SERVED: December 15, 2008

NTSB Order No. EA-5420

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 12th day of December, 2008

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| ROBERT STURGELL,<br>Acting Administrator,<br>Federal Aviation Administration,<br><br>Complainant,<br><br>v.<br><br>JON W. HEYL,<br><br>Respondent. | ) | Docket SE-18279 |

**OPINION AND ORDER**

Respondent appeals the oral initial decision of Administrative Law Judge William R. Mullins, served in this emergency revocation proceeding on July 8, 2008.[1] By that decision, the law judge dismissed respondent's appeal of the

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

Administrator's emergency revocation order, which revoked respondent's airline transport pilot (ATP) certificate and any airman medical certificate that respondent held.[2] We deny respondent's appeal.

The Administrator's emergency revocation order, dated June 2, 2008, alleged that respondent was not qualified to hold an airline transport pilot certificate or any medical certificate, based on respondent's "refusal to submit" a urine specimen, pursuant to 14 C.F.R. part 121, App. I,[3] and 49 C.F.R. § 40.191(a)(2),[4] on October 3, 2007. The Administrator's order, which also now serves as the complaint, asserted that revocation was the appropriate sanction for respondent's alleged refusal,

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[2] Respondent waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

[3] Title 14 C.F.R. part 121, App. I, § II, defines "refusal to submit" as follows: "*Refusal to submit* means that an employee engages in conduct including but not limited to that described in 49 C.F.R. 40.191."

[4] Title 49 C.F.R. § 40.191(a)(2) provides as follows:

> **§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?**
>
> (a) As an employee, you have refused to take a drug test if you:
>
> * * * * *
>
> (2) *Fail to remain at the testing site until the testing process is complete; Provided*, That an employee who leaves the testing site before the testing process commences (see § 40.63(c)) for a pre-employment test is not deemed to have refused to test[.]

pursuant to 14 C.F.R. §§ 61.14(b),[5] and 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2).[6] The Administrator's complaint also alleged that respondent's prospective employer, Compass Air (hereinafter "Compass"), ordered him to take a pre-employment drug test, and that respondent attempted to provide a sufficient amount of urine, but did not provide the requisite amount of 45 milliliters. Compl. at ¶ 9(b). The complaint further alleged that staff at the testing facility, Park Nicollet Airport Clinic (hereinafter "the Clinic"), instructed respondent to provide a second urine sample, and that this sample was also insufficient. Id. at ¶ 9(c)-(d). The complaint also alleged that staff at the Clinic instructed respondent to provide another sample, but that respondent did not do so, and left the testing site. Id. at ¶ 9(e)-(f). As such, the complaint alleged that respondent

[5] Title 14 C.F.R. § 61.14(b) provides that a "[r]efusal 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 suspension or revocation of any certificate, rating, or authorization.

[6] Title 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) provide the mental standards for first-, second-, and third-class medical certificates, respectively, and require as follows:

> (b) No substance abuse within the preceding 2 years defined as:
>
> (2) … a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation[.]

"refused" to take the drug test under the aforementioned regulations. Id. at ¶¶ 10-13. Based on these allegations, the Administrator contends that revocation of respondent's certificates is the appropriate sanction. Id. at ¶ 14. Respondent filed an answer in response to the Administrator's complaint, in which he admitted that he had reported to the Clinic for the drug test, and that employees at the Clinic instructed him to provide a total of three urine specimens. Respondent denied that he "refused" to provide a urine specimen by leaving the Clinic without authorization, and stated that, after providing the second sample, he went into the waiting room and a receptionist advised him that he could leave, and directed him to a telephone that he could use to obtain transportation to the airport.

Respondent appealed the Administrator's order, and the case proceeded to hearing before the law judge on July 8, 2008. At the hearing, the Administrator provided the testimony of Mr. Philip Herbert, an FAA investigator in the Drug Abatement Division. Tr. at 20. Mr. Herbert testified that he concluded that respondent had refused to provide a urine specimen, because he had left the collection site prior to the completion of the collection. Tr. at 23. Mr. Herbert also testified that he received a report of a drug or alcohol refusal from Ms. Carole Bolan, the Designated Employer Representative (DER) for drug and

