DECEMBER 2009 FLIGHTWATCH

TWO COURT OPINIONS DECLARE DECISIONS OF THE NTSB MUST BE REVERSED FOR DEPARTURE FROM BINDING PRECEDENT

I. Overview

The United States Court of Appeals for the District of Columbia issued two opinions on December 8, 2009 declaring that the National Transportation Safety Board ("NTSB") departed from binding precedent without giving an adequate explanation. Both cases involved allegations that the airmen gave intentionally false responses on a medical application form. Both cases involved Emergency Orders of Revocation. In one case, the airman persuaded the administrative law judge ("ALJ") that he did not give an intentional false response to a question on the medical application form, and the ALJ agreed. However, the NTSB reversed the ALJ claiming his decision was erroneous. The second case was one in which the airman maintained his innocence. The airman asserted that he did not understand the term "administrative action" on the medical application form and braced a judicial, court-ordered suspension of his driving privileges. The Board had affirmed an order granting summary judgment asserting that the airman's response to the question was so patently false he would not even be afforded a hearing. Once again, the Court of Appeals for the District of Columbia found the Board had departed from binding precedent in failing to give consideration to the state of knowledge of the airman.

II. The Dillmon Case

Dillmon v. National Transportation Safety Board[1] involved an airman who was convicted of bribery in February of 1997. In March of 1997, he completed a medical application form, and in response to question 18w gave a negative response to "[h]istory of nontraffic conviction(s) (misdemeanors or felonies)." He also gave negative responses to this question on the medical application form in May of 2007 and in March of 2008.

Dillmon discussed his concerns with the aviation medical examiner who administered the flight physical, and Dillmon understood from his conversations with the AME that question 18w was only concerned with drug or alcohol-related offenses. Based upon that advice from the AME, Dillmon understood he could properly give a negative response to question 18w on the medical application form.

When the case was tried, Dillmon's counsel made a motion to dismiss. However, Judge Fowler denied the motion maintaining that the FAA had made out a *prima facie* case of a regulatory violation. However, after hearing the testimony of Dillmon and his response to questions on cross-examination, Judge Fowler concluded that Dillmon had successfully

[1] *Jack Rondal Dillmon v. National Transportation Safety Board*, Case No. 08-1390, United States Court of Appeals for the District of Columbia (Opinion Dec. 8, 2009).

rebutted the FAA's *prima facie* case of intentional falsification. For that reason, Judge Fowler reversed the FAA's Emergency Revocation Order.

The FAA then appealed the decision of Judge Fowler to the NTSB. The NTSB maintained that Judge Fowler had made two mistakes. The NTSB concluded that Judge Fowler erred when he found that Dillmon had rebutted the FAA's *prima facie* case of intentional falsification. Secondly, the NTSB concluded that Judge Fowler had applied an erroneous standard by requiring the FAA to prove specific intent to deceive when all the FAA had to prove was an intentional falsification.

Dillmon then filed a petition for review with the United States Court of Appeals for the District of Columbia and maintained it was the NTSB, not Judge Fowler, that misunderstood the law. The Court used this rather explicit language in the initial paragraph of the opinion:

> Petitioner Jack Rondal Dillmon accuses the National Transportation Safety Board (Board) of hypocrisy – saying one thing while doing another. Dillmon argues the Board departed from its prior decisions without adequate explanation when it affirmed the Federal Aviation Administration's (FAA's) Emergency Revocation of his airman and medical certificates. We agree with Dillmon: the Board has failed to exhibit the reasoned decision making we require of agencies. We therefore grant this petition for review.

The Court gave two separate and distinct reasons for overturning the decision of the NTSB. First, the Court had overturned a credibility assessment made by Judge Fowler without even acknowledging it was overturning a credibility assessment. The Court referenced *Administrator v. Roarty*,[2] in which the Board had declared:

> [R]esolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge.[3]

In contrast to the Board's decision to overturn the factual findings of Judge Fowler without even acknowledging that is what it was doing, Judge Fowler had made a very careful record and declared:

> My determination is that [Dillmon] was quite forthright and candid in his testimony.[4]

In reversing the Board, the Court made the following observation:

> "But when it reversed the ALJ, the Board did not even acknowledge he had made a credibility finding.

