

SERVED: May 21, 2001

NTSB Order No. EA-4895

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 17th day of May, 2001

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JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15861
v.)	
)	
RONALD F. WRIGHT,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on July 18, 2000, at the conclusion of an evidentiary hearing held on June 15 and July 18, 2000.¹ By that decision, the law judge affirmed the Administrator's emergency order of revocation² of

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

² Respondent waived the expedited procedures applicable to an emergency order of revocation.

respondent's mechanic certificate for violating section 65.23(b), 14 C.F.R. Part 65, of the Federal Aviation Regulations ("FARs").³ We deny the appeal.

The Administrator's January 31, 2000 Emergency Order of Revocation alleges, among other things, the following facts and circumstances concerning respondent:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate number 2325207, issued under Part 65 of the FAR.
2. At all times herein, an employee who performs maintenance or preventative maintenance is performing a covered function, as prescribed in Part 121, Appendix I, Section III (14 C.F.R. Part 121, App. I, § III).
3. On or about August 23 and 24, 1999:
 - a. You were employed at American Eagle Airlines as a Quality Control Inspector, and were working the 11 p.m. to 7 a.m. shift.
 - b. At approximately 6:00 a.m. on August 24, 1999, you were notified by American Eagle employee Tim Kelly that you had been selected

³ FAR § 65.23 provides, in relevant part, as follows:

§ 65.23 Refusal to submit to a drug or alcohol test.

* * * * *

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for--

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

for random drug testing by your employer, American Eagle.

- c. You told Mr. Kelly that you were finished with a training class you had attended during your scheduled shift and that you were tired and going home.
- d. Mr. Kelly told you that the person who would perform the test would arrive at 6:45 a.m. and left your presence to gather the paperwork for your test.
- e. When Mr. Kelly returned with the paperwork, you were gone.
- f. Mr. Kelly went to the parking lot of the facility and observed that your vehicle was not there.
- g. You did not "clock out" or otherwise indicate that you did had quit working prior to 7:00 a.m., when your shift was scheduled to end.
- h. You did not at any time receive permission to leave the facility before the end of your scheduled shift from any person authorized to grant such permission.

Additional information was adduced at the hearing. Respondent's training, and follow-up testing, ended between 5:15 and 5:30 a.m. See Exhibits ("Ex.") R-2 and R-6. Although respondent claimed he was authorized to leave after his training, and the training attendees were instructed not to "badge out" and, instead, were instructed to fill out "exception logs" to ensure payment for a full shift, other evidence also indicates that this guidance did not apply to Quality Insurance Inspectors such as respondent. See Ex. A-2 and A-8. Respondent, in any event, did not leave immediately after his training requirements had been fulfilled. Instead, respondent testified that he went to find and inform a union official that he would not be attending a union meeting

scheduled for 8:00 a.m. Respondent testified that he located the union official, who was busy releasing an aircraft, and, at that time, was approached by third-shift supervisor Tim Kelly and informed that he had been selected for random drug testing, and that the person administering the test would arrive at 6:45 a.m. Respondent replied to Kelly that he was tired, and was going home. Kelly testified that he then went into his office, adjacent to where he had the conversation with respondent, and, within 20 seconds, returned with the required paperwork, but respondent was gone.⁴ See Hearing Transcript ("Tr.") at 32-33; Ex. A-2. Kelly then notified respondent's direct supervisor, Jon Hale, who, on the advice of company officials responsible for

⁴ At the hearing, and in the statement submitted to the company, respondent claimed that he told Kelly that he had a family emergency to deal with, and that Kelly told him that he could go home without submitting to the test. Kelly testified at the hearing, consistent with a written statement he made just after the events of 6 a.m., that he did not give respondent authorization to skip the random testing, and that respondent did not inform him of his family's medical emergencies. Two other individuals, respondent's direct supervisor, Jon Hale, and co-worker Dave Rhorlick, testified that respondent never mentioned family emergencies during conversations with each of them during the shift that ended on August 24th, and Rhorlick also testified that respondent told him that he intended to attend the 8 a.m. union meeting after his shift ended. The law judge credited Mr. Kelly's testimony that he did not give respondent permission to leave before the test, as well as the testimony of Hale and Rhorlick. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (the Board defers to a law judge's credibility determinations, unless shown to be arbitrary or capricious). Evidence adduced at the hearing indicates that respondent's wife and son both had medical conditions that were being monitored, but the evidence, including the fact that respondent did not make or receive urgent telephone calls at work, does not indicate that there was a pressing medical need requiring respondent to leave immediately.