alcohol testing at Compass, and that the form indicates that respondent departed from the collection site after two quantity not sufficient (QNS) samples. Tr. at 24, 27; Exh. A-1. Mr. Herbert also testified that the Custody and Control Form for the samples indicated that respondent attempted to provide urine specimens at 3:10 pm and 3:50 pm on October 3, 2007, but that both specimens were of insufficient quantity, and that respondent departed from the collection site without providing a sample. Tr. at 30. Mr. Herbert stated that he spoke with two receptionists at the Clinic, and that both stated that they did not have authority to discharge any patients, so they would notify nursing staff or the staff physician if a patient asked to leave before a staff member had discharged the patient. Tr. at 72. Mr. Herbert also stated that he mailed respondent a Letter of Investigation on March 18, 2008, and that respondent replied to the letter with a response that contained several inconsistencies. Tr. at 37. In particular, Mr. Herbert cited respondent's statement that he was at the collection site for more than 2 hours on October 3, 2007; that he claimed that he asked staff at the Clinic to void his test; and that he declared that he had to catch a scheduled flight less than 2 hours from the time of the second collection. Tr. at 37-39; Exh. A-4. Mr. Herbert testified that the evidence disputed each of these claims. Mr. Herbert also stated that he had obtained evidence

from Northwest Airlines indicating that respondent checked in for his scheduled flight to Orlando at 4:44 pm on October 3. Tr. at 46; Exh. A-5. Mr. Herbert also testified that the airport is approximately 10 minutes from the Clinic. Tr. at 39. The Administrator also provided the testimony of Denise Mapston, the manager of employee and industrial travel at Northwest Airlines, who explained that Exhibit A-5 includes a record of respondent's check-in for his October 3 flight at a computer kiosk. Tr. at 88.

The Administrator also provided the testimony of Ms. Lisa Hoff, a nursing supervisor at Park Nicollet Health Services, who collected respondent's first urine specimen, and who supervised the person who collected respondent's second specimen. Tr. at 105, 110. Ms. Hoff testified that she did not specifically recall dealing with respondent on October 3, 2007 (Tr. at 118), but explained her procedures for dealing with QNS specimens, and for implementing the "shy bladder" procedure (Tr. at 103-104, 106, 111-12). Ms. Hoff testified that the Clinic's records showed that respondent arrived at 2:44 pm for the test. Tr. at 115; Exh. A-6.

The Administrator concluded his case-in-chief by presenting the testimony of Ms. Denise Sylvers, a certified medical assistant and team leader of the lab at the Clinic. Tr. at 124. Ms. Sylvers stated that she oversees the daily functions of the

drug screening laboratory, and that she understands the shy bladder procedures, which entail providing the donor with up to 40 ounces of water and waiting on him or her to provide a sample within 3 hours of the last attempt. Tr. at 125-26. Ms. Sylvers testified that she considers a donor to have "refused" a test when he or she leaves the Clinic without providing a sample, or before the 3-hour shy bladder period has concluded. Tr. at 126. Ms. Sylvers stated that she trains all employees who complete drug screenings at Park Nicollet Health Service's multiple locations, and that she instructs employees to inform donors of the ramifications of leaving the testing site before providing a sample. Tr. at 126-28. Ms. Sylvers stated that, with regard to respondent's case, she found the Custody and Control Form for respondent's test in the shy bladder bin the morning after the test, and that she documented on the form that respondent had left the test site. Tr. at 128-29. Ms. Sylvers testified that she spoke with the collector of the second urine specimen, Ms. Gloria Weinrebe, that morning, and inquired about what happened. Tr. at 130-31. Ms. Sylvers also stated that, before she departed the Clinic for the day on October 3, 2007, she overheard Ms. Weinrebe tell respondent that he had to stay in the building. Tr. at 131. Ms. Sylvers acknowledged that the Custody and Control Form contained some errors, in that, when she found it, the form did not contain a note in the "remarks"

section to indicate that respondent had departed the Clinic, and that someone had checked the box "split" on the form, which was an incorrect indication that the collector had divided the specimen into two separate vials to achieve a split test. Tr. at 136, 138.

In response to the Administrator's case, respondent provided his own testimony, in which he stated that he is currently employed as a first officer at Miami Air International, and that he was applying for a position as a first officer for an Embraer 175 jet for Compass. Tr. at 144-45. Respondent testified that he knew early in the interview process with Compass that he was not a strong candidate, but he still reported to the Clinic for the drug test, because he did not want to be perceived as refusing to take the test. Tr. at 146-47. Respondent testified that he checked in for the test at the Clinic well before the 2:45 pm check-in time, and that an employee at the Clinic called him out of the waiting room to provide a specimen at approximately 3:00 pm. Tr. at 148-49. Respondent stated that the employee, who he believed was Ms. Hoff, explained the testing procedure to him before he began the test (Tr. at 149), that Ms. Hoff marked the specimen cup before he filled it, and that, after respondent filled the cup, Ms. Hoff stated that respondent had not provided a sufficient amount of urine (Tr. at 149-50). Respondent stated that he had

