SERVED: January 16, 2013

NTSB Order No. EA-5647

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 day 16th of January, 2013

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. JASON L. JONES, Respondent.	Docket SE-19389

OPINION AND ORDER

1. ***Background***

Respondent appeals the oral initial decision of Administrative Law Judge Stephen R. Woody, issued December 12, 2012.[1] By that decision, the law judge determined respondent violated 14 C.F.R. § 67.403(a)(1)[2] by intentionally falsifying two medical certificate applications

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

[2] The pertinent portion of section 67.403(a)(1) prohibits a person from making fraudulent or intentionally false statements on an application for a medical certificate.

and violated 14 C.F.R. §61.15(e)[3] by failing to report two motor vehicle actions to the Federal Aviation Administration (FAA) within the required 60-day time period. The law judge ordered revocation of respondent's airline transport pilot (ATP) certificate, first-class medical certificate, and any other airman certificates respondent holds based upon the violation of § 67.403(a)(1). We deny respondent's appeal.

A. *Facts*

Respondent, who started flying during his sophomore year in high school, first applied for an FAA medical certificate in 1994. Between 1994 and 2010, respondent submitted over a dozen medical certificate applications. Over the course of his aviation career, respondent logged nearly 5,000 hours of flight time. For the past six years, respondent flew part 121 flights for a company called ExpressJet Airlines.

On December 4, 2010, respondent and a female friend left a night club in his brother's Corvette. Respondent, in an attempt to impress his friend, applied some gas to spin the tires on the Corvette. At that point in time, two officers from the Las Vegas Metropolitan Police stopped respondent for a traffic violation. They asked respondent if he had been drinking and requested he perform field sobriety tests, which he failed. The officers arrested respondent for driving under the influence of alcohol (DUI).[4] Respondent refused a breathalyzer test, so the officers took respondent to the police station, where a blood sample was taken, detained him for twelve hours, and then released him.

[3] The pertinent portion of § 61.15(e) states, "[e]ach person holding a certificate issued under this part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division … not later than 60 days after the motor vehicle action."

[4] Exh. A-3.

On July 14, 2011, respondent reapplied for his first-class medical certificate. He completed his application by using the FAA's online system called MedXPress.[5] Respondent filled out the FAA Form 8500-8 online, electronically signed the form, and electronically submitted it to the FAA.[6] In filling out the application, respondent selected the "no" box for question 18.v.[7] Question 18.v. inquires as to whether an airman has a

> [h]istory of (1) an arrest(s) and/or conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any arrest(s), and/or conviction(s), and/or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation program.

On November 4, 2011, a Las Vegas township judge found respondent guilty of a first-offense DUI for alcohol and sentenced respondent to pay a $585.00 fine and to attend a DUI school/victim impact panel.[8] In a letter dated November 18, 2011, the State of Nevada Department of Motor Vehicles (DMV) notified respondent his Nevada driving privileges were revoked for a period of 90 days, from November 26, 2011 to February 23, 2012, because of his DUI conviction. The Nevada DMV sent this letter via certified mail to respondent's then-current mailing address on Pebble Road in Las Vegas. The United States Post Office confirmed delivery on November 26, 2011.[9] In December 2011, respondent moved from Pebble Road to West Sahara Avenue in Las Vegas. He did not provide a forwarding address to the Nevada DMV at that time.

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[5] See https://medxpress.faa.gov/medxpress.

[6] Exh. A-15 at 13.

[7] Id. at 14.

[8] Exh. A-4 at 1.

[9] Exh. A-6.

On July 16, 2012, respondent once again reapplied for his first-class medical certificate using MedXPress. As he did in 2011, respondent selected the "no" box for question 18.v.[10] Respondent filled out the FAA Form 8500-8 online, electronically signed the form, and electronically submitted it to the FAA.

Later in July 2012, FAA Special Agent Cristina Johnson received a copy of respondent's driving record from the State of Nevada and opened an investigation. She confirmed respondent's arrest and conviction as well as obtained respondent's FAA airman and medical certificate files.[11] After reviewing the records, Special Agent Johnson realized respondent failed to disclose his DUI arrest on his 2011 medical application and failed to disclose his arrest, conviction, and driving revocation on his 2012 medical application. She also ran a check of FAA records for section 61.15(e) compliance, and her review returned no records indicating respondent ever reported his DUI conviction or driving revocation to the FAA. On September 5, 2012, Special Agent Johnson sent a letter of investigation (LOI) to respondent's current address informing him the FAA was investigating him for potential violations of sections 61.15(e) and 67.403(a)(1). Special Agent Johnson did not receive a timely response from respondent so she forwarded the case file to FAA's legal counsel office recommending initiation of an enforcement action.

While respondent did not respond to the LOI, on October 1, 2012, he faxed a copy of the FAA section 61.15 reporting form to the FAA's Civil Aviation Security Division. On this fillable form, respondent indicated he received an alcohol related suspension/revocation. At the

[10] Exh. A-15 at 2.

[11] Tr. at 31.

bottom of the form, he included a statement which read, "I was never convicted pleaded [sic] no contest so it never went to court. No BAC disclosed."[12]

B. *Procedural Background*

The Administrator issued the emergency revocation order,[13] which became the complaint in this case, on November 19, 2012, alleging respondent violated 14 C.F.R. § 67.403(a)(1) by answering "no" to question 18.v. on his 2011 and 2012 medical certificate applications and violated 14 C.F.R. § 61.15(e) by failing to notify the FAA of his two motor vehicle actions within the required 60-day time period. The case proceeded to hearing before the law judge on December 11, 2012. At the hearing, the parties stipulated to some of the facts in this case.[14] The Administrator's exhibits A-1 through A-19 were admitted into evidence without objection. Respondent conceded he did not timely report the motor vehicle actions and admitted his answers to question 18.v. on the medical applications were incorrect.

C. *Law Judge Oral Initial Decision*

At the conclusion of the hearing, the law judge held respondent intentionally falsified the applications at issue, finding the evidence satisfied all three prongs of the Hart v. McLucas intentional falsification test.[15] Under Hart v. McLucas, the Administrator must prove an airman: (1) made a false representation, (2) in reference to a material fact, and (3) with knowledge of the

[12] Exh. A-9.

[13] This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52–821.57.

[14] See ALJ Ex. 1.

[15] Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

falsity of the fact.[16] Regarding the first prong, the law judge found respondent admitted making incorrect entries in response to question 18.v. on both his 2011 and 2012 medical certificate applications.[17] The law judge further found the documentary evidence the Administrator presented supported that conclusion.[18] As to the second prong, the law judge held this false information was made in regard to a material fact. He based this conclusion upon the testimony of Dr. Steven Schwendeman, a medical officer in the FAA's Aerospace Medical Certificate Division. Dr. Schwendeman testified airmen medical examiners (AME) rely on the answers provided on the medical certificate application in deciding whether to issue a medical certificate. If respondent had disclosed his arrest and conviction for the DUI, an AME would not have issued a medical certificate without further inquiry. The law judge found Dr. Schwendeman's testimony credible. Finally, with regard to the third prong, the law judge noted respondent's knowledge of the falsity of the fact "rest[ed] largely on the credibility of [r]espondent's explanation."[19] The law judge found respondent's explanation was not credible and, thus, concluded respondent knowingly falsified the medical certificate applications.[20]

Likewise, based upon this adverse credibility determination, the law judge found respondent failed to report the motor vehicle actions to the FAA in the required timeframe in

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[16] Id.

[17] Initial Decision at 207.

[18] Id.

[19] Id. at 208.

[20] The law judge stated, "I find less than credible the suggestion that he did not understand that question 18.v. required [r]espondent to provide information regarding his arrest in December 2012 [sic], as well as any subsequent conviction or driver license revocation or suspension." Id. at 210.

accordance with § 61.15(e), noting respondent admitted he failed to submit the required notifications.

On the issue of sanction, the law judge stated on August 3, 2012, the President of the United States signed the Pilot's Bill of Rights into law.[21] The Pilot's Bill of Rights strikes from 49 U.S.C. § 44709(e) language requiring the Board defer to all validly adopted interpretations of laws and regulations the Administrator carried out and of written agency policy guidance available to the public related to sanction, unless the Board found the interpretation arbitrary, capricious or otherwise not according to law. The law judge stated,

> While I am no longer bound to give deference to the Federal Aviation Administration by statute, that agency is entitled to the judicial deference due to all other Federal administrative agencies under the Supreme Court decision in Martin v. Occupational Safety and Health Review Commission, which can be found at 499 U.S. 144, 111 S.Ct. 1171 [1991]. In applying the principle of judicial deference to the interpretations of laws, regulations and policies that the Acting Administrator carries out, I must analyze and weigh the facts and circumstances in each case to determine if the sanction selected by the Acting Administrator is appropriate.[22]

The law judge concluded "the sanction sought by the Administrator [wa]s appropriate and warranted in the public interest in air commerce and air safety" and affirmed the emergency revocation of respondent's airmen and medical certificates.[23]

D. *Issues on Appeal*

Respondent appeals the law judge's decision.[24] He asserts the law judge's decision and findings of fact are arbitrary, capricious, and against the weight of the evidence. He claims the

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[21] Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012).

