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## Why Jurisdiction Over Airmen Enforcement and Certificate Cases Should Be Transferred from the National Transportation Safety Board to Federal District Court

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**WHY JURISDICTION OVER AIRMEN ENFORCEMENT  
AND CERTIFICATE CASES SHOULD BE TRANSFERRED  
FROM THE NATIONAL TRANSPORTATION SAFETY  
BOARD TO FEDERAL DISTRICT COURT**

ALAN ARMSTRONG\*

I. INTRODUCTION AND SUMMARY OF DISCUSSION

**A**N AIRMAN'S CERTIFICATE is a protected property or liberty interest<sup>1</sup> that cannot be suspended or revoked without affording the airman due process of law, including notice and an opportunity for a hearing as provided in the Administrative Procedure Act (APA).<sup>2</sup> Because the hearing must conform to

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<sup>1</sup> *White v. Franklin*, 637 F. Supp. 601, 610–11 (N.D. Miss. 1986).

In the present case, the plaintiff's license qualifies as a protectible [sic] property interest[.]

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[T]he defendants' actions totally foreclosed the plaintiff's opportunity to pursue his career as a flight examiner . . . As such, the plaintiff possessed a liberty interest requiring a fifth amendment due process hearing prior to deprivation.

*Id.*; see also *Tamura v. FAA*, 675 F. Supp. 1221, 1228 (D. Haw. 1987) (Hawaii state law gave physician property interest in redesignation as an aviation medical examiner).

<sup>2</sup> 5 U.S.C. § 558(b) (2018) ("A sanction may not be imposed . . . except within the jurisdiction delegated to the agency and as authorized by law."); 5 U.S.C. § 558(c) (2018) (requiring compliance with §§ 556 and 557 of the APA); 5 U.S.C. § 556 (2018) (hearing procedure); 5 U.S.C. § 557 (2018) (describing the manner in which the record is perfected, objections are made, and rulings are excepted).



the due process requirements of the APA, it must be conducted in an “impartial manner.”<sup>3</sup> Proceedings to suspend, revoke, or deny an airman’s certificate are not conducted in federal district court. Rather, by law, jurisdiction of such cases is vested in the National Transportation Safety Board (Board or NTSB). Unfortunately, the Board has a conflict of interest that precludes the proceedings from being conducted in an “impartial manner” either at the administrative hearing level or on an appeal, with the Board sitting as the appellate body. The reason the Board has a conflict of interest is because it does not and cannot adjudicate the airman’s case in an impartial manner since that is not its standard in deciding whether the airman retains or loses his certificate. The statute that vests the Board with jurisdiction to adjudicate airmen cases provides, *inter alia*: “[T]he Board may amend, modify, or reverse the order [of the Federal Aviation Administration (FAA)] when the Board finds . . . that *safety in air commerce* or air transportation and the *public interest* do not require affirmation of the order.”<sup>4</sup>

When an airman’s case appears before the Board or any of the Administrative Law Judges (ALJs) employed by the Board, the Board’s focus is not *exclusively* on the guilt or innocence of the airman or his qualifications to hold a certificate. Rather, the Board, by statute, is focused on “safety in air commerce . . . and the public interest.”<sup>5</sup> While other governmental agencies act within a mandate to act in the “public interest,”<sup>6</sup> the Board’s

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<sup>3</sup> 5 U.S.C. § 556(b)(3) (2018) (“The functions of presiding employees . . . shall be conducted in an impartial manner.”).

<sup>4</sup> 49 U.S.C. § 44709(d)(1)(A) (2018) (emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> *Roof v. Conway*, 133 F.2d 819, 827 (6th Cir. 1943) (“The duties of [the Public Utilities Commission of Ohio] begin and end with conservation of the public interest” and are not concerned with individual rights.); *Bowles v. Skaggs*, 151 F.2d 817, 821 (6th Cir. 1945) (“[O]rders of regulatory bodies are in the public interest—they are not in the nature of suits at common law and frequently authorize remedies in derogation of the common law.”); *Berg v. Cincinnati Newport & Covington Ry.*, 56 F. Supp. 842, 848 (E.D. Ky. 1944) (“The [SEC] and [ICC] are agencies of the Government set up primarily to protect the public rather than determine issues between stockholders[.]”); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131–32 (1945) (“The public interest with which the [FCC] is charged is that involved in granting licenses.”) (internal quotation omitted); *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945) (“The [ICC] is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted.”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1965) (“The touchstone provided by Congress was the ‘public interest, convenience, or necessity’ [which the Communications Act sets up as a criterion for exercise of power by the FCC] ‘is as concrete as the

principal focus on “safety in air commerce . . . and the public interest” creates an inherent conflict of interest that renders it incapable of adjudicating airmen certification and enforcement cases in an “impartial manner” as required by statute.<sup>7</sup> The Board, like most governmental agencies with a mandate to protect the public interest, is not concerned with the individual rights of airmen.<sup>8</sup> The Board’s indifference to the individual rights of airmen explains why the Board refuses to sanction violations by the FAA of its own policies and procedures or to rule on constitutional issues.<sup>9</sup>

In this article, the author maintains that the Board’s singular focus on air safety and the public interest and its manifest, pronounced indifference to the due process rights of airmen precludes it from acting impartially as the adjudicative body in the United States that determines the fate of U.S. airmen and those who seek airman certification. The Board’s institutional bias against airmen explains why the Board, which enjoys a deferential scope of appellate review,<sup>10</sup> has had its orders repeatedly vacated by the appellate courts because the Board did not follow its own rules,<sup>11</sup> departed from its own precedent,<sup>12</sup> or departed from its own precedent without explanation or without giving a reason for doing so.<sup>13</sup> Furthermore, in this article, the author will review and explain a number of cases that demonstrate, in great detail, how the Board’s institutional bias has prevented it from affording airmen due process of law.

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complicated factors for judgment in such a field of delegated authority permit[.]” but does not set up “a standard so indefinite as to confer an unlimited power.”).

<sup>7</sup> 5 U.S.C. § 556(b)(3) (2018).

<sup>8</sup> See cases cited *supra* note 6.

<sup>9</sup> See, e.g., Murphy, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at \*3 (Jan. 16, 2008); Moshea, N.T.S.B. Order No. EA-5328, 2007 WL 3088248 (Oct. 17, 2007); Moshea v. NTSB, 570 F.3d 349, 352–53 (D.C. Cir. 2009); Lybyer, N.T.S.B. Order No. EA-4822, 2000 WL 193000, at \*1 (Feb. 10, 2000) (“[W]e do not have jurisdiction to review the constitutionality of regulations issued by the Administrator[.]”).

<sup>10</sup> Ramaprakash v. FAA, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (“Our review under the APA is highly deferential, but agency action is arbitrary and capricious if it departs from agency precedent without explanation.”); see also 49 U.S.C. § 44709(d)(3) (2018); 49 U.S.C. § 44703(f) (2018); 49 U.S.C. § 44710(d)(3) (2018) (“Findings of fact of the Board . . . are conclusive if supported by substantial evidence.”).

<sup>11</sup> *Ramaprakash*, 346 F.3d at 1126.

<sup>12</sup> *Id.* at 1124.

<sup>13</sup> See *id.*; Dillmon v. NTSB, 588 F.3d 1085, 1089 (D.C. Cir. 2009); Singleton v. Babbitt, *infra* note 272; *Adm’r v. Manin*, *infra* note 282.

There are five systemic and fundamental problems that preclude the Board from performing adjudicative functions in a fair, impartial, and predictable manner:

- (1) The first problem is the Board's bias in favor of the FAA, which originates from the Board's mission to ensure air safety. While the Board's Rules of Practice, specifically Rule 32,<sup>14</sup> place the burden of proof on the FAA, that is not how adjudications are really conducted. As a practical matter, because the Board's mandate in deciding whether to "amend, modify, or reverse the [FAA] order"<sup>15</sup> is "that safety in air commerce or air transportation and public interest do not require affirmation of the order[,] "<sup>16</sup> the Board's singular focus is whether the airman raising a new or innovative defense is or could *potentially be* a threat to air safety, or whether a decision favorable to this particular airman could open the floodgates for airmen in the future thereby impacting air safety or the public interest.<sup>17</sup> Because the Board's paramount concern by statute<sup>18</sup> is "safety in air commerce or air transportation and the public interest,"<sup>19</sup> as a practical matter, the "real" burden is on the airman to demonstrate that he is not a present or *potential* threat to air safety. Based upon the philosophical orientation of the Board, even the flimsiest and most unfounded charges brought by the FAA will not be dismissed on dispositive motions and will result in an evidentiary hearing where the ALJ can employ "credibility" findings against the airman as a means for ruling in favor of the FAA. Credibility findings of the ALJ are subject to deference by the Board on appellate review.<sup>20</sup> Similarly, the Board's factual findings are conclusive on appeal to the United States courts of appeals if they are supported by substantial evidence.<sup>21</sup>
- (2) The second problem is an outgrowth of the first problem: bias. The Board consistently refuses to sanction the FAA

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<sup>14</sup> 49 C.F.R. § 821.32 (2018).

<sup>15</sup> *Id.* § 44709(d)(1).

<sup>16</sup> 49 U.S.C. § 44709(d)(1)(A) (2018).

<sup>17</sup> Transcript of Proc. in Knight, N.T.S.B. Docket No. SE-30308 (Sept. 28, 2017) [hereinafter *Knight* Transcript] (on file with author).

<sup>18</sup> 49 U.S.C. § 44709(d)(1)(A) (2018).

<sup>19</sup> *Id.*

<sup>20</sup> Chirino v. NTSB, 849 F.2d 1525, 1529–30 (D.C. Cir. 1988).

<sup>21</sup> Dillmon v. NTSB, 588 F.3d 1085, 1089 (D.C. Cir. 2009).

for misconduct. This is especially true in circumstances where the FAA has failed to follow its own rules and guidelines. Since the Board refuses to sanction FAA misconduct, airmen are powerless to obtain a modicum of due process unless they have the resources to finance appellate review to the circuit courts of appeals. While the Board has of late claimed that it lacks jurisdiction to sanction FAA misconduct, at one time it possessed the resolve and sense of fairness not to permit FAA misconduct. If the FAA is guilty of misconduct, it will require an appeal to a circuit court of appeals to get the Board ruling reversed. The Board will refuse to sanction the FAA for violations of its own rules either claiming it cannot interfere with the FAA's "prosecutorial discretion" or that it cannot or will not reach constitutional issues.

- (3) The Board has ignored *stare decisis* and made it easier for the FAA to prevail in false statement cases. This, in turn, has led to airmen being forced to resort to the circuit courts of appeals. There is no requirement that Board members be lawyers or have any legal training. Lawyers understand the difference between "dicta," language not germane or material to a decision, and the holding of the case, that is, the language that is germane or material to the decision. The Board's lack of understanding of *stare decisis* results in it relying on dicta from one case to reach an improper result in another case.
- (4) Related to the third problem mentioned above is the fact that since the Board does not understand *stare decisis*, it does not understand the importance of following precedent or, alternately, if it is going to depart from precedent, the need to articulate a rational basis for doing so. This lack of understanding by the Board has resulted in decisions by the circuit courts of appeals reversing the Board and declaring that the Board has acted in an arbitrary and capricious manner contrary to pertinent statutory authority.<sup>22</sup>
- (5) Despite the passage of the Pilots Bill of Rights I, the Board's Chief ALJ has ignored and refused to follow the Federal Rules of Civil Procedure and Federal Rules of Evidence. Efforts to remediate the conditions at the Board

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<sup>22</sup> 5 U.S.C. § 706(2)(A) (2018).

have failed. The only recourse is to transfer airmen enforcement and certification cases to federal district court.

## II. ARGUMENTS SUPPORTING A TRANSFER OF JURISDICTION TO FEDERAL DISTRICT COURT

These five systemic and functional issues that prevent the Board from properly performing its responsibilities as an impartial adjudicator will be explored in the remainder of this article.

### A. THE BOARD'S PUBLIC POLICY CONCERNS FOR AIR SAFETY CREATES AN INHERENT CONFLICT OF INTEREST WHICH PREVENTS IT FROM ACTING AS AN IMPARTIAL ADJUDICATOR IN AVIATION CERTIFICATE ACTIONS AND ENFORCEMENT PROCEEDINGS

According to the Fifth Amendment of the Constitution of the United States, "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"<sup>23</sup> The protection of an airman's right to due process has been set out in the APA.<sup>24</sup> Moreover, there is authority that an airman's certificate is a protected property or liberty interest that cannot be taken from him without affording him due process of law.<sup>25</sup> Even in those circumstances where an airman finds himself before an administrative agency which may decide whether he can continue to exercise the privileges of his certificate, the airman has a statutory right to the matter being adjudicated "in an impartial manner."<sup>26</sup> In contrast to the airman's constitutional and statutory protections of due process, we have the statutory authority for airmen to appeal adverse orders issued by the Administrator of the FAA to the Board where "the Board may amend, modify, or reverse the [FAA] order when the Board finds . . . that safety in air commerce or air transportation and the public interest do not require affirmation of the order[.]"<sup>27</sup> Nothing in the statute vesting appellate jurisdiction of aviation enforcement proceedings in the Board requires the Board to conduct the proceedings "in an impartial manner."<sup>28</sup> While one would hope that "safety in air commerce" would be congruous with the due pro-

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<sup>23</sup> U.S. CONST. amend. V.

<sup>24</sup> 5 U.S.C. §§ 556, 557, 558 (2018).

<sup>25</sup> *White v. Franklin*, 637 F. Supp. 601, 610 (N.D. Miss. May 23, 1986); *see also Tamura v. FAA*, 675 F. Supp. 1221, 1228 (D. Haw. 1987) (citing *White*, 637 F. Supp. at 601).

<sup>26</sup> 5 U.S.C. § 556(b) (2018).

<sup>27</sup> 49 U.S.C. § 44709(d)(1)(A) (2018).

<sup>28</sup> 5 U.S.C. § 556(b).

cess rights of the airman to an adjudication “in an impartial manner,” experience shows that this is not the case. The Board does not pretend to be a trial court. It does not pretend to be a court at all. It is a governmental and policy-making body mandated to investigate aviation accidents and ensure air safety, yet it has the small, isolated, and incompatible additional task of reviewing FAA enforcement actions against certificate holders. A review of case law confirms that governmental agencies charged with protecting the public interest are not focused on the rights of individuals.<sup>29</sup>

The adjudication of airman certification in enforcement cases is a collateral or tangential aspect of the Board’s mission to promote and ensure air safety. Therefore, it should not be surprising that the Board has a built-in and systemic bias against airmen accused of violations of the Federal Aviation Regulations. Nor should it be a surprise that the Board views itself as an ally of the FAA in a collaborative effort to ensure and promote air safety in the United States. Moreover, experience shows that any Board judge assigned to try an airman’s case is *not* focused *exclusively* on the merits of the airman’s case. Rather, as the comments below by Board Chief ALJ Montañó demonstrate, an airman who raises a novel or unique defense will not have his fate determined based on the facts of his particular case. Rather, part of the equation as to whether the airman will be allowed to prevail depends on what the judge thinks might happen in future cases if he decides in favor of the airman and how that might impact the judge’s ability to be transported safely home by the airlines.<sup>30</sup>

Of late, at least one of the Board’s administrative law judges (ALJs) maintains that he is authorized to cross-examine and interrogate witnesses.<sup>31</sup> Since the focus is inevitably cross-examination of the airman or the airman’s witnesses,<sup>32</sup> the nature of a proceeding before a Board ALJ is inquisitorial where the respondent confronts not one, but two, adversaries. Make no mistake, the tenor of Board hearings is inquisitorial in nature; there is no pretense that Board hearings are conducted in an impartial manner<sup>33</sup> as required by law.<sup>34</sup> Not only will an ALJ

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<sup>29</sup> See cases cited *supra* note 6.