emptied his bladder into the toilet and refrained from flushing it, in accordance with Ms. Hoff's instructions while providing the first sample, and thus could not immediately provide another sample. Tr. at 151. Respondent testified that Ms. Hoff subsequently instructed him to sit in the waiting room and drink water. Id. Respondent then stated that he provided a second specimen and "was expecting to have to only do enough for one since [he] filled the one test sample." Id. After returning to the waiting room subsequent to providing the second specimen, respondent testified that he asked a receptionist in the waiting room, after waiting for approximately 20 to 30 minutes, whether he could leave. Tr. at 156. Respondent testified that he remembered the receptionist checking with someone, and then telling respondent, "you're free to go." Tr. at 152. Respondent stated that he used the telephone to which the receptionist pointed, and called a taxi van, which transported him to the airport. Tr. at 152. Respondent testified that, on November 7 and December 3, 2007, he took two drug tests for other airlines, and these tests showed no evidence of any prohibited substances. Tr. at 158-59; Exhs. R-4 and R-5.

At the conclusion of the hearing, the law judge issued an oral decision, in which he determined that the central issue in this case was whether respondent proved that his departure from the testing site was authorized. Initial Decision at 201. The

law judge found that the Administrator had established that the two urine samples were of insufficient quantity, and that, overall, the evidence established that respondent had left the collection site without providing a sufficient sample. Id. at 204, 206. The law judge concluded that such conduct constituted a refusal to provide a specimen, and that such refusal was grounds for revocation. Id. at 206.[7]

On appeal, respondent presents a variety of arguments. Specifically, respondent argues that the law judge erred in concluding that the clinic's drug testing policies and procedures were "not critically aberrant"; that the law judge did not issue a complete decision; that the law judge erred in interpreting 49 C.F.R. § 40.193 and in concluding that the shy bladder procedures of § 40.193 did not apply; that the law judge erred in ruling that the split sample was insufficient; that the law judge should not have considered testimony and evidence concerning respondent's presence at an airport kiosk while checking in for his flight after leaving the clinic; and that

[7] We note that the law judge incorrectly summarized one witness's testimony concerning the handling of the first specimen; the law judge incorrectly stated that Ms. Hoff testified that, "she had collected the first sample, and that apparently there was some of it spilled or poured out before the second vial was filled, and it turned out that it was not a sufficient quantity." Initial Decision at 198. However, a careful review of the transcript shows that, while Ms. Hoff explained the procedure for dealing with spilled specimens, she testified that she did not spill respondent's specimen in this case. Tr. at 112.

the law judge erred in denying respondent's motion to dismiss under the stale complaint rule. We do not find any of these arguments persuasive.

Respondent's principal argument appears to consist of his contention that the Clinic's handling of respondent's urine specimens and the overall test procedure were contrary to the Clinic's policies and Department of Transportation requirements concerning drug testing procedures. Respondent cites Application of Petersen, NTSB Order No. EA-4490 (1996), and Administrator v. King, NTSB Order No. EA-4997 (2002), in support of this argument. Respondent's brief repeats a portion of text from Petersen, in which we stated that, "we view government imposition of drug testing programs and government use of drug testing results to carry special, heightened obligation." Petersen, supra, at 8. Respondent implies that, in King, which also involved the Park Nicollet Airport Clinic, we rested our decision on the fact that the respondent "observed nothing aberrant about the conduct of the testing." Br. at 13 (citing King, supra, at 7). As such, respondent appears to contend that his showing that the Clinic's handling of his test was aberrant is grounds for reversal of the law judge's decision.

Respondent argues that, in the case at hand, the Clinic erred in numerous ways, in that staff at the Clinic did not comply with the Clinic's protocols or Department of

Transportation regulations, and that the Clinic failed to report or document any failure tests on October 3, 2007. Respondent further alleges that no one at the Clinic had any recollection or knowledge of what happened to respondent after he was sent to the waiting room, that the Custody and Control Form did not include a notation in the "remarks" section indicating that respondent had left the facility, that no one at the Clinic notified the DER at Compass about respondent's test, and that a Clinic employee had initially marked "split" on the Custody and Control Form, which indicated that the test was complete. Respondent also contends that the Administrator did not dispute that respondent inquired about leaving, and that someone at the Clinic told him that he could leave. Based on these facts, respondent asserts that the Clinic erred with regard to numerous aspects of his October 3, 2007 test, and that such errors should result in overturning the Administrator's complaint.

With regard to these arguments, we first note that respondent does not deny that he reported to the Clinic pursuant to instructions from Compass, nor does respondent deny that, after he provided two separate urine specimens, the collectors at the Clinic notified him that he had not provided a sufficient amount of urine, and that he needed to wait in the waiting room and eventually provide another specimen. In spite of receiving these instructions from nursing staff, however, respondent

claims he asked an administrative staff member if he could leave the Clinic, and contends that he was informed that he could depart.

