SERVED: April 29, 1994

NTSB Order No. EA-4156

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 17th day of April, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. THEODORE R. ROBBINS, Respondent.	)	Docket SE-12247

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on April 16, 1992, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator finding that respondent had violated 14 C.F.R. 61.15 and

[1]The initial decision, an excerpt from the hearing transcript, is attached.

67.20(a)(1).[2] The complaint alleged that respondent failed to report, on six medical applications over an approximately 2 1/2 year period, his conviction for possession of, with intent to distribute, cocaine. He had answered no to each application's question regarding "other [than traffic] convictions."

The law judge affirmed the Administrator's order revoking all respondent's airman certificates, except respondent's airframe and powerplant (A&P) certificate.[3] And, although he affirmed the Administrator's order, the law judge opined that respondent's conviction for possession of cocaine with intent to distribute did not, standing alone, justify revocation, as respondent had not used an aircraft in the commission of the

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[2]§ 61.15, as pertinent, provides:

> (a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for -
>
> > (1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of final conviction; or
> >
> > (2) Suspension or revocation of any certificate or rating issued under this part.

§ 67.20(a)(1) provides:

> (a) No person may make or cause to be made--
>
> (1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part[.]

[3]The A&P authority is not a separate certificate, but a rating attached to a mechanic's certificate. Although the Administrator did not appeal the law judge's decision that respondent should be permitted to retain his A&P rating, we note our disagreement with the law judge's rationale for allowing respondent to retain this authority (Tr. at 221).

offense. The Administrator's appeal seeks reversal of that conclusion.[4] Respondent seeks dismissal of the complaint. We deny respondent's appeal and grant that of the Administrator.

Respondent admitted the drug conviction. Documentary evidence read into the record at the hearing indicated that, at the time respondent agreed to participate in a scheme to sell cocaine, his health was poor and his finances problematic. Tr. at 174 (quoting presentencing letter from probation officer, the language of which was approved by respondent). At the hearing, respondent testified that he was protecting his step-son, and that the cocaine belonged to his step-son. He agreed, however, that he cooperated in the "enterprise." Id. at 175 and Exhibit C-1 at 16. When arrested, he was found with $2,780, obtained as a result of the drug deal. Tr. at 175.

Respondent denied the § 67.20(a)(1) charge of intentionally falsifying applications to avoid reporting this conviction, and his defense at the hearing focused on this charge. He argued, among other things, that the application was confusing, that he had used other means to report the conviction to the FAA, and that he had properly completed various airman applications during this time. Respondent testified that he wrote and called the FAA Atlanta office and told an attorney there. An FAA inspector, Terry Exley, also testified on respondent's behalf that respondent informed him of the conviction when he applied to take

[4]We disagree with respondent's contention that the Administrator may not appeal this legal conclusion. And, regardless of whether the Administrator had done so, we would have addressed this finding.

a flight engineer exam. Tr. at 58.

Respondent raises a number of procedural challenges to the law judge's decision that we will address first. Contrary to his suggestion, we see no denial of respondent's right to a fair hearing in the law judge's refusal to grant a continuance. Respondent's late hiring of counsel does not provide good cause for a last-minute delay of the hearing.[5] The order of hearing indicated that a continuance would not be granted within 7 days of the hearing "except for extraordinary circumstances, shown by affidavit."

Nor was it error for the law judge not to require the Administrator to produce respondent's airman file (in the Administrator's possession at the hearing) for counsel's review at the hearing or to deny respondent's Notice to Produce at Trial (directed to various applications for certificates), served just prior to the hearing. Respondent had a full opportunity to obtain these materials through pre-hearing discovery, as authorized by our rules, in the 6 months between the Administrator's order and the hearing. Moreover, it is not at all clear that these materials were not available to respondent before or at the hearing. See Affidavit of Raymond Veatch, attached to the Administrator's reply to respondent's motion to strike, and Tr. at 170 (pursuant to respondent's earlier Freedom of Information Act request, the Administrator had produced his entire file). Respondent attached to his appeal copies of six

[5]See Administrator v. Dudek, 4 NTSB 385 (1982), especially footnote 5, and Administrator v. Kuhn, NTSB Order EA-4038 (1993).

airman applications (App. 4-9), each of which answered yes to a question regarding drug convictions. This material is intended to buttress his substantive claim that no falsification was intended and that it was the medical application only that confused him (as well as support his procedural claim of prejudice from the inability to access documents in the FAA's file). However, the law judge considered this substantive claim (see Tr. at 198).

Respondent also moves to strike material in the Administrator's reply addressing these issues, but we see nothing susceptible to a motion to strike. The Administrator is offering reply facts and argument, and the motion to strike offers little more than respondent's rebuttal.

We similarly see no basis in respondent's claim that the law judge exceeded his role as an impartial trier of fact. His questioning of respondent's witness Exley was within its proper scope -- the law judge is entitled to ask questions that may improve his ability to ascertain the reliability of testimony. He did nothing more here than his role as trier of fact permits.