<sup>30</sup> *Knight* Transcript, *supra* note 17, at 622.

<sup>31</sup> *Knight* Transcript, *supra* note 17, at 590.

<sup>32</sup> *Knight* Transcript, *supra* note 17, at 590–625.

<sup>33</sup> *Knight* Transcript, *supra* note 17, at 590–625.

<sup>34</sup> 5 U.S.C. § 556(b) (2018).

subject the respondent's expert witness to a grueling cross-examination in what can only be described as an attempt to negate the respondent's affirmative defenses,<sup>35</sup> but as Judge Montaña has demonstrated, the ALJ can go much further. For example, an ALJ, over the objection of respondent's counsel,<sup>36</sup> recalled via telephone an FAA lay witness,<sup>37</sup> who had been excused and left the city where the hearing was being conducted, and elicited Rule 702<sup>38</sup> opinion testimony, stating that record alterations in an FAA witness's medical chart were not material.<sup>39</sup>

In *Administrator v. Knight*,<sup>40</sup> the Administrator revoked, on an emergency basis, the airman's mechanic certificate, claiming he had refused to provide a urine specimen in response to a Department of Transportation (DOT) drug test. The airman set up as an affirmative defense that he had been unable to provide the 45mL urine specimen because he suffered from paruresis as diagnosed by a board-certified urologist.<sup>41</sup> In a moment of remarkable candor, the following exchange took place between Board Chief Judge Montaña and Dr. Hill, a urologist who testified on behalf of the respondent:

JUDGE MONTAÑA: All right. Let me explain something to you, Doctor. And the reason I've asked you so many questions, is that I have to understand this.

.....

JUDGE MONTAÑA: No, because it is critically important because I am facing situations in cases w[h]ere people go for drug tests are pilots, you know, people who are flying for United or Mr. Knight, you know, doing important work as an A&P mechanic, insuring we're safe.

DR. HILL: Yeah, huge.

JUDGE MONTAÑA: Ensuring we're all safe when we fly when I go home on Delta.

DR. HILL: Yeah.

JUDGE MONTAÑA: —or whatever airline I go home on.

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<sup>35</sup> *Knight* Transcript, *supra* note 17, at 590–625.

<sup>36</sup> *Knight* Transcript, *supra* note 17, at 305–06.

<sup>37</sup> *Knight* Transcript, *supra* note 17, at 125–34, 161.

<sup>38</sup> *Knight* Transcript, *supra* note 17, at 125–34, 161. Since the ALJ ruled that the medical review officer was only being considered as a lay witness due to the FAA's failure to disclose him as an expert witness, the lay witness was not to sponsor an opinion "based on scientific, technical, or other specified knowledge within the scope of Rule 702." FED. R. EVID. 701(c).

<sup>39</sup> *Knight* Transcript, *supra* note 17, at 305–06.

<sup>40</sup> *Knight* Transcript, *supra* note 17, at 305–06.

<sup>41</sup> Third Amended Answer and Affirmative Defs., Nos. 1–4, *Knight*, N.T.S.B. Docket No. SE-30308 (June 23, 2017) (on file with author).

DR. HILL: Amen.

JUDGE MONTAÑO: So, its critically important if someone goes for a drug test and can't produce urine, and that person can say, you know—I can look at it this way. I can say, you know, that's—Dr. Hill diagnosed it—and I'm not saying I won't; this is what I'm weighing. Dr. Hill says, yeah, this one time, doesn't matter what happened before, doesn't matter what happens after; this is what it was on that one occurrence. Well, I wasn't there and you weren't there. Right?

DR. HILL: Um-hum. Um-hum.

JUDGE MONTAÑO: Is that right?

DR. HILL: That's correct.

JUDGE MONTAÑO: Okay. You didn't examine him that day?

DR. HILL: I did not.

JUDGE MONTAÑO: Okay. So, based on everything that you have made your conclusion on based on his history; correct?

DR. HILL: Correct.

JUDGE MONTAÑO: Okay. So, then I have to say, okay, well which do I give the more weight to because—I'm not—you know, I may very well—well, geez, you know, Dr. Hill was clear. He was immovable. I believed his testimony. So, future cases, what would happen is that—could potentially happen is that, you know, I have paruresis—paruresis.

DR. HILL: Paruresis.

JUDGE MONTAÑO: Paruresis for day [sic].

DR. HILL: Yeah.

JUDGE MONTAÑO: You know, that would be the defenses that would come before me.

DR. HILL: I don't know.

JUDGE MONTAÑO: Paruresis for the day. You know, it's like—and that's it. I don't need to show—

DR. HILL: That's the new thing.

JUDGE MONTAÑO: So, that is why it is critical for me to understand. So if I understand your testimony, then that could essentially happen?

DR. HILL: Right.

JUDGE MONTAÑO: All right. People could take the drug test, hold their urine, go back and forth in the waiting room, shaking and can't wait to come out, and negative dilute. That's—strike that. And then come to you or any other urologist, and says, this is what happened: I have problems at weddings; I have problems at bar mitzvahs; I have problems when I'm waiting in line. Then we have paruresis—

DR. HILL: Yeah.

JUDGE MONTAÑO: —which would serve as a reason for this person to retain his job and ensure whether or not we fly safely or a pilot flies us safely. And we're really not—but then that

would be the medical—the physiological reason for it; is that right?<sup>42</sup>

The comments of Judge Montañó must be placed in context. That exchange between the judge and the physician/expert witness for the respondent took place following a rigorous and extremely aggressive cross-examination *by the court* in an attempt to persuade the respondent's expert witness to recant or alter his opinion testimony.<sup>43</sup>

The inquisitional tenor of Board proceedings in *Knight* is confirmed by the activities of the ALJ in supplanting and reinforcing the functions of the prosecutor by:

- (1) engaging in a 30-minute cross-examination of the respondent's expert witness,<sup>44</sup> raising legal issues that were not raised by FAA counsel;<sup>45</sup>
- (2) asking respondent's expert witness leading questions without a factual basis;<sup>46</sup>
- (3) stating respondent's counsel was present at a medical examination when there is no evidence in the record to support that assertion;<sup>47</sup>
- (4) suggesting that the medical records of the respondent's expert were incomplete;<sup>48</sup>
- (5) repeatedly arguing with respondent's expert witness about matters of fact that the expert said were not material to his decision;<sup>49</sup>
- (6) arguing with respondent's expert and telling the expert that he had to answer the questions of the judge;<sup>50</sup>
- (7) repeatedly intoning that respondent went to the expert for purposes of litigation;<sup>51</sup>
- (8) relating to respondent's expert that while respondent would lose his job if the court rejected the "paruresis for a day defense," the court was concerned if he sustained

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<sup>42</sup> *Knight* Transcript, *supra* note 17, at 621–24.

<sup>43</sup> *Knight* Transcript, *supra* note 17, at 590–625.

<sup>44</sup> *Knight* Transcript, *supra* note 17, at 590–625.

<sup>45</sup> *Knight* Transcript, *supra* note 17, at 595–96, 601–03, 607–08, 616–18.

<sup>46</sup> *Knight* Transcript, *supra* note 17, at 605.

<sup>47</sup> *Knight* Transcript, *supra* note 17, at 610.

<sup>48</sup> *Knight* Transcript, *supra* note 17, at 618–20.

<sup>49</sup> *Knight* Transcript, *supra* note 17, at 525, 614–15, 617–20.

<sup>50</sup> *Knight* Transcript, *supra* note 17, at 620.

<sup>51</sup> *Knight* Transcript, *supra* note 17, at 612, 621.

the defense, other airman would raise that defense and compromise air safety;<sup>52</sup>

- (9) remediating, over objection of respondent's counsel, deficiencies in the FAA's evidence by recalling a lay witness<sup>53</sup> to testify that alterations in the medical records of an FAA witness did not matter;<sup>54</sup>
- (10) asking, over the objection of respondent's counsel,<sup>55</sup> if alterations by the FAA examining physician to her records were material;<sup>56</sup>
- (11) refusing to even consider respondent's motion in limine;<sup>57</sup>
- (12) rehabilitating the testimony of the FAA's examining witness over the respondent's objection;<sup>58</sup>
- (13) becoming an advocate for the proposition that unannotated late entries in a shy bladder assessment form were immaterial<sup>59</sup> even though a blank version of that form had been employed by the FAA as the authentic article throughout the litigation with a more complete version of the form only having surfaced twenty-one days before trial;<sup>60</sup>
- (14) remarking, after respondent's counsel objected and attempted to curtail the trial court's advocacy,<sup>61</sup> that the regulations permitted him to ask questions for clarification;<sup>62</sup>
- (15) advocating on behalf of the FAA's interests, since when respondent moved to strike the testimony of the exam-

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<sup>52</sup> *Knight* Transcript, *supra* note 17, at 621–25.

<sup>53</sup> *Knight* Transcript, *supra* note 17, at 125–34, 161.

<sup>54</sup> *Knight* Transcript, *supra* note 17, at 303–07.

<sup>55</sup> *Knight* Transcript, *supra* note 17, at 305–06.

<sup>56</sup> *Knight* Transcript, *supra* note 17, at 303–07.

<sup>57</sup> *Knight* Transcript, *supra* note 17, at 27–28.

<sup>58</sup> *Knight* Transcript, *supra* note 17, at 197–200, 205, 207, 213–15.

<sup>59</sup> *Knight* Transcript, *supra* note 17, at 217, 303–06.

<sup>60</sup> Adm'r's Supplemental Prehearing Submission, Knight, N.T.S.B. Docket No. SE-30308 (Sept. 11, 2017). Under "Exhibits" there was a reference to Exhibit A-6, a shy bladder assessment form dated August 29, 2016, the version of A-6 to the Administrator's Supplemental Prehearing Submission having been materially altered from the genuine form used throughout the litigation. Only after respondent made an issue about the "altered form" by filing emergency motions did the FAA make a distinction between the original blank form and the supplemental altered version of the form.

<sup>61</sup> *Knight* Transcript, *supra* note 17, at 286–87.

<sup>62</sup> *Knight* Transcript, *supra* note 17, at 214.

ining physician and her medical chart as unreliable,<sup>63</sup> the ALJ elicited testimony from the examining physician and medical review officer that subsequent unannotated entries in the medical chart did not matter;<sup>64</sup>

- (16) repeatedly accusing respondent's counsel of claiming that FAA counsel had altered the shy bladder assessment form<sup>65</sup> when the ALJ's accusations were not supported by the record;<sup>66</sup>
- (17) reversing, *sub silentio*, the ALJ's prior ruling that the medical review officer would not be considered as an expert witness because the FAA had failed to disclose him as such;<sup>67</sup>
- (18) refusing to permit respondent's counsel to cross-examine the FAA's Deputy Air Surgeon for the Southern Region about the respondent's history of difficulty voiding in public restrooms<sup>68</sup> even though the Deputy Federal Air Surgeon for the Southern Region testified that he relied upon the medical history of the examining physician in reaching his conclusions;<sup>69</sup> and
- (19) in contrast, the 35-page grueling cross-examination of the respondent's expert witness,<sup>70</sup> which asked only a few easy questions for the FAA's expert witness, the Deputy Federal Air Surgeon for the Southern Region.<sup>71</sup>

The foregoing facts in the *Knight* record lead to an inference that the Chief ALJ had pre-determined his decision before considering the evidence, a practice condemned in *United States ex rel. Accardi v. Shaughnessy*.<sup>72</sup> Moreover, the extensive remarks by the Chief ALJ in expressing his concerns for air safety in light of the "paruresis for a day" defense make the following comments by the Sixth Circuit Court of Appeals apt:

Nevertheless, a judge should be careful not to give the impression that a particular view of the law prevents a careful consider-

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<sup>63</sup> *Knight* Transcript, *supra* note 17, at 220–22.

<sup>64</sup> *Knight* Transcript, *supra* note 17, at 226–28, 303–06.

<sup>65</sup> *Knight* Transcript, *supra* note 17, at 19, 226–27.

<sup>66</sup> *Knight* Transcript, *supra* note 17, at 19, 226–27.

<sup>67</sup> *Knight* Transcript, *supra* note 17, at 125–35, 161, 305–06.

<sup>68</sup> *Knight* Transcript, *supra* note 17, at 372–73.

<sup>69</sup> *Knight* Transcript, *supra* note 17, at 398–400.

<sup>70</sup> *Knight* Transcript, *supra* note 17, at 590–625.

<sup>71</sup> *Knight* Transcript, *supra* note 17, at 404–06.

<sup>72</sup> 347 U.S. 260, 267 (1954) ("We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision.").

ation of the law and facts applicable to any given case. When an entire career has been spent in the service of one governmental agency, it can be easy for a judge to slip into a stance that may appear to be advocating, rather than judging, those interests.<sup>73</sup>

The language employed by the Board and administrative law judges makes it clear that the Board has a conflict of interest that precludes it from adjudicating airman certificate actions in an impartial manner as required by the statute.<sup>74</sup> “No man can serve two masters.”<sup>75</sup> The Board is attempting to serve two masters. It is attempting to promote and serve the interests of air commerce, air safety, and the public interest and, at the same time, impartially adjudicate airman enforcement proceedings. The problem with Congress vesting the jurisdiction of aviation enforcement proceedings in the Board is that the Board cannot and will not adjudicate these cases “in an impartial manner” as required by law.<sup>76</sup>

The remarks by Chief Judge Montañó in *Knight* demonstrate that the court was not focused *exclusively* on Mr. Knight’s guilt or innocence. While the ALJ announced on the record that he believed Dr. Hill’s testimony that Knight had paruresis,<sup>77</sup> the ALJ still found in favor of the Administrator, concluding that an airman who had provided a 31mL urine sample<sup>78</sup> rather than the required 45mL sample had refused to submit to a DOT drug test.<sup>79</sup> Since the ALJ believed respondent’s expert’s testimony that respondent suffered from paruresis,<sup>80</sup> the only logical basis for the ALJ’s ruling was, despite that belief, safety in air commerce or air transportation and the public interest<sup>81</sup> required affirmation of the order of revocation based on the ALJ’s concern about being safely transported on the airlines.<sup>82</sup> The court’s focus was on how the Board would handle the deluge of cases that was sure to follow if it rendered a decision favorable to the respondent.<sup>83</sup> The ALJ’s actions and language in *Knight* underscore the patent conflict of interest presented where the ad-

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<sup>73</sup> *Parchman v. USDA*, 852 F.2d 858, 866 (6th Cir. 1988).

<sup>74</sup> 5 U.S.C. § 556(b) (2018).

<sup>75</sup> *Matthew* 6:24.

<sup>76</sup> 5 U.S.C. § 556(b) (2018).

<sup>77</sup> *Knight* Transcript, *supra* note 17, at 68.

<sup>78</sup> *Knight* Transcript, *supra* note 17, at 66.

<sup>79</sup> *Knight* Transcript, *supra* note 17, at 771–896.

<sup>80</sup> *Knight* Transcript, *supra* note 17, at 623.

<sup>81</sup> 49 U.S.C. § 44709(d)(1)(A) (2018).

<sup>82</sup> *Knight* Transcript, *supra* note 17, at 622.

<sup>83</sup> *Knight* Transcript, *supra* note 17, at 621–24.

judicating agency is charged with adjudicating the guilt or innocence of an airman and rendering that decision based on air safety and the public interest.