We do not believe that respondent's allegations concerning the Clinic's alleged aberrant handling of his specimens form a basis for granting his appeal. While the evidence indicates that the Clinic erred in filling out the Custody and Control Form, respondent does not explain how an erroneous form might refute an argument that respondent refused to provide a sufficient specimen by leaving the testing site without permission.

Moreover, with regard to respondent's contention that a Clinic employee told him he could leave, this argument appears insufficient, if not outright inapposite. Respondent does not assert that he asked the employee whether he could leave the testing site without providing a sufficient sample and thus being found in violation of a Federal Aviation Regulation.[8] Respondent does not argue that employees at the Clinic were obligated to explain to him that he would be found in violation

[8] In addition, the evidence that this conversation occurred is solely based on respondent's testimony; if an employee at the Clinic did ask a supervisor whether respondent could leave, and the supervisor responded in the affirmative, then it appears unlikely that neither the supervisor nor any other employee would include a notation on any record at the Clinic indicating that respondent had left. Instead, the testimony at the hearing indicated that no one at the Clinic knew when respondent departed. Tr. at 68.

if he left without providing a sufficient sample. Respondent's contention also is incongruent with the fact that he does not dispute that, upon providing his first urine specimen of an insufficient quantity, he was informed that he must wait in the waiting room until he could provide a new specimen. Furthermore, Ms. Sylvers testified that she overheard Ms. Weinrebe inform respondent that he could not leave the facility until he had provided a sufficient specimen following the second insufficient sample. Overall, respondent has not provided convincing evidence to establish that an unnamed employee told him that he could leave, or how this could have misled him, even if the employee made such a statement. In brief, respondent does not overcome the clear implication of the greater weight of the probative evidence that he knowingly left the testing site without providing a sufficient sample, and without authority.

We also find that respondent's other arguments are not persuasive. Respondent's contention that the law judge's decision was incomplete, and therefore not compliant with the Board's Rules of Practice at 49 C.F.R. § 821.42(b),[9] is unavailing. Respondent argues that the law judge's statements

[9] Title 49 C.F.R. § 821.42(b) provides that, "[t]he initial decision shall include findings and conclusions upon all material issues of fact, credibility of witnesses, law and discretion presented on the record, together with a statement of the reasons therefor."

that "a big hole" exists in the regulation regarding split samples (Initial Decision at 203), that the word "must" in 49 C.F.R. § 40.193 "doesn't mean what it seems to say" (id. at 205), and that, "that regulation, and all the things that the DER people are supposed to do, all relate to employees, not pre-employment people" (id. at 202), are all examples of how the law judge did not issue a complete decision. We disagree with respondent's contention in this regard. Although the law judge's statements recited above may be somewhat confusing, they do not provide a basis for reversing the law judge's decision. The law judge specifically, unambiguously found that the evidence established that respondent's departure from the Clinic before providing a sufficient specimen amounted to a refusal under the relevant regulations. Id. at 206. The law judge also cited specific facts that formed the basis for this conclusion. Id. at 204. As such, the law judge's remarks about the regulations do not form a basis for reversing his decision.

Respondent's argument that the law judge erred in concluding that the shy bladder rule did not apply to this case is confusing, and does not provide a basis for reversing his decision. First, the law judge did not state in his decision that the shy bladder rule did not apply to this case. To the extent that respondent may read the law judge's decision as reflective of a refusal to consider the shy bladder procedures,

we note that the evidence establishes that the Clinic initiated the shy bladder procedures. However, once respondent departed from the facility prior to the expiration of the 3-hour period without providing a sufficient sample, the case became a refusal case, rather than a shy bladder case.

Respondent further argues that the law judge erred in finding that the provisions in 49 C.F.R. § 40.193[10] are not requirements that would cause us to find a drug test fatally flawed if the collector did not fulfill them. The law judge based this conclusion on the fact that, in King, we found that the collection was not fatally flawed when the collector did not specifically urge respondent to drink up to 40 ounces of water. King, supra, at 6. Respondent contends that § 40.193 required the collectors to direct the employee to obtain, within 5 days of consulting with the appropriate Medical Review Officer, an evaluation from a licensed physician; to notify the DER immediately of the failed collection; and to "do a host of other

[10] Title 49 C.F.R. § 40.193(a) provides the "procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (*i.e.*, 45 mL of urine)," and, in subsection (b), states that collectors must (1) discard the insufficient specimen, and (2) urge the donor to drink up to 40 ounces of fluid. Section 40.193(b) also provides that, "[i]f the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the 'Remarks' line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test."

critical items required by the clinic's protocol." Resp. Br. at 19. However, given our finding that this case concerns a refusal, rather than a shy bladder, the collectors were not obligated to direct respondent to seek an evaluation from a physician. Instead, the case at hand is similar to King in that the collectors at the Clinic did not complete the Custody and Control Form by noting that respondent had departed from the collection site. 49 C.F.R. § 40.193(b)(3). Respondent does not, however, show how this failure fatally flawed the entire collection procedure.[11] As such, we reject this argument.

