FLIGHTWATCH

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D.C. Circuit Court of Appeals Reverses the NTSB and Declares the Board Departed from Precedent without a Reasoned Explanation – But the Board Signals Its Intention to Continue to Favor the FAA

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I.
Prologue

This issue of Flightwatch will discuss the confusion that abounds at the NTSB about the elements required to be satisfied if the Federal Aviation Administration ("FAA") is to prevail in a claim against an airman alleging the airman made an intentionally false statement. The author of Flightwatch, together with co-counsel, tried the case, which is the subject of this of Flightwatch and is more than casually acquainted with the evidence that unfolded at trial.

The case we are about to discuss arose out of a claim that an airman gave an intentionally false statement in response to Question 18w on a medical application form. It is the conviction of the author that there is nothing wrong with the FAA requiring pilots to complete medical application forms. However, it is confusing to ask pilots questions about their driving history or record of convictions on a form that is ostensibly a medical application form. If the FAA wants information about the backgrounds of pilots in terms of whether they have been arrested or convicted or have been disciplined, then it may make more sense to have two forms: (1) a medical application form, and (2) a pilot background questionnaire. The current FAA Form 8500-8 sews confusion in the minds of pilots who ponder whether they are required to tell the FAA they have had convictions or administrative actions on a form that is ostensibly designed to determine whether airmen are physically and mentally fit to operate an aircraft.

II.
The Facts of the Underlying Case

The airman was convicted on multiple counts of bribery on February 26, 1997.[i] About one month later, he completed an FAA medical application form (Form 8500) and gave a negative response to Question 18w concerning any "[h]istory of non-traffic conviction(s) (misdemeanors or felonies)." [FAA Form 8500-8 (7-92)].[ii]

On May 2, 2007, and on March 17, 2008, the airman completed medication application forms and gave negative responses to Question 18w.[iii]

In August of 2008, the FAA issued an Emergency Order of Revocation revoking the airman's medical as well as airman's certificates citing as a basis for its action 14 C.F.R. § 67.403(a)(1) which states: "No person may make or cause to be made … [a] fraudulent or intentionally false statement on any applications for a medical certificate."[iv] The airman appealed the emergency order, and a trial was convened before Judge Fowler of the National Transportation Safety Board ("NTSB") on October 2, 2008.[v] The FAA placed into evidence a certified copy of the bribery conviction, the airman's 1997, 2007 and 2008 medical application forms along with the instructions that accompany the form.[vi] After resting, the airman's counsel made a motion to dismiss the case on the theory that the FAA had failed to make out a *prima facie* case.[vii] Judge Fowler denied the airman's motion to dismiss, and then the airman testified. The airman testified that he believed Question 18w on the

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medical application form was concerned with alcohol or drug related offenses.[viii] In fact, he was first informed of this position in 1990 when he was concerned about having shot a dog and the consequences that might flow from that event. More recently, the airman had asked his aviation medical examiner in 2007 and 2008 about the question, and he was told the FAA was only concerned with drug or alcohol-related offenses.[ix]

The airman gave candid testimony to the judge that he was painfully aware of his criminal convictions, but it was something he would not lie about or try to hide.[x] On cross-examination by the FAA attorney, the airman admitted he never read the instructions that accompany the medical application form until the day before the hearing.[xi] The instructions that accompany the medical application form declared: "Letter (w) … asks if you have ever had any other (non-traffic) convictions (e.g., assault, battery, public intoxication, robbery, etc.). If so, name the charge for which you were convicted and the date of the conviction in the EXPLANATIONS box." [FAA Form 8500-8 (3-99)].[xii] The airman admitted he knew he had a non-traffic conviction when he completed the applications in 1997, 2007 and 2008, and that today he would answer the questions "absolutely yes."[xiii]

After the hearing, Judge Fowler rendered his oral initial decision and noted that the central question was, "What is in the man's mind?"[xiv] Judge Fowler found that the airman was a credible witness who was quite forthright and candid in his testimony.[xv] Because the airman understood from his discussions with the aviation medical examiners that Question 18w only related to drug or alcohol convictions, the court concluded that the airman had successfully rebutted the administrator's *prima facie* case of intentional falsification.[xvi] Accordingly, the FAA's Emergency Order of Revocation was reversed.[xvii]

III.
The FAA's Appeal to the NTSB

The FAA appealed the initial decision of Judge Fowler to the NTSB claiming, among other things, (1) that Judge Fowler erred in finding that the airman did not have the intent to falsify his medical application form, and (2) that Judge Fowler's finding that the airman did not know his answers were false was contrary to the weight of the evidence.[xviii] The NTSB reversed Judge Fowler and made the following declarations:

> We find that the law judge erred in concluding that respondent's failure to include his conviction on his medical application due to his confusion concerning Question 18w did not constitute intentional falsification.
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> * * *
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> We also find that the law judge erred in concluding that the Administrator was required to establish that respondent had a specific intent to deceive the administrator in completing his application….[xix]

The Board, in its first comments reversing Judge Fowler, cited two cases that are not applicable. They were *Administrator v. Boardman*, N.T.S.B. Order No. EA-4515 (1996), and *Administrator v. Sue*, N.T.S.B. Order No. EA-3877 (1993).[xx] The *Boardman* case merely stands for the proposition that the airman completing a medical application form must consider the questions carefully. The *Sue* case merely states that the questions about traffic and other convictions on the form are not confusing to a person of ordinary intelligence.