[22] Initial Decision at 219.

[23] Id. at 220-21.

[24] Respondent only appeals the law judge's finding as to the section 67.403(a)(1) violations. He does not appeal the law judge's finding as to the section 61.15(e) violations.

law judge erred by "failing to apply" the certified Nevada conviction record of respondent and the plain language of the Nevada statute.[25] He alleges the law judge erred in finding intentional falsification[26] when both FAA witnesses testified respondent made an "incorrect answer" on his medical certificate application. Respondent also alleges the law judge erred in disregarding language in the Pilot's Bill of Rights for improvements in the FAA's medical certificate application.[27] Finally, respondent argues the law judge erred in affirming the revocation of his certificates without considering the mitigating factors present in his case.

2. *Decision*

A. *Intentional Falsification Findings*

As mentioned above, with regard to the issue of intentional falsification of a medical certificate application, we long have adhered to a three-prong test. The Administrator must prove an airman: (1) made a false representation, (2) in reference to a material fact, and (3) with

[25] Appeal Br. at 4.

[26] In his brief, respondent's counsel repeatedly makes references to the term "fraud" instead of "intentional falsification." The Administrator charged this case as an intentional falsification and the law judge found a violation of intentional falsification—not fraud. Under Hart v. McLucas, intentional falsification requires a lesser standard of proof than does fraud. Because respondent was neither charged with fraud nor found to have committed fraud, we presume the use of the term "fraud" is simply an imprecise language choice on the part of respondent's counsel. This presumption is also based on the fact respondent's brief repeatedly refers to the Dillmon case, which is an intentional falsification case rather than a fraud case.

[27] Section 4 of the Pilot's Bill of Rights requires the Comptroller General of the United States to "initiate an assessment of the [FAA's] medical certification process and the associated medical standards and forms" within 180 days after enactment of the statute. Pub. L. 112-153 § 4(a), 126 Stat. 1159, 1162-63 (August 3, 2012). In addition, section 4 of the statute includes a detailed list specifying the goals of the FAA's medical certificate application process, which should include questions on the application form that are clear, "subject to a minimum amount of misinterpretation and mistaken responses," promote consistent responses, and avoid "unnecessary allegations" that a respondent provided false information on the form. Id. at § 4(b).

knowledge of the falsity of the fact.[28] In Administrator v. Dillmon,[29] after remand from the Court of Appeals for the District of Columbia Circuit,[30] we clarified our analysis of this three-prong test. We consider our law judges' credibility findings, as well as other relevant evidence, concerning a respondent's subjective understanding of a question on the medical application. If a respondent contends he or she is confused about the meaning of a question or asserts he or she provided an incorrect answer as a result of allegedly misunderstanding the question, our law judges must make a credibility determination concerning the alleged confusion and the respondent's state of mind at the time he or she completed the application.[31] We defer to our law judge's credibility findings unless those findings are arbitrary and capricious.[32] In Administrator v. Porco, we also held the law judge's credibility determination should be based explicitly upon factual findings in the record.[33]

In this case, respondent contends the law judge's decision and findings of fact were arbitrary, capricious, and against the weight of the evidence.[34] We disagree. The law judge

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[28] Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)).

[29] NTSB Order No. EA-5528 (2010).

[30] 588 F.3d 1085 (D.C. Cir. 2009).

[31] Id. at 12-14.

[32] Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), affirmed by 472 Fed.Appx. 2 (D.C. Cir. 2012).

[33] Id. at 22, 28-29.

[34] To the extent respondent argues the law judge's credibility findings were arbitrary, capricious, and against the weight of the evidence, we note this standard is inconsistent with our decision in Porco. In Porco, we expressly adopted "arbitrary and capricious" as our sole standard of review for our law judge's credibility determinations and rejected all other legal standards including "against the weight of the evidence." NTSB Order No. EA-5591 at 20 (2011).

correctly noted the third prong of the Hart v. McLucas test in this case rested on his credibility determination of respondent's testimony, particularly concerning respondent's subjective understanding of question 18.v. on the medical certificate application. Based on Porco, we find no reason to disturb the law judge's credibility determinations as they were not arbitrary and capricious.

As the law judge stated in support of his adverse credibility finding, the only evidence supporting respondent's assertion he was not convicted of DUI and failed to receive the notice of the revocation of his driving privileges was respondent's own uncorroborated testimony. Because respondent claimed he misunderstood question 18.v. on the medical certificate applications and, thus, simply provided an incorrect answer on both applications, the law judge noted "the knowledge element again turns on the credibility of [r]espondent's explanation regarding disposition of his case and the information he supplied in response to question 18.v."[35] The law judge found respondent's testimony not credible and supported this credibility determination with explicit factual findings and evidence from the record.

To begin, the law judge found not credible respondent's assertions he subjectively misunderstood or was confused that question 18.v. on the medical certificate application required him to disclose information regarding his 2010 arrest as well as his subsequent 2011 conviction and driving privileges revocation.[36] Contrary to respondent's assertions he was confused by the question, the law judge found respondent was a person of significant intelligence. He based this finding upon respondent's acceptance into a high school flight program reserved for exceptional students, completion of a degree in aviation flight sciences in college, interning as a computer

[35] Initial Decision at 209.

[36] Id. at 210.

programmer for Honeywell, Inc., and completion of rigorous study and training required to earn an ATP certificate.[37]

The law judge noted respondent presented several alternative explanations for why he failed to check "yes" to question 18.v., none of which the law judge found credible. Respondent asserted he mistakenly believed 18.v. only required reporting of "felonies" or "major crimes."[38] The law judge determined these assertions were inconsistent with the plain language of question 18.v. When asked why respondent believed the question only referred to felonies or major crimes, the law judge concluded respondent could not "reasonably articulate why he might have reached such a conclusion despite there being no reference to such limitations."[39] The law judge also found not credible respondent's second explanation for failing to answer "yes" to question 18.v., which was respondent believed reporting was required only if he was arrested ***and*** convicted. The law judge determined that explanation also was contrary to the plain language of the question. Finally, the law judge found not credible respondent's third explanation—that respondent simply answered question 18.v. as he had in the past because he had no prior arrests. Respondent indicated he had no questions about the medical application and sought no guidance but rather just answered as he had in the past. Given respondent's testimony that he daily regretted his actions on December 4, 2010, the law judge found it unlikely respondent would simply answer the question as he always had in the past without more careful review of the question regarding arrest.

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[37] Id.

[38] Id.

[39] Id. at 211.

Additionally, the law judge found it not credible that respondent failed to disclose his arrest on the July 14, 2011 medical certificate application as "[t]here [wa]s no question [r]espondent was arrested on December 4, 2010, and that [r]espondent knew he was arrested."[40] The law judge noted respondent was detained after failing a field sobriety test, transported to the police station, and incarcerated for twelve hours. Respondent had a blood test to establish his blood alcohol content level. The law judge concluded, based upon this evidence, respondent was aware of his DUI arrest when he completed his July 14, 2011 medical certificate application.

Likewise, the law judge made an adverse credibility finding as to respondent's contention regarding the disposition of his DUI charge. Respondent contended he pleaded no contest and the State of Nevada disposed of the charges through a "conditional misdemeanor" process such that no conviction would appear on his record, yet the certified court record showed a conviction for a DUI alcohol first offense and a finding of guilty.[41] The law judge noted, except for respondent's uncorroborated testimony, the record was devoid of evidence showing an alternate disposition for the DUI charge. In this regard, the law judge stated, "I find the bald, uncorroborated assertions not supported by the evidence in the case and lacking in reliability."[42]

Similarly, the law judge made an adverse credibility finding as to respondent's contention he never received the November 18, 2011 letter revoking his driving privileges from the Nevada DMV until late July 2012, ***after*** he completed his July 16, 2012 medical certificate application.[43] The certified mail receipt showed this letter was delivered to respondent's then-current address

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[40] Id. at 208.

[41] Tr. at 119, 123.

