

Attorney Registers First Pilot's Bill of Rights Victory: Airman Back in the Air Within 60 Days

Amundsen Davis Aerospace Alert
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It is not often that you get the opportunity to take a matter to trial twice and appeal once in 45 days. The story ends well, as our client is back in the left seat of a corporate aircraft where he belongs.

On the day before Thanksgiving 2016, the FAA initiated an Emergency Order of Revocation of an airman's ATP certificate for alleged intentional falsification of FAA Form 8500-8 [the Medical Application]. Specifically, the administrator claimed the pilot's arrest should have been disclosed on the application. Indeed, the pilot had been arrested while attending flight training in the United States. However, that arrest had not reached the point of a conviction at the time he submitted his medical application.

The question at issue, item 18.v., reads:

Arrest, Conviction and/or Administrative Action History

[Have you ever had] history of (1) any arrest(s) and/or conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any arrest(s), and/or conviction(s), and/or administrative action(s) involving and offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or rehabilitation program.

This precise question has been roundly criticized by every pilot's group; ultimately becoming one of the pillars of the Pilot's Bill of Rights in 2012 (PBOR-1). PBOR-1 required the Comptroller General to commission a study of the medical application system; which it did – publishing the April, 2014 U.S. Government Accountability Office (GAO) report entitled *FAA Should Improve Usability of its Online Application System and Clarity of the Pilot's Medical Form*. PBOR-1 then required the FAA to respond appropriately to the GAO recommendations within one year. The FAA ignored this Congressional mandate as it relates to item 18.v.

The pilot set forth several affirmative defenses based on the PBOR-1 and the

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GAO Report. Over the administrator's vigorous objection, the Administrative Law Judge (ALJ) allowed the pilot "some latitude to make his record on these issues," and allowed expert testimony on the subjects of clarity and compliance with PBOR-1.

The GAO Report specifically identified question 18.v. as particularly confusing – stating that an airman would need more than 20 years of education to fully understand its meaning. Indeed, the administrator's own expert admitted at the first hearing that the question had *at least* 62 separate meanings. Unbelievably, this same medical certification expert claimed to only be vaguely familiar with the PBOR-1, and stated he would not read the GAO Report "*unless forced to do so.*"

The pilot is a foreign national, who's native language has no equivalent to the usage of "*and/or*" or the parenthetical "*(s)*." In addition, the pilot researched the need for disclosure, by googling the terms "Pilot DUI." The resulting FAA web page clearly suggested there was no need to disclose an arrest; only a "conviction or administrative action." Thus, he concluded he only needed to report an "arrest and conviction" or "just a conviction." And, he immediately took steps to report this matter when it reached the final adjudication stage.

The FAA inspector did not speak to the pilot or the aviation medical examiner. The administrator's expert admitted that he has no way of determining precisely what was on the pilot's mind. And, the Regional Counsel ignored the pilot, when he tried to explain these facts to her. In short, the FAA made no effort, whatsoever, to establish the "knowing" or "intentional" elements of their case.

Another interesting wrinkle is that the airman filled out his medical application through the MedXpress app on his iPhone. The entire question is not viewable at one time on an iPhone screen. In addition, it came to light during the second hearing that the actual wording of the question at issue is different on the MedXpress app as compared with the paper copy generated and made part of the airman's record.

At the initial hearing, while acknowledging the vast basis for confusion of the question at issue, the ALJ affirmed the administrator's emergency order stating that he was bound by precedent (Dillon) that suggested the question was clear. On appeal, the National Transportation Safety Board remanded the case to back to the ALJ for rehearing on a broad number of issues. On January 11, 2017, the ALJ reversed his opinion regarding revocation of the airman's certificates and found in favor of the pilot, citing the Pilot's Bill of Rights, the GAO report as well as issues surrounding the digital MedXpress application system. The ALJ also found persuasive the steps that the pilot took in furtherance to his mistaken understanding of the question, and the fact that the FAA offered no contrary evidence on the issue of "knowledge" and "intent."

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In an almost unprecedented move, the FAA abandoned the appeal. The FAA clearly did not want the facts of this case to be disclosed. So, by all means, please feel free to contact me with any questions.

Notably, this victory relied heavily on the Pilot's Bill of Rights which my partner, Alan Farkas, helped to draft through their work as board member and Chair of the legal advisory council for the Experimental Aircraft Association (EAA), respectively.

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