[2] *Administrator v. Roarty*, NTSB Order No. EA-5261, 2006WL3472333 (Nov. 21, 2006).
[3] *Dillmon* Opinion at 8.
[4] *Id.*

> The Board's silence on this pivotal factual issue leaves us unable to determine whether it acted consistent with its precedent (citations)."[5]

Of interest is the fact that Court recognized the FAA had admitted in its brief that the Board had "implicitly" overturned the credibility determination by Judge Fowler.[6]

The second bone of contention in the appeal was the assertion by the FAA that the Board had the requisite basis for overturning the decision of Judge Fowler in terms of his credibility assessment, the FAA arguing that the Board's decision was supported by substantial evidence and should therefore be affirmed. With respect to this argument, the Court had the following to say:

> The FAA's substantial evidence argument is thus a thinly-veiled attempt to rehabilitate the Board's decision by suggesting it reached the right destination, even though it chose the wrong path to get there.[7]

The Court distinguished between the five elements of fraud[8] as opposed to intentional falsification which has only three elements.[9] The Court reasoned that the Board could not eliminate the requirement that the airman have the subjective understanding to intentionally falsify the form when the Court wrote:

> The question for this court then is whether Dillmon's subjective understanding of the questions in the medical application form is relevant to the offense of intentional falsification. The Board's precedent establishes it is, and that is the FAA's position as well. See Oral Arg. Recording at 13:40-14:06.

The Court remanded the case to the NTSB for further findings consistent with its opinion "Because the Board departed from its precedent without reasoned explanation…."[10]

III. The Singleton Case

Singleton v. Babbitt,[11] involved a pilot who had a judicial suspension of his driving privileges which he did not disclose as an "administrative action" in responding to question 18v

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[5] *Id*. at 9.

[6] *Id.* at 9: "The FAA essentially concedes the Board deviated from its precedent when it argued, 'To the extent in so reversing the ALJ, the Board *implicitly* overturned any of his credibility determinations, the substantial evidence in the record establishes that the [Board] had the requisite basis to do so under the foregoing standard.' FAA Br. at 50 (emphasis added).'

[7] *Id.* at 11.

[8] "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation." *Id.* at 12.

[9] *Id.* at 13: "Falsity, materiality and knowledge."

[10] *Id.* at 17.

on his medical application form. The FAA then brought an emergency action to revoke his certificates, and Singleton maintained that he did not appreciate or understand that a judicial suspension of his driving privileges was an "administrative action" he should have disclosed when responding to question 18v on the form.

The FAA issued its Emergency Order of Revocation on October 2, 2008, and then twenty-five days later, the FAA brought a motion for summary judgment arguing there was no material question of fact and Singleton obviously had the requisite intent to give a false statement by reason of which his certificates should be revoked.[12] Singleton filed an opposition to the FAA's motion for summary judgment on November 5, arguing that the term "administrative action" is not defined on the medical application form or anywhere in the instructions which accompany the form.[13] Also, Singleton executed an affidavit attesting that he "did not know the events were an administrative action as asked for on Question 18V." On September 18, 2008, Singleton filed a supplemental response to a pre-hearing order.[14] In that supplemental response, Singleton included as an exhibit a page from Black's Law Dictionary stating that "administrative functions or acts are distinguished from such as are judicial."[15] The following day, the ALJ granted the FAA's motion for summary judgment declaring: "It is patently absurd and unbelievable that he did not know that his North Carolina driver license had been administratively revoked/suspended."[16]

Singleton appealed the decision of the ALJ to the NTSB.[17] However, the "Board rejected Singleton's contention that he did not know that the phrase 'administrative action' covered the court-ordered revocation of his driver's license."[18] The Board maintained that question 18v on the form concerning "administrative action" was not confusing and that Singleton was attempting to "sow confusion" with his argument.[19] More troublesome, however, is the fact that the Board in its opinion on Singleton's appeal claimed that Singleton's understanding of question 18v was not even relevant to whether he had knowledge to make an intentionally false statement.[20]

The United States Court of Appeals for the District of Columbia found that the Board had departed from its own precedent without giving a satisfactory explanation, since there were at least three cases the Board had decided in which the NTSB had declared that

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[11] *Harold v. Singleton v. J. Randolph Babbitt, Administrator, Federal Aviation Administration*, *et al.,* United States Court of Appeals for the District of Columbia, Case No. 09-1117 (Opinion Dec. 8, 2009).
[12] *Id.* at 4.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 5.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 6.

intentional falsification "requires actual knowledge of the false statement."[21] The Court agreed with Singleton that knowledge of the falsity depended on the pilot's understanding of the question.[22] The Court declared "…the intentional falsification prong of § 67.403 (a)(1) requires the FAA to show – and the NTSB to find – that a pilot understood the question to which he or she provided an allegedly false answer."[23]