[42] Id. at 211.

[43] Id. at 212.

on Pebble Road on November 26, 2011. Respondent attempted to argue he had moved and, thus, did not receive the letter. However, in response to questions by the FAA counsel and law judge, respondent admitted he did not move from his address on Pebble Road until December 2011. He also admitted he did not provide the Nevada DMV with a forwarding address. In this regard, the law judge stated, "[failure to receive the letter at the Pebble Road address] in and of itself is not entirely unreasonable; however, the testimony that the notice fortuitously appeared some 7 to 8 months later at a new address for which [r]espondent did not complete change of address paperwork … stretches the bounds of believability."[44] After making these credibility determinations, the law judge concluded "the misrepresentations made by [respondent] in his two applications for medical certificates were made with knowledge of their falsity."[45]

Contrary to respondent's assertions, we find a preponderance of reliable, probative, and substantial evidence supports each of the law judge's factual findings. The law judge made credibility determinations and related them to specific findings of fact, as required by Porco. In reviewing all the evidence presented at the hearing, we find the law judge's credibility findings were not arbitrary and capricious.

In his brief, respondent repeatedly claims his evidence was unrebutted by the Administrator, seeming to imply the law judge must accept respondent's evidence as fact absent the Administrator affirmatively putting on a rebuttal case to respondent's case-in-chief. This argument misconstrues the findings in the Dillmon case. In the government's case-in-chief, the Administrator bears the burden of proving the prima facie case. In the case *sub judice*, the Administrator met the first two prongs of the Hart v. McLucas test in the Administrator's prima

[44] Id. at 212-13.

[45] Id. at 213.

facie case. Since respondent asserted he misunderstood question 18.v., under Dillmon, the law judge needed to make a credibility finding concerning respondent's subjective understanding of the question, to resolve the case on the third prong of the Hart v. McLucas test. The law judge did so in this case. The preponderance of the evidence supports the law judge's credibility determination; based on Porco, we will not disturb those credibility findings. Therefore, we affirm the law judge's determination that respondent intentionally falsified the medical certificate applications at issue.

B. *Conviction in Nevada*

Related to respondent's argument that the law judge's findings were arbitrary and capricious, he also argues the law judge erred in "failing to apply" the Nevada certified conviction record of respondent and the plain language of the sole Nevada statute cited on the conviction record.[46] Specifically, respondent contends "[t]he Certified Conviction Record from the State of Nevada shows [r]espondent being convicted of only one statute – 484.3791. This statute, which was not produced by the Acting Administrator in discovery or at the hearing, and is a Civil Penalty DUI Statute only."[47] We find this argument fails for several reasons.

First of all, as noted above, the law judge made credibility findings adverse to respondent on this exact point. The law judge did not credit respondent's testimony that he was not convicted of any offense but rather had a conditional misdemeanor which would leave his record as soon as he paid the fine and attended training. Under the circumstances, we defer to the law judge's credibility finding on this point.

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[46] Appeal Br. at 4.

[47] Appeal Br. at 14-5.

Next, all the documentary evidence in the record indicates respondent was, in fact, ***convicted*** of a DUI offense. The Administrator submitted a certified copy of respondent's conviction into evidence.[48] Exhibit A-4 is consistent with the law judge's factual findings. The certified record shows respondent was found guilty of "DUI-ALCOHOL-1ST-OFFENSE." It further shows respondent was sentenced on November 4, 2011, to pay a $585.00 fine and to attend a DUI school and victim impact panel. The Administrator also submitted a copy of the driving privilege revocation letter respondent received from the State of Nevada DMV.[49] This letter reads, "Department records show you have been ***convicted of driving under the influence***" (emphasis added).

Ironically, despite respondent's assertions at the hearing that he was not convicted of anything, in his appeal brief, respondent appears to concede he was convicted of a DUI offense, but asserts it was merely a conviction for civil penalty DUI. We reviewed the statute respondent submitted as an attachment to his brief and find it inapplicable to the issue of whether respondent was convicted. The statute, Nevada Revised Statute (NRS) Section 484.3791, is entitled *Driving under the influence of intoxicating liquor or controlled or prohibited substance: Civil penalty.*[50] It provides, "[i]n addition to any other penalty provided by law, a person convicted of a violation of NRS 484.379 is liable to the State for a civil penalty of $35." NRS 484.379, referenced as a prerequisite for the civil penalty, was the general DUI statute in effect at the time of respondent's conviction. Respondent's reliance on NRS 484.3791 is misguided, as the civil penalty cannot be issued without an underlying conviction for the general DUI offense.

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[48] Exh. A-4.

[49] Exh. A-6.

[50] Nev. Rev. Stat. § 484.3791 (2006).

Finally, even assuming, *arguendo*, respondent's version of the events were true—he was not convicted of DUI but instead received some sort of deferred adjudication—we still would find respondent in violation of intentionally falsifying both medical certificate applications because he failed to disclose his DUI ***arrest*** on either application. The law judge did not credit respondent's subjective contention that he believed he needed to be arrested and convicted in order to answer "yes" to question 18.v. In this regard, respondent argued the plain language of question 18.v. requires *both* an arrest *followed by* a conviction. As quoted above, the question requires a response to whether an airman has a "[h]istory of (1) an arrest(s) ***and/or*** conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug" (emphasis added). As the law judge noted in his initial decision, the plain language of the question, alone, does not support respondent's assertion. This language, combined with the law judge's adverse credibility determination, renders respondent's argument ineffective. We agree with the law judge that respondent intentionally falsified the medical certificate applications at issue based upon his failure to disclose the DUI arrest.

C. *Testimony Regarding "Incorrect" Answers*

Respondent next argues the law judge erred in finding him in violation of section 67.403(a)(1) when the corroborated evidence in the case only supported a finding of section 67.403(c)(1) for making an incorrect statement on his medical certificate applications. As noted above, section 67.403(a)(1) states, "[n]o person may make or cause to be made—(1) A fraudulent or intentionally false statement on any application for a medical certificate." Subsection (c)(1) of the regulation, however, allows the Administrator discretion to either suspend or revoke a medical certificate when an applicant has included "an incorrect statement" on a medical certificate application. Based on this distinction, respondent contends he merely made an

"incorrect statement" on his medical certificate application. We find this argument without merit.

The Administrator's witnesses, Special Agent Johnson and Dr. Schwendeman, both testified respondent provided an "incorrect" answer on his medical certificate applications because respondent had, in fact, been arrested, convicted, and had his driving privileges revoked.[51] Likewise, respondent asserted he provided an incorrect answer. Respondent contends since the Administrator's own witnesses "corroborated" his testimony, we may only affirm a violation of section 67.403(c)(1) for making an incorrect statement.[52] This assertion overlooks the fact that in cases where there is no direct evidence of intentional falsification, the Board's decisions in Dillmon and Porco stand for the proposition that the law judge must make credibility determinations regarding a respondent's subjective understanding of the meaning of the questions on the medical certificate application. In this case, neither Special Agent Johnson nor Dr. Schwendeman had actual knowledge of respondent's state of mind when he completed his medical certificate application. Thus, the case hinged on whether the law judge found respondent's subjective understanding of the question credible. In this case, the law judge did not find respondent's argument that he did not understand question 18.v to be credible. The law judge's credibility determinations were based upon specific findings of fact, and were not arbitrary and capricious.

As a result, we reject respondent's argument that he merely included an "incorrect answer" on his medical certificate applications. Respondent's answers were more than incorrect:

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[51] Tr. at 34, 34, 78.

[52] Appeal Br. at 15.

the evidence establishes respondent intentionally falsified his applications by answering "no" to question 18.v.

D. *Pilot's Bill of Rights—Medical Certificate Application*

Respondent next asserts the law judge improperly ignored language in the Pilot's Bill of Rights regarding the medical certificate application process in finding respondent intentionally falsified these documents. Citing several of the legislative goals of the FAA's medical certificate program enumerated in section 4(b) of the Pilot's Bill of Rights, respondent appears to argue the FAA violated his due process rights by bringing this certificate action prior to changing any language on the medical certificate application. We disagree.