In addition to the comments by Chief Judge Montaña in *Knight*, consider *In re Rice*<sup>84</sup> where the Administrator's counsel neglected to place into evidence the FAA's sanction guidance table that outlined levels of sanction for various infractions of the Federal Aviation Regulations. While the FAA initially sought a ninety-day suspension for an off-airport landing due to fuel exhaustion,<sup>85</sup> the law judge reduced the sanction from ninety days to seventy-five days, and the Board reduced the suspension to sixty days.<sup>86</sup> In rendering its decision, the Board declared: "In future cases, we *encourage* the Administrator to present evidence of the sanction guidance table, and evidence or argument addressed to the validity of choice of sanctions in the context of the specific facts of each case."<sup>87</sup>

Certainly no one would expect a criminal court to tell the prosecutor in the presence of defense counsel how to conduct himself in future cases if he wants to prevail. No one would imagine a civil court judge instructing counsel for one of the litigants about how he should conduct himself if he desires to prevail. Such conduct would be unseemly and would reveal the clear bias of the court that could lead to the court's disqualification. In court, it would be a gross act of impropriety. Given that an airman's loss of license or loss of career is the nature of litigation before the Board, why are these unseemly and biased comments any more tolerable—just because the Board happens to be an administrative agency rather than a court? Just as a judge would be summarily disqualified due to bias in favor of one litigant over the other, so should the Board by virtue of its manifest bias in favor of the FAA be "disqualified" from adjudicating airman certification and enforcement actions. However, that is of no concern to the Board, since it is an ally of the FAA in pursuit of ensuring air safety. Moreover, one must remember that the Board is not a court and, in the context of aviation enforcement proceedings, the focus of the Board is on "safety in air commerce or air transportation and the public interest."<sup>88</sup>

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<sup>84</sup> N.T.S.B. Order No. EA-5474, 2009 WL 2844146 (Aug. 26, 2009).

<sup>85</sup> *Id.* at \*1.

<sup>86</sup> *Id.*

<sup>87</sup> Rice, N.T.S.B. Order No. EA-5408, 2008 WL 4452143, at \*4 n.11 (Sept. 25, 2008) (emphasis added).

<sup>88</sup> 49 U.S.C. § 44709(d)(1)(a) (2018).

The institutional bias that the Board exhibits in favor of the FAA is also confirmed by the exchange between counsel and the Board law judge in *Shaffer*.<sup>89</sup> Shaffer's counsel served discovery requests on the Administrator for "all radar data showing the location of N3050H on 30 May 2006."<sup>90</sup> But the FAA only produced radar data for the flight prior to the aircraft's return leg to Homestead, Florida.<sup>91</sup> When the FAA had not produced the radar data by the close of proceedings on Friday, the solution of the Board ALJ was to have the FAA produce the data on the following Monday after the airman's expert witness in the air traffic control matters would no longer be available to testify.<sup>92</sup> The ALJ would not consider dismissing the charges on the grounds the FAA had not timely produced the radar data noting: "I just don't see any other way that I can deal with this, other than to dismiss the case summarily, and I don't think that the public interest and air safety in air operation is served by doing that."<sup>93</sup> On the other hand, a federal district court judge would have had no difficulty in summarily dismissing the FAA's case based on its refusal to produce radar data relevant to the case in issue. However, because the Board is concerned with "safety in air commerce or air transportation and the public interest"<sup>94</sup> as a public government agency, it cannot and will not adjudicate airman enforcement actions "in an impartial manner."<sup>95</sup> The Board's institutional bias toward promoting air safety precludes it from conducting airman certificate and enforcement proceedings "in an impartial manner" as required by law.<sup>96</sup>

In *Murphy*,<sup>97</sup> the author moved in limine to preclude the FAA from entering evidence inconsistent with the Administrator's admissions *in judicio* by virtue of requests for admission to which the Administrator had failed to respond into the record. The author noted, "[i]f those admissions are admitted, there is no

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<sup>89</sup> Transcript of Proc., *Shaffer*, N.T.S.B. Docket No. SE-17764 (July 21, 2006) [hereinafter the *Shaffer* Transcript] (on file with author).

<sup>90</sup> *Id.* at 723.

<sup>91</sup> *Id.* at 699.

<sup>92</sup> *Id.* at 720–21.

<sup>93</sup> *Id.* at 714.

<sup>94</sup> 49 C.F.R. § 44709(d)(1)(A) (2018).

<sup>95</sup> 5 U.S.C. § 556(b) (2018).

<sup>96</sup> *Id.*

<sup>97</sup> Transcript of Evidentiary Hearing, at 23, *Murphy*, N.T.S.B. Order No. 5355, 2008 WL 205095, at \*14 n.1 (Jan. 16, 2008) (on file with author).

case. The case is over.”<sup>98</sup> The author requested that he be permitted to read the thirty-five paragraphs of requests for admission into the record,<sup>99</sup> and FAA counsel admitted that no response or objections to the respondents’ request for admission had been served.<sup>100</sup> In federal district court, the FAA would have been in serious trouble. The case would have been over for the FAA. However, Judge Pope of the Board merely directed that the Administrator’s counsel read into the record his responses to the request for admission.<sup>101</sup> This unorthodox procedure, which is outside the rules of every court, was objected to.<sup>102</sup> There can be little doubt that Judge Pope was reluctant to grant the motion in limine and declare that the FAA lost the case by default because he was constrained by concerns for “safety in air commerce or air transportation and the public interest.”<sup>103</sup>

In *Administrator v. Roarty*,<sup>104</sup> the agency sought to revoke an airman’s certificate alleging that he had made intentionally false statements on his medical application form by not disclosing a conviction of driving under the influence.<sup>105</sup> After Judge Mullins found that the airman did not intentionally falsify his medical application form and exonerated the airman, the Board affirmed, declaring: “*Unfortunately*, the Administrator did not call any witnesses, and, we think, did not aggressively cross-examine respondent regarding his exculpatory claims.”<sup>106</sup> To be clear, from the Board’s perspective in *Roarty*, it was *unfortunate* that the Administrator had not aggressively cross-examined the airman. This is not the kind of language one reads in decisions of trial courts because trial court judges understand the importance of both appearing and acting in an impartial manner. The Board does not. The Board’s support and bias in favor of the FAA is persistent and in plain public view for all the world to see. If you were an airman and if proceedings were brought to revoke your certificate, you would hope the judge’s decision would be based

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 25.

<sup>101</sup> *Id.* at 26–27.

<sup>102</sup> *Id.* at 28–29.

<sup>103</sup> 49 U.S.C. § 44709(d)(1)(A) (2018).

<sup>104</sup> *Roarty*, N.T.S.B. Order No. EA-5261, 2006 WL 3472333, at \*1 (Nov. 27, 2006).

<sup>105</sup> *Id.*; see also 14 C.F.R. § 67.403(a)(1) (2009) (prohibiting making fraudulent or intentionally false statements on an application for a medical certificate).

<sup>106</sup> *Roarty*, 2006 WL 3472333, at \*2 (emphasis added).

upon the merits of your case and not a concern about what might happen in future cases in the event you were to prevail. Unhappily, that is not the case. As demonstrated by the remarks of Chief Judge Montaña, the bias the Board exhibits in favor of the FAA renders the Board an improper forum to adjudicate airman certificate action and enforcement cases.

B. THE BOARD, AN INSTITUTION OPENLY BIASED IN FAVOR OF THE FAA, CONSISTENTLY REFUSES TO SANCTION FAA MISCONDUCT, RENDERING IT AN IMPROPER FORUM TO ADJUDICATE AIRMEN ENFORCEMENT AND CERTIFICATION CASES

As if manifest and open bias on the part of the Board in favor of the FAA is not alone sufficient grounds for transferring jurisdiction of airman certificate actions from the Board to federal district court, the Board has also demonstrated a propensity to ignore violations by the Administrator of his own rules, procedures, and protocols. For example, in *Administrator v. Murphy*,<sup>107</sup> where the captain and first officer were represented by the author, a Lear jet momentarily departed from its cruising altitude of 26,000 feet to less than 26,300 feet when there was a Canadair CRJ-2 aircraft within 3.4 nautical miles laterally at an altitude of 27,000 feet.<sup>108</sup> The captain, upon detecting this altitude deviation, directed the co-pilot to descend to 26,000 feet.<sup>109</sup> The parties stipulated it was a computer-detected altitude deviation.<sup>110</sup> The en route separation was 1,000 feet vertically with five miles lateral separation.<sup>111</sup> Because vertical separation had been compromised by more than 20%, the data blocks on the aircraft began to flash on the controller's radar scope even though there was no suggestion of mid-air collision anywhere in the evidence or in the transcript.<sup>112</sup>

FAA Enforcement Bulletin 86-1 was in place at the time of the incident as an Appendix to the FAA Enforcement Handbook, requiring the matter be resolved administratively if it involved (1) a computer-detected altitude deviation; (2) of 500 feet or less; (3) where there was no mid-air collision; (4) where there were no aggravating circumstances; and (5) where the pilot did

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<sup>107</sup> *Murphy*, N.T.S.B. Order No. EA-5355, 2008 WL 205095, at \*1 (Jan. 16, 2008).

<sup>108</sup> *Id.* at \*1, \*7.

<sup>109</sup> *Id.* at \*1.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

not have a history of committing an altitude deviation in the past five years.<sup>113</sup> Both airmen in *Murphy* met all of the criteria set forth in the bulletin.<sup>114</sup> Judge Pope found in favor of the airmen, concluding that the criteria of Bulletin No. 86-1 were satisfied and that the FAA was bound by its own regulations, policies, and procedures, citing a number of cases.<sup>115</sup> The FAA appealed the adverse decision, and the Board reversed concluding it had no jurisdiction to interfere with the FAA's prosecutorial discretion.<sup>116</sup>

In *Administrator v. Moshea*,<sup>117</sup> the airman appealed from a fifty-day suspension of his airline transport pilot certificate after Judge Geraghty affirmed violations stating that the airman had operated an aircraft in an unairworthy condition.<sup>118</sup> Moshea had flown the subject aircraft operated by Key Lime on multiple occasions, had experienced difficulty with the landing gear, had disclosed this to maintenance personnel, but had not made an entry in the aircraft logbook.<sup>119</sup> When a different pilot flying this aircraft had a severe landing gear problem to such an extent that the pilot diverted to an airport with crash, fire, and rescue services, Key Lime promptly notified the FAA, making a "self-disclosure" in accordance with FAA Advisory Circular AC 00-58, and asserting that the incident was caused by "lack of communication between the pilot and maintenance."<sup>120</sup> The FAA did not pursue action against Key Lime but did pursue enforcement action against Moshea.<sup>121</sup> Judge Geraghty found that the Board lacked jurisdiction to review how the FAA implements AC 00-58.<sup>122</sup>

On appeal, Moshea argued that Judge Geraghty erred in ruling that the Board does not have jurisdiction to review the Administrator's discretion to pursue enforcement actions, arguing "that the Administrator violated his policy in pursuing action, thereby violating respondent's fundamental due process

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<sup>113</sup> *Id.* at \*2.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at \*14 (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Steenholdt v. FAA*, 314 F.3d 633 (D.C. Cir. 2003); *Lopez v. FAA*, 318 F.3d 242, 249 (D.C. Cir. 2003); *Brasher*, 5 N.T.S.B. 2116 (1987); *Randall*, 3 N.T.S.B. 3624 (1981)).

<sup>116</sup> *Murphy*, 2008 WL 205095, at \*4.

<sup>117</sup> N.T.S.B. Order No. EA-5328, 2007 WL 3088248 (Oct. 17, 2007).

<sup>118</sup> *Id.* at \*1; 14 C.F.R. §§ 91.7(a), 135.65(b), 91.13(a) (2018).

<sup>119</sup> *Moshea*, 2007 WL 3088248, at \*1.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

rights.”<sup>123</sup> The Board affirmed Judge Geraghty’s Initial Decision denying Moshea the affirmative defense based upon AC 00-58, declaring:

The Board has previously held that it does not have the authority to review the Administrator’s determination to pursue a matter through legal enforcement action. The Board is precluded from deciding a case based on the Administrator’s choice of pursuing an action against an individual. Such an action would intrude upon the Administrator’s prosecutorial discretion. The Board’s “jurisdiction concerning enforcement proceedings extends only to the question of whether safety and public interest require affirmation of the Administrator’s order.”<sup>124</sup>

In *Moshea v. NTSB*,<sup>125</sup> Moshea appealed the Board’s ruling that it lacks jurisdiction over the FAA’s prosecutorial discretion in terms of sanctions, or lack thereof, expressed in AC 00-58.<sup>126</sup> At the time of the appeal, 49 C.F.R. § 44709(d)(3) still existed and provided that the Board was

not bound by findings of facts of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public *related to sanctions* to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.<sup>127</sup>

The Board took the position that AC 00-58 was not “related to sanctions” under the then codified § 44709(d)(3), an argument the D.C. Circuit summarily rejected. The court noted:

We find unreasonable the efforts of the FAA and the Board to evade Circular 00-58 in this way. Without getting into a metaphysical discussion of the meaning of the phrase “related to,” it suffices here to say that the words “related to” are broad . . . And we think a Circular that says no sanction will be imposed in the case of voluntary disclosure is quite obviously “related to sanctions.” We conclude that the Board’s analysis was unreasonable and contrary to the statute.<sup>128</sup>

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<sup>123</sup> *Id.* at \*2 (internal quotation marks omitted) (citation omitted).

<sup>124</sup> *Id.*

<sup>125</sup> 570 F.3d 349 (D.C. Cir. 2009).

<sup>126</sup> *Id.* at 351.

<sup>127</sup> *Id.* (citing 49 U.S.C. § 44709 (d)(3)) (emphasis in original).

<sup>128</sup> *Id.* at 352 (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 307–08 (1995) (“Congress did not delineate the scope of ‘related to’ jurisdiction, but its choice of words suggests a grant of some breadth.”)).

The Board suggested, but did not rule, that Moshea may not have satisfied the requirements of the Advisory Circular.<sup>129</sup> The D.C. Circuit reversed for a second reason, declaring:

The Board's analysis suffers from a separate flaw that also requires vacatur. The Board's position in Moshea's case is inconsistent with his handling of a prior case. In *Liotta*, the Board allowed an employee of an air carrier to assert an "affirmative defense" based on Advisory Circular 00-58. *Liotta*, NTSB No. EA-5297, slip op. at 6, 2007 WL 1920600 (June 27, 2007). In *Liotta*, the Board thus exercised its jurisdiction to consider an affirmative defense virtually identical to Moshea's. By departing from the *Liotta* precedent without explanation, the Board here acted in an arbitrary and capricious manner. *Cf. Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.") (internal quotation marks omitted). The Board's inconsistent treatment of Moshea's case and *Liotta*'s case supplies an independent basis for vacating the Board's Order in this case.<sup>130</sup>

In remanding the case to the Board, the court declared: "The Board had jurisdiction to decide whether the FAA's suspension of Moshea comported with the FAA's voluntary disclosure policy set forth in Advisory Circular 00-58."<sup>131</sup>

While a review of *Administrator v. Liotta*<sup>132</sup> indicates that the respondent was ultimately unsuccessful in his effort to persuade the Board that he met the requirements of AC 00-58, nonetheless, in that case, the airman was allowed a defense based upon that advisory circular. In *Moshea*, this was not allowed, nor was it allowed in *Murphy*. The holding in *Moshea v. NTSB* clearly indicates that had *Murphy* had the resources to take an appeal to the United States Circuit Court of Appeals, he would have prevailed, since the FAA Enforcement Bulletin 86-1 did relate to sanction.<sup>133</sup> Aside from being invalid, as demonstrated by the holding of the United States Circuit Court of Appeals for the District of Columbia in *Moshea v. NTSB*, the Board's position that it lacks

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<sup>129</sup> *Id.* at 351.

<sup>130</sup> *Id.* at 352-53.

<sup>131</sup> *Id.* at 353.

<sup>132</sup> *Liotta*, N.T.S.B. Order No. EA-5297, 2007 WL 1920600 (June 29, 2007).