The Court reasoned that question 18v "did not require him to report *every* revocation of his driving privileges. Rather, it required him to indicate whether he had a 'history of any conviction(s) or administrative action(s)' that resulted in revocation."[24] Since an administrative action equates with action taken by an agency while judicial action equates with civil revocation of a certificate as Singleton had experienced, the Court noted: "Singleton's reading is not inherently implausible."[25]

To the extent the Board's opinion was premised on the assertion that Singleton should have understood that "administrative action" included a judicial revocation of his driving certificate, the Court cited Webster's Third New International Dictionary of the English Language Unabridged noting that "administrative law" generally deals with government agencies.[26] In contrast, Singleton's driving privileges had been "judicially" suspended. The Court's treatment of the Board's decision demonstrates how thoughtless the Board decision was, since the Court noted:

> Likewise, the Board's decision repeatedly proclaims that the term has a 'plain' or 'literal' meaning, Board Opinion at 8, but it never identifies what that meaning is or why it includes a court-ordered revocation. Nor do the instructions for Question 18v provide any illumination. See Instructions to Form 8500-8….[27]

Because an administrative action cannot be equated with judicial action, a point obviously lost on the NTSB, the Court made the following dispositive declaration:

> Under these circumstances, Singleton's affidavit, averring that he did not understand the revocation to be an administrative action raised a genuine issue of material fact as to his knowledge of falsity. Summary judgment was thus inappropriate under the Board's regulation. 49 C.F.R. § 821.17 (d), and it was arbitrary and capricious for the Board to find otherwise, See *Rogers Corp. v. EPA*, 275 F.3d 1096, 1097 (D.C.Cir.2002).[28]

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[21] *Id.* at 8. The three cases are *Administrator v. Sue*, NTSB Order No. EA-3877, 1993WL157467 (Apr. 28, 1993); *Administrator v. Robbins*, NTSB Order No. EA-4156, 1994WL159899 (Apr. 17, 1994); *Administrator v. Reynolds*, NTSB Order No. EA-5135, 2005WL196535 (Jan. 24, 2005).
[22] *Singleton* Opinion at 9.
[23] *Id.* at 9.
[24] *Id.* at 11.
[25] *Id.* at 11.
[26] *Id.* at 12.
[27] *Id.*
[28] *Id.* at 12.

The ALJ and the Board had both declared that there was no point in providing Singleton a hearing, since his understanding was not relevant. However, the Court, in reversing the Board, made the following concluding remark:

> We conclude that it was arbitrary and capricious to deny Singleton a hearing at which he could offer evidence that he did not understand the phrase 'administrative action' to include a court-ordered revocation of his driver's license. Accordingly, we grant the petition for review, vacate the NTSB's summary judgment order, and remand for further proceedings consistent with this opinion.[29]

IV. Conclusion

The opinions of the United States Court of Appeals for the District of Columbia in reversing the Board for decisions that were arbitrary and capricious is part of a growing body of case law that demonstrates that the Board does not understand how to correctly apply its own precedent.[30]

While the decisions in *Dillmon* and *Singleton* are encouraging, these decisions underscore the conviction of the author that increasingly airmen must have the resources not only to engage in discovery and try the case, pursue an appeal to the NTSB, but then the airman must have the resources to pursue an appeal to a United States Court of Appeals if he or she is to actually receive justice in the United States. This is increasingly true because the NTSB does not understand its own rules or binding precedent and how those legal principles are applied.

Mr. Singleton was represented by Kathleen A. Yodice, Esq. of Washington, DC throughout the course of his litigation. Mr. Dillmon was represented by the author and Weldon E. Patterson, Esq. during the hearing before Judge Fowler and during the appeal before the NTSB; and Mr. Patterson continued with the representation by successfully appealing the Board's decision to the United States Court of Appeals for the District of Columbia.

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[29] *Id.* at 13.

[30] See *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C.Cir.2003) where the Board's refusal to enforce its own stale complaint rule (49 C.F.R. § 821.33) was reversed by the D.C. Circuit Court of Appeals for at least three separate reasons. The first reason was that the threat to safety requires a more strict application of Rule 33, not a less strict application. The second was that the Board failed to understand that Rule 33 involves a presumption of prejudice, not a requirement that the pilot prove he has been prejudiced. Finally, the Board did not understand the requirement of prosecutorial diligence and misapplied Rule 33 by suggesting that the FAA did not have actual knowledge of a violation until data had been extracted from magnetic tape that had been in the possession of the FAA for quite some time.