In fact, the law judge's rulings were greatly favorable to respondent overall. For example, he made allowances for respondent's earlier pro se status, accepting his late answer and, at the hearing, allowed respondent to offer witnesses unknown to the Administrator until the moment they were sworn, despite the Administrator's outstanding discovery request to be informed of intended witnesses. Tr. at 68.

Turning to the merits, we see one substantive issue as

controlling. That is, does the crime of which respondent was convicted warrant the sanction of revocation? The law judge held it did not, making a distinction between crimes committed with aircraft and those without. We agree with the Administrator that this distinction is invalid.

We recently noted, in a case directly on point:

> The Board has repeatedly expressed the view that revocation should be upheld on charges under section 61.15 without regard to aircraft involvement if the drug offense underlying the charge is serious enough to draw in question the airman's qualification to hold a certificate; that is, did it demonstrate a lack of the necessary care, judgment, and responsibility a certificate holder must possess.

Administrator v. Piro, NTSB Order EA-4049 (December 15, 1993) at 3, citations omitted. In that case, the Board affirmed revocation solely on the § 61.15 violation (a related § 67.20(a)(1) allegation of failure to report the conviction on a medical application having been dismissed). We stated:

> In our judgment, any drug conviction establishing or supporting a conclusion that the airman possessed a controlled substance for profit or commercial purposes is a flagrant one warranting revocation under the regulation. An individual who knowingly participates in a criminal drug enterprise for economic gain thereby demonstrates such a disregard for the rights and lives of others that he may reasonably be viewed as lacking the capacity to conform his conduct to the obligations created by rules designed to ensure and promote aviation safety.

Id. at 4.

In the case before us, the same conclusion is compelled. Respondent cooperated, for economic gain, in the drug selling enterprise. This behavior shows, at best, extremely poor judgment, and for the reasons set forth in Piro, calls into question respondent's qualification to hold any airman

certificate.[6] Accordingly, we grant the Administrator's appeal seeking reversal of the law judge's conclusions on this point.[7]

In light of our conclusion that the § 61.15 violation alone warrants revocation of all respondent's airmen certificates, respondent's concerns regarding the law judge's handling of the § 67.20(a)(1) charge require little, if any, discussion. Although he contends that the Administrator did not meet his burden of proof and that the evidence does not support the law judge's ruling, we disagree.

To uphold a charge of intentional falsification, the Administrator must prove a false representation, in reference to a material fact, made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976). Respondent admits that his answers were false. The Administrator established the materiality of the false answers, and on appeal respondent offers no arguments to counter this finding, well established in case law. See Administrator v. Twomey, 5 NTSB 1258, 1261 (1986) (the false statement had a natural tendency to influence or was

[6]And, as we noted in Piro (at footnote 5), revocation for this violation of § 61.15 is consistent with the Administrator's enforcement guidelines.

[7]Respondent suggests that the rule may not be applied here because the conviction occurred more than 1 year before the Administrator's order. As the Administrator notes, however, this limitation is in the rule itself, and clearly applies only to the Administrator's action against new applications, as opposed to existing certificates. Compare § 61.15(a)(1) ("Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of final conviction) and § 61.15(a)(2) ("Suspension or revocation of any certificate or rating issued under this part"). See, e.g., Administrator v. Adler, NTSB Order EA-4048 (December 22, 1993) at 5.

capable of influencing the decision whether to issue the certificate and the false fact, if known by the medical examiner, would indicate a disqualifying or potentially disqualifying impairment that would invite further inquiry). Precedent also establishes that the Administrator's case was adequate to shift the burden of persuasion to respondent to explain the false statements. See, e.g., Administrator v. Horvath, 3 NTSB 3223, 3230 (1981), and the issue for the law judge was whether respondent knew he was giving false answers. In reaching his decision, the law judge was required to assess respondent's credibility. He did so, and found that respondent had failed to rebut the Administrator's showing, via circumstantial evidence, that respondent knew his answers were false.

The issue for us, on review, is not whether other conclusions are possible, but whether there is sufficient basis to discard the law judge's conclusion. See Administrator v. Pullaro, NTSB Order EA-3495 (1992) at 3 (absent "arbitrariness, capriciousness or other compelling reasons" we will not disturb a law judge's credibility determination); and Administrator v. Klock, NTSB Order EA-3045 (1989) at 4 (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth"). Respondent gives us insufficient reason to reject the law judge's finding (Tr. at 220) that respondent's explanation was not credible. Not only did the law judge have the opportunity to observe respondent at the hearing, the law judge questioned respondent extensively regarding both his intentions

and his understanding of the application questions.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's motion to strike is denied;

2. The Administrator's appeal is granted, and the initial decision is modified as set forth in this opinion;

3. Respondent's appeal is denied; and

4. The revocation of respondent's airman certificates shall begin 30 days from the date of service of this order.[8]

VOGT, Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[8]For the purposes of this order, respondent must physically surrender his certificates to an appropriate representative of the FAA pursuant to FAR § 61.19(f).