<sup>133</sup> *Moshea v. NTSB*, 570 F.3d 349, 352 (D.C. Cir. 2009) ("And we think that a Circular that says no sanction will be imposed in the case of voluntary disclosure is quite obviously 'related to sanctions.' We conclude that the Board's analysis was unreasonable and contrary to the statute.").

jurisdiction over the Administrator's "prosecutorial discretion" is a concept of recent invention.<sup>134</sup>

In *Administrator v. Randall*,<sup>135</sup> the airman was alleged to have banked a North American Sabreliner beyond eighty degrees and to have stressed the aircraft to a load of +5.27Gs on several occasions.<sup>136</sup> The Administrator brought an emergency order of revocation against the respondent's airline transport pilot certificate, the case having been tried before Judge Fowler, who reduced the sanction to a nine-month suspension.<sup>137</sup> During the hearing, the respondent had repeatedly objected to the admission of flight data recorder (FDR) tapes because FAA Order 2150.3 dated May 16, 1980 provided:

Flight recorder tapes will not be utilized as a means to discover violations when the FAA has no other evidence of possible violation; and flight recorder tapes will not be used as evidence in an FAA enforcement action except for the purpose of corroborating other available evidence or to resolve conflicting evidence.<sup>138</sup>

The Board granted the airman's appeal reversing the initial decision and the emergency order of revocation, declaring:

The fact that the Administrator may be authorized to use FDR tapes in an enforcement proceeding does not, as the law judge appears to have assumed, entitle him to disregard a policy he has adopted, as a matter of his prosecutorial discretion, to restrict the use of such tapes in an enforcement action. Such a claim of entitlement would draw in question the most elementary principles of due process, for it would presume to reserve to the Administrator the authority to arbitrarily confer upon or deny any individual an important benefit. The Supreme Court has refused to sanction an agency's noncompliance with its procedural rules even in instances where the only individuals who could benefit from them were the agency's own employees and even thought the adoption of the rules was a purely discretionary exercise of authority. We think it follows that a policy that applies to any individual who may be subject to FAA enforcement action cannot be ignored on the claim that it involves general, internal agency

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<sup>134</sup> See Austin, N.T.S.B. Docket No. EA-5610, 2011 WL 7061940, at \*1 (Dec. 21, 2011) (citing *Moshea v. FAA*, 570 F.3d 349 (D.C. Cir. 2009)). The Board directed the ALJ to "accept briefs, evidence and/or testimony on the issue of whether the Board has jurisdiction to review the ASAP program and its applicability to this case."

<sup>135</sup> *Randall*, 3 N.T.S.B. 3624 (1981).

<sup>136</sup> *Id.* at 3624.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 3625.

guidance. Moreover, such a claim cannot be reconciled with the explicit instruction in Order 2150.3 that "FAA legal counsel shall not use flight recorder data as evidence, in any FAA enforcement action, except to corroborate other available evidence of a possible violation, or to resolve conflicting evidence."

The absence of articulated reasons within Order 2150.3 itself for departing from the FDR tape policy in a specific case creates the potential for capricious application which can only be avoided or, in this case, remedied, by giving the policy as written full force and effect in our proceedings. Since the Administrator sponsored no evidence independent of the FDR tapes to establish the alleged violations, the initial decision and the order of revocation cannot stand.<sup>139</sup>

Moreover, in footnote five of the opinion, the Board declared: "In *Administrator v. Montgomery, et al.*, NTSB Order No. EA-1397 (1990), we rejected the contention that the Administrator's prosecutorial discretion included the right to depart from the policy or guidelines he had established through adoption of the Aviation Safety Reporting Program."<sup>140</sup>

Clearly, in 1980 and 1981, as evidenced by *Montgomery* and *Randall*, the Board *did* have jurisdiction to prevent the FAA from violating its own rules and did not create the fiction that it lacked jurisdiction to question the Administrator's prosecutorial discretion. This invention gives the Administrator wide latitude to violate his own rules and places the airman at a pronounced disadvantage before an adjudicator that does not care and is indifferent. Because the Board clings to the invention that it lacks jurisdiction to question the Administrator's prosecutorial discretion when the Administrator violates his own rules, the Board is an improper forum to adjudicate airman enforcement and certificate actions, and these matters should be transferred to the jurisdiction of federal district courts.

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<sup>139</sup> *Id.* at 3626 (internal citations omitted).

<sup>140</sup> *Id.* at 3631, n.5.

C. THE BOARD HAS ROUTINELY DEPARTED FROM PRECEDENT AND LOWERED THE FAA'S BURDEN OF PROOF IN FALSE STATEMENT CASES REQUIRING AIRMEN TO PURSUE APPEALS TO THE UNITED STATES CIRCUIT COURTS OF APPEAL, RESULTING IN FINDINGS BY THE COURTS THAT THE BOARD ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER OR DEPARTED FROM PRECEDENT WITHOUT EXPLANATION

Perhaps no area of Board case law is fraught with more uncertainty, confusion, and disarray than the body of the law the Board has created in adjudicating charges brought by the FAA asserting that an airman made “a fraudulent or intentionally false statement.”<sup>141</sup> Because of the byzantine and confusing nature of this area of the law, the reader may anticipate that this portion of this article will be somewhat protracted in scope. The author apologizes, in advance, for the length of this portion of the article. However, without a comprehensive review of Board precedent, the reader will not have a complete appreciation for all the machinations the Board has pursued to lower the FAA's burden of proof in false statement cases and put in place what is in effect a standard of strict liability necessitating an adverse decision to the airman any time there is proof the statement was false and the airman knew it, without regard to the airman's *subjective* state of mind and whether he believed he was required to disclose the information in response to an unambiguous question.

We begin our journey with *Administrator v. Hart*,<sup>142</sup> where a tired and exhausted flight instructor inattentively made entries in his students' flight records about flight instruction that never took place.<sup>143</sup> Judge Moorhead found that the entries were intentionally false but not fraudulent and affirmed an order of revocation.<sup>144</sup> On appeal, the Board found the proper sanction was a nine-month suspension, concurring with Judge Moorhead's assessment that the entries were not fraudulent but were made with knowledge of the character of the document and the

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<sup>141</sup> See, e.g., 14 C.F.R. § 67.403(a) (2018) (“No person may make or cause to be made—(1) [a] fraudulent or intentionally false statement on any application for a medical certificate[.]”); 14 C.F.R. § 43.12(a) (2018) (“No person may make or cause to be made: (1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part[.]”).

<sup>142</sup> *Hart*, 2 N.T.S.B. 828 (1974).

<sup>143</sup> *Id.* at 828–29.

<sup>144</sup> *Id.* at 828.

nature of the data being endorsed.<sup>145</sup> Accordingly, the airman's appeal was granted in part, and denied in part.<sup>146</sup> Hart's petition for reconsideration was denied.<sup>147</sup>

*Hart v. McLucas*<sup>148</sup> is the seminal case relied on in practice before the Board when dealing with the difference between fraudulent and false statements. Hart appealed to the Ninth Circuit Court of Appeals which found that the language in the regulations dealing with "fraudulent or intentionally false" statements dealt with the concept of fraud, i.e., "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with intent to deceive (5) with action taken in reliance upon the representation."<sup>149</sup> A false statement charge is a lesser included offense that requires proof of "falsity, materiality and knowledge."<sup>150</sup> The fundamental issue raised by Hart on appeal was whether he had subjective knowledge of the falsity. In reversing the Board, the Ninth Circuit declared:

The FAA argues that knowledge of falsity is not a required element for intentional false statement under § 61.59(a)(2). While the NTSB agreed with that construction of § 61.59(a)(2), we do not. And, indeed, at oral argument, attorneys for the government disavowed the NTSB's interpretation of § 61.59(a)(2).

In effect, the FAA and NTSB would interpret § 61.59(a)(2) as establishing strict liability: the making of a false statement would be punishable, under their interpretation of § 61.59(a)(2), even if the person who made the statement did not know the statement to be false.

The obvious problem with this interpretation is that it effectively construes the term "intentionally" out of the regulation. The use of the word "intentionally," however, must be assumed to impart a mens rea requirement to the regulation. Were this not so, the draftsman of § 61.59(a)(2) could have defined the offense as the making of a false statement without any reference to the mental state of the person who makes the entry. Since, however, § 61.59(a)(2) explicitly includes an intent requirement, it is inconsistent to read the regulation as establishing strict liability.

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<sup>145</sup> *Id.* at 829.

<sup>146</sup> *Id.* at 830.

<sup>147</sup> *Id.* at 836.

<sup>148</sup> 535 F.2d 516 (9th Cir. 1976).

<sup>149</sup> *Id.* at 519.

<sup>150</sup> *Id.*

In short, the administrative interpretation of § 61.59(a)(2) advanced below, which essentially establishes a strict liability offense, is incorrect since it violates the common and normal reading of the phrase “intentionally false.” A fair reading of § 61.59(a)(2) indicates a desire to require scienter, i.e., knowledge of falsity, for liability. If the FAA thinks it would be better to establish strict liability, it is free to seek amendment to the regulation.<sup>151</sup>

The Ninth Circuit noted, “neither Judge Moorhead nor the [Board] squarely addressed the issue of Hart’s knowledge of falsity.”<sup>152</sup> The Ninth Circuit, in remanding the case to the Board, made this very telling remark:

Possibly the judge and the NTSB sought to spare Hart the obloquy of the direct finding, although there are indications that the administrative law judge and the NTSB believed that Hart was unaware of the falsity of the entries he made. Certainly, that is one possible interpretation of the finding that the false entries were the result of “inattention.”

However, there are other comments by the NTSB which may be interpreted to the contrary. In particular, the NTSB said (somewhat obliquely) that Hart knew “the nature of the data he was signing.” Does this mean that Hart knew the entries were false? We do not know.

In short, the finding of the NTSB on the issue of knowledge is understandably ambiguous because the NTSB incorrectly thought that knowledge was not a requisite element for a violation of § 61.59(a)(2).<sup>153</sup>

A casual reading of the decision of the Ninth Circuit in *Hart* makes it clear that the question of “knowledge” on the part of the airman extends not merely to “the nature of the data he was signing,”<sup>154</sup> but to whether the airman “knew the entries were false.”<sup>155</sup> In other words, the area of inquiry on the third element of a false statement case, the question of knowledge, depends upon the subjective understanding and intent of the airman to report the data.<sup>156</sup>

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<sup>151</sup> *Id.* at 519–20.

<sup>152</sup> *Id.* at 520.

<sup>153</sup> *Id.* at 521.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Following remand from the Ninth Circuit to the Board, the Board in *Administrator v. Hart*<sup>157</sup> dismissed the complaint and terminated the proceedings, reasoning “that a presumption of actual knowledge on the part of respondent at the time of his false entry was amply rebutted, so that no *scienter* had been established.”<sup>158</sup> However, the FAA petitioned for reconsideration and the Board issued a briefing schedule to allow the parties to brief the issue of *scienter*.<sup>159</sup>

In *Administrator v. Hart*,<sup>160</sup> the Board, once again, dismissed the complaint and terminated proceedings after considering the parties’ briefs, declaring:

The hearing examiner found that respondent’s falsity was most probably the result of inattention. We agree with that finding and our rereading of the record has not changed our opinion. We are impressed, moreover, with the argument of respondent that it is impossible to be inattentive and at the same time have actual knowledge of an act performed.<sup>161</sup>

The Board, after searching the record, commented:

[W]e agree with the Administrator that it is almost impossible to establish a past state of mind of another person, particularly when he disagrees. But, in accordance with the court’s decision in this case, we think that circumstantial evidence on that issue must be so compelling that no other determination is reasonably possible. We do not find that the record supports any such compelling determination. Rather, it is our view that the record, as a whole, indicates that the Administrator has not borne the burden of proving *scienter* as required by the Court of Appeals.<sup>162</sup>

A casual reading of the Board’s pronouncement in *Administrator v. Hart* makes it clear that merely establishing that an airman knew a fact does not mean that the airman acted with subjective knowledge. Moreover, “it is almost impossible to establish a past state of mind of another person, particularly when he disagrees.”<sup>163</sup> No one reading this language by the Board would imagine that the Board would sanction motions for summary judgment. No person reading this language by the Board would imagine that the Board would employ and approve the doctrine

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<sup>157</sup> 2 N.T.S.B. 841 (1976).

<sup>158</sup> *Id.* at 841.

<sup>159</sup> *Id.*

<sup>160</sup> 3 N.T.S.B. 24, 26 (1977).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

that if the airman knew the data, he acted with knowledge sufficient to satisfy a false statement charge. No one would imagine that the Board would lay down a doctrine that “inattention” *would not be a defense* in future cases, especially when this was a factor in the Board’s decision in *Hart*. As we shall see in the discussion below, the Board labored diligently to resurrect the strict liability standard and make it easier for the Administrator to prevail on false statement charges. More disturbing, however, is the fact that the Board departed from its own precedent without ever acknowledging or admitting that it was doing so.

*Administrator v. Juliao*<sup>164</sup> was decided only thirteen years after the Board’s decision in *Hart*. Consequently, the Board had not yet disavowed the requirement of *subjective* knowledge as a condition to the Administrator proving a false statement charge. Juliao had been convicted of attempting to transport approximately \$100,000 in currency to Columbia, South America.<sup>165</sup> Approximately six months after his conviction, Juliao completed a medical application form and gave a negative response to Question 21w, “Medical History—Have you ever had or have you now any of the following: Record of other convictions.”<sup>166</sup> Judge Reilly affirmed the FAA’s order revoking Juliao’s airman certificate concluding that “respondent had intentionally falsified two medical certificate applications.”<sup>167</sup> Harking back to the decision in *Hart*, where the entries in the students’ logbooks were arguably the result of “inattention,” Juliao testified his entries on the medical application forms were due to “his inadvertent failure to read them closely[.]”<sup>168</sup> Juliao looked at the list of questions under “Medical History” on the form asking for questions about heart problems and similar problems and concluded “I don’t have—haven’t ever had any medical problems, so I just went down the line with Xs on the no, both lines, and then I finish real quick, and next I started with the rest of the questions.”<sup>169</sup> Judge Reilly “made no credibility findings because he concluded . . . that respondent’s explanation for the wrong answers was inadequate as a matter of law.”<sup>170</sup> The

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<sup>164</sup> 7 N.T.S.B. 94 (1990).

<sup>165</sup> *Id.* at 94.

<sup>166</sup> *Id.* at 94–95.

<sup>167</sup> *Id.* at 94.

<sup>168</sup> *Id.* at 95.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 94, 95.

Board reversed Judge Reilly and remanded the case for further proceedings, declaring:

The conclusion was erroneous because actual knowledge of the falsity of an entry is required to establish a violation of section 61.20(a)(1). In other words, while the law judge, by rejecting respondent's testimony, could have inferred an intent to falsify from the fact that the applications were shown to contain incorrect information, he could not ignore the respondent's testimony and find an intent to falsify in a breach of the respondent's perceived duty to know what information the application was in fact seeking. It is not enough, under the regulation, to show that a respondent should have known. Rather, the proof, either directly or circumstantially, must show what he knew.<sup>171</sup>

The holding of the Board in *Juliao* clearly reinforced the holding in *Hart* that in order for the Administrator to prevail, it must show not only that the information was false and that the airman knew it was false but also that the airman knew he had a duty to disclose the information in response to the question. Furthermore, *Juliao* makes it clear that "inattention" can be a defense in a false statement case, and there was no Board case law at that time declaring that the failure of the airman to read the instructions on the Medical Application Form deprived him of the defense that he did not act with subjective knowledge as specifically held by the Ninth Circuit in *Hart v. McLucas*.

