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NTSB Order No. EA-4678

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 29th day of June, 1998

JANE F. GARVEY, Administrator, Federal Aviation Administration, Complainant, v. CHESTER A. PITTMAN, III, Respondent.	)	Docket SE-15201

OPINION AND ORDER

The Administrator and the respondent have both appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding at the conclusion of an evidentiary hearing held on May 27, 1998.[1] By that decision, the law judge sustained the Administrator's allegation, in an emergency order of revocation, that respondent had violated

[1]An excerpt from the hearing transcript containing the initial decision is attached.

section 61.14(b) of the Federal Aviation Regulations ("FAR," 14 CFR Part 61).[2] On appeal, the Administrator objects to the law judge's modification of her order to provide for a nine-month suspension of respondent's pilot certificate, rather than revocation, and the respondent contends that, if a violation finding is warranted at all, any sanction for it should be less severe than the one the law judge imposed. For the reasons discussed below, we find merit only in the Administrator's appeal.

The Administrator's April 10, 1998 Emergency Order of Revocation, as amended at the hearing, alleges, among other things, the following facts and circumstances concerning the respondent:

> 1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot Certificate No. 245436457.
>
> 2. At all times mentioned herein, you performed flight crew duties for Grand Strand Aviation, Inc., a Part 135 certificate holder.
>
> 3. At all times mentioned herein, an employee that performs flight crew duties is performing a covered function, as prescribed [by] Appendix J, Section II (14

[2]FAR section 61.14(b) provides as follows:

> **§ 61.14 Refusal to submit to a drug or alcohol test.**
>
> * * *
>
> (b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—
>
> (1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and
>
> (2) Suspension or revocation of any certificate or rating issued under this part.

C.F.R. Part 121, Appendix J, Section II.)

4. On or about May 21, 1997, you were late reporting for flight crew duties at Raleigh Durham Airport, North Carolina for a flight to Wilmington, N. Carolina.

5. On or about May 21, 1997, after completing the above-described flight, you spoke to Francis Goggin, Chief Pilot of Grand Strand Aviation, and told him that you had overslept through two alarm clocks and that you had consumed alcohol the night before.

6. Based on the behavior described in paragraphs 4 and 5 above, Francis Goggin had a reasonable suspicion to believe that you had violated alcohol misuse prohibitions.

7. On or about May 21, 1997, you were notified orally by Francis Goggin that you were required to submit to a reasonable suspicion alcohol test and that you were to report to LabCorp for the test.

8. At all times mentioned herein, a reasonable suspicion alcohol test is an alcohol test required by Part 121, Appendix J, Section III. D. (14 C.F.R. Part 121, Appendix J, Section III. D.).[3]

9. At all times mentioned herein, engaging in conduct that clearly obstructs the testing process is considered a refusal to submit to the required alcohol test as set forth in Part 121, Appendix J, Section I (14 C.F.R. Part 121, Appendix J, Section I.)[4]

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[3]The referenced appendix, which is entitled "Alcohol Misuse Prevention Program," states, in section D., that "[a]n employer shall require a covered employee to submit to an alcohol test when the employer has reasonable suspicion to believe that the employee has violated the alcohol misuse prohibitions in § 65.46a, 121.458, or 135.253 of this chapter." The misuse prohibition in § 135.253 relevant to this case is section 135.253(b), which states, in part, that "[n]o covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater."

[4]Appendix J defines a refusal to submit in the following language:

> *Refuse to submit* (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this appendix, or engages in conduct that

> 10. On or about May 21, 1997, you reported to LabCorp, signed a consent form, and took a breath alcohol screening test, which required a confirmation breath alcohol test.
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> 11. While waiting for the confirmation of the test described in paragraph 10 above, you removed the test form from the computer printer, turned off the computer-processing unit, and exited the collection facility.
>
> 12. Your conduct described in paragraph 11 above, clearly obstructed the testing process and you thereby refused to submit to the required alcohol test.

The law judge found that all of these allegations had been proved by the Administrator.[5] In his appeal, respondent, in effect, challenges only the finding that his employer had a reasonable suspicion to request that he take a breath test for alcohol. Before turning to that argument, we will address the two procedural objections raised by respondent.

Respondent contends that the Administrator's pursuit of revocation in this case is a subterfuge to avoid dismissal of a complaint in which a notice of proposed certificate action was not sent to him within six months after the FAA learned of the circumstances on which the regulatory charge rests. We find no error in the law judge's denial of respondent's motion to dismiss

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clearly obstructs the testing process.