While it is clear section 4 of the Pilot's Bill of Rights expresses Congress's concern with the medical certificate process, no part of the statute serves to strike down the current process. Unlike section 2 of the Pilot's Bill of Rights, *Federal Aviation Administration Enforcement Proceedings and Elimination of Deference*, which became effective immediately upon enactment, sections 3 and 4, *Notices to Airmen* and *Medical Certification*, respectively, are not effective immediately. These sections of the law include specific timeframes for implementation. Furthermore, in section 4, Congress was not prescriptive in what changes, if any, the FAA must make to the medical certificate process. As noted above, Congress directed the Comptroller General of the United States to "initiate an assessment of the [FAA's] medical certification process and the associated medical standards and forms" and to provide a report to Congress within 180 days of the bill's enactment.[53] Congress also ordered the FAA to take appropriate steps to respond to the Comptroller General's report within one year of its issuance.[54]

[53] Pub. L. 112-153 § 4(a)(1) and (2), 126 Stat. 1159, 1162-63 (August 3, 2012).

[54] Id. § 4(c) and (d).

Because the Pilot's Bill of Rights mandated no immediate statutory changes to the FAA's medical certification process, we find the law judge did not error in declining to grant relief to respondent under section 4 of the Pilot's Bill of Rights. Until such time as the Comptroller General and FAA respond to Congress on this issue, our law judges and the Board will continue to consider carefully each alleged intentional falsification case coming before the NTSB to assess whether the Administrator's evidence meets the requirements of the three-prong Hart v. McLucas test. In the case *sub judice*, the Administrator met this burden of proof.

D. *Pilot's Bill of Rights—Sanction and Mitigating Factors*

Finally, respondent contends the law judge erred by misapplying the changes made in the Pilot's Bill of Rights regarding the Board's deference to the Administrator's choice of sanction, and by failing to consider the mitigating factors in this case in determining an appropriate sanction.

Congress, in the Pilot's Bill of Rights, struck down the language contained in section 44709(d)(3), which had required the NTSB to defer to the Administrator's choice of sanction.[55] The Congressional Record provides further guidance on the legislative intent of this provision:

> **Mr. Rockefeller.** It is not the intention of the Senate to eliminate the NTSB's practice to observe the principles of judicial deference to the FAA Administrator when reviewing airmen appeals. The Senate only finds that this language is redundant of what is already provided for under the law and it is not the intent of the Senate to prevent the NTSB from applying the principles of judicial deference in adjudicating Federal Aviation Administration cases.
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> The purpose of these changes is simply to make the statute consistent with the laws governing all other Federal agencies. Thus, it is the intention of the Senate that the NTSB, in reviewing FAA cases, will apply principles of judicial deference to the interpretations of laws, regulations, and policies that the Administrator carries out in accordance with the Supreme Court's ruling in Martin v. OSHRC, 449 U.S. 114 (1991).

[55] Supra note 51 at § 2(c)(2).

Mr. Inhofe. Mr. President, I concur.[56]

In Martin, the United States Supreme Court stated, "[t]he reviewing court should defer to the Secretary only if the Secretary's interpretation of an ambiguous regulation *is* reasonable. That interpretation is subject to the same Administrative Procedure Act standard of substantive review that applies to any other exercise of delegated lawmaking power."[57] Likewise, in Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., the Supreme Court held,

> The power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[58]

In the case at hand, respondent violated 14 C.F.R. §§ 61.15(e) and 67.403(a)(1). The FAA's Sanction Guidance Table provides for revocation of all certificates for a violation of § 67.403(a)(1).[59] However, under 14 C.F.R. § 67.403(b)(1), the commission of an act prohibited under § 67.403(a)(1) is a basis for ***suspending or revoking*** all airman, ground instructor, and medical certificates and ratings held by that person.

As the plain language of section 67.403(b)(1) of the Federal Aviation Regulations (FAR)

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[56] 2012 WL 2491446, 158 Cong. Rec. S4733-01 (June 29, 2012).

[57] Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 145, 111 S. Ct. 1171, 1173, 113 L. Ed. 2d 117 (1991).

[58] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984)(citations omitted).

[59] See FAA Order No. 2150-3B, Fig. B-4-a(1).

provides for either suspension or revocation, we will examine both potential penalties to determine whether revocation was the appropriate sanction. We will consider both aggravating and mitigating factors in evaluating an imposed sanction.[60] In the past, we compared factually similar cases in determining whether the Administrator's choice of sanction was appropriate.[61] However, at this juncture, we are reluctant to engage in sanction comparison to cases decided prior to the enactment of the Pilot's Bill of Rights.

Considering all the aggravating and mitigating factors in the case *sub judice*, we find respondent provides no reason compelling us to refrain from revoking his certificates under these particular circumstances.[62] In his initial decision, the law judge indicated he carefully considered the facts of this case in determining whether revocation was appropriate.[63] However, to the extent respondent contends the law judge failed to consider the mitigating factors in this case, we will do so in this opinion.

In regard to potentially mitigating factors, respondent urges us to consider, among other things, the following factors in arriving at an appropriate sanction: his reputation in the aviation community, his response to Special Agent Johnson, and the fact he has a daughter who depends on him. We will consider these factors. We decline to consider several of respondent's

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[60] See Administrator v. Hackshaw, NTSB Order No. EA-5501 (2010) (recon. denied, NTSB Order No. EA-5522 (2010)) and Administrator v. Simmons, NTSB Order No. EA-5535 (2010). In light of the enactment of the Pilot's Bill of Rights, we find the Hackshaw and Simmons cases even more relevant, as many cases that preceded Hackshaw and Simmons regarding sanction involved the statutory deference 49 U.S.C. §§ 44709 and 44710 required.

[61] See Simmons, supra note 58 at 9; see also Administrator v. Poland, NTSB Order No. EA-5449 at 9-10 (2009).

[62] We caution litigants this determination is case-specific based upon the facts and circumstances adduced at hearing.

[63] Initial Decision at 219.

purported mitigating factors. While respondent cites to his nearly 5,000 hours of flight time and his violation-free history as mitigation, we view a violation-free history as status quo, rather than a mitigating circumstance. All airmen are expected to safely operate aircraft and comply with the FAR so the fact respondent has done so up to this point in his career is not a matter in mitigation. Likewise, we consider the fact this DUI was respondent's first criminal offense and only arrest in the same manner. Finally, based upon the law judge's adverse credibility determination, we do not find respondent has been "totally honest and forthcoming related to"[64] his DUI offense, especially in regard to his decision to falsify his medical certificates and, thus, do not consider that enumerated item as a basis for mitigation.

Under Hackshaw and Simmons, we also must consider any aggravating factors, which we find exist in this case. Respondent holds an ATP certificate—the highest level certificate an airman can hold. Respondent was arrested for DUI on December 4, 2010. After his arrest, respondent claimed he daily lamented his decision to drink and drive that evening.[65] In July 2011, respondent intentionally falsified his medical certificate application by failing to disclose his DUI arrest for the FAA's consideration. On November 4, 2011, he appeared before a judge. The judge found respondent guilty of a first offense DUI, and sentenced him to pay a $585.00 fine and to attend a DUI school/victim impact panel. Respondent failed to report that conviction to the FAA within the 60-day time period as required by the FAR. In fact, he never voluntarily informed the FAA of this motor vehicle action. On November 26, 2011, respondent's Nevada driving privileges were revoked for 90 days. Again, respondent failed to

[64] Appeal Br. at 19.

[65] Tr. at 112, 140.

report this driving revocation action to the FAA within the 60-day time period.[66] In July 2012, respondent intentionally falsified a second medical certificate application by failing to disclose his DUI arrest, his DUI conviction, and his DUI-related driving privileges revocation.

These facts exhibit a disregard for the requirement that airmen accurately complete medical certificate applications and inform the FAA in a timely manner of certain changes in one's driving privileges under state laws. It is axiomatic the FAA must rely on airman to provide truthful and accurate answers on the medical certificate application, and are complying with reporting requirements. Otherwise, the entire system for awarding and administering medical certificates fails. Respondent's disregard for this purpose indicates a disregard for aviation safety, in general. We find such an attitude is an aggravating factor, which counsels in favor of revocation.

In conclusion, balancing the mitigating factors against the aggravating factors present in this particular case, we find revocation is the appropriate sanction.

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 and first-class medical certificates, and any other certificates respondent holds, is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

[66] Respondent did file a section 61.15 notification for the driving privilege suspension on October 1, 2012. He claimed he had only received notice of the revocation action in late July 2012. As discussed supra, the law judge found this assertion not credible.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
MICHAEL P. HUERTA,	*	
ACTING ADMINISTRATOR,	*	
FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Complainant,	*	Docket No.: SE-19389
v.	*	JUDGE WOODY
	*	
JASON LATRAILE JONES,	*	
	*	
Respondent.	*	

Department of Education
490 L'Enfant Plaza East, S.W.
Suite 2100A
Washington, D.C.

Wednesday,
December 12, 2012

The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 a.m.