In *United States v. Manapat*,<sup>172</sup> the United States Court of Appeals for the Eleventh Circuit affirmed the trial court's *sua sponte* decision to dismiss charges against the airman brought under 18 U.S.C. § 1001 in connection with allegedly "knowingly and willfully" making false statements on the FAA Medical Application Form. Questions 22 and 23 under the heading "Medical History" dealt with "record of traffic convictions" and "record of other convictions."<sup>173</sup> The district court, in dismissing the indictment, made these telling remarks on the record:

I have determined that it is a matter of fundamental fairness. And the way their question has been put on this form, which is basically to determine medical conditions, is fundamentally unfair; that the way it is put is vague. It is misleading and confusing. It is ambiguous, and the way it is configured on the form amounts to a trick question; and I think it is fundamentally unfair to base a felony prosecution on any answers that may be

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<sup>171</sup> *Id.* at 96 (citations omitted).

<sup>172</sup> 928 F.2d 1097 (11th Cir. 1991).

<sup>173</sup> *Id.* at 1098-99.

given by anybody on this form. And it is so fundamentally unfair that it amounts to a denial of due process.<sup>174</sup>

Circuit Judge Kravitch on the Eleventh Circuit Panel wrote:

It is conceivable that an applicant might believe that the form was asking for convictions somehow related to medical conditions. Or, an applicant could fail to understand the importance of such questions on a form concerning medical conditions and simply not give proper thought before answering. Or, more likely, an applicant in generally good health could routinely check off the many items on the standardized form without reading them carefully, resulting in an inaccurate response.

Although the single statements “Record of traffic convictions,” or “Record of other convictions” may not be ambiguous standing alone, they become quite confusing when buried in a list headed “Medical History” and purportedly concerned with medical conditions. Several courts have stated that “[a] defense to a charge of perjury may not be established by isolating a statement from context, giving it in this manner a meaning entirely different from that which it has when the testimony is considered as a whole.” This principle applies equally to prosecutions as well as defenses. In order to successfully prosecute an indictment for making a false statement, the government must not remove questions from the context in which their answers were given in an attempt to prove their clarity.

Members of our society are often asked to fill out standardized forms containing large numbers of general background questions. Such forms, usually hastily completed in waiting rooms, rarely require critical information that, if inaccurate, could result in criminal prosecution. If these forms do require such critical information, unwary citizens should be able to expect that important questions will not be hidden in laundry lists of unrelated topics. Unlike other crimes, the crime of making a false statement is unique in that there is no separately demonstrable *actus reus*. The *actus reus* and the *mens rea* unite into a single inquiry: Did the defendant know the statement was false when made? When the question that lead to the allegedly false response is fundamentally ambiguous, we cannot allow juries to criminally convict a defendant based on their guess as to what the defendant was thinking at the time the response was made.<sup>175</sup>

Within two years of the decision in *Manapat*, the Board was working diligently on behalf of the FAA to make it less burdensome for the Administrator to prevail over airmen in false state-

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<sup>174</sup> *Id.* at 1099.

<sup>175</sup> *Id.* at 1101 (citations omitted).

ment charges. In *Administrator v. Sue*,<sup>176</sup> the airman did not report two convictions of driving while intoxicated on his Medical Application Form.<sup>177</sup> Judge Geraghty reduced an order of revocation to an eleven-month suspension of the airman's commercial pilot certificate after Judge Geraghty found that "he did know . . . that what they were asking on the form he should have said yes to."<sup>178</sup> The Board remarked, "We agree with respondent that a finding of violation requires actual knowledge of the false statement, and that is not enough that a respondent should have known that an entry was false."<sup>179</sup> In granting the Administrator's appeal and order of revocation of the respondent's airman and medical certificates, the Board declared:

We also affirm the law judge's finding that the Administrator met his burden of proof on the falsification charge, and thereby reject respondent's contention that there was no evidence that respondent had actual knowledge that his statements were false. Respondent testified that he had read the form. In fact, in response to the law judge's questioning, respondent acknowledged that he looked at the form to see the questions that were being asked, that he had read the question asking for traffic conviction information and he "just didn't feel it was pertinent." With this testimony, the law judge had sufficient evidence to uphold this count of the complaint.<sup>180</sup>

With all due respect, this pronouncement by the Board was wrong for a least two reasons. The first reason the pronouncement was wrong is because knowledge that the statement was false is not the relevant standard. The standard is whether the airman harbored a subjective intent that a proper response to the question was to disclose the data. This was the Board's holding in *Juliao*. Secondly, the airman testified that he didn't feel the data was pertinent to the question. Again, harking back to the Board's decision in *Hart*, "in accordance with the Court's decision in this case, we think that circumstantial evidence on that issue must be so compelling that no other determination is reasonably possible."<sup>181</sup> Not only does it appear that the Board applied the incorrect standard in *Sue* but also, in order to lower the Administrator's burden of proof and decrease the level of

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<sup>176</sup> N.T.S.B. Order No. EA-3877, 1993 WL 157467, at \*1 (Apr. 28, 1993).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (citations omitted).

<sup>181</sup> *Hart*, 3 N.T.S.B. 24, 26 (1977) (citation omitted).

due process airmen could receive in enforcement proceedings, the Board made the following statement:

Respondent also argues, in connection with the § 67.20 finding, that the medical application is too vague to support a finding of intentional falsification and that the questions regarding traffic or other convictions exceed the Administrator's legitimate interests. In support, respondent claims that the FAA has admitted the form to be vague and notes that a U.S. District Court so held (*United States v. Manapat*, Case No. 88-325-Cr-T-13(a) (U.S.D.C. Middle District of Florida, Tampa Division, December 12, 1988)).

We have already dismissed the Administrator's motion, predicated on *Manapat*, for expedited review. NTSB Order No. EA-3430 (1991). In that order, we addressed in detail the subsequent decision on review by the Court of Appeals in *United States v. Manapat*, 928 F.2d 1097 (11th Cir. 1991). We there determined that *Manapat* is not controlling and does not require a finding that the medical application was vague. We also specifically found that, despite their placement under the heading "Medical History," the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence. We especially noted that the key questions determinative of whether an application was vague as applied—respondent's knowledge and intent—would be determined by the law judge at the hearing.<sup>182</sup>

Once again, with all due respect, the Board appears to have acted improperly. The United States Court of Appeals for the Eleventh Circuit made a finding that placing questions about driving convictions under a laundry list of "Medical History" rendered the form not merely vague, but "fundamentally ambiguous."<sup>183</sup> Another reason the Board's decision is disturbing is because the decision in *Manapat* was based upon due process, constitutional grounds, and the trial court's finding that the form was "fundamentally unfair."<sup>184</sup> Since the basis of the Eleventh Circuit decision in *Manapat* was constitutional concern for due process, it is ironic that the Board rejected a constitutional, due process attack on the Medical Form, especially since the Board routinely takes the position that its jurisdiction does not

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<sup>182</sup> Sue, N.T.S.B. Order No. EA-3877, 1993 WL 157467, at \*2 (Apr. 28, 1993).

<sup>183</sup> *United States v. Manapat*, 928 F.2d 1097, 1101 (11th Cir. 1991) ("When the question that led to the allegedly false response is fundamentally ambiguous, we cannot allow juries to criminally convict a defendant based on their guess as to what the defendant was thinking at the time the response was made.").

<sup>184</sup> *Id.* at 1099.

extend to constitutional issues.<sup>185</sup> The Board's pronouncement that it would not follow the Eleventh Circuit holding in *Manapat* and would allow law judges to rule on the airman's state of mind is further disturbing for the reason that the assessment of the judges would be nothing more than speculation. The Eleventh Circuit Court of Appeals noted, "we cannot allow juries to criminally convict a defendant based on their guess as to what the defendant was thinking at the time the response was made."<sup>186</sup> Accordingly, the Board, which does not reach constitutional issues, unilaterally decided it would reject *Manapat* and allow judges to "guess" at what the respondent was thinking. Regrettably, the Board's decision in *Sue* was affirmed in an unpublished disposition.<sup>187</sup> As the reader will appreciate from discussions set forth below, the Board's articulation of the wrong standard in *Sue*, together with its rejection of the holding in *Manapat* and its finding that law judges can guess about the state of mind of airmen, allows the FAA to reap dividends in the future since the *Sue* case is cited by the Board for the proposition that questions on the Medical Application Form were "not confusing to a person of ordinary intelligence."<sup>188</sup>

In order for the Board to lower the FAA's burden of proof in false statement cases, to make it easier and simpler for the FAA to prevail, and to eliminate defenses airmen could employ in an effort to prevent the FAA from revoking their certificates, the Board continued its retreat from the ruling in *Hart v. McLucas*<sup>189</sup> where the airman's *subjective* state of mind was declared to be a requirement to proving "knowledge" in the context of false statement charges.<sup>190</sup> In *Administrator v. Boardman*,<sup>191</sup> the Board covertly worked to undermine the pronouncement in *Administrator v. Hart*<sup>192</sup> where the Board admitted "that it is almost impossible to establish a past state of mind of another person,

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<sup>185</sup> Lybyer, N.T.S.B. Order No. EA-4822, 2000 WL 193000, at \*1 (Feb. 10, 2000) ("[W]e do not have jurisdiction to review the constitutionality of regulations issued by the Administrator or the Secretary of the Department of Transportation.") (citation omitted).

<sup>186</sup> *Manapat*, 928 F.2d at 1101.

<sup>187</sup> *Sue v. NTSB*, 8 F.3d 30 (9th Cir. 1993).

<sup>188</sup> *Sue*, N.T.S.B. Order No. EA-3877, 1993 WL 157467, at \*2 (Apr. 28, 1993).

<sup>189</sup> 535 F.2d 516, 519 (9th Cir. 1976).

<sup>190</sup> *Id.* at 520.

<sup>191</sup> *Boardman*, N.T.S.B. Order No. EA-4515, 1996 WL 748190, at \*7 (Dec. 20, 1996).

<sup>192</sup> *Hart*, 3 N.T.S.B. 24 (1977).

particularly when he disagrees.”<sup>193</sup> It also quietly overruled, *sub silentio*, its holding in *Administrator v. Juliao*,<sup>194</sup> where the Board recognized that inattentiveness on the part of the airman could negate the FAA’s claim that the airman had actual knowledge of the falsity.<sup>195</sup> In *Boardman*, Judge Fowler reversed an emergency order revoking the airman’s medical certificates based upon an alleged violation of § 67.20(a) of the Federal Aviation Regulations, i.e., knowingly making a fraudulent or intentionally false statement on a Medical Application Form.<sup>196</sup> Even though Judge Fowler made a credibility assessment in favor of the airman, and even though it was “the Board’s policy not to disturb a credibility finding ‘unless there is a compelling reason for the finding was clearly erroneous,’”<sup>197</sup> the Board, *sub silentio*, overruled its holding in *Administrator v. Hart*.<sup>198</sup> It also overruled its holding in *Administrator v. Juliao*<sup>199</sup> by declaring that the failure of an airman to carefully read the form could be a defense in a false statement case. The respondent in *Boardman* admitted that he placed the wrong answer in response to the question concerning a history of non-traffic convictions, but testified that his actions were “the result of an inadvertent mistake, borne out of haste, not an effort to hide the convictions from the Administrator.”<sup>200</sup> While a lack of attentiveness was recognized as a basis for making an erroneous entry in both *Hart v. McLucas* and *Administrator v. Juliao*, the Board, in rejecting Judge Fowler’s credibility assessment that the airman did not harbor the intent to make an intentionally false entry on his Medical Application Form, declared:

Before discussing our reasons for believing that the respondent purposefully falsified his medical certificate application, some comment is warranted on the defense the law judge concluded exonerated the respondent of the intentional falsification charge; namely, that accountability for erroneous answers on the application could be avoided if the respondent did not actually read the questions to which they corresponded. We are troubled by such a ruling.

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<sup>193</sup> *Boardman*, 1996 WL 748190 at \*7; *Hart*, 3 N.T.S.B. at 24.

<sup>194</sup> *Juliao*, 7 N.T.S.B. 94, 96 (1990).

<sup>195</sup> *Id.* at 96.

<sup>196</sup> *Id.*

<sup>197</sup> *Chirino v. NTSB*, 849 F.2d 1525, 1529–30 (D.C. Cir. 1988).

<sup>198</sup> *Hart*, 3 N.T.S.B. at 24, 26.

<sup>199</sup> *Juliao*, 7 N.T.S.B. at 96.

<sup>200</sup> *Boardman*, N.T.S.B. Order No. EA-4515, 1996 WL 748190, at \*1 (Dec. 20, 1996).

The very act of submitting a medical certificate application invites reliance by the FAA on the responses it contains, and the nature of the responses, every airman can be fairly presumed to appreciate, dictates whether the certificate will be issued. It seems to us that an airman who, knowing this, tenders an application that turns out to have a wrong answer to one or more of many questions he freely chose not to even read, much less to thoughtfully answer, cannot reasonably argue that he lacked the intent to give false information, for the submission of inaccurate information is a natural and foreseeable consequence of completing an application in a manner that essentially guarantees its unreliability. We think that such an airman, having acted in a manner that could be viewed as evincing a willful disregard of the truth or falsity of the information officially submitted and, therefore, in a way reflecting contempt for the airman medical certification process, should be determined to have intended whatever answer he gave be utilized in the review of his qualifications. Allowing the airman later to assert that a different answer would have been given had he read the questions (and, in the process, to disavow a signed assurance to the effect they had been perused) would promote a kind of “heads-I-win, tails-you-lose” fraud in filling out applications that we are reluctant to excuse or reward by accepting the kind of defense on which the respondent in this proceeding rests.<sup>201</sup>

The Board, in reversing the credibility findings of Judge Fowler that the airman did not have the intent to give a false statement, further declared:

The Administrator’s position, in effect, is that respondent’s convictions were so recent, occurring only about five months before the medical application was filled out, and so momentous that it strains credulity to accept the respondent’s assertion that his failure to report them on the application was an innocent mistake, rather than a purposeful effort to keep the information from the Administrator. While we are in agreement with the Administrator on [t]his point, we do not find it necessary to find that respondent must have had the convictions on his mind when he filled out the medical certificate application or that the existence of these relatively fresh convictions for such major criminal infractions precludes a finding that the respondent could not have misread a question that sought their discovery. Rather, it is sufficient to note that the recency of the convictions and their serious character reduce still further the likelihood that respondent’s explanation for not supplying the correct answer is truthful.<sup>202</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at \*2.

The Board granted the Administrator's appeal, overturned the credibility assessments of Judge Fowler, overturned the Ninth Circuit ruling in *Hart v. McLucas*, and overturned the Board's decision in *Administrator v. Juliao*. The Board's ruling in *Boardman* is particularly troubling because it retreated from the clear requirement articulated by the Ninth Circuit in *Hart v. McLucas* that an entry made due to inattention will not satisfy the requirement of knowledge for a false statement charge. In fact, the defense of "inattention" was specifically recognized by the Board in *Juliao* when the Board declared: "It is not enough, under the regulation, to show what a respondent should have known. Rather, the proof, either directly or circumstantially, must show what he knew."<sup>203</sup>

The Administrator in *Boardman* did exactly what it said it could not do in *Juliao*. The Board in *Juliao* said that it could not base a false statement charge on what the airman should have known.<sup>204</sup> But then in *Boardman*, the Board said, "respondent's convictions were so recent, occurring only about five months before the medical application was filled out, and so momentous that it strains credulity to accept respondent's assertion that his failure to report them on the application was an innocent mistake[.]"<sup>205</sup> It is impossible to reconcile the Board pronouncement in *Juliao* with this pronouncement in *Boardman*. In *Juliao*, the Board said it is not sufficient to show what the airman should have known, but what he actually knew.<sup>206</sup> In *Boardman*, the Board said the respondent's convictions were so recent and momentous it "strains credulity to accepts respondent's assertion[.]"<sup>207</sup> What the Board did in *Boardman* is overrule *Juliao sub silentio*. The Board retreated from the requirement that the standard is not what the airman should have known but what the airman actually knew as in *Juliao* and substituted the Board's own surmise about what the Board thinks the airman should have known the question meant if he had carefully read the form.