With regard to the second error attributed to Judge Fowler by the Board, the Board relied upon the case of *Administrator v. McGonegal*, N.T.S.B. Order No. EA-5224 (2006), where the court repeatedly applied the wrong standard of law, something Judge Fowler did not do in the underlying case.[xxi] To be clear, what the Board did was find several cases that were not directly on point and employ those cases to reverse the decision of a fully capable and experienced judge who made credibility findings in favor of the airman. The accuracy of this statement will be verified as one ponders the language contained in the opinion of the District of Columbia Circuit Court of Appeals discussed below. Continuing its comments reversing the initial decision of Judge Fowler, the Board declared:

> In conclusion, we find that the law judge erred in granting respondent's appeal below, as the evidence establishes that respondent failed to include required information on his application with the knowledge of the omission, as alleged.[xxii]

IV.
The D.C. Circuit Reverses the NTSB

The airman appealed from the decision of the NTSB reversing Judge Fowler and set forth two specific arguments: (1) that the NTSB, by reversing Judge Fowler, did so without addressing the credibility determination made by the trial judge, and (2) that the NTSB had applied an improper standard for the intent element of the offense of intentional falsification.[xxiii] The D.C. Circuit Court of Appeals noted, "The Board's policy is not to disturb a credibility finding unless there is a compelling reason or the finding was clearly erroneous." [*Citing Chirino v. NTSB*, 849 F.2d 1525, 1529-30 (D.C. Cir. 1988).[xxiv] Furthermore, the Court noted that the position of the Board in reversing Judge Fowler was incongruous with its declaration in *Administrator v. Barghelame*, 7 N.T.S.B. 1276, 1991 WL 321289 (Nov. 5, 1991): "We think that … the task facing our law judges is essentially no different from any other adjudication in which a credibility assessment concerning an individual's intent must be made."[xxv] In other words, while Judge Fowler had specifically declared in the initial decision that he found the airman to be a credible witness and believed his testimony, and even though the Board had declared in the *Barghelame* case that judges are called upon to make credibility assessments when the airman's intent is in issue, the Board failed to give a single reason for declaring that the credibility assessment by Judge Fowler that the airman did not have the intent to deceive was in any way improper or not supported by the evidence.[xxvi] In light of the mandate the Board gave judges in *Barghelame*, its failure to address the credibility assessment made by Judge Fowler in reversing him was inconsistent with Board precedent.[xxvii]

Not only did the *Barghelame* case support the position that the Board should have given some reason for reversing Judge Fowler, but only two years before the decision in question, the Board had affirmed a decision in *Administrator v. Roarty*, N.T.S.B. Order No. EA-5261, 2006 WL 3472333 (Nov. 21, 2006) in which the Board reviewed an ALJ's determination that an airman had not intentionally falsified his medical application reasoning that his failure to disclose a prior revocation of his medical certificate when filling out the form was a negligent mistake, rather than an intentionally false answer.[xxviii] In fact, in *Roarty*, the Board had commented, "[R]esolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge."[xxix] But even though resolution of credibility issues is within the province of the law judge unless made in an arbitrary and capricious manner, the Board had not explained in any fashion in its decision reversing Judge Fowler how or in what manner his credibility assessment in favor of the airman was arbitrary or capricious.

The D.C. Circuit, in sustaining the first argument of the airman challenging the Board decision made the following comment:

> The facts in *Roarty* appear indistinguishable from the circumstances in Dillmon's case, and the Board has not offered an explanation for these conflicting results. If a compelling reason for refusing to believe Dillmon and rejecting the ALJ's credibility assessment exists, the Board has not revealed it to us. Because the Board departs from its precedent without adequate explanation, its decision reversing the ALJ without overturning his credibility determination is arbitrary and capricious. *See Ramaprakash*, 346 F.3d at 1124-25; *see also Andrzewski v. FAA*, 563 F.3d 796, 800 (9th Cir. 2009) (holding the Board's "failure to give the ALJ's implicit credibility determination the requisite level of deference was contrary to [the Board's] precedent and therefore arbitrary and capricious.")[xxx]