BEFORE: STEPHEN R. WOODY
Administrative Law Judge

APPEARANCES:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE WOODY: Good morning. This is a proceeding under the provisions of Title 49 of United States Code, Section 44709, formerly Section 609 of the Federal Aviation Act, and the provisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board. This matter has been heard before this Administrative Law Judge, and as required by the Board's rules in emergency cases, I am issuing an Oral Initial Decision.

Pursuant to notice, this matter came on for hearing on December 11, 2012, in Washington, D.C. The Administrator was represented by one of his staff counsel, Ms. La Donna Douglas, Esquire, along with co-counsel, Mr. Scott Reygers, Esquire, for the Federal Aviation Administration. Respondent was represented by Mr. Joseph Michael Lamonaca, Esquire. The parties were afforded full opportunity to offer evidence, to call, examine and cross-examine witnesses, and to make arguments in support of their respective positions.

I will not discuss all of the evidence in detail. I have, however, considered all the evidence, both oral and documentary. That which I do not specifically mention is viewed by me as being corroborative or as not materially affecting the outcome of the decision.

Mr. Jason Latraile Jones, the Respondent, appealed the Administrator's Emergency Order of Revocation dated November 12th, 2012. Pursuant to Section 821.31(a) of the Board's Rules, the Administrator filed a copy of that order on November 19, 2012, which serves as the complaint in this case. The Administrator also twice subsequently amended the Emergency Order of Revocation, on November 21st and December 7th, 2012, respectively.

The Administrator ordered the emergency revocation of Respondent's airline transport pilot certificate number 002718670 based on Respondent's violation of Federal Aviation Regulation Section 61.15(e) and 67.403(a)(1). More specifically, the complaint alleged that the Respondent: (1) failed to report alcohol-related motor vehicle actions to the FAA Civil Aviation Security Division within 60 days of the motor vehicle actions; and (2) made or caused to be made a fraudulent or intentionally false statement on applications for medical certificate dated July 14, 2011 and July 16, 2012.

The Administrator further alleged that even if the statements provided on the application for medical certificate be determined not to be intentionally false or fraudulent, the information provided was nonetheless incorrect and thereby provides a basis for suspension or revocation of the Respondent's medical certificate.

In answer to the Administrator's complaint, Respondent admitted the allegations contained in paragraphs 1, 2, 3, 7, 8 and

9. With respect to paragraph 9, the Respondent admitted only that the response he provided was incorrect, but denied that the response was intentionally false or fraudulent. As Respondent has admitted those allegations or particular portions of the allegations, they are deemed as established for purposes of this decision.

Respondent has denied paragraphs 4, 11 and 13. With respect to paragraph 4, the Respondent denies that his driver's license was revoked, but in his answer admitted that the license was suspended for 60 days. With respect to paragraphs 11 and 13, the Respondent denies that the statement and certification reference were intentionally false or fraudulent, but admits the statement and entry were incorrect.

The Administrator moved for admission of Exhibits A-1 through A-19, which were admitted into evidence without objection from Respondent. Respondent did not move for admission of any exhibits.

The Administrator presented testimony of Special Agent Cristina Johnson and Dr. Steven Schwendeman. Special Agent Johnson is a security specialist at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma. She has been a security specialist for the past 10 years and employed by the FAA for 15 years. She testified that as a security specialist, she is assigned to investigate alleged violations of Federal Aviation Regulations Section 61.15(e), regarding failure to report alcohol-

related motor vehicle actions, and 67.403(a), related to falsification of information on airman medical applications. She is familiar with the Respondent in this matter and was assigned to investigate his alleged violations of 61.15(e) and 67.403(a).

She was first made aware of the potential violations in approximately July of 2012, and at that time the Respondent's driving record already contained a documented arrest, conviction and license revocation action. She confirmed that the driving record she received was in fact that of the Respondent. She also obtained copies of the Respondent's airman and medical certification files.

In reviewing the medical certification files, she discovered that the Respondent's medical certification application forms completed on July 14, 2011 and July 16, 2012 contained incorrect information in block 18(v). Specifically, the July 14, 2011 application indicated a "No" response to the question even though the Respondent had been arrested for DUI in Las Vegas, Nevada on December 4, 2010. Respondent's July 16, 2012 application similarly indicated "No" in response to question 18(v) even though records that she obtained indicated he had also been convicted of DUI alcohol first offense on November 4, 2011, and his driver's license had been revoked for a period of 90 days beginning on November 26, 2011, per Exhibits A-5 and A-6.

On August 6, 2012, Special Agent Johnson also performed a search of FAA records for any record of an alcohol-related motor

vehicle action report made by the Respondent, but found none. That information is contained in Exhibit A-7. Such reports are required to be filed within 60 days of a motor vehicle action.

Following her review, Special Agent Johnson then issued to Respondent a letter of investigation, which I may refer to as an LOI, dated September 5, 2012 -- that's at Exhibit A-8 -- notifying the Respondent that he was being investigated for alleged violations of 14 C.F.R. Section 61.15(e) and 67.403(a). The LOI did not specifically identify the arrest, conviction or license revocation in issue.

The Respondent did not directly respond to the LOI, but on October 1, 2012, he filled out a notification letter at Exhibit A-9, which was submitted via fax. In that notification letter the Respondent identified the arrest date of December 4, 2010, and also checked the box for revocation or suspension of his driver's license. The letter also noted, "I was never convicted, pleaded no contest, so it never went to court, no BAC disclosed."

In contrast to this response, court disposition records indicated the Respondent had been found guilty of DUI alcohol first offense. There was no indication of a plea of no contest. Documentation from the DMV at Exhibit A-6 also noted a 90-day driver's license revocation beginning on November 26, 2011 based on a DUI conviction on November 4, 2011.

Special Agent Johnson did research the specific Nevada statute listed on the court disposition records, but did not

recall specific details regarding that statute. She did recall that nothing in her review was in conflict with the documentation that was in her possession.

At the conclusion of her investigation, Special Agent Johnson forwarded her investigative report to the legal counsel with a recommendation of appropriate action, including a recommended sanction. She relied on the sanction guidelines, FAA Order 2150.3B, Table of Sanctions, at Exhibit A-18, and Chapter 7 from those guidelines at Exhibit A-19. The sanction guidelines include discussion of factors to be considered, which she reviewed before making a recommendation. The guidelines are clear that for matters related to a lack of qualifications such as those involving intentional falsification, the appropriate sanction is revocation of all airman and medical certificates.

Special Agent Johnson indicated that the LOI sent to the Respondent is a form letter which has boxes to be checked regarding alleged violations. The options in the letter include a violation for fraud or intentional falsification, but do not include an option regarding incorrect information mistakenly provided. In her experience, cases do not always involve fraud or intentional falsification rather than a mistake; however, the LOI at least initially indicates fraud or intentional falsification. In this case, she reached her conclusion regarding intentional falsification based on the evidence that she gathered during the investigation.

Special Agent Johnson confirmed that the address to which the DMV, that being Department of Motor Vehicles, Notice of Revocation of Driving Privileges was mailed, was not the same address to which her LOI was subsequently mailed; however, the certified mail receipt for the DMV notice indicated delivery was accomplished on November 26, 2011.

Special Agent Johnson stated she is very familiar with question 18(v) on the application for medical certificate, and that question 18(v) is the only question having multiple lines in a compound question.

Agent Johnson did not recall a conversation with the Respondent after she sent the LOI. If she had such a conversation, she would have possibly made notes of it in the case file. It is possible that she could have had a conversation with the Respondent and just does not recall that conversation.

Next, Dr. Steven Schwendeman testified. He is currently employed as a medical officer at Aerospace Medicine in the FAA Aerospace Medical Certification Division in Oklahoma City, Oklahoma. He has held that position since 2006. Prior to that, Dr. Schwendeman was employed in occupational medicine for the FAA from 1995 to 2006. Dr. Schwendeman has been designated an aviation medical examiner, or AME, since 1980, and a senior AME since 1985. In his current position, he talks with AMEs and discusses issues related to air medical certification of pilots on a daily basis. He is familiar with the AME and medical

certification application process.

Dr. Schwendeman is familiar with the FAA Form 8500-8, the Medical Certificate Application. He is also familiar with MedXPress, the electronic medical certificate application process which replaced Form 8500-8 as of October 1, 2012. MedXPress provides the option to complete the form over a 60-day period and also provides a help function, links to instructions, and the opportunity to click on a question mark icon to gather additional information regarding information requested by the form. The help function and readily accessible information and instructions are greatly improved from the paper form. Once the form has been completed and submitted by the airman electronically, it can be accessed and modified by the AME if necessary during a scheduled exam.