[5]Counsel for respondent asserts that the law judge "specifically ruled that he was making a credibility determination in favor of Respondent" (Brief at 11). We see no such ruling in his decision. Although the law judge did indicate that, with respect to sanction, he "was going to give [the respondent] somewhat the benefit of the doubt" (I.D. at 275), we construe that statement to reflect no more than the law judge's apparent sympathy for respondent, whom he believed, for reasons unexpressed, needed "to turn his life around," not an unqualified acceptance of all of his testimony as credible.

the complaint as stale.[6] While it is possible that a refusal to submit to an alcohol breath test could be shown not to warrant revocation, we have no hesitancy in expressing our view that an issue of lack of qualification would appear to inhere in every case in which such a charge has been made. A pilot who, contrary to clear regulatory mandate, does not cooperate with official efforts to assess his sobriety reveals a willingness to place personal interest above the public's in a matter of vital concern to air safety. Such a predisposition, in view of the contempt it shows for authority and for a lawful and necessary condition on the right to exercise the privileges of an airman license, effectively defines an individual who does not possess the care, judgment, and responsibility demanded of certificate holders.[7]

The respondent's second procedural objection is that the law judge erred by allowing the Administrator to amend his complaint at the hearing, pursuant to a motion filed five days earlier, by substituting, in paragraph 10, the clause "required a confirmation breath alcohol test," for the phrase "was positive."[8] Once again, we find no merit in the respondent's

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[6]Under the Board's stale complaint rule, 49 C.F.R. § 821.33, allegations of infractions that occurred more than six months prior to the Administrator advising a respondent of any pending charges may be dismissed unless an issue of lack of qualifications is presented.

[7]Moreover, unless revocation were the predictable consequence for such individuals, they could routinely escape accountability for alcohol misuse by simply refusing to be tested.

[8]Respondent suggests that the original allegation that the

position.

Since paragraph 11 of the complaint already referred to respondent's departure from the collection facility before the confirmation test had been performed, the amendment in paragraph 10 merely made explicit what previously had been implied; namely, that the respondent was required to take a confirmation test prior to leaving. It was well within the law judge's discretion to permit this amendment, as it did not negatively alter respondent's ability to defend himself against the single charge in the complaint. In fact, if respondent believed, before the amendment, that he had to defend against an allegation that he had misused alcohol, the amendment arguably should have lessened his anticipated defensive burden by laying any such ill-founded belief to rest.

Respondent's only challenge to the merits of the charge against him is an indirect one. He appears to concede that he refused to take the confirmation breath alcohol test but maintains that the refusal should be of no consequence because his employer did not have reasonable suspicion to direct him to

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breath alcohol screening test was "positive" was incorrect because the test only showed an alcohol concentration of .034, not .04 or above. It is the respondent who is mistaken in his reading of the allegation. The Administrator did not allege in his order or argue at the hearing that respondent's alcohol screening test established alcohol misuse; that is, that respondent had performed a safety-sensitive function while having an alcohol concentration of 0.04 or greater. Rather, we assume that the term "positive" referred, perhaps too obliquely, to the requirement in Part 121, Appendix J for a confirmation test whenever a screening test result is .02 or above.

take the test in the first place. We disagree.[9]

Appendix J in Part 121 does not undertake to define what constitutes "reasonable suspicion." It does, however, give employers guidance on the elements that should bear on a judgment respecting the necessity for testing (Id. at III, D. 2.):

> The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.

We think the respondent's employer's account of his telephone conversation with respondent on the morning of May 21, 1997, is fully consistent with this guidance and reflects more than enough information on which to base a reasonable suspicion.

Specifically, Grand Strand Aviation's Chief Pilot, Mr. Goggin, testified about the call as follows (Transcript at pp. 31-32):

> A. Well, I asked him why he was late. He said he, that they overslept. I asked him if they had alarms set. He said they had two of them, slept through them both. I then asked why he did not call.
> Q. Let me interrupt you for a second.
> A. Yes. Sure.
> Q. Were Mr. Pittman and [another Grand Strand pilot] sharing a room?
> A. Yes.
> Q. Where was the room?

[9]We must admit to some uneasiness about our authority, or at least the propriety of our exercise of authority, to review an employer's "reasonable suspicion" determinations, for the only cases in which we will be called upon to consider the issue will be those, such as this one, where the testing, without regard to the correctness of the judgment that initiated it, produced a result that indicated a significant, if not necessarily a prohibited, concentration of alcohol. In the non-criminal context of a Board proceeding, a party seeking to have this agency disregard competent evidence of such concentrations in light of the possibly faulty judgments in the ordering of the tests that produced them would face, at best, an uphill battle.