The Board's decision in *Boardman* is a perfect illustration of the arbitrary and capricious nature of Board decisions. What was in style in 1976, 1977, and 1990 was not in style in 1996. In other words, while the Board recognized that actual subjective under-

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<sup>203</sup> *Juliao*, 7 N.T.S.B. at 96 (citation omitted).

<sup>204</sup> *Id.*

<sup>205</sup> *Boardman*, 1996 WL 748190, at \*2.

<sup>206</sup> *Juliao*, 7 N.T.S.B. at 96.

<sup>207</sup> *Boardman*, 1996 WL 748190, at \*2.

standing of the airman was essential after the Ninth Circuit ruling in *Hart*, and after the court had actually effected that requirement in its decision in *Juliao*, the Board ignored precedent without specifically saying it was changing the law and concluded the airman must have known what the Administrator was asking on the form because “the convictions were so recent[.]”<sup>208</sup> The recency of the convictions is one thing, the airman’s subjective intent is another.

Judge Fowler, in compliance with the Ninth Circuit’s decision in *Hart* and in compliance with the Board’s decision in *Juliao*, clearly understood the question before him was whether the respondent’s inattention explained why the airman did not have the requisite “knowledge” to suffer a revocation of his airman certificates for a false statement charge. In contrast to the Board, most judges have a strong understanding and appreciation for American jurisprudence, the concept of *stare decisis*, and the meaning of *ratio decidendi*, that is, the reason or rationale for the decision. The Board does not have this understanding. Not only is the Board generally uninformed about legal principles but also the Board is concerned with “safety in air commerce or air transportation and the public interest[.]”<sup>209</sup> and because one of the functions of the Board is to issue safety recommendations, the Board is, in part, a governmental “policy” agency. The result is that Board decisions are frequently driven more by policy concerns than legal principles. Airmen are having their fates determined by a public policy agency and not by a court. The Board changes its position on a given issue without understanding it is doing so or without giving a reason for doing so.

Lawyers who practice before the Board have an extraordinary challenge because the decisions of the Board are not governed by traditional notions of *stare decisis* nor binding precedent. While that should be the case, as a matter of fact, and as illustrated by the Board’s decisions in *Boardman*, *Sue*, *Vernick*, *Murphy*, and *Moshea*, the Board apparently lacks an understanding of American jurisprudence, does not understand it is governed by its own binding precedent, and routinely and without explanation departs from binding precedent. This behavior by the Board makes it virtually impossible for a legal practitioner to give informed advice to his client about what the outcome may

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<sup>208</sup> *Id.*

<sup>209</sup> 49 U.S.C. § 44709(d)(1)(A) (2012).

be in any given fact pattern. Moreover, the declaration by the Board in *Boardman* that it will not reward an airman who is inattentive in completing his Medical Application Form is a repudiation of the Board's pronouncement in *Administrator v. Hart*: "We are impressed, moreover, with the argument of respondent that it is impossible to be inattentive and at the same time have actual knowledge of an act performed."<sup>210</sup> So, while the Board in *Hart* understood that inattention could negate knowledge for purposes of a false statement charge, the Board retreated from that position without acknowledging it was doing so in *Boardman* when the Board considered inattention to be "a willful disregard of the truth[.]"<sup>211</sup>

In *Administrator v. Martinez*,<sup>212</sup> the Board found the perfect opportunity to abandon the dictates of the Ninth Circuit in *Hart v. McLucas*,<sup>213</sup> and to complete its retreat from its decision in *Administrator v. Juliao*.<sup>214</sup> *Martinez* was the perfect opportunity to take language that had been developed by the Board in *Boardman* and *Sue*, and use that in a case where the Board knew it would not be seriously challenged because *Martinez* was pro se.<sup>215</sup> *Martinez* had been convicted of disorderly conduct, a class one misdemeanor, but gave a negative response to Question 18w on the Medical Application Form concerning "history of nontraffic conviction(s) (misdemeanors or felonies)."<sup>216</sup> Because *Martinez* was pro se and could not mount a serious legal challenge, the FAA brought a motion for summary judgment to have the ALJ make a determination solely on the pleadings, and without an evidentiary hearing, that *Martinez* harbored the requisite knowledge for the Administrator to make out a prima facie case of a materially false statement.<sup>217</sup> The Board affirmed Judge Geraghty's order revoking the airman and medical certificates of *Martinez*, declaring:

In the case at issue, the evidence establishes the respondent pled guilty to a misdemeanor in Maricopa County Justice Courts on April 27, 2007. The evidence also establishes that, less than 8 months later, respondent completed an application for an air-

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<sup>210</sup> *Hart*, 3 N.T.S.B. 24, 26 (1977).

<sup>211</sup> *Boardman*, 1996 WL 748190, at \*1.

<sup>212</sup> N.T.S.B. No. EA-5409, 2008 WL 4603570 (Oct. 7, 2008).

<sup>213</sup> 535 F.2d 516 (9th Cir. 1976).

<sup>214</sup> 7 N.T.S.B. 94 (1990).

<sup>215</sup> *Martinez*, 2008 WL 4603570, at \*1.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

man medical certificate, on which he indicated that he did not have a history of “non-traffic conviction(s).” Respondent’s attempt to justify his answer to question 18w on his application by stating that he misinterpreted the question is unavailing, as we have previously held that the failure to read questions on the medical application closely enough to supply accurate answer is not a basis to dispute a charge of intentional falsification. In *Administrator v. Boardman*, for example, we stated that the respondent’s failure to consider question 18w on a medical application carefully before providing an answer did not establish a lack of intent to provide false information, and that we were not persuaded by the respondent’s contention that the fact that he had informed his employer of the impending conviction indicated his lack of an intent to keep anyone of learning of the conviction. Similarly, we recognized in *Administrator v. Sue*, that the argument that question 18w on the medical application is vague is unavailing, and that, “the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence.” Overall, we conclude that the law judge did not err in rejecting respondent’s argument that he did not answer “yes” to question 18w because he misunderstood the question. In addition, the law judge did not err in concluding that the evidence established that respondent intentionally falsified his application.<sup>218</sup>

The Board’s retreat from the requirements of the Ninth Circuit in *Hart v. McLucas*,<sup>219</sup> and from the Board’s own ruling in *Administrator v. Juliao*<sup>220</sup> reached its full maturity and development in *Martinez*, in which the Board rejected, *sub silentio*, the legal principle that inattention could form the basis for a defense to a false statement charge. Unhappily for the Board, its full-blown retreat from binding precedent was just about to come to an end.

In *Administrator v. Dillmon*,<sup>221</sup> the author and Weldon Patterson, Esq., represented an airman who was the subject of an emergency order of revocation.<sup>222</sup> The airman had failed to disclose that he had been convicted of ten counts of bribery in response to Question 18w on the Medical Application Form.<sup>223</sup> Dillmon testified that he discussed the matter on several occa-

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<sup>218</sup> *Id.* at 3 (citation omitted).

<sup>219</sup> 535 F.2d 516 (9th Cir. 1976).

<sup>220</sup> 7 N.T.S.B. 94, 96 (1990).

<sup>221</sup> N.T.S.B. Docket No. SE-18349, 2008 WL 4685542 (Oct. 2, 2008).

<sup>222</sup> *Id.* at \*1.

<sup>223</sup> *Id.* at \*2.

sions with his Aviation Medical Examiner, and based upon those discussions, Dillmon understood that the FAA was concerned about drug and alcohol convictions.<sup>224</sup> Dillmon testified that “it never entered his mind that flying an airplane in a safe and prudent and reasonable manner had anything to do other than with convictions or offenses related to one’s health.”<sup>225</sup> Judge Fowler, in reversing the emergency order of revocation, declared:

That the Administrator established at a very minimum a prima facie case. However, upon additional reflection and analyzation, Respondent’s testimony coupled with the Respondent’s documentary exhibits, upwards of 17 exhibits, admitted into the hearing record here, it is clear to me that there’s no intention on the part of the Respondent to falsify, let alone be fraudulent in setting forth the answers that he did to this question, 18W.

The Respondent’s case and the testimony itself, I think, stresses that his medical application, particularly those questions 18V and 18W, definitely be deemed as somewhat excessively vague and fundamentally ambiguous, and could easily raise the specter that we have in this proceeding on what would appear to be intentional false statements on the part of the applicant.

It is my judgment that the term “intentionally false” is the overriding, paramount governing factor in this proceeding. My determination and conclusion is that the Respondent successfully rebutted with the documentary exhibits the Respondent produced, as well as the Respondent’s testimony itself, the prima facie case earlier established by the Administrator.<sup>226</sup>

In *Administrator v. Dillmon*,<sup>227</sup> the Administrator appealed from the Order of Judge Fowler, and the Board reversed Judge Fowler’s initial decision, declaring:

We find that the law judge erred in concluding that respondent’s failure to include his conviction on his medical applications due to his confusion concerning question 18w did not constitute intentional falsification. Respondent asserted that he had not read the instructions that accompany the application, and that he presumed that the FAA would not be concerned with convictions that did not relate to drugs or alcohol. We rejected this argument in *Administrator v. Boardman*, in which we stated that the respondent’s failure to consider question 18w on a medical appli-

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at \*3.

<sup>227</sup> N.T.S.B. Order No. EA-5413, 2008 WL 4771937 (Oct. 7, 2008).

cation carefully before providing an answer did not establish a lack of intent to provide false information. Similarly, we recognized in *Administrator v. Sue*, that the argument that question 18w on the medical Application is vague was unavailing, and that “the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence.”<sup>228</sup>

Undeterred, Mr. Dillmon appealed the Board’s order reversing Judge Fowler and reinstating the order of revocation, filing his petition for review with the United States Court of Appeals for the District of Columbia in *Dillmon v. NTSB*.<sup>229</sup> In a stunning rebuke of the Board and its retreat from binding precedent, the United States Circuit Court of Appeals for the District of Columbia declared:

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 reasoned decision making we require of agencies. We therefore grant his petition for review.<sup>230</sup>

The D.C. Circuit summarized Dillmon’s testimony as it appeared in the record and in the summary of Judge Fowler.<sup>231</sup> The D.C. Circuit noted that the Board believed Judge Fowler had erred in determining that “Dillmon had successfully rebutted the FAA’s *prima facie* case[.]”<sup>232</sup> The court also noted that the Board determined that Judge Fowler had “erred by requiring the Administrator to prove Dillmon had the specific intent to deceive the FAA, rather than the lesser burden of proving intent to falsify.”<sup>233</sup> The court noted that “the Board’s policy is not to disturb a credibility finding unless there is a compelling reason or the finding was clearly erroneous.”<sup>234</sup> The court further noted that the Board had approved an initial decision of a

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<sup>228</sup> *Id.* at \*4 (citation omitted).

<sup>229</sup> 588 F.3d 1085 (D.C. Cir. 2009).

<sup>230</sup> *Id.* at 1087.

<sup>231</sup> *Id.* at 1088–89.

<sup>232</sup> *Id.* at 1089.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 1090 (citing *Chirino v. NTSB*, 849 F.2d 1525, 1529–30 (D.C. Cir. 1988)).

law judge who concluded an airman did not have the intent to falsify in *Administrator v. Roarty*.<sup>235</sup>

As the court noted, the Board may not reverse the decision of a law judge simply because the Board might reach a different conclusion.<sup>236</sup> The court noted, “we are unable to reconcile the Board’s decision with its precedent concerning its review of an ALJ’s credibility determination.”<sup>237</sup> The court noted that the Board was silent on the pivotal issue about why it found Judge Fowler’s credibility findings to be unreliable.<sup>238</sup> Since the Board failed to give an explanation for overturning Judge Fowler’s credibility findings, the Board decision was a departure from precedent. The court noted that it could not “ascertain whether the Board reviewed the finding under the appropriate standard or simply ignored it.”<sup>239</sup> The court reiterated that the Board never gave an explanation for its departure from Board precedent.<sup>240</sup> Dillmon argued that “the Board departed from its precedent by allowing the FAA to prove his intent by satisfying the lesser burden of showing negligence (he should have known his answer was false) rather than knowledge (he knew his answer was false).”<sup>241</sup> The court rejected the Board’s reasoning that merely because Dillmon knew he had been convicted of bribery, he had given a false response to Question 18w, since “*Reynolds* appears to require the FAA to prove the airman subjectively understood what the question meant. Having announced this interpretation of the intent element in *Reynolds*, the Board was obligated to apply it consistently.”<sup>242</sup>

Since the Board had ignored the requirement of what the airman subjectively understood in the context of the “knowledge requirement” for a false statement, the court remarked: “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.”<sup>243</sup> The court specifically found the Board’s reliance on *Boardman*

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<sup>235</sup> Dillmon v. NTSB, 588 F.3d 1085, 1090 (D.C. Cir. 2009) (citing Roarty, N.T.S.B. Order No. EA-5261, 2006 WL 3472333 (Nov. 21, 2006)).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1091.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 1092.

<sup>241</sup> *Id.* at 1093.

<sup>242</sup> *Id.* at 1094 (citation omitted).

<sup>243</sup> *Id.*

and *Sue* was misplaced.<sup>244</sup> Consequently, the Board's decision in *Dillmon* was vacated, and the matter remanded for further proceedings.<sup>245</sup>

The Board was told by the Ninth Circuit in *Hart v. McLucas*,<sup>246</sup> and again in *Dillmon v. NTSB*,<sup>247</sup> that the airman's subjective state of mind had to be considered when adjudicating a false statement charge, but the Board, like a petulant child, while grudgingly accepting the reprimand, announced its intention to cling to case law in the form of *Boardman* and *Sue* that was specifically rejected by the D.C. Circuit Court of Appeals in *Dillmon*. This reality is evident in *Administrator v. Dillmon*.<sup>248</sup> In *Administrator v. Dillmon*, the Board issued its opinion and order following remand from the United States Circuit Court of Appeals for the District of Columbia. In rendering its decision, the Board made these observations:

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 in our original opinion on two of our previous cases concerning the understanding of a question, *Administrator v. Boardman*, NTSB Order No. EA-4515 (1996), and *Administrator v. Sue*, NTSB Order No. EA-3877 (1993) was misplaced. The Court stated as follows:

*Boardman* stands for the proposition that the airman must read the question carefully before answering . . . *Sue* stands for the proposition that the question on the medical application are not inherently too vague to support a finding of intentional falsification.

588 F.3d at 1094–1095. 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 these 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. Like-

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 1095.

<sup>246</sup> 535 F.2d 516 (9th Cir. 1976).

<sup>247</sup> *Dillmon*, 588 F.3d at 1094.

<sup>248</sup> *Dillmon*, N.T.S.B. Order No. EA-5528, 2010 WL 2715714 (June 30, 2010).

wise, 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 determine 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 confusion or misunderstanding is credible.<sup>249</sup>

The meaning of the Board’s remarks in the language set out above is extraordinarily disturbing. The D.C. Circuit had just determined that the Board had failed to give a reason for rejecting the credibility findings of Judge Fowler where the record showed that Dillmon did not carefully read the instructions that accompanied the Medical Application Form. But the Board, once again clinging to *Boardman* and *Sue*, was giving instruction to its law judges that they could still rely on *Boardman* and *Sue* even though the D.C. Circuit found that the Board’s reliance on *Boardman* and *Sue* was misplaced.<sup>250</sup> The comments of the Board in the wake of the reversal by the D.C. Circuit in *Dillmon* harkens back to the behavior of the Board exhibited in *Roarty* where the Board declared in its opinion that it was “unfortunate” that the Administrator had not aggressively cross-examined the airman.<sup>251</sup> There is a common theme that permeates Board decisions. That common theme is that the Board takes the FAA’s side. The Board and the FAA are in league in their pursuit and coordination of enforcing and effecting air safety in the United States. Because this kind of language permeates Board decisions, it reinforces the first argument in this article: the Board is biased and incapable of impartially adjudicating cases brought by the FAA to revoke or suspend an airman’s certificate.<sup>252</sup> The language of the Board in *Administra-*

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<sup>249</sup> *Id.* at \*4–5.