The second element of the airman's challenge to the Board's decision was the Board's implying an improper standard for the intent element of the offense of intentional falsification. At this point, it is

worth reviewing 14 C.F.R. § 67.403(a)(1) which states: "No person may make or cause to be made … [a] fraudulent or intentionally false statement on any application for a medical certificate." If the statement is fraudulent, then there are five elements to wit: (1) a false representation (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) with intent to deceive, and (5) and with knowledge taken in reliance upon the representation.[xxxi] If the claim by the agency is that the airman made an intentionally false statement, then there are three elements: (1) a false representation, (2) in reference to a material fact, and (3) made with knowledge of its falsity.[xxxii]

While the Board found Judge Fowler had erred in failing to find that there was an intentional falsification, the D.C. Circuit noted the following:

> The Board previously has stated it considers the airman's subjective interpretation of the meaning of a question to be relevant: "The law judge correctly noted that the third requirement of an intentional falsification charge is that the statements made must have been made 'with knowledge of their falsity.' Therefore, its finding on this element necessarily hinged on the respondent's understanding of what information the question was intended to elicit. *Administrator v. Reynolds*, N.T.S.B. Order No. EA-5135, 2005 WL 196535 at 4 (Jan. 24, 2005). *Reynolds* appears to require the FAA to prove the airman subjectively understood what the question meant. *Id.* Having announced this interpretation of the intent element in *Reynolds*, the Board is obligated to apply it consistently. *See Ramaprakash*, 346 F.3d at 1124.[xxxiii]

With regard to the second argument advanced by the airman, that the Board had applied the wrong standard on the intent requirement, once again, the D.C. Circuit reversed the Board making this telling point:

> The Board reversed the ALJ on the ground he erroneously departed from its precedent in two respects. However, we conclude it was the Board, not the ALJ, that applied precedent incorrectly.[xxxiv]

The D.C. Circuit then remanded the case to the Board for further consideration consistent with the Court's opinion.

V.
On Remand, the NTSB Reverses its Prior Opinion But Signals its Intention to Continue to Follow Inapplicable Cases

On June 30, 2010, the Board issued its opinion in *Administrator v. Dillmon*, N.T.S.B. Order No. EA-5528 (June 30, 2010). The Board's opinion and order on remand unfortunately does not indicate it fully appreciates the decision of the D.C. Circuit. Rather, the Board has signaled that it intends to continue to follow a path inconsistent with the directive of the D.C. Circuit. Consider the following language in the Court's decision on remand:

> The D.C. Circuit's opinion makes it clear that the Board is required to consider a respondent's subjective understanding of the question at issue when the respondent alleges that he or she misunderstood the question. In this regard, the court determined that our reliance on our original opinion on two of our previous cases concerning the understanding of a question, *Administrator v. Boardman*, N.T.S.B. Order No. EA-4515 (1996), and *Administrator v. Sue*, N.T.S.B. Order No. EA-3877 (1993) was misplaced. The Court stated as follows:
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> > *Boardman* stands for the proposition that the airman must read the question carefully before answering it … *Sue* stands for the proposition that the questions on the medical application are not inherently too vague to support a finding of intentional falsification.
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> 588 F.3d at 1094-95. Although the Court did not overturn or invalidate *Boardman* and *Sue*, it concluded that we did not correctly apply the standards of *Boardman* and *Sue* in

this case. On remand, we do not believe the Court's above-quoted statements concerning those cases preclude us in the future from considering whether an airman's defense on this subject is credible, based on the plain language of a question on the application. For example, where an applicant admits that he or she did not read a question carefully, a law judge is still free to reject the applicant's testimony that he or she did not understand the question. Likewise, when an applicant argues that he or she did not understand a question that has a plain, unambiguous meaning, our law judges may still consider such a defense as lacking credibility – especially if the applicant did not seek clarification from a medical examiner or FAA employee – and determined that the evidence suffices to prove that the airman intentionally falsified his or her response to the question. Therefore, *Boardman* and *Sue* continue to have relevance as they relate to a law judge's ability to assess and weigh testimony regarding a respondent's understanding of a question, the meaning of which we have consistently found obvious to a person of ordinary intelligence; they do not stand for the proposition that a respondent may not raise his or her subjective understanding of a question, or that a law judge may resolve the question, without a factual finding as to whether a respondent's claim of misunderstanding is credible.

We also note that the court stated that respondent's awareness and recollection of his conviction at the time he completed the application did not suffice to prove that respondent knew that his answer to the question was false. Again, this finding is based on respondent's testimony that he believed the question only required information concerning convictions related to drug or alcohol offenses. Based on the court's reasoning, and the fact that the United States Court of Appeals for the D.C. Circuit has universal jurisdiction in such cases, we acknowledge that, in considering future cases involving § 67.403(a)(1) the Board is required to consider an applicant's subjective understanding of the question at issue. However, we also emphasize that our precedent allows the Administrator to prove an applicant's state of mind by circumstantial evidence. In this regard, we are cognizant of the Administrator's concerns that, in the absence of a respondent who takes the stand unequivocally testifies that he knowingly lied on the application, it would otherwise be difficult for the Administrator to ever prove that someone violated § 67.403(a)(1). For this reason, we will also consider circumstantial evidence that the Administrator presents concerning a respondent's state of mind.

