

SERVED: March 28, 2003

NTSB Order No. EA-5032

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 21st day of March, 2003

_____)	
MARION C. BLAKEY)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-16577
v.)	
)	
EDWIN C. TAN,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued in this emergency revocation proceeding¹ on July 31, 2002.² By that decision, the law judge upheld the Administrator's charges that

¹ Respondent waived the expedited schedule applicable to immediately-effective emergency revocation proceedings.

² An excerpt of the hearing transcript containing the law judge's decision is attached.

respondent violated sections 61.14(b) and 65.23(b) of the Federal Aviation Regulations (FARs), and affirmed revocation of respondent's commercial pilot certificate, flight instructor certificate and mechanic certificate with airframe and powerplant ratings.³ We deny respondent's appeal.

³ FAR sections 61.14, 14 C.F.R. Part 61, and 65.23, 14 C.F.R. Part 65, provide, in relevant part, as follows:

§ 61.14 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.

§ 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.

* * * * *

The Administrator's complaint alleged that respondent, a pilot employed at the time by Air Wisconsin, refused to submit to a required random drug test by adulterating his urine sample. The law judge's attached initial decision provides a thorough recitation of the relevant evidence. For our purposes, it is sufficient to note that the record indicates that respondent provided a urine sample, the sample was then poured in his presence into two "split" vials, and both vials were transported via appropriate chain of custody procedures. Subsequent analysis of the contents of both vials, by independent laboratories, revealed that the pH level of respondent's sample was below an acceptable, or biologically valid, level.⁴

At the conclusion of the hearing, the law judge found that the Administrator had proved her allegations by a preponderance of the evidence, and affirmed her emergency order of revocation in its entirety.

⁴ Guidance issued to certified laboratories by the Department of Health and Human Services regarding validity testing on regulated specimens states that any urine sample found to contain a pH level outside a range between 3 to 11 is to be deemed adulterated. Marshfield Laboratories ("Marshfield"), in Marshfield, Wisconsin, which tested the first "split" of respondent's sample, determined that the pH level of respondent's sample was 1.8, and, therefore, that the sample was adulterated. After being notified by Air Wisconsin's Medical Review Officer ("MRO") of Marshfield's findings, and being advised by the MRO that none of the medications and other substances respondent reported ingesting around the time of the sample collection could explain the low pH level, respondent requested that the other "split" be tested by another laboratory. LabCorp Occupational Testing Services ("LabCorp"), in Research Triangle Park, North Carolina, performed tests on two separate aliquots from the other "split" of respondent's sample. LabCorp's tests indicated pH levels of, respectively, 1.7 and 1.8, and, therefore, LabCorp confirmed that respondent's sample was, indeed, adulterated.

On appeal, respondent does not contest the results of the testing, or the chain of custody, but, rather, claims that the law judge overlooked the "evidence" that respondent's sample was "inadvertent[ly] or negligent[ly]" adulterated by the collection agent.⁵ Respondent claims that the evidence shows that the collection agent:

taps the open part of the [collection] cup against a surface so that the [sealed] items inside of the cup fall out. Obviously, whatever foreign material exists on the flat surface (in this case a sink top) sprays into the cup [and respondent] cannot be responsible for what then becomes part of the sample.

Respondent's Brief at 3.

We note that the collection agent, when asked on cross-examination how she opens the sealed collection kit, testified, "I open it [i.e., the sealed collection kit, or more precisely, the sealed collection cup containing the other kit components] up and just dump everything on the sink and then hand him the cup." Hearing Transcript ("Tr.") at 30. The collection agent then replied "yes" when respondent's counsel asked, "[s]o the [collection cup] either touches the sink or comes very close to touching the sink?" Tr. at 30-31. However, the record indicates

⁵ Respondent also reiterates the character evidence submitted on his behalf, the evidence that he was required to empty his pockets prior to providing his urine sample, and the fact that he had previously submitted to and passed random drug tests, and argues that this demonstrates that he had neither the opportunity nor the motive to adulterate his urine sample. This evidence is not definitive where, by the logic of respondent's own argument, the only sources of the adulterant are either respondent or the collection agent's procedure.

that neither the collection agent nor respondent testified that they observed any substance on the sink ledge where the collection kit was opened. See Tr. at 30 (the collection agent testifying, "one side of the sink has a container of the [sic] soap. But the other side doesn't have anything. It was clean."); 134 (respondent, when asked whether he saw "any substances that could be acids in the restroom," answered "not to my knowledge, no.").⁶ Moreover, the collection agent testified that she had been performing random urine sample collections for Air Wisconsin for over three years by the time she performed the procedure at issue in this case, and was never corrected regarding her procedures. Tr. at 13-14. The collection agent's supervisor testified that her job performance was "excellent." Tr. at 106.

We agree with the law judge that the Administrator proved her case by a preponderance of the evidence, and, in particular, we concur that respondent did not provide sufficient rebuttal to the circumstantial evidence that he was the source of the adulterant. Drug testing cases, where the sample provider is, ultimately, the only witness to the actual collection, necessarily depend on circumstantial evidence. Here, the

⁶ We also note that respondent did not complain about possible contaminants on the sink when first contacted by the MRO about the initial test results, or when he met with Air Wisconsin officials as part of the termination process initiated because of the test results, or in the letter he wrote to the FAA Inspector investigating his case. This is, of course, circumstantial evidence that militates against a finding that *any* contaminant was present on the sink that could have been introduced into respondent's sample during the collection process.

Administrator presented scientific evidence demonstrating that the low pH level could only be from an adulterant, and evidence of the collection agent's essential adherence to proper drug testing procedures. The law judge did not err in invoking the doctrine of *res ipsa loquiter* in affirming, on this record, the Administrator's allegations. In light of the Administrator's evidence, it was incumbent upon respondent, who offered no expert witnesses, to provide a scientifically-viable alternative explanation for the adulteration of his sample. His speculative argument here, unsupported as it is by any evidence of any contaminant on the sink, much less any testimony to support a conclusion that a contaminant was present that could yield artificially-low pH levels, does not demonstrate that the law judge did not properly evaluate the record evidence.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's decision, upholding the Administrator's amended emergency order or revocation in its entirety, is affirmed.

HAMMERSCHMIDT, Acting Chairman, and GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order. Member GOGLIA submitted the following concurring statement.

I concur in the Board's decision. The Administrator presented sufficient circumstantial evidence that respondent adulterated his sample, and respondent failed to rebut that evidence with a factually-supported and scientifically-valid alternate explanation for the source of the adulterant found in his urine sample. Nonetheless, I believe it important to reiterate my view that adherence to the DOT collection and testing procedures is essential to

ensure the integrity of the drug testing program and the reliability of the results of DOT-required drug tests. We have often seen allegations of improper handling of samples, failure to follow collection protocols, and similar chain of custody problems, and some of those allegations have been demonstrated to be true. The results of any DOT-required drug test are extremely important, both to aviation safety and to the career of the individual subject to that test. The Administrator should insist upon strict adherence to collection and testing guidelines by all persons who participate in the process. I will not hesitate to reject the results of a DOT-required drug test if the DOT testing procedures were not followed.