<sup>250</sup> *Dillmon*, 588 F.3d at 1094.

<sup>251</sup> *Roarty*, N.T.S.B. Order No. EA-5261, 2006 WL 3472333, at \*2 (Nov. 21, 2006).

<sup>252</sup> *See* 5 U.S.C. § 556(b)(3) (2018); 49 U.S.C. § 44709(d)(1)(A) (2018).

tor *v. Dillmon* where it announced that it would continue to follow its decisions in *Boardman* and *Sue* is not the kind of language one would find in a lower court that had been rebuked by an appellate court. However, the Board is not a court. It does not pretend to be a court. In addition to its investigatory functions, it views itself as a policy organization to ensure air safety and ensures that its judges toe the line even in the face of a rebuke by the D.C. Circuit.

The Board in *Administrator v. Dillmon*<sup>253</sup> reversed course from its earlier decisions, declaring: "In this case, the Administrator did not provide sufficient evidence to overcome respondent's defense that he misunderstood question 18w."<sup>254</sup> Respectfully, the Board's language in *Administrator v. Dillmon*, after reversal and remand by the D.C. Circuit, is extraordinarily confusing. On the one hand, the Board appears to be doubling down on its belief that *Boardman* and *Sue* are still relevant to Board proceedings even after the D.C. Circuit found those cases were inapplicable. And while *Boardman* and *Sue* stand for the proposition that an airman should read the instructions on the medical form and that the medical form questions are not confusing, the Board nonetheless, as directed by the D.C. Circuit, found that "the Administrator did not provide sufficient evidence to overcome the respondent's defense that he misunderstood question 18w."<sup>255</sup> What the Board appears to be saying is that it is going to have to find for the airman in this particular case, but in future cases, the judge should consider *Boardman* and *Sue*, thereby decreasing the likelihood of airmen like Dillmon prevailing in similar circumstances.

The Board's choice of language in *Administrator v. Dillmon* following remand from the D.C. Circuit is further incongruous and illogical for the following reasons:

- (1) In *Administrator v. Sue*,<sup>256</sup> the Board declared: "We there determined that *Manapat* is not controlling and does not require a finding that the medical application was vague. We also specifically found that, despite their placement under the heading 'Medical History,' the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence."<sup>257</sup>

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<sup>253</sup> *Dillmon*, 2010 WL 2715714, at \*1.

<sup>254</sup> *Id.* at \*6.

<sup>255</sup> *Id.*

<sup>256</sup> N.T.S.B. Order No. EA-3877, 1993 WL 157467 (Apr. 28, 1993).

<sup>257</sup> *Id.* at \*2.

- (2) The Eleventh Circuit in *Manapat* declared: “We merely hold that the government may not provide someone with a confusing and ambiguous form and then prosecute when the answers are inaccurate. The government could avoid this problem by providing a separate form for convictions, or by redesigning the Airman Medical Certificate application form so that it clearly shows that critical non-medical information is being requested of the applicant.”<sup>258</sup>
- (3) However, even though the Board in *Sue* had rejected the Eleventh Circuit ruling in *Manapat*, the Board made the following extraordinary comments in *Dillmon*:

As a separate matter, we do not believe 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 his cases on alleged § 67.403(a)(1) violations by amending the application process and forms to provide impeccable clarity. The application for a medical certification 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 must 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.<sup>259</sup>

The Board’s posture on the FAA’s Medical Application Form has been disingenuous and hypocritical. This is because the Board declared in *Sue* “that, despite their placement under the heading ‘Medical History,’ the two questions about traffic or other convictions are not confusing to a person of ordinary in-

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<sup>258</sup> United States v. Manapat, 928 F.2d 1097, 1102 (11th Cir. 1991).

<sup>259</sup> Dillmon, N.T.S.B. Order No. EA-5528, 2010 WL 2715714, at \*6 (June 30, 2010).

telligence.”<sup>260</sup> As far as the Board was concerned, the FAA Medical Application Form was unambiguous and not confusing to a person of ordinary intelligence *until* the Board suffered a rebuke and reversal in *Dillmon*. Then, the Board continued to cling to its precedent in *Boardman* and *Sue*.<sup>261</sup> But, in the same breath, it contradicted itself by admitting what everyone who had read *Manapat* knew, that “[i]t may behoove the Administrator to segregate medical- and health-related questions from other questions, perhaps on a separate form.”<sup>262</sup>

Not only does the opinion of the Board in *Administrator v. Dillmon* following reversal and remand by the D.C. Circuit contain a series of contradictions and incongruous statements, but once again, the built-in bias of the Board in favor of the Administrator is on display for all the world to see. To wit: “As a prospective consideration, the Administrator may strengthen his cases on alleged § 67.403(a)(1) violations by amending the application process and forms to provide impeccable clarity.”<sup>263</sup> This language in the Board’s opinion in *Administrator v. Dillmon* following remand from the D.C. Circuit once again displays the institutional bias the Board exhibits against airmen and in favor of the FAA.<sup>264</sup>

In *Administrator v. Singleton*,<sup>265</sup> where the airman was represented by Kathleen Yodice, Esq., Judge Pope granted summary judgment to the FAA when the airman suffered a driver’s license suspension for a cause related to alcohol and had neglected to disclose this on his Medical Application Form.<sup>266</sup> The airman asserted that he believed he only had to give an affirmative response if the revocation was due to a conviction.<sup>267</sup> Judge Pope granted summary judgment to the FAA, and the Board affirmed, continuing its reliance on *Boardman* (the airman must carefully read the questions on the medical application before providing an answer)<sup>268</sup> and *Sue* (“the two questions about traffic and other convictions are not confusing to a person of ordinary in-

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<sup>260</sup> *Sue*, 1993 WL 157467, at \*2.

<sup>261</sup> *Dillmon*, 2010 WL 2715714, at \*5.

<sup>262</sup> *Id.* at \*6.

<sup>263</sup> *Id.*

<sup>264</sup> *See* Roarty, N.T.S.B. Order No. EA-5261, 2006 WL 3472333, at \*1–2 (Nov. 21, 2006).

<sup>265</sup> N.T.S.B. Order No. EA-5437, 2009 WL 870356, at \*1 (Mar. 24, 2009).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at \*9.

<sup>268</sup> *See id.* at \*3 (citing *Boardman*, N.T.S.B. Order No. EA-4515, 2009 WL 870356, at \*3 (Mar. 24, 2009)).

telligence”).<sup>269</sup> In denying the airman’s appeal, the Board declared, “[f]urthermore in *McGonegal* . . . we held that the Administrator need not establish intent to falsify, but only that the respondent made false answers while cognizant of their falsity.”<sup>270</sup> The Board pronouncement rejecting the airman’s appeal in *Singleton* was clearly wrong since the Board once again chose to ignore the requirement of subjective intent as an element of “knowledge” in a false statement case.<sup>271</sup> Recognizing the grave error committed by the Board in affirming Judge Pope, Singleton naturally appealed to the United States Court of Appeals for the District of Columbia in *Singleton v. Babbitt*.<sup>272</sup> The D.C. Circuit vacated and remanded the Board’s affirmation of Judge Pope’s grant of summary judgment and rejected the Board’s position “that Singleton’s understanding of Question 18v was not even relevant to whether he had knowledge requisite to make an intentionally false statement.”<sup>273</sup> The D.C. Circuit reminded the Board that the elements of intentional falsity were “(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity.”<sup>274</sup> The D.C. Circuit explained to the Board that “knowledge of falsity” was required and necessitated “reference to the mental state of the person who makes the entry.”<sup>275</sup> The D.C. Circuit, referencing *Dillmon v. NTSB*, explained that the requisite proof had to include that the “airman subjectively understood what the question meant.”<sup>276</sup> The D.C. Circuit also noted, “in the past, the FAA and NTSB have suggested that credibility hearings are the norm in intentional falsification cases because factual determinations about knowledge do not readily lend themselves to adjudication on paper.”<sup>277</sup> The D.C. Circuit, noting that Singleton’s reading of the medical form was “not inherently implausible,” found

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<sup>269</sup> *Id.* (citing Sue, N.T.S.B. Order No. EA-3877, 1993 WL 157467, at \*2 (Apr. 28, 1993)).

<sup>270</sup> *Id.* at \*4.

<sup>271</sup> *See, e.g.*, Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (where the Ninth Circuit rejected the argument that the FAA could prevail in a false statement case “even if the person who made the statement did not know the statement to be false”); Dillmon v. NTSB, 588 F.3d 1085, 1094 (D.C. Cir. 2009) (“*Reynolds* appears to require the FAA to prove the airman subjectively understood what the question meant.”).

<sup>272</sup> 588 F.3d 1078 (D.C. Cir. 2009).

<sup>273</sup> *Id.* at 1081.

<sup>274</sup> *Id.* at 1082 (quoting Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976)).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (quoting Dillmon v. NTSB, 588 F.3d 1085, 1094 (D.C. Cir. 2009)).

<sup>277</sup> *Id.* at 1083.

that the Board acted in an arbitrary and capricious manner, vacated the Board's summary judgment order, and remanded the case for further proceedings.<sup>278</sup>

In *Administrator v. Singleton*,<sup>279</sup> the Board recognized that the decision in *Singleton* was issued in tandem with the opinion in *Dillmon v. NTSB* and recognized that the outcome of the case "may rest upon the respondent's alleged subjective understanding of the question."<sup>280</sup> The case was remanded to Judge Pope to make a credibility finding concerning Singleton's subjective state of mind.<sup>281</sup>

In *Administrator v. Manin*,<sup>282</sup> Judge Fowler granted summary judgment to the Administrator where the airman failed to disclose on his medical application forms two convictions for domestic violence and disorderly conduct.<sup>283</sup> The Board, in affirming the initial decision of Judge Fowler, advanced three spurious arguments: (1) that the airman must read the application form carefully and that the Board rejects the airman's own interpretation of the requirements of a medical certificate; (2) that Question 18w on the Medical Application Form could be understood by a person of ordinary intelligence;<sup>284</sup> and (3) that "[a] respondent's incorrect answers on his medical applications amount to an intentional falsification under Board precedent when the respondent was cognizant of their falsity."<sup>285</sup>

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<sup>278</sup> *Babbitt*, 588 F.3d at 1084–85.

<sup>279</sup> N.T.S.B. Order No. EA-5529, 2010 WL 2846975, at \*3 (June 30, 2010).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> N.T.S.B. Order No. EA-5439, 2008 WL 5972912 (Apr. 13, 2008).

<sup>283</sup> *Id.* at \*1.

<sup>284</sup> While the Board maintained in *Manin* that the form could be understood by a person of ordinary intelligence, the Board appeared to contradict this statement in *Administrator v. Dillmon*:

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 a question falsely.

*Dillmon*, N.T.S.B. Order No. EA-5528, 2010 WL 2715714, at \*6 (June 30, 2010).

<sup>285</sup> *Manin*, 2008 WL 5972912, at \*4.

Manin, just like Dillmon and Singleton before him, was compelled to appeal to the United States Court of Appeals for the District of Columbia, where he was represented by Kathleen Yodice, Esq., in *Manin v. NTSB*.<sup>286</sup> Just as the D.C. Circuit explained to the Board in *Singleton*,<sup>287</sup> the D.C. Circuit once again explained to the Board that “a pilot’s understanding of a question is not irrelevant[.]”<sup>288</sup> There were other errors in the Board’s analysis in *Manin* that will be discussed in the next topic of this article, dealing with arbitrary and capricious decisions of the Board. Suffice it to say that once again, the D.C. Circuit vacated and remanded the Board’s decision granting summary judgment to the FAA because “[a]s our decisions in *Dillmon* and *Singleton* make clear, Board precedent requires consideration of a pilot’s subjective understanding of questions on a medical certificate application. The Board’s unexplained failure to adhere to this precedent renders it action arbitrary and capricious.”<sup>289</sup>

In *Administrator v. Manin*,<sup>290</sup> the Board, upon remand of the *Manin* case from the United States Court of Appeals for the District of Columbia, declared:

The Court further instructed us to reconsider respondent’s arguments concerning intentional falsification, given the Court recently remanded *Dillmon* . . . with direction that we must consider a respondent’s subjective understanding of a question on a medical certificate application when a respondent presents such an argument. In light of the D.C. Circuit’s opinion in *Dillmon*, we issued a post-remand opinion and order instructing law judges to assess a respondent’s credibility in determining whether the respondent misunderstood a question on a medical certificate application. In addition, we issued an opinion in *Administrator v. Singleton*, applying this *new* standard and consequently stating summary judgment is an improper means for disposing of intentional falsification cases. It is this standard we direct the law judge to apply on remand in the case at issue here.

Similar to the circumstances of *Singleton*, we are compelled to remand this case to the law judge for a determination concerning respondent’s state of mind at the time he completed the medical certificate applications in question. As we indicated in our post-remand *Dillmon* opinion, law judges’ credibility findings concerning a respondent’s defense that he or she misunderstood a ques-

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<sup>286</sup> 627 F.3d 1239 (D.C. Cir. 2011).

<sup>287</sup> 588 F.3d 1078, 1079–80 (D.C. Cir. 2011).

<sup>288</sup> *Manin*, 627 F.3d at 1244.

<sup>289</sup> *Id.* (citation omitted).

<sup>290</sup> N.T.S.B. Order No. EA-5586, 2011 WL 2141430, at \*1 (May 19, 2011).

tion on the application are critical in determining the veracity and overall practicability of the defense. Therefore, we ask the law judge to consider all evidence—both direct and circumstantial—indicating respondent's state of mind at the time he completed the applications.<sup>291</sup>

The language that the Board employed above demonstrates that the Board does not understand the three elements of a false statement case laid down in 1976 by the United States Court of Appeals for the Ninth Circuit in *Hart v. McLucas*.<sup>292</sup> It has been no secret to the Board since 1976 that in order for the Administrator to prevail, evidence had to be adduced with respect to the *subjective intent* of the airman either in making a logbook entry or in filling out a Medical Application Form. As has been illustrated in this article, the Board has been working diligently on behalf of the FAA to establish a standard of strict liability so that these cases can be adjudicated on summary judgment, thereby saving the taxpayers the cost of a trial, but at the same time, denying airmen due process of law.<sup>293</sup> While the Board in *Manin* portrayed the decision of the United States Court of Appeals for the District of Columbia as “applying this *new* standard”<sup>294</sup> there was nothing “new” about the standard at all. This has been the standard since 1976. However, the Board has been in headlong retreat from the standard and attempted, for the convenience of the FAA and the Board, to impose a strict liability standard that can be adjudicated on summary judgment without the mess and fuss of a trial, and without ensuring that airmen's rights to due process are properly protected, a consideration of small consequence to the Board.<sup>295</sup>

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<sup>291</sup> *Id.* at \*3 (emphasis added).

<sup>292</sup> 535 F.2d 516 (9th Cir. 1976).

<sup>293</sup> Martinez, N.T.S.B. Order No. EA-5409, 2008 WL 4603570, at \*2–3 (Oct. 7, 2008).

<sup>294</sup> *Manin*, 2011 WL 2141430, at \*3 (where the Administrator was allowed to prevail on a motion for summary judgment where the airman undertook to represent himself without the assistance of counsel) (emphasis added).

<sup>295</sup> Boardman, N.T.S.B. Order No. EA-4515, 1996 WL 748190, at \*1 (Dec. 20, 1996).

We think that such an airman, having acted in a manner that could be viewed as evincing a willful disregard of the truth or falsity of the information officially submitted and, therefore, in a way reflecting contempt for the airman medical certification process, *should be determined to have intended* that whatever answer he gave be utilized in the review of his qualifications.