American Eagle's anti-drug program, called respondent at his home at 9:00 a.m. See Ex. A-2 and A-7. Hale informed respondent that he was to be suspended without pay, and was required to return to the hangar with a written statement regarding his refusal to submit to random drug testing. Respondent asked if he could take the drug test when he returned to the hangar, but was informed by Hale that he could not. Respondent returned later that morning to the hangar, providing a receipt for a drug test (which later proved to be negative) that he had undertaken on his own after his conversation with Hale, and, later that afternoon, completed the statement requested by the company.⁵ See Ex. A-7, A-8 and R-5.

The law judge found that the respondent "didn't mention to anyone [his family emergency] prior to 6:00 [a.m.] when he was requested ... to take the drug test[.]" He further found that respondent, upon being informed by Kelly of the drug test, told Kelly that he was tired and that he was going home, "and didn't submit to the drug test." The law judge further observed that "[m]ental intent has nothing to do with the taking of this drug test. You either take it or you don't. If you don't take it, that constitutes a refusal."⁶ And that's what happened here."

⁵ The negative test results obtained privately by respondent are not contemplated by the FAA-mandated random drug testing program, and therefore they have absolutely no bearing on this case. However, assuming they are legitimate, the results emphasize the magnitude of respondent's ill-considered behavior.

⁶ Appendix I, Part 121, defines a refusal to submit to a drug test in the following language:

(continued . . .)

On appeal, respondent argues that he was not properly notified of the requirement to submit to a drug test, and that, a *fortiori*, a finding of refusal to submit to a drug test cannot be made "in the absence of conduct intentionally designed to obstruct the testing process in order to avoid the results of that process." The Administrator argues in rebuttal to respondent's brief, and urges us to uphold the law judge's decision.⁷

Turning to respondent's first argument, we find it has no merit. It essentially complains that certain details of the notification process, some of which are patently not applicable to the circumstances, were not followed to respondent's prejudice.⁸ First, no evidence was introduced at the hearing demonstrating that the American Eagle employee handbook was incorporated explicitly or by reference in the company's FAA-

(continued . . .)

Refusal to submit means that an individual failed to provide a urine sample as required by 49 CFR Part 40, without a genuine inability to provide a specimen (as determined by a medical evaluation), after he or she has received notice of the requirement to be tested in accordance with this appendix, or engaged in conduct that clearly obstructed the testing process.

⁷ The Administrator has attached several documents, not admitted during the hearing, as Appendix II to her appeal brief, and respondent has raised an objection to these exhibits. We agree with respondent that these exhibits are not in accordance with our procedural rules and, therefore, they shall be stricken from the record.

⁸ For example, respondent argues that Kelly didn't make "positive identification" of respondent, even though they are co-workers and know each other by sight.

approved anti-drug program. See Tr. at 198-200. Second, respondent's complaint that he wasn't provided formal notification is misplaced, because his decision to leave ensured that he never received the paperwork which sets forth the formal notifications he now complains he did not receive. Most importantly, however, we discern nothing in the record which indicates that respondent was unaware that he had been selected, in accordance with FAA requirements, for random drug screening. See Ex. R-6 (respondent's statement to American Eagle, stating that at 5:30 a.m., Tim Kelly told him "there was a lady coming to do drug testing and my name came up"); see also Tr. at 293 (respondent relating his 6:00 a.m. conversation with Kelly, "He goes, oh, the Grim Reaper is showing up today sometime after 7:00 and your name came up. All I said was, Jesus.... [A]nd now I've got to hang around until after 7:00.").⁹

We are likewise not persuaded by respondent's argument that he cannot be said to have refused a drug test because there is no indicia of intent to obfuscate detection of drugs. This argument is based on an erroneous reading of the FAR definition of "refusal," and, apparently, the fact that respondent subsequently submitted to drug testing that he arranged privately. It is also based on an unproven assumption that the privately-obtained drug testing results were conducted in accordance with the same chain-

⁹ Respondent, during his lengthy aviation career, previously had to submit to at least 3 or 4 other random drug tests under FAA-mandated anti-drug programs.

of-custody procedures required by the FAA-mandated program, and requires us to accept, without proof, the validity of those results. See footnote 5, supra. The issue before us is not, however, whether respondent was drug-free when his employer notified him of the need to submit to a random test, but his compliance with a program the Administrator has put in place in the interest of air safety. That program cannot succeed if covered personnel are permitted to provide post-hoc rationalizations for refusing to submit to any required drug or alcohol test. See Administrator v. Pittman, NTSB Order No. EA-4678 (1998).

ACCORDINGLY, IT IS ORDERED THAT:

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

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