> A. We kept a room at Piedmont Aviation. We rented a room from them, right on the airport.
> Q. Okay. What else happened during this conversation?
> A. I asked him why he did not call me immediately to alert me that we had a late problem, so that I would have an answer for Airborne, if they called. He did not answer that question. I then asked him if he had been drinking the night before, and he said he had. I asked him how much he had drunk, and he did not tell me that. I asked him what time he went to bed, and I got no answer from that, or I don't know what time he went to bed.
> From these, I was suspicious that alcohol was involved in the oversleeping and being late.
> * * * * *
> Q. What do you mean when you say, these factors gave you the impression?
> A. Well, it made me suspicious. Yes.
> Q. Of what?
> A. That the alcohol was a factor in his behavior, in his being late.
> Q. Were you concerned it was in his system?
> A. Well, certainly. Yes.

We think Mr. Goggin's account reflects an adequate articulation of the observations on which he decided to send respondent for an alcohol test. The issue, as we understand it, is not whether the details Mr. Goggin acquired about respondent's behavior (admitted drinking, oversleeping thereafter through two alarm clocks, failing to report anticipated lateness, and evasiveness concerning the quantity of alcohol he had consumed) were enough to prove that respondent had violated alcohol misuse regulations, but, rather, whether that information, along with any reasonable inferences it raised, was sufficient to engender in Mr. Goggin a legitimate doubt as to respondent's compliance with those regulations. We think it was.[10]

[10]Contrary to the respondent's position on brief, we think it irrelevant, for purposes of this conclusion, that the other Grand Strand pilot was not sent for testing. We would point out, nevertheless, that Mr. Goggin appears not to have been able to

Although we have no precedent dealing with FAR section 61.14, we have, supra, discussed our reasons for believing that revocation would in most cases be the appropriate sanction for a refusal to submit to a breath alcohol test. None of the factors cited by the respondent[11] or relied on by the law judge (for example, respondent's violation-free record and the facts that he's only 28 and his conduct produced no accident), persuades us that revocation should not be imposed in this case.

We recognize that respondent, while waiting to take a confirmation test, may have become increasingly concerned, even panicky, over the future of his aviation career. However, we do not believe that any apprehensions respondent may have had in this regard excuse in any way the conduct that attended his exit from the testing room, the salient circumstances about which the initial decision is inexplicably silent.

Notwithstanding respondent's disavowal of any wrongful intent, it strains credulity to believe that his retrieval of his alcohol test consent form, his removal of the screening test

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speak with that individual until the next day, which would have been after the period within which a reasonable suspicion test for him could have been required.

[11]As we have indicated, we find nothing questionable about respondent's employer's reasonable suspicion determination; we do not agree, as respondent repeatedly insists, that he can be said to have voluntarily provided a breath sample when he had been directed by his employer to give one; it is of no significance that he may have mistakenly believed that a positive result on the screening breath test meant he was in violation of misuse regulations; and we perceive no basis in the record for respondent to have entertained "reasonable and legitimate concerns about the competency of the lab technicians who were

result printout, and his switching off the computer whose monitor displayed the results of the screening test did not represent a calculated, albeit a clumsy and ineffectual, effort to thwart the lab's ability to report alcohol findings respondent thought would adversely affect his career. Further, while the respondent may not, in his haste to depart, have intended to harm the lab technician who stood between him and the door to the testing room, his forceful removal of her hand from the doorknob, before he pushed her out of his way, caused her injury, and the door he opened into her knocked her to the floor. We think that respondent's apparent attempt to eliminate or destroy evidence of his visit to the alcohol testing center and his aggressive behavior in leaving there establish that his refusal to be tested for alcohol misuse occurred in the context of other conduct that reinforces the conclusion that the refusal itself demonstrates that respondent does not possess the care, judgment, and responsibility we expect of a certificate holder.

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testing him" (Res. Reply Brief at 7).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent’s appeal is denied;

2. The Administrator’s appeal is granted; and

3. The initial decision is affirmed to the extent it finds a violation of FAR section 61.14(b), and it is reversed to the extent it modified the Administrator’s emergency order to provide for a suspension instead of revocation.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. Vice Chairman FRANCIS submitted the following concurring statement:

I agree with the decision in this case that affirms the revocation of the respondent’s pilot certificate for refusal to submit to a reasonable suspicion alcohol test. However, I do not believe that we need to reach the issue of whether the circumstances presented here constitute adequate reasonable suspicion to order an employee to submit to an alcohol test. The issue is narrow and limited to whether the employee refused to submit to the second part of a required alcohol test. Having said that, I am comfortable with the discussion of the issue in footnote 9 of our opinion and order.