Respondent also contends that the law judge erred in ruling that the split sample that respondent submitted was not sufficient. Respondent states that the law judge opined that, "a big hole exists in the regulation regarding split samples," but does not explain how this statement would be relevant to a finding that respondent did not provide a sufficient amount of urine. Respondent emphasizes that someone had checked "split" on the Custody and Control Form, and that this indicated that respondent had provided a sufficient sample; therefore, he asks us to infer that the receptionist who told him he could depart

[11] In this regard, we note that the Federal Circuit has held that a violation of chain-of-custody procedures does not automatically and fatally undermine the drug test, and that, "where there is procedural error on the part of the agency, the error does not require that the agency decision be overturned unless the error is shown to have been harmful." Frank v. FAA, 35 F.3d 1554, 1557 (Fed. Cir. 1994).

must have corresponded with someone who reviewed the form and verified that respondent had provided a sufficient sample. This allegation, however, is incongruent with the fact that respondent does not deny that he was instructed to wait in the waiting room until he could provide a third specimen, nor does he deny that Ms. Weinrebe informed him that he could not depart without providing another specimen. In addition, the fact that respondent sat in the waiting room for approximately 20 minutes before allegedly asking the receptionist if he could leave is not consistent with respondent's clear implication that no one instructed him to wait, and that he thought he had provided a sufficient amount of urine after the testing.

Respondent's contention that the law judge erred in allowing testimony and an exhibit concerning the time at which respondent checked in for his flight at the airport is also unavailing. We have long held that law judges maintain a significant amount of discretion in overseeing hearings.[12] Respondent has not established that the law judge abused his discretion in this regard.

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[12] Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). Moreover, we will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

Finally, respondent also contends that Compass received a report from the Clinic on October 8, 2007, that alleged that respondent left the Clinic without providing a specimen, that the Administrator did not serve a Notice of Proposed Certificate Action in this case, and that the Administrator did not serve the emergency order of revocation at issue here until June 4, 2008. Respondent argues that "no good reason" exists for this delay, and that the public interest does not warrant the imposition of a sanction. Respondent also asserts that, "although the complaint does allege a lack of qualification, it appears to be nothing more than [pretext for] filing the matter in excess of nearly 60 days late with the Board." Resp. Br. at 23. Respondent therefore urges us to reverse the law judge's denial of respondent's Motion to Dismiss Stale Complaint prior to the hearing. In this regard, we note that the Board's Rules of Practice provide that, in cases in which the complaint alleges a lack of qualification of the respondent, "the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion." 49 C.F.R. § 821.33(b). In the cases that respondent cites, Administrator v. Bellis, NTSB Order No. EA-4528 (1997), and Administrator v. Hawes, NTSB Order No. EA-3830 (1993), we agreed with the law judge's determination

that the Administrator's complaint did not sufficiently allege that the respondents lacked the qualifications to hold their certificates. However, in cases concerning a refusal to submit to a drug test, we have consistently held that such refusal demonstrates a lack of qualifications to hold an airman certificate. Administrator v. Pittman, NTSB Order No. EA-4678 at 5 (1998).

Overall, the governing regulations provide that voluntarily leaving a drug testing collection site without providing a complete sample constitutes a refusal to submit to a drug test. 49 C.F.R. § 40.191(a)(2). In addition, Board precedent provides that, "refusal to be tested warrants revocation." Administrator v. King, NTSB Order No. EA-4997 at 8 (2002) (citing Administrator v. Krumpter, NTSB Order No. EA-4724 (1998)).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;

2. The law judge's decision is affirmed; and

3. The Administrator's emergency revocation of respondent's ATP certificate and any medical certificates that respondent holds is affirmed.

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, SUMWALT, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

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| In the matter of: | * | |
| | * | |
| ROBERT STURGELL, | * | |
| ACTING ADMINISTRATOR, | * | |
| Federal Aviation Administration, | * | |
| | * | |
| Complainant, | * | |
| v. | * | Docket No.: SE-18279 |
| | * | JUDGE MULLINS |
| JON W. HEYL | * | |
| | * | |
| Respondent. | * | |

U.S. Courthouse, Skyway Level
2nd Floor Conference Room
300 S. 4th Street
Minneapolis, Minnesota 55415

Tuesday,
July 8, 2008

The above-entitled matter came on for hearing, pursuant to Notice, at 9:00 a.m.