Prior to 2011, the Respondent filled out the paper Form 8500-8. In both 2011 and 2012, the Respondent completed his application for medical certificate using the MedXPress electronic application.

With regard to question 18(v) on the application, it is important to answer it accurately, according to Dr. Schwendeman. This is especially true for ATPs, who are held to a higher degree of expectation because of the nature of their positions and training. Individuals with even a single DUI have been shown to have a higher rate of aircraft accidents. Had the Respondent reported his arrest, additional evaluation and information would

have been necessary. If the AME is not fully informed, then he or she is not aware of information that is relevant to flight performance. In this case, had question 18(v) been answered yes, then the AME would have been precluded from issuing the medical certificate.

Following the passage of the Pilot's Bill of Rights, or PBR, Dr. Schwendeman received training on the subject provided by Susan Caron from the FAA General Counsel's office. The training addressed notice requirements imposed by the PBR and also included discussions regarding question 18(v), but Dr. Schwendeman indicated he could not recall the precise discussions regarding question 18(v). Since the Pilot's Bill of Rights there have been changes in the Aerospace Medicine Section in the process for reviewing applications, in particular, as it pertains to all communications with airmen now, including written notice to the airmen of their rights under the Pilot's Bill of Rights. There has been no change to question 18(v) or other changes to the form since passage of the Pilot's Bill of Rights.

The Respondent presented the testimony of Mr. Brian Brown as well as the Respondent himself, Mr. Jason Jones. Mr. Brian Brown resides in Houston, Texas and has done so all his life. He has been employed as a pilot by ExpressJet Airlines for approximately 6 years. He met the Respondent in August of 2007. Although he and Respondent work for the same company, he has never flown with the Respondent. He occasionally socializes with the

Respondent and is in contact with him one to three times per month, sometimes in person and sometimes by phone. They mostly talk about work.

His impression of the Respondent is that he is professional and a stand-up guy. He has no concerns about Respondent's competence as a pilot. He has never had any reason to question Respondent's veracity. He believes the Respondent's standing within the company is good. He has talked to one or two other pilots about the Respondent, one in early 2012 and one sometime in 2011. He cannot remember the names of the individuals he spoke with and he did not talk with them about the Respondent's honestly.

Mr. Brown has met the Respondent's mother and brother and believes the Respondent comes from a good family. Respondent did tell Mr. Brown about the incident in December 2010 and indicated he thought the incident was behind him, as he was not convicted of a felony. Mr. Brown was not present when the Respondent filled out the medical applications in question here.

The Respondent then testified. He testified that he resides at 200 West Sahara, Unit 2007, Las Vegas, Nevada, and has done so since early December 2011. He is employed as a pilot and first officer at ExpressJet Airlines and remains employed there despite this pending action. He believes the company is awaiting the outcome of this hearing to make a final decision regarding his continued employment. He has worked for ExpressJet for the past

6 years and has accumulated approximately 5,000 flight hours over the course of his career.

His flying history began when he was in high school in Detroit, Michigan. He attended a vocational high school where flight training was available to exceptional students that maintained a certain GPA. His first flight occurred in tenth grade along with his first student medical certification. In fact, he flew before he was able to drive. Although the high school flight program was designed to allow students to attain their private pilot's license, he did not do so in high school because he was busy as the senior class president.

He then attended Western Michigan Aviation University where he earned his pilot's license and obtained a degree in aviation flight sciences. He built his flight hours flying for a sky-diving operation, and then for Regions Air, before joining ExpressJet 6 years ago. He has also completed an internship writing computer code for Honeywell and became a Mason at the age of 21 or 22 years old.

Mr. Jones described his arrest for DUI on December 4, 2010 after an evening at dinner and a club with a female friend. He was stopped by police after goosing the accelerator and spinning the tires on his brother's Corvette. After taking a field sobriety test, he refused a breathalyzer and was detained. His vehicle was impounded and he was taken into custody and transported to the police station where a blood sample was taken

for purposes of determining blood alcohol content. He was held for approximately 12 hours and released the next day. His license was not taken from him and he was able to pick up his brother's vehicle from the impound lot. His understanding of the dispositions of the resulting charges against him based on the judge's pronouncement at the hearing was that he pled no contest and received a conditional misdemeanor for which he was required to pay a fine, to participate in a victim impact panel, and to complete an online driving school which included information regarding drinking and driving.

He indicated the judge informed him if he completed the program requirements quickly, then his case would be closed. He completed all requirements within 2 months. Mr. Jones indicated he did not ever lose possession of his driver's license and did not receive a notice of the driver's license revocation, which is at Exhibit A-6, until after completing his medical certificate application in July of 2012.

Shortly after completing the medical certificate application in July 2012, he found the Notice of Revocation of Driving Privileges on his bed along with other mail items. He admitted that he had been driving during the entire designated period of his license revocation. He then took steps to have his driving privileges reinstated. The Respondent admitted that he did not file a report of alcohol-related motor vehicle action with the FAA, but explained that he did not realize that he needed to

file such a report.

With regard to the responses in question 18(v) on his July 2011 and July 2012 medical application forms, the Respondent indicated he read the question but determined that it did not pertain to him. He read the question and asked himself, have I been arrested and convicted of any felonies? Based on what he had been told, he believed he was not convicted of any felonies or crimes, and thus he answered no to question 18(v). He interpreted the question as not pertaining to him. This process was all new to him since he had never been arrested before. He also answered question 18(v) the same way in both 2011 and 2012, as he had many times in the past, as this question had never pertained to him as long as he had been flying. He realizes now that he screwed up and that he should have answered "Yes" to question 18(v) on both applications; however, he indicated he did not intentionally falsify the application forms.

Regarding the LOI from Special Agent Johnson dated September 5, 2012, the Respondent indicated he did not receive that letter until the end of September because he had been on the road working most of the month and had not been home to Las Vegas. As soon as he received the LOI, he faxed the notification letter at Exhibit 9 to Special Agent Johnson and contacted her by phone to confirm that it was received. He also inquired whether there was anything else that he needed to do. According to Mr. Jones, Special Agent Johnson confirmed receipt, but indicated there was

nothing else to do, as she had already forwarded the file to legal counsel.

With regard to the DMV Notice of Driving Privileges Revocation at Exhibit A-6, Mr. Jones confirmed that the notice indicates his driving privilege was revoked as a result of having been convicted of driving under the influence. The notice does not reference a conditional misdemeanor or any conditional disposition. A disposition notice from the Las Vegas Township Justice Court at Exhibit A-4 shows the disposition as guilty of DUI alcohol first offense.

Respondent indicated that despite this disposition notice, he did not hear the judge advise him at the hearing that he had been found guilty of anything. Further, although the noted sentence includes DUI education, he believes what he attended was regular driving school. He also does not recall at the time he filled out the forms, the part of question 18(v) related to attendance at an educational program or driving school, but believes that the educational program referenced in question 18(v) on the application form was referring to DUI education, which he did not believe he attended.

Respondent indicated that every day he kicks himself of the incident that occurred on the night of December 4, 2010.

He also indicated that he read question 18(v) as all-encompassing. When he read the question, he did not understand it as an either/or request, but rather he read the question as

applying together. He further indicated he read question 18(v) and it does not reference felonies; nonetheless, he understood the question as only applying to major crimes and felonies. After reading question 18(v), he believed he had filled out the question correctly and did not refer to the instructions or ask for further guidance from the AME or anyone else. He answered the question in both 2011 and 2012 the way he always had.

In regard to the certified mail receipt at Exhibit A-6, page 2, the Respondent acknowledged that the receipt indicated the item was delivered and signed for on November 26, 2011, prior to his changing addresses in early December. He denied that the signature on the receipt was his, that he recognized his signature, or that the signature was similar to his signature on other documents in the case file. He reiterated that front desk staff members both at his old and new addresses sometimes signed for mail items. He asserted that he did not receive the notice in November 2011 or at any time prior to submitting his application for medical certificate in July 2012.

Now, with respect to the alleged violations. First, with respect to the alleged violation of Federal Aviation Regulation Section 67.403(a)(1), the elements of an intentionally false statement are: (1) a false representation; (2) made in reference to a material fact; and (3) made with knowledge of its falsity. These elements are based on the seminal case of *Hart v. McLucas*, which can be found at 535 F.2d 516. That's a Ninth

Circuit case from 1976.