In this case, the Administrator did not provide sufficient evidence to overcome respondent's defense that he misunderstood question 18w. For example, the Administrator apparently did not seek to issue Dr. Van Den Berg or call him to the stand (or seek telephonic testimony) to question him about anything he may have remembered about his advice to respondent on question 18w. While we note that the two letters from the doctor that respondent submitted into evidence appear to be incongruent, and are far from exculpatory on their face, the Administrator nevertheless failed to test respondent's defense by challenging the merit, authenticity, or persuasiveness of the letters.

As a separate matter, we do not believe that the Administrator is now, under this ruling, unable to pursue a matter in the face of testimony from a respondent who claims subjective confusion about a question on the medical application. As a prospective consideration, the Administrator may strengthen this case on alleged § 67.403(a)(1) violations by amending the application process and forms to provide impeccable clarity. The application for a medical certificate asks whether an applicant has been convicted or subjected to any "administrative action(s)." We recognize that the instructions that accompany the application, as quoted above, provide examples of nontraffic convictions that an applicant report.

> However, the question on the form itself may be revised to solicit more clearly the information that the Administrator seeks. In addition, the application is one for a *medical* certificate. It may behoove the Administrator to segregate medical- and health-related questions from other questions, perhaps on a separate form. Overall, given the D.C. Circuit's opinion in this case, the Administrator may wish to take this opportunity to review the medical certificate application form carefully, and amend it to avoid an applicant misconstruing a question as respondent claimed to have done in the matter before us. Unless, and until, the Administrator does so, certain cases may very well require a detailed factual determination by the law judge in ascertaining whether a respondent intended to answer a question falsely.[xxxv]

VI.
Conclusion

The language employed by the NTSB in its opinion following remand of the underlying case from the D.C. Circuit is akin to a primer for the FAA and its lawyers about how to overcome challenges by airmen who assert they did not give a false statement on a medical application form. Further, the language in this unfortunate opinion clearly shows that the *Board is not an impartial tribunal*. The Board is sending messages to the FAA about how it can win cases and how it can amend forms *so that the FAA, not the airmen, can prevail*. This is not the kind of impartial and credible tribunal airmen should expect to adjudicate cases lodged against them by the FAA.

In addition to the foregoing, the decision of the D.C. Circuit merely took Board precedent and analyzed it. The D.C. Circuit explained that two cases, *Boardman* and *Sue*, were not applicable. Nevertheless, the NTSB has signaled that it is not going to surrender these cases as means of ensuring that the FAA enjoys the advantage over the airmen. Any thinking airman or legislator should carefully consider the language contained in the Board's opinion on remand and contrast that to the language of the D.C. Circuit in this case. Such a reading and evaluation of those materials leads to the inevitable conclusion that the NTSB believes it is the ally of the FAA in the war on pilots. Nowhere in the Board's opinion on remand did it give any suggestions to practitioners who represent pilots before the NTSB. Rather, the suggestions were from the NTSB to the FAA on how to win cases and amend the form to get desired outcome. This is conclusive evidence that the Board is no longer capable of acting as an impartial tribunal in aviation enforcement cases.

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i *Dillmon v. National Transportation Safety Board*, 588 F.3d 1085, 1087 (D.C. Cir. 2009)
ii *Id.*
iii *Id.*
iv *Id.*
v *Id.*
vi *Id.*
vii *Id.*
viii *Id.*
ix *Id.*
x *Id.*
xi *Id.*
xii *Id.*
xiii *Id.*
xiv *Id.*
xv *Id.*
xvi *Id.* at 1089.
xvii *Id.*
xviii *Administrator v. Dillmon*, NTSB Order No. EA-5413, 2008 WL 1771937 (N.T.S.B.) at 3.
xix *Id.* at 4.
xx *Id.*
xxi *Id.*
xxii *Id.*
xxiii *Dillmon v. National Transportation Safety Board*, *supra* at 1090.
xxiv *Id.*
xxv *Id.*
xxvi *Id.*
xxvii *Id.* at 1090.
xxviii *Id.*
xxix *Id.*
xxx *Id.* at 109l.
xxxi *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).
xxxii *Id.*
xxxiii *Dillmon v. National Transportation Safety Board*, *supra* at 1094.
xxxiv *Id.*
xxxv *Administrator v. Dillmon*, NTSB Order No. EA-5528 (June 30, 2010), at 11-16.