*Id.* (emphasis added); see also Sue, N.T.S.B. Order No. EA-3877, 1993 WL 157467, at \*2 (May 12, 1993).

The experiences of Dillmon, Singleton, and Manin painfully illustrate the waste of time and resources that is being expended on this dysfunctional system of adjudicating airman certificate actions. The Board does not understand the body of law it purports to apply. The Board retreats from well-established law decided by the Ninth Circuit Court of Appeals. The Board ignores well-established law pronounced by the Eleventh Circuit Court of Appeals. Then, when the D.C. Circuit in *Dillmon*, *Singleton*, and *Manin* required the Board to make a finding that the airman harbored subjective intent, the Board claims that this is a “new” standard. This system of adjudicating airman cases is broken and cannot be repaired. Airmen, with an expectation of an impartial adjudicator and due process of law, have a right to have their cases adjudicated in federal district court.

D. BECAUSE THE BOARD DOES NOT UNDERSTAND THE PRINCIPLE OF *STARE DECISIS* AND CONFUSES ITS OBLIGATION TO PROTECT AIR SAFETY IN THE PUBLIC INTEREST WITH DUE PROCESS, IT REPEATEDLY IGNORES STANDING PRECEDENT AND ISSUES DECISIONS THAT ARE ARBITRARY AND CAPRICIOUS, NECESSITATING COSTLY APPEALS TO THE APPELLATE COURTS IN ORDER TO FORCE THE BOARD TO FOLLOW ITS OWN RULES

The author had two cases litigated before the Board at the same time with identical facts where the trial court rulings were diametrically opposed. These cases were litigated before the Board and before the courts of appeal for nearly five years. It took five years to get a just outcome and proper decision in two very simple cases involving the “stale complaint rule,” Rule 33 of the Board’s Rules of Practice.<sup>296</sup> After nearly five years of litigation, resulting ultimately in a favorable outcome to the airmen, the Board still did not recognize its error but rather merely mimicked the language dictated to the Board by the court of appeals. For anyone who would argue that litigation before the Board is economical and efficient, a study of these two cases will convince any thinking person to the contrary.

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We there determined that *Manapat* is not controlling and does not require a finding that the medical application was vague. We also specifically found that, despite their placement under the heading “Medical History,” the two questions about traffic and other convictions are not confusing to a person of ordinary intelligence.

*Id.*

<sup>296</sup> 49 C.F.R. § 821.33 (2018).

On December 18, 1998, the appeal was filed in the case of *Administrator v. Shrader*.<sup>297</sup> After the filing of the appeal with the Board, the author filed a motion to dismiss the Administrator's complaint as stale on behalf of Shrader.<sup>298</sup> Shrader's driver's license was suspended by the State of California on April 11, 1995, for driving with an excessive blood alcohol level, culminating in a conviction on May 8, 1995, in Orange County, California.<sup>299</sup> Shrader completed his medical application on April 24, 1997.<sup>300</sup> In completing his medical application, Shrader was very explicit. He gave an affirmative response to the question concerning "History of Driving Offenses" and specifically wrote on the form "1995, March 12, DUI, California[.]"<sup>301</sup> The Administrator was on notice of the fact that Shrader had suffered a DUI conviction in California on March 8, 1995 by virtue of his Medical Application Form of April 24, 1997.<sup>302</sup>

Nearly eleven months after Shrader completed his Medical Application Form, the FAA issued a Notice of Proposed Certificate Action on March 13, 1998, claiming that Shrader had not reported his conviction of driving under the influence within sixty days as required by 14 C.F.R. § 61.15(e).<sup>303</sup> As revealed by the record in *Shrader*, when an airman completes his Medical Application Form, the medical application data is placed on a computer tape with the names of the applicants and then dispatched by the FAA to the National Driver Register (NDR).<sup>304</sup> The NDR then examines the names and compiles an electronic list on a computer tape, and that tape captures the states or jurisdictions in which airmen have suffered legal or administrative

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<sup>297</sup> N.T.S.B. Order No. EA-5100, 2004 WL 1375856, at \*2 (Mar. 25, 2003) ("This case was originally filed back over four years ago, December 18th of 1998.")

<sup>298</sup> Shrader, N.T.S.B. Order No. EA-4971, 2002 WL 1041171, at \*4 (May 14, 2002).

The respondent has moved for an Order Dismissing Stale Complaint as provided in Rule 33 of the Board's Rules, 49 C.F.R. Sec. 821.33. The Administrator has responded to this Motion alleging that there was good cause for the delay and, further, the Administrator has moved for Judgment on the Pleadings.

*Id.*

<sup>299</sup> *Id.* at \*1.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Shrader, N.T.S.B. Order No. EA-4971, 2002 WL 1041171, at \*1 (May 14, 2002).

action against their drivers' licenses.<sup>305</sup> After the NDR returns the tape with the information regarding who suffered administrative or legal action against their drivers' licenses, then the FAA security personnel compare that data to information appearing on the National Law Telecommunications System (NLETS).<sup>306</sup> Between June 2 and June 9, 1997, the FAA received the data downloaded from the DUI tracking system of the DUI/DWI Investigation Program but waited more than two months to assign the tape to a special agent for review on August 20, 1997.<sup>307</sup> After that two-month delay from the FAA's receipt of the NDR data, the special agent waited from August 20, 1997, to February 6, 1998, to begin her investigation of the data on the tape.<sup>308</sup> Then on March 13, 1998, over nine months after the FAA had received the tape from NDR, the agency issued a suspension order against Shrader's airman certificate.<sup>309</sup>

At all times relevant to this discussion, the Board had in place Rule 33 of its Rules of Practice,<sup>310</sup> which provided:

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. § 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(a) In those cases where the complaint does not allege lack of qualification of the respondent:

(1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.<sup>311</sup>

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<sup>305</sup> *Id.* at \*1-2 (May 14, 2002); Ramaprakash, N.T.S.B. Order No. EA-4947, 2002 WL 226617, at \*1-3 (Feb. 11, 2002).

<sup>306</sup> *Shrader*, 2002 WL 1041171, at \*1-2.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at \*2.

<sup>309</sup> *Id.* at \*1-2.

<sup>310</sup> 49 C.F.R. § 821.33(a) (2018).

<sup>311</sup> *Id.*

Any person reading Rule 33 will recognize that there is a distinction between the “good cause” and the “public interest” exceptions. Unfortunately, this distinction was lost on the Board as will be apparent from the remainder of this discussion. Because eleven months had elapsed from the date Shrader disclosed his DUI conviction on his Medical Application Form, and nine months had elapsed from the date the agency was in possession of the computer data delivered from NDR, the author, acting on behalf of Shrader, moved to dismiss the complaint while the FAA alleged there was good cause for the delay and moved for judgment on the pleadings.<sup>312</sup> On May 26, 1999, Judge Mullins passed an order dismissing the Administrator’s complaint in *Shrader* as stale.<sup>313</sup> Judge Mullins reasoned that whether one took the starting date as the date the FAA received the data on Shrader’s Medical Application Form or the date the Administrator received the data from the NDR, the charges brought against Shrader were stale and should be dismissed.<sup>314</sup> Judge Mullins noted: “The Board has held if the Administrator need go no further than her own records, then the stale complaint time begins.”<sup>315</sup> As relates to the Administrator’s receipt of the data from the NDR, Judge Mullins further declared: “Even this date was seven months prior to the issuance of the NOPCA.”<sup>316</sup> Consequently, the Administrator’s complaint was dismissed as stale and the Administrator’s motion for judgment on the pleadings was declared to be moot.<sup>317</sup>

At the very same time the author was representing Shrader, the author was also representing Tilak Ramaprakash in *Administrator v. Ramaprakash*.<sup>318</sup> While the author had filed the appeal on behalf of Shrader on December 18, 1998,<sup>319</sup> the appeal on behalf of Ramaprakash was filed with the Board on February 3, 1999.<sup>320</sup> On February 25, 1997, Ramaprakash was convicted of driving under the influence in the Doraville Municipal Court in

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<sup>312</sup> Shrader, N.T.S.B. Order No. EA-4971, 2002 WL 1041171, at \*4 (May 14, 2002).

<sup>313</sup> *Id.* at \*1.

<sup>314</sup> *Id.* at \*6 n.1.

<sup>315</sup> *Id.* at \*5 (citing Pacholke, 5 N.T.S.B. 467, 469 (1985)).

<sup>316</sup> *Id.* at \*6.

<sup>317</sup> *Id.*

<sup>318</sup> N.T.S.B. Order No. EA-4947, 2002 WL 226617, at \*1 (Feb. 7, 2002).

<sup>319</sup> Shrader, N.T.S.B. Order No. EA-5100, 2004 WL 1375856, at \*2 (Mar. 25, 2003).

<sup>320</sup> *Ramaprakash*, 2002 WL 226617, at \*5.

Doraville, Georgia.<sup>321</sup> The computer tape was received by FAA personnel from the NDR on May 16, 1997.<sup>322</sup> Three days later, on May 19, 1997, the computer tape was assigned to Ms. Bussing for processing, and she took action on the file. The tape was then transferred to Special Agent Fields for work.<sup>323</sup> Then, due to a transfer of Special Agent Fields, the tape was reassigned to Special Agent Sloan on September 16, 1997.<sup>324</sup> Then, when Special Agent Sloan transferred to a new position, the tape was reassigned to Special Agent Simpson on October 27, 1997.<sup>325</sup> Finally, on February 4, 1998, Special Agent Simpson electronically interrogated NLETS and discovered a positive response for Ramaprakash indicating an unreported alcohol-related conviction or administrative action motor vehicle violation.<sup>326</sup> Over two months later, the FAA issued the Notice of Proposed Certificate Action on April 22, 1998.<sup>327</sup> The NOPCA was issued by the FAA eleven months after it came into possession of the data from the NDR from which it could have ascertained a violation of the regulations by Ramaprakash.<sup>328</sup>

On the very same day Judge Mullins granted the motion to dismiss in *Shrader*, Judge Pope denied the motion to dismiss in *Ramaprakash*.<sup>329</sup> Judge Pope, in denying the airman's motion to dismiss the stale complaint, relied upon *Administrator v. Ikeler*.<sup>330</sup> Judge Pope failed to recognize that the Board's decision in *Ikeler* was a departure from Board precedent without explanation. The Board in *Ikeler* incorrectly found that the six months only begin to run *after the FAA had found a violation*, ignoring established precedent that the six months begins to run when the FAA has in its possession information concerning "possible violations."<sup>331</sup> On February 11, 2002, the Board affirmed the order of Judge Pope denying the motion to dismiss the stale complaint

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<sup>321</sup> *Id.* at \*1.

<sup>322</sup> *Id.* at \*2.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at \*2.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at \*1–2.

<sup>329</sup> *Id.* at \*4 (Order Denying Respondent's Motion to Dismiss Adm'r's Complaint, (May 26, 1999) (the same date as the Order of Judge Mullins in *Shrader*)).

<sup>330</sup> *Id.* at \*6 (citing *Ikeler*, N.T.S.B. Order No. EA-4695, 1998 WL 564088 (Aug. 31, 1998)).

<sup>331</sup> Dill, N.T.S.B. Order No. EA-4099, 1994 WL 78131, at \*4 (Feb. 20, 2004). The author represented Mr. Dill and two other airmen in that case. The Administrator, after issuing a revocation order against Dill's certificates and suspension,

in *Ramaprakash*, doing so “given the importance to air safety of monitoring the alcohol-related infractions of certificated airmen.”<sup>332</sup> Member Goglia, joined by Member Hammerschmidt, dissented as follows:

The stale complaint rule (49 C.F.R. 821.33) is simple, straightforward and clear. If more than 6 months elapse, then the Administrator shall be required to show good cause. Good cause is not established (shown) in this case.

I specifically do not agree with the language in the opinion that suggests that the stale complaint rule is diluted by a balancing of the “Administrator interests in prioritizing her enforcement efforts . . . (against) . . . the negative impact of forcing an airman to answer a charge long after the conduct giving rise to it.” There either ‘is’ a stale complaint rule or there ‘is not.’<sup>333</sup>

After the Board affirmed the decision of Judge Pope dismissing the stale complaint motion in *Ramaprakash*, the Board reversed the order of Judge Mullins in *Shrader* on May 17, 2002.<sup>334</sup> The Board, in reversing Judge Mullins, ignored the clear language of its own rule, Rule 33, and donned the cloak as the protector of public safety, citing its decision in *Ramaprakash*<sup>335</sup> as a supposed basis for its reversing the order of Judge Mullins dismissing the complaint as stale.<sup>336</sup> Rather than following precedent, the Board went on a tangent, announcing its decision was made “given the importance to air safety of mon-

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ordered against the certificates of Eide and Prater. The Board in *Dill* affirmed the order of Judge Davis issued December 17, 1991, declaring,

Once the Administrator identified the respondents as involved in potential and ongoing violations dating back almost two years, he was required to treat these stale charges as non-routine, priority matters . . . and minimize any further delay . . . We think this is particularly so where the FAA had been in contact with respondents’ employer from the outset, and when there had been an outstanding invitation from his employer to discuss the timeshare arrangement if the FAA questioned its legal status.

*Id.*; see also Thomson, N.T.S.B. Order No. EA-4170, 1994 WL 228277 (May 12, 1994) (The author was successful in having a revocation against Thompson’s certificates dismissed in an order granting motion to dismiss stale complaint passed by Judge Fowler on August 5, 1991. The Board affirmed the order of Judge Fowler on May 27, 1994.).

<sup>332</sup> *Ramaprakash*, N.T.S.B. Order No. EA-4947, 2002 WL 226617, at \*1–3 (Feb. 7, 2002).

<sup>333</sup> *Id.* at \*4.

<sup>334</sup> *Shrader*, N.T.S.B. Order No. EA-4971, 2002 WL 1041171, at \*1 (May 14, 2002).

<sup>335</sup> 2002 WL 226617, at \*1.

<sup>336</sup> *Shrader*, 2002 WL 1041171, at \*2.

itoring alcohol-related infractions of certificated airmen[.]”<sup>337</sup> The Board, in language that can best be described as muddled ambiguity in reversing Judge Mullins’s order dismissing the complaint, declared:

While we would have preferred a more detailed explanation of the time period between the assignment of the tape to the special investigator and her commencement of its review, the reasons supplied are sufficient to satisfy the good cause burden in this instance. As we recognized in *Ramaprakash*, there is a strong safety-related rationale for taking into account the Administrator’s need for some flexibility in the administration of this program. Our opinion, however, is not to be read as an acceptance of any delay, regardless of length, in all situations. It would seem that the benefit to aviation safety of monitoring alcohol-related driving infractions of certificated airmen may well be diluted if too much time is consumed in the effort to discover them.<sup>338</sup>

As was the case in *Ramaprakash*, Member Goglia dissented, joined by Member Hammerschmidt in *Shrader*, declaring:

I dissent on Notation 7336B, *Administrator v. Shrader*. It should not be re-opened. The reasons supplied continue to be insufficient in satisfying the burden of the Administrator to show good cause to avoid dismissal of the complaint. It is stale under the regulation that requires the Administrator to take timely action. There is no good reason for the Administrator to now take disciplinary action based on an April 1995 event. The Administrator must take more timely action.<sup>339</sup>

The language employed by the majority in *Shrader* to reverse the order of Judge Mullins dismissing the complaint is clear and palpable evidence that the Board is incapable of performing an adjudicative function. The Board views itself as a public policy machine to ensure air safety. For that reason, it is inevitably all too happy to oblige the Administrator when the FAA requires “some flexibility” in the administration of the regulations.<sup>340</sup>

After the Board reversed Judge Mullins in *Shrader*, counsel in *Ramaprakash* petitioned for reconsideration of the