SERVED: September 21, 2001

NTSB Order No. EA-4912

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 19th day of September, 2001

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. JAMES R. CAREY, Respondent.	Docket SE-15803

OPINION AND ORDER

The respondent has appealed from the written initial decision Administrative Law Judge William A. Pope, II, issued in the proceeding on December 27, 2000, following an eleven-day evidentiary hearing held in several sessions that concluded on July 27, 2000.[1] By that decision, the law judge affirmed an emergency order of the Administrator that revoked any airman certificate held by respondent, including Airline Transport Pilot ("ATP") Certificate Number 1607651, for his alleged violations of

[1]A copy of the initial decision is attached. Attached to it is a copy of the Administrator's Third Amended Order of Revocation, which served as the complaint in this action.

sections 61.59(a)(1) and (2) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 61.[2] For the following reasons, the respondent's appeal will be denied.[3]

This is the sixth falsification case to come to the Board involving the respondent's alleged efforts to circumvent, by having other instructors attest (on copies of FAA Form 8710-1) to the provision of student training they had not performed,[4] an FAA policy that forbade him, in his capacity as an Airline Transport Pilot Examiner ("ATPE"),[5] from both training and flight-testing applicants for type ratings.[6] The law judge found that the

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[2]FAR §§ 61.59(a)(1) and (2) provide as follows:

> **§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.**
> (a) No person may make or cause to be made:
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, authorization, or duplicate thereof, issued under this part;
> (2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part….

[3]The respondent waived expedited processing of his appeal, to which the Administrator filed a reply in opposition.

[4]The top of the second page of FAA Form 8710-1 contains a section entitled "Instructor's Recommendation." It states, "I have personally instructed the applicant and consider this person ready to take the test."

[5]An ATPE is a specific type of Designated Pilot Examiner ("DPE") authorized by the Administrator to test other airmen for various flight certificates and ratings.

[6]See Administrator v. Richardson, NTSB Order No. EA-4820 (2000); Administrator v. Richards, NTSB Order No. EA-4813 (2000); Administrator v. Vecchie, NTSB Order No. EA-4816 (2000); Administrator v. Holland, NTSB Order No. EA-4817 (2000); and

Administrator had carried her burden of establishing that, as to the Falcon 10 type-rating applications of seven airmen, respondent had violated FAR section 61.59 by supplying the students with application forms that already bore the instructor's endorsement of Paul Jay Richardson, an individual who had not participated, personally or otherwise, in their flight training.[7] The law judge also found the Administrator's evidence sufficient to show that the respondent had further falsified the applications of fifteen Falcon type-rating applicants, including the seven with Mr. Richardson's "endorsement," by indicating that he had reviewed the applicants' pilot logbooks, when he had not, and by certifying, ostensibly on the basis of that review, in effect, and among other things, that the logbooks contained all necessary instructor signatures[8] and reflected the applicants' satisfaction of all requirements relevant to their receiving the type rating sought.

The law judge's decision thoroughly discusses the evidence adduced by the parties and correctly concludes, we think, that the respondent was shown to have intentionally falsified the airman applications, at least as to the second basis on which the

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Administrator v. Luginbuhl, NTSB Order No. EA-4821 (2000).

[7]The law judge apparently believed that the respondent in this way "caused" the applications to reflect intentionally false endorsements. Our decision in Administrator v. Richardson, NTSB Order No. EA-4820 (2000), infra, contains Mr. Richardson's explanation as to why he signed the blank applications.

[8]FAR sections 61.63(d)(2) and (3) require logbook endorsements attesting that an additional type-rating applicant has demonstrated the requisite knowledge and proficiency.

Administrator's charge is predicated.[9] As to the false endorsements on the applications Mr. Richardson pre-signed in blank, however, we are not persuaded that those false entries were material, as we discuss below.

It is clear from the record that no instructor's recommendation was required on the seven applications for additional type ratings on which Mr. Richardson's signature appears, a circumstance the parties view quite differently on the issue of materiality. Respondent maintains that the lack of a requirement for an instructor's recommendation precludes a finding that the entry was material, while the Administrator contends that the entry should be deemed material because it had the capacity to influence the judgment of the FAA on whether to issue the rating. We think the Administrator's argument must fail in the context of this case.

