows:

[DPE Carey and I] discussed it a little bit more. I said, 'Jesus, it's kind of superfluous.' We didn't think we needed it, and he said, 'Well, yeah, but you did give instruction.' I said, 'Yeah. I did give instruction[.]' And that's exactly what [the form] says....

Tr. at 238. The FAA inspector who testified on behalf of the Administrator stated that the "Instructor Recommendation" section was not required to have been completed on applicants' forms, but that, since it was, he relied on it. The inspector also testified that the FAA had not authorized DPE Carey to administer a practical exam to an airman whom he had also provided the required flight training, but there is nothing in this record to indicate that respondent, who had not previously met Mr. Carey, knew of this. Mr. Carey is the subject of another pending enforcement action.

⁶ The record does not demonstrate that the applicants did not receive the required ground and flight training.

regarding respondent's character, competence and veracity.⁷

Each applicant passed the practical exam, and the FAA subsequently issued them Falcon 20 type ratings. Subsequently, in mid-1999 during the course of an investigation of DPE Carey, the FAA discovered respondent's endorsements. After investigating and determining that respondent did not provide Falcon 20 flight training to the applicants (a fact readily admitted by respondent when contacted by the FAA), the Administrator initiated this enforcement proceeding.

The law judge credited respondent's claim that he thought he could endorse the "Instructor Recommendation" section of the form under the circumstances, and found "no intention to make a false statement[.]" Tr. at 291. On appeal, the Administrator argues that the law judge erred in finding that the evidence did not support her charge that respondent intentionally falsified the application forms. She argues that in endorsing the application forms, respondent "effectively represented" that he had given each applicant flight instruction because that is "the only reasonable interpretation" of the language contained in the "Instructor's Recommendation" section. She also argues that respondent had "no basis" to attest that he considered each applicant "ready to take the test" where he had not participated in the applicants' flight training for the practical test and when, as a CFI, he knew that "[u]nder the FARs only a flight

⁷ The enforcement investigation was conducted by the Teterboro, New Jersey FSDO which oversees DPE Carey.

instructor who flies with an applicant in a particular aircraft can endorse an applicant for a flight test to receive a type rating in that aircraft." Finally, she argues that because respondent knew he had not provided flight instruction to applicants but nonetheless endorsed each form for submittal to the FAA, "[h]e intended for the certificate or rating to issue to the applicants based on false information that he conveyed," and, therefore, that the record demonstrates that respondent "intended to deceive."⁸

In our view, the Administrator's arguments are unavailing. What respondent should have known is not the issue. See, e.g., Administrator v. Juliao, 7 NTSB 94, 95-96 (1990). In order to establish the charge of intentional falsification, it was the Administrator's burden to prove that respondent made a false statement, that he made it with knowledge of its falsity, and that the statement he made was in reference to a material fact. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). If the evidence fails to support any one of these elements, the allegation fails. For our purposes here, it is sufficient to observe that the law judge found against the Administrator as to the second element when he found that respondent's endorsement of the "Instructor's Recommendation" section of the forms was not intended to be an attestation that he had provided the required flight instruction but, rather, an attestation that,

⁸ Respondent has filed a brief in opposition, arguing that the law judge's decision should stand.

for the reasons articulated by respondent and set forth in this opinion, he considered the applicants to be fully trained and ready to take the test. In reaching these conclusions, the law judge credited respondent's testimony. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (credibility findings will not be disturbed on appeal absent clear error). We do not find respondent's testimony inherently incredible, nor are we compelled by any of the Administrator's arguments that the law judge erred in reaching his decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's decision dismissing the Administrator's order of revocation is affirmed.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.