BEFORE: WILLIAM R. MULLINS
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

ANGEL COLLAKU
LAURA PONTO
Federal Aviation Administration, AGC-300
Office of the Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20191

On behalf of the Respondent:

JOSEPH MICHAEL LAMONACA
127 Commons Court
Chadds Ford, Pennsylvania 19317

ORAL INITIAL DECISION

This has been a proceeding before the National Transportation Safety Board held under the provisions of Section 44709 of the Federal Aviation Act of 1958 as amended, on the appeal of Jon W. Heyl, who I'll refer to as Respondent, from an order of revocation that has revoked. And it was an emergency order initially, but the emergency time constrainys have been

waived and that emergency order has revoked his airline transport pilot certificate, and his medical certificate.

The order of revocation serves as the complaint in these proceedings and was filed on behalf of the Administrator of the Federal Aviation Administration through the General Counsel's Office in Washington, DC.

The matter has been heard before me, William R. Mullins. I am the Administrative Law Judge for the National Transportation Safety Board; and, as is provided by the Board's rules, I will issue a decision at this time.

The matter came on for hearing pursuant to notice that was sent to the parties, and was called for trial here in Minneapolis this 8th day of July of 2008.

The Administrator was present throughout these proceedings and represented by counsel, Mr. Angle Collaku, Esquire, of the General Counsel's Office in Washington, DC, and Ms. Laura Ponto, Esquire, also of that office. The Respondent was present throughout these proceedings, and represented by his counsel, Mr. Joseph Michael Lamonaca, Esquire, of Chatter Ford?

MR. LAMONACA: Chadds Ford.

ADMINISTRATIVE LAW JUDGE MULLINS: Chadds Ford, Pennsylvania.

MR. LAMONACA: Thank you, Your Honor.

ADMINISTRATIVE LAW JUDGE MULLINS: The parties were afforded a full opportunity to offer evidence, to call, examine,

and cross-examine witnesses. In addition, the parties were afforded an opportunity to make argument in support of their respective positions.

STATEMENT OF THE CASE

This case arose as a result of a pre-employment drug test that was to be administered to the Respondent on October 3rd of 2007, here in Minneapolis, at the Park Nicollet Clinic, which is apparently out near the Airport. And, as a result of the failure to complete that test, the Administrator some six months afterwards issued their emergency order of revocation for failure to complete the test.

The Administrator had four witnesses: Mr. Phil Herbert, who's an investigator with the drug enforcement group with the FAA in Washington, DC. And Mr. Herbert testified about how he first came in receipt of the notice that was sent from the designated employee representative of Compass Airline, and that designated employee representative was Ms. Carole Bolan. And she apparently somehow came into some information, and I'm not sure how this all got started that late, but in any event, she said that they had sent this gentleman over, the Respondent, and they had received just then some sort of notification from the Park Nicollet Clinic that he had not completed the test, that he left without completing it, and therefore, that constituted a failure under the regulation.

Mr. Herbert identified Exhibit A-1, which is the

report of refusal, which was sent in by Ms. Bolan to the Administrator. He also identified Exhibit A-2, which is the drug testing Custody and Control Form, and we'll talk about that form at length.

Exhibit A-3 was also identified as the medical review officer's report. It says electronically signed by Dr. Vanderploeg, M.D.

Exhibit A-4 was a letter that was received from Mr. Heyl, the Respondent, as a result of his -- the letter of investigation that went out.

Exhibit A-5 was the form from Northwest Airlines that shows the check-in time at the airport on that afternoon after the test was supposedly submitted.

And then I'll go ahead and tell you that A-6, although this was not introduced by Mr. Herbert, but A-6, which included all of the Administrator's exhibits, was one from the clinic, which shows that the check-in time for Respondent on that date of October 3rd was 2:44 in the afternoon.

The second witness called by the Administrator was Ms. Mapston, and she's a manager of employee and industrial travel, or industry travel, from Northwest Airlines. And she identified and spoke about Exhibit A-5, and testified that this was a reservation that had been made on September 28th of 2007 for travel on October 2nd from Orlando, Florida, to Minneapolis-St. Paul, and then shows that a return flight that left Minneapolis-

St. Paul at about 7:28 on the evening of October 3rd. And it does show that the Respondent had checked in at approximately 4:10, not approximately, at 4:10, according to their computer, at a kiosk, at the Minneapolis-St. Paul Airport.

The third witness called by the Administrator was Ms. Lisa Hoff, who was one of the collectors at the Park Nicollet Clinic, and she testified about A-2, and recognized her handwriting on A-2, although she had no independent recollection of Mr. Heyl. But, she testified that she had filled this out and that she had collected the first sample, and that apparently there was some of it spilled or poured out before the second vial was filled, and it turned out that it was not a sufficient quantity. And she had made a remark on this that QNS, quantity not sufficient, at 15:10.