Next, I'll address each of these elements and the underlying evidence for each. With respect to the falsity, the Respondent does not contest the inaccuracy of the information provided in response to question 18(v) on the applications for medical certificate that were completed on July 14, 2011 and July 16, 2012. In his answer to the complaint as well as in his testimony, he admits that the statements made in response to question 18(v) were incorrect. The documentary evidence, including the arrest report and record of conviction and revocation of driving privileges further support this conclusion. Stated another way, the information provided by the Respondent on those application forms was not true and accurate, or in other words, was false. Thus, I find that the first element is established by the evidence.

The second issue is whether or not those representations which I found to be false were material. Under the Board's precedent, a misrepresentation is material if it can affect the Administrator's decision as to whether or not a certificate should be issued. Here, Dr. Schwendeman testified that the information in the medical application can influence whether or not the Administrator would issue a medical certificate. He further testified that had the Respondent accurately reported his arrest and/or conviction, then further evaluation information would have been required and the AME would have been precluded from awarding

the first class medical certificate to the Respondent.

I found Dr. Schwendeman's testimony to be very credible in this regard. Nor has the Respondent contradicted the testimony of Dr. Schwendeman or otherwise substantially contested the materiality of the false representations provided on the medical applications. In fact, the Respondent stipulated that the AME should have relied upon the information provided by the Respondent when issuing the medical certificates for which he applied, which is consistent with Dr. Schwendeman's testimony. Therefore, I find that the misrepresentations made by Mr. Jones in his two applications for medical certificates are material.

The last element, the knowledge of the falsity of the statement, is the critical issue to be decided in this case. Evaluation of this element, as suggested by Respondent's counsel in argument, rests largely on the credibility of the Respondent's explanation. There is substantial documentary evidence establishing the information available to the Respondent and when that information was available. There is no question the Respondent was arrested on December 4, 2010, and that the Respondent knew he was arrested. He was detained following a field sobriety test, transported to the police station and incarcerated for 12 hours and into the next day. His vehicle was impounded and a blood sample was taken from him to establish a blood alcohol content level. Thus, when the Respondent completed the July 14, 2011 medical certificate application, the evidence

clearly establishes that he was aware of his arrest in December of 2010. Thus, the question of the knowledge of the falsity of the information provided turns on the credibility of the Respondent's explanation regarding his "No" response on question 18(v).

Similarly, with respect to the answer to question 18(v) on the July 16, 2012 application for medical certificate, there is substantial documentary evidence regarding the Respondent's conviction and driver's license suspension revocation. The certified court records indicate the Respondent was found guilty of DUI alcohol first offense on November 4, 2011, and that his driver's license was revoked for a period of 90 days beginning on November 26, 2011; coincidentally, the date that the certified mail receipt indicates the Notice of Revoked Driving Privileges was signed for. Thus, the knowledge element again turns on the credibility of the Respondent's explanation regarding disposition of his case and the information he supplied in response to question 18(v).

In this regard, the Respondent has raised mistake as an affirmative defense in this matter. Specifically, he argues that he provided an incorrect but not intentionally false statement in his responses on the applications in question. More specifically, he asserts that he was confused regarding what information he was required to provide in response to question 18(v) on the applications at issue.

With regard to the Respondent's understanding of

question 18(v), the Board has held in *Administrator v. Sue*, NTSB Order EA-3877, a 1993 decision, that question 18(v) is not confusing to a person of ordinary intelligence. Here, although the Respondent in his testimony refers to himself as an average guy, his accomplishments demonstrate otherwise. Per his testimony, he was accepted into a flight program in high school reserved for exceptional students who maintained a certain GPA, and he was flying before he was able to drive. He was elected as his high school senior class president. He is a college graduate, successfully completing a degree program in aviation flight sciences. He interned as a computer programmer for Honeywell. In his early twenties he completed training to become a Mason. He holds an airline transport pilot certificate which requires rigorous study and training to complete, and has been professionally employed as a pilot for many years. In short, the Respondent has demonstrated that he is a person of significant intelligence. I find less than credible the suggestion that he did not understand that question 18(v) required the Respondent to provide information regarding his arrest in December 2012, as well as any subsequent conviction or driver license revocation or suspension.

Other explanations by the Respondent also undermine his credibility in this regard. Respondent's testimony that he believed he was only required by question 18(v) to report felonies or other major crimes is wholly inconsistent with any language

contained in that question. There is no reference to felonies or major crimes in question 18(v), nor was the Respondent able to reasonably articulate why he might have reached such a conclusion despite there being no reference to such limitations. The only reference to felonies is contained in question 18(w), which also refers to misdemeanor convictions. The alternate explanation offered, that is, that the Respondent read the question as all-encompassing, requiring reporting only if he had been both arrested and convicted, is likewise contrary to the plain language of the question and not credible.

Nor do I find believable the Respondent's assertions regarding his understanding of the disposition of the charges in his case. Respondent referenced disposition through a conditional misdemeanor process, yet the certified court and DMV records note only a conviction for DUI alcohol first offense and no conditional or other disposition different than a guilty finding. There has been no evidence presented to corroborate Respondent's testimony regarding any deal struck by his attorney with the prosecutor. There is no affidavit from the attorney or other documentary evidence from any source that would support the existence of an alternate disposition of the matter apart from the guilty disposition on the DUI charge and the resulting driver's license revocation plainly noted in the court and DMV records that are in evidence. I find the bald, uncorroborated assertions not supported by the evidence in the case and lacking in reliability.

The Respondent also explained that he answered question 18(v) as he did, at least in part, because he had always done so in the past and had never been arrested or had to deal with such a situation. However, given the uniqueness of the circumstance to the Respondent and his professed daily ruminations over the incident since it occurred in December 2010, it would seem more likely to highlight for the Respondent the possible need to report the arrest and subsequent court action and to more specifically and carefully review questions related to such matters on the application form. Yet Respondent indicated that he had no questions about the form and sought no guidance; instead, merely answering as he had so many times in the past. Again, I find that explanation difficult to accept as reasonable or likely.

The Respondent's testimony regarding receipt of the DMV Notice of Revocation of Driving Privileges is likewise dubious. The certified mail receipt shows that the DMV notice was signed for on November 26, 2011. Setting aside any suggestion regarding the similarity of the signature on the receipt to the Respondent's signature on other documents, the explanation offered for how and when Mr. Jones received the notice is somewhat incredible. Despite the fact that the notice was signed as received prior to the Respondent's move from his old address, he denies having received that document before moving. That in and of itself is not entirely unreasonable; however, the testimony that the notice fortuitously appeared some 7 to 8 months later at a new address

for which the Respondent did not complete change of address paperwork and did so just after he had completed his most recent medical certificate application stretches the bounds of believability.

Based on the foregoing, I find that the misrepresentations made by Mr. Jones in his two applications for medical certificates were made with knowledge of their falsity.

Having found that the Administrator has established all the elements of intentional falsification by a preponderance of evidence, I further conclude, consistent with the discussions above, that the Respondent has failed to establish the affirmative defense of mistake.

The Respondent has also raised as an affirmative defense the recent passage of the Pilot's Bill of Rights, and argues that in passing the Pilot's Bill of Rights, Congress specifically found the medical application process in general and question 18(v) in particular to lack clarity. Initially, Respondent's counsel filed a written motion objecting to my consideration of the application form itself, then at hearing stipulated to admission of the applications without objection. As I now understand counsel's argument, he appears to suggest that the Pilot's Bill of Rights essentially dictates a per se finding that question 18(v) and the application for medical certificate as a whole are confusing and, therefore, as a matter of law, no finding of intentional falsification can be upheld.

Contrary to that assertion, I find no evidence of such specific findings by Congress in the text of the Pilot's Bill of Rights or in the limited *Congressional Record*. In the Pilot's Bill of Rights, Congress did direct an assessment be made by the Comptroller General of the medical certification process and the associated forms and standards. Thus far, no such assessment has been undertaken. Certainly I do not find that the Pilot's Bill of Rights establishes any black letter law that would dictate findings as suggested by counsel. Until or unless such changes to the law are enacted, I must rely on the established Board precedent in making my determinations.

In this case, a key issue is whether the Respondent was confused by the medical application and whether that confusion led to a mistaken rather than knowingly false submission. Consistent with my earlier discussions, I find that all the elements of intentional falsification are established by a preponderance of reliable, probative and credible evidence. I further find that the Respondent has not established by a preponderance of evidence an affirmative defense based upon passage of the Pilot's Bill of Rights.