As a starting point, it is not clear to us how the existence of an unnecessary instructor's endorsement could influence the FAA's judgment on whether to grant or deny an application, when it concedes that the absence of one would have no bearing on the matter. Indeed, since an examiner's certification on a type-rating application attests the requisite instructor endorsements in the applicant's logbook, it seems to us that the fact that an instructor had also endorsed the application would have to be viewed as irrelevant to whatever review process to which the

[9]Falsity, knowledge, and materiality -- the evidence must be sufficient to support each one of these elements of an intentional falsification.

application might thereafter be subjected. In this connection we note that unlike the potential with a pilot logbook, where falsely entered hours that were not needed to establish qualification for one application might be subsequently relied on to show compliance with some other Part 61 requirement,[10] no claim is made here that the gratuitous instructor endorsements on the applications in this case would be germane to any purpose associated with the applicants' future demonstrations of currency or eligibility for licensing advancement.

These factors lead us to conclude that the false instructor endorsements can not reasonably be found to have had the capacity to influence the FAA's judgment on whether to grant or deny the applications on which they appeared.[11] They simply did not convey or represent information that was of decisional weight in determining the qualification of the applicant to possess the rating at issue or any other license-related matter. The Administrator does not argue, for example, that a type-rating applicant must be trained and examined by different individuals, only that the respondent had not been authorized to serve in both capacities.[12] Moreover, the Administrator does not argue that

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[10]See Administrator v. Cassis, 4 N.T.S.B. 555 (1982).

[11]After re-examining the issue, we hereby disapprove dicta in Administrator v. Holland, NTSB Order No. 4817 (2000), p. 6, n.7, which suggests agreement with the contention that an extraneous endorsement should be viewed as capable of influencing a licensing judgment.

[12]The fact that having someone else endorse the applications as instructor would help shield from discovery the fact that respondent had both trained and examined the applicants does not

respondent's noncompliance with policies governing his performance as an ATPE automatically draws in question the adequacy of the training or testing his students received.[13] In short, we are not convinced that the false instructor endorsements were material, as that term is understood in the context of a falsification charge.

By contrast, we entertain no doubt as to the materiality of the numerous falsifications catalogued by the law judge with respect to the 15 designated examiner reports ("DER") on which the respondent falsely certified that he had: "…personally reviewed this applicant's logbook, and certify that the individual meets the pertinent requirements of FAR 61 for the pilot certificate or rating sought." Although respondent concedes that he looked at no logbook for any of these applicants, he maintains, citing Administrator v. Crocker, NTSB Order No. EA-4565 (1997), that he could nevertheless certify that he had done so because he reviewed, in effect, other reliable records of the applicants' training for the ratings or certificates whose issuance he was endorsing. We disagree.

Even if we were to conclude, notwithstanding the Administrator's convincing showing to the contrary in her reply,

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make the entries material, as the Administrator appears to argue. Respondent's actual motives for having the applications endorsed when they did not need to be would be reflective of his intent, not of the importance of the entries to a licensing decision.

[13]In this regard we note respondent's unrebutted assertion that no action has been taken by the Administrator to compel the surrender of any of the type-rating certificates of the seven airmen on whose applications the Richardson endorsement appeared.

that the records respondent says he reviewed were reliable, respondent's certification would still be false. The certification respondent signed contemplates an objective examination of the submission *by* an applicant of documentation, whether in the form of a logbook or other reliable record or both, that demonstrates, through, among other things, the signoffs of *others* authorized to attest to the provision and completion of required flight and ground instruction, the airman's fulfillment of all relevant Part 61 requirements. It does not envision an examiner's self-serving assurance that training records he created for the applicant so demonstrate.[14] Because respondent admittedly failed to look at any of the *applicants'* records, reliable or otherwise, his false certification that he had, coupled with the law judge's adverse credibility assessment of respondent's disavowal of any intent to mislead the Administrator or circumvent known procedures, provided a sufficient basis for the intentional falsification charge the law judge upheld.

[14]The training record the respondent in Crocker relied on instead of a logbook was presented to him, not produced by him.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and

2. The initial decision, except to the extent it is inconsistent with this opinion and order, is affirmed.

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