She, or someone on that date, had put on there that it was a split, had marked X in the split collection. And she also testified that she did not do it, but there was another quantity not sufficient at 3:50 that day, and apparently, that was by Ms. Weinrebe whose initials appear somewhere up around in step 1-D. In any event, that was her testimony.

Ms. Hoff testified and identified Exhibit A-6, which she said was made when someone comes into the clinic. They walk up and stand at the counter and fill out a time sheet, and from that time sheet, it's this computer-generated form, I mean, the time is put on the check-in sheet, and the computer-generated form

reflects the time when the person signs it as having checked in, which shows that Respondent arrived there at 2:44.

Then, the fourth, and last, witness called by the Administrator was Ms. Sylvers. She is a trained collector at Park Nicollet. She's a certified medical assistant.

She testified that when she came in, she may have been there on the 3rd of October, although that wasn't clear, but she didn't have anything to do with this form. She came in on the morning of October 4th, and found this form, A-2, in the box there for the people who don't give a sufficient sample, urine sample, But, in any event, she crossed out the word split where it had been X'd and initialed it, and then after 3:50, she wrote: donor left without providing sample, although she didn't know that; she just knows that this form was still left in the box. And she also wrote on the 4th of October her name, down under collector's name, Denise L. Sylvers, and that completed this form, and then she also put on there that the DER notified 10/4/07 at 7:50 a.m., and her testimony was that this notification was by voicemail on the telephone.

Ms. Sylvers did testify that she was in the room when Ms. Weinrebe told Respondent that he had to give a sufficient sample, and if he left, that would be tantamount to failure of the drug test. And Ms. Sylvers testified she heard Ms. Weinrebe advise Respondent of that.

Respondent then in his case in chief testified, and he

identified R-2, which is his resume. R-1 was identified earlier, and that was the supplemental information submitted by Ms. Bolan, who was the DER at Compass Airline.

Mr. Heyl, Respondent, testified that he had gone to this clinic, he said, sometime shortly after lunch. He said it was a long time before 2:44, which is indicated on the Administrator's Exhibit A-6, and that's sort of consistent with his letter that he sent in. And he testified, after the second sample was given, which shows 3:50, that he waited an hour or so before he went to the airport. And he identified R-3, which is a phone bill, which shows that his cell phone had received a call apparently from his wife's cell phone, as he testified, at approximately 4:09 that afternoon, which was basically the same time as the exhibit from Northwest Airlines would show that he was checking in at a kiosk.

I thought it was interesting, sometimes I ask these questions and sometimes I just let them go, and sometimes I don't even think about them until afterwards. There was a huge amount of questioning about universal time and time zones and everything about the Administrator's document, which shows that he checked in at the airport at 4:10, and the testimony was, on cross-examination from Ms. Mapston that that was local time, Minneapolis time. Well, the one question we didn't have was whether that phone bill was Florida time or Minneapolis time, and who knows, but anyway, it says 4:09, and I'll tell you this, just as I was thinking about how many times I go through airports every week, I

see people routinely standing at kiosks with cell phones in their ear. In fact, I can't think of any place in our environment you go today that you don't see people with cell phones in their ear, including going down the highway, so I wasn't particularly enamored with that evidence as being particularly critical as to whether or not he was checking in at the airport at 4:10.

The R-4 and 5 were results of drug tests that have been taken subsequently from that date by Respondent, and they were both negative.

ISSUE

The basic issue then for my consideration in this case is whether or not Respondent, after he, and the testimony is clear that he went there for this pre-employment drug test, is whether his departure from that testing site was authorized in anyway under this evidence, and if not, then it would have been tantamount under the regulation as failure of the drug test.

SUMMARY OF EVIDENCE

A-2 is critical, and I'm going to come back to the King case, because I believe the King case, if my recollection serves me, involved this same clinic, but the sad thing from a traditional standpoint, and the sad thing, it has to be, from any airman's standpoint, is that this sort of paperwork can be generated without any apparent oversight at a clinic, and yet, it can be the basis for a career-ending revocation of an airman's certificate, and at the same time, not be, other than by virtue of

the paper of the regulation, anyway related to drug use, other than somebody left without giving a full sample.

But, as I pointed out, the critical portions of this document were all prepared a day later. Ms. Sylvers testified she wrote in there that the donor left without providing a sample, and the only basis she had for that was that this paper was in this box -- let's go off the record for a minute.

(Off the record.)

(On the record.)