With regard to the alleged violations of Federal Aviation Regulation Section 61.15(e), the Respondent stipulates that he did not report two motor vehicle actions to the FAA Civil Aviation Security Division within 60 days of the alcohol-related motor vehicle actions. In this case, the triggering motor vehicle

actions were his November 4, 2011 conviction for DUI alcohol first offense and his subsequent driving privilege revocation beginning on November 26, 2011. As noted in my previous discussion, I find his explanation regarding when the Respondent became aware of the driver's license revocation and what he understood regarding the disposition of the charges against him to be less than credible and not supported by substantial evidence. Nor is his testimony that he did not realize that he had to report the actions a defense to the failure to report. Thus, I find that a preponderance of reliable, probative and credible evidence establishes violations of Federal Aviation Regulation Section 61.15(e).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now, based on the foregoing, I make the following findings as to the specific allegations in the complaint. And when I refer to the complaint, I am referring to at this point the Acting Administrator's Second Amended Emergency Order of Revocation.

As noted previously, the Respondent admitted allegations in paragraphs 1, 2, 3, 7, 8, and 9 in part. With respect to 9, admitted that the information was incorrect but not intentionally false. So, for our purposes, I will deem those as established and make positive findings with respect to those paragraphs.

With respect to paragraph 4, I find that the evidence established that on or about November 26, 2011, the Respondent's

driver's license was revoked by the State of Nevada.

Paragraph 5, I find that the conviction and revocation referenced in paragraphs 3 and 4 of the allegations are alcohol-related motor vehicle actions which the Respondent was required to report to the FAA Civil Aviation Security Division within 60 days of the motor vehicle actions.

With respect to paragraph 6, I find that incident to paragraphs 3 through 5 of the complaint, the Respondent did not report the motor vehicle actions within the 60-day reporting period.

With respect to paragraph 9, I find that incident to paragraph 2 of the complaint as it relates to the July 14, 2011 medical application, and paragraphs 2 through 4 of the complaint as it relates to the July 16, 2012 medical application, the Respondent's answer to item 18(v) on those applications was not correct.

As to paragraph 10, I find that incident to paragraphs 2, 8 and 9 of the complaint regarding the July 14, 2011 medical application, and paragraphs 2 through 4 and 8 and 9 of the complaint as it pertains to the July 16, 2012 medical application, the FAA relied upon the information provided by the Respondent in response to item 18(v) on the applications.

With regard to allegation number 11, I find that incident to paragraphs 2, 7 and 8 of the complaint as it relates to the July 14, 2011 medical application, and paragraphs 2 through

4 and 7 and 8 of the complaint as it relates to the July 16, 2012 medical application, the Respondent's answer to item 18(v) on the applications was intentionally false.

With respect to paragraph 12, I find that incident to paragraphs 2, 7, 8 and 11 of the complaint as it relates to the July 14, 2011 medical application, and paragraphs 2 through 4 and 7, 8 and 11 of the complaint as it relates to the July 16, 2012 medical application, the information provided by the Respondent in response to item 18(v) was material, in that an airman medical certificate was issued to the Respondent without consideration of his actions, as described in paragraph 2 pertaining to July 14, 2011 medical application and paragraphs 2 through 4 of the complaint related to the July 16, 2012 medical application.

With respect to allegation number 13, I find that on item 20 of the application forms referenced in paragraph 7 of the complaint, the Respondent certified that the entries were complete and true, knowing that the entries and certifications were false.

Based upon those enumerated findings, I conclude that the Respondent violated Section 61.15(e) of the Federal Aviation Regulations in that he failed to report alcohol-related motor vehicle actions to the FAA Civil Aviation Security Division within 60 days, and that Respondent violated Section 67.403(a)(1) of the Federal Aviation Regulations in that he made intentionally false statements on applications for medical certificates dated July 14, 2011 and July 16, 2012, respectively.

Having found that the Administrator has proven all of the allegations in the Administrator's complaint by a preponderance of the reliable, probative and credible evidence, I now turn to the sanction imposed by the Administrator in this case.

On August 3rd, 2012, Public Law 112-153, known as the Pilot's Bill of Rights, was signed into law by the President of the United States. The law applies to all cases before the National Transportation Safety Board involving reviews of actions of the Administrator of the Federal Aviation Administration to deny airman medical certification under 49 United States Code, Section 44703, or to amend, modify or suspend or revoke airmen certificates under Title 49, United States Code, Section 44709. The law became effective immediately upon its enactment.

The Pilot's Bill of Rights specifically strikes from 49 United States Code, Section 44703 language that provides that in cases involving airman certificate denials, the Board is bound by all the validly adopted interpretations of law and regulations the Administrator carries out unless the Board finds that an interpretation is arbitrary, capricious or otherwise not according to the law.

The Pilot's Bill of Rights also strikes from 49 United States Code, Sections 44709 and 44710 language that in cases involving amendments, modifications, suspensions or revocations of airman certificates, the Board is bound by all validly adopted

interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section, unless the Board finds an interpretation is arbitrary, capricious or otherwise not according to law.

While I am no longer bound to give deference to the Federal Aviation Administration by statute, that agency is entitled to the judicial deference due to all other Federal administrative agencies under the Supreme Court decision in *Martin v. Occupational Safety and Health Review Commission*, which can be found at 499 U.S. 144, 111 S.Ct. 1171. In applying the principle of judicial deference to the interpretations of laws, regulations and policies that the Acting Administrator carries out, I must analyze and weigh the facts and circumstances in each case to determine if the sanction selected by the Acting Administrator is appropriate.

In the case before me, the Administrator has argued that the appropriate sanction based on sanction guidelines and past precedent is revocation of any and all airman and medical certificates. The Administrator further suggests that revocation is appropriate in any case where, as here, the violation goes to a lack of qualifications.

The Respondent made no argument with respect to the deference due the Administrator, but has argued that the evidence establishes only that the Respondent provided mistakenly incorrect

rather than intentionally false information and that revocation is therefore not an appropriate sanction.

Now, Board precedent firmly establishes that even one intentional falsification compels the conclusion that the falsifier lacks the necessary care, judgment and responsibility required to hold any airman certificate. That precedent stems from the case of *Administrator v. Barry*, NTSB Order EA-2689, and that case was decided in 1988. Since 1988, the Board has found and continues to find that even one intentional falsification compels the conclusion that the falsifier lacks the necessary care, judgment and responsibility required to hold any airman certificate. I therefore find that the sanction sought by the Administrator is appropriate and warranted in the public interest in air commerce and air safety. Therefore, I find that the emergency order, the complaint herein, must be and shall be affirmed as issued.

ORDER

IT IS HEREBY ORDERED that the Emergency Order of Revocation, the complaint herein, be and is hereby affirmed as issued, that Respondent's airline transport pilot certificate number 002718670 and first-class medical certificate and any other certificate held by him be, and hereby are, revoked.

This Order is entered this 12th day of December 2012, at Washington, D.C.

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STEPHEN R. WOODY

Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE WOODY: Now, Mr. Jones, in light of my findings, you have certain appeal rights. I'm sure -- I assume that your counsel has spoken with you about those appeal rights in the event that those came into play here. I also have for you, and I would hand a copy of that to counsel.

Mr. Lamonaca, if you don't mind retrieving a copy of that?

So your counsel can show that to you and explain that to you, but that sets forth your rights on appeal and the timelines. As I'm sure Mr. Lamonaca will explain, the timelines are very important because, absent a showing of good cause, any late filing

of an appeal will be grounds for denial of that appeal. So you don't want to miss the timelines.

Certainly you have the opportunity to exercise those appeal rights if you desire to do so, and the full Board would then make a decision about whether or not they believe that the decision that I made in this case is the right and appropriate one based on the evidence before me. All right.

I'll hand a copy of these appeal rights or I'll provide a copy to the Administrator's counsel just so that you have that and you know what those appeal rights are and what I've provided to the Respondent in this case.

All right. Counsel, let me -- I'll ask both of you. Is there anything that you believe I misspoke on or need to be addressed at this point with respect to my decision?

MS. DOUGLAS: I believe that's about as thorough a bench decision as I've heard. I can't add anything to it, can't correct anything.

ADMINISTRATIVE LAW JUDGE WOODY: Mr. Lamonaca, anything that -- at this point?

MR. LAMONACA: Nothing at this point, Your Honor.

ADMINISTRATIVE LAW JUDGE WOODY: All right, thank you.

All right. Mr. Jones, I wish you the best of luck in the future. And with that, this hearing is adjourned.

(Whereupon, at 11:09 a.m., the hearing in the above-entitled matter was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Jason Latraile Jones

DOCKET NUMBER: SE-19389

PLACE: Washington, D.C.

DATE: December 12, 2012

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

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Timothy J. Atkinson, Jr.
Official Reporter