

SERVED: March 12, 1998

NTSB Order No. EA-4624

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 25th day of February, 1998

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JANE F. GARVEY, )  
Administrator, )  
Federal Aviation Administration, )  
                    )  
                    Complainant, )  
                    )                        Docket SE-14955  
v.                 )  
                    )  
BRETT GENE NIEHAUS, )  
                    )  
                    Respondent. )  
                    )  
                    )  
                    )

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**OPINION AND ORDER**

The respondent, pro se, has appealed from an order issued by Administrative Law Judge William E. Fowler, Jr., on October 2, 1997, granting the Administrator's Motion for Judgment on the Pleadings.<sup>1</sup> By so doing, the law judge affirmed an emergency order of the Administrator revoking respondent's second class medical certificate for violating the provisions of section 67.20(a) of the Federal Aviation Regulations (FARs), 14 C.F.R.

§ 67.20(a).<sup>2</sup> The Administrator has filed a brief in reply, requesting that the Board affirm the law judge's order. After careful consideration, we grant respondent's appeal and remand the case for hearing.

The July 3, 1997 Emergency Order of Revocation (complaint) states, in pertinent part:

1. On October 1, 1996, you were issued a second class medical certificate by George M. Kreyling, M.D.
2. In your application for that certificate you certified in response to questions 18n. and o. that you had never failed a drug test, or used illegal substances for 5 years or had a history of alcohol [or] drug abuse.
3. You also certified that you had previously provided all records related to your positive responses to questions 18v. and w., history of traffic and non-traffic related convictions.
4. Your responses to those questions were false.
5. In [sic] January 17, 1995, you were convicted of felony flight, possession of dangerous drugs, possession of marijuana and sentenced to imprisonment for 1 ½ years and as [sic] costs.
6. You failed to acknowledge or provide information about your positive drug tests and conviction

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(..continued)

<sup>1</sup>The law judge's order is attached.

<sup>2</sup>Respondent waived his right to expedited review.

FAR section 67.20(a) states, in pertinent part:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

- (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....

- occurring since your last medical certificate application.
7. You represented that all such information had previously been provided to the Administrator on that application.

In his answer, respondent denied paragraphs 2-4, stating that his answers to questions 18.o and n were an "oversight" and that "I failed to read the question and copied the answers from my previous medical form." Respondent's Answer, July 21, 1997. Respondent further asserted that the Administrator had all of his criminal records at the time of the issuance of the medical certificate. He also denied the Administrator's allegations in paragraphs 6-7, stating that he did not misrepresent any information.

The elements of intentional falsification are 1) a false statement, 2) in reference to a material fact, 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9<sup>th</sup> Cir. 1976). While knowledge of falsity may be inferred from circumstantial evidence, Administrator v. Juliao, 7 NTSB 94 (1990), that does not obviate the need for a hearing on the merits where a respondent denies having intentionally falsified his application and there is no evidence directly contradicting the denial which would justify not affording the respondent an opportunity to persuade the trier of fact that the false entry was not purposeful.

Therefore, judgment on the pleadings is not appropriate in the instant case, since there is a dispute as to a material issue of fact.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted;
2. The law judge's order granting the Administrator judgment on the pleadings is reversed; and
3. The case is remanded for further proceedings.

HALL, Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. FRANCIS, Vice Chairman, did not concur.