ADMINISTRATIVE LAW JUDGE MULLINS: Okay. We're back on the record. That's a shy bladder syndrome or shy bladder result, and they put this shy bladder paperwork in one box, and she found it the next morning. And the last thing on it was 'quantity not sufficient,' at 3:50. She didn't know what happened to this Respondent, but she wrote on there that he left without providing a sample, and she presumed that he had done that, that he had left without providing a sample, because there wasn't a sample. This paperwork was in this basket, and then she says she notified the DER at 7:50 that morning by voicemail, and, of course the regulation requires all kinds of immediate notification to the designated employee representative, and things that they're supposed to do, and, of course what's interesting is that that regulation, and all the things that the DER people are supposed to do, all relate to employees, not pre-employment people, so I don't even know how that applies.

But, in any event, there was the testimony from Ms. Sylvers, that she overheard Ms. Weinrebe advise Mr. Heyl, the Respondent, that he could not leave without doing this sample, otherwise he would be considered to have failed the test. And if he gave a quantity not sufficient at 3:50, and he checked in at the airport at 4:10, and I'm satisfied that that document speaks for itself, that he did check in at the kiosk at the Minneapolis Airport, which the testimony from Mr. Herbert was, that it was four or five minutes away, is consistent with him leaving almost immediately after that second sample was given non-sufficient.

I thought it was interesting, and, again, there's another big hole, I think, in the regulation, this requires a split sample. He provided enough sample on the first go-around to fill both vials, but there was some spillage and/or too much poured into one bottle, for whatever reason. But, even though he had provided what was requested, the second vial was not filled because it was spilled by Ms. Hoff, and so he was told to wait.

And also, it's interesting that the testimony of the Respondent, and it's consistent with the other testimony that I've heard in these drug cases, he was told that once he filled his cup to this line, that he can go ahead and void his bladder in the commode there, but not flush it, so now his bladder is completely void and he has to wait, and he waits 50 minutes. He's able to fill, and he believed that all he had to do, according to his testimony, was fill this second vial of 15 milliliters because the

30 milliliter one had been filled, and he voided his bladder again, and now they tell him this one's not sufficient, you know, but he had also been told at the time that if he left, it would be tantamount to failure of the test, but he left notwithstanding those conditions.

FINDING OF FACT

First, there were two samples provided that were both marked QNS, quantity not sufficient, one at 3:10 p.m. on October 3rd, the other at 3:50 p.m. on October 3rd.

Two, that the evidence, and Exhibit A-5 shows that Respondent checked in for his flight back to Orlando at 4:10, 20 minutes after the last sample was given to him marked quantity not sufficient.

And three, Ms. Sylvers overheard Ms. Weinrebe, who was the collector for the second sample, tell Respondent that he couldn't leave until a sufficient specimen had been provided, otherwise it would be tantamount to failure of the exam.

CONCLUSION OF LAW

There have been two cases provided by Respondent, the Petersen case, and the Petersen case was a 1996 case that was an Equal Access to Justice case, and those usually get a different look.

The second case, and I want to talk about that a little bit, I think it reflects the Board's attitude, if you will, certainly Board precedent, about what the word 'must' means, and

regulation FAR 40.193.

In the King case, which was my case, the Park Nicollet Clinic had told this Respondent that, here's a cup, and there's a water fountain out in the hall, and that was all the information they gave him, and my finding was that that didn't satisfy the 'must' requirement that that whole regulation starts out. It says, as a collector, you must do the following, and paragraph 2 says, "urge employee to drink up to 40 ounces of fluid distributed reasonably for a period of up to three hours."

And the Board stated, after I had so ruled, there's no indication that Respondent did not appreciate the direct biological relationship between the consumption of liquid and the production of urine. And so the Board is saying, well, they walk upright, they're adult, they drink water, and they urinate, then that 'must' doesn't mean anything, doesn't mean what it seems to say. But, in any event, to argue that before me in this case I think is probably a little futile. I got slapped down pretty good on that, and that's the Board's position, that 'must,' the requirement for the collector to do certain things, is going to be sort of, at least in my opinion, overlooked, and it was overlooked in that case.

But, here, notwithstanding that, we have a fairly good timeline, as related in Exhibit A-2, although a lot of it wasn't completed, but the timing was on there, and that was a QNS provided at 3:10, and one at 3:50, and then we had a check-in at

the airport at 4:10.

There was also testimony that he was advised that he couldn't leave without it being a failure. And I think given that these other requirements would fall to the wayside, and that this case, the Administrator has sustained their burden as to establishing a regulatory violation as set forth.

ORDER

IT'S THEREFORE ORDERED that safety in air commerce and safety in air transportation requires an affirmation of the Administrator's order of revocation as issued, and specifically, I find there was established by a preponderance of the evidence a refusal of a holder of a certificate of a drug test, which would be grounds for revocation. That's under 14 CFR Section 61.14(b). And that is also under 14 CFR Section 67.107(b)(2), 207(b)(2), and 307(b)(2), that the Respondent's medical certificate should be also revoked as specified.

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EDITED & DATED
JULY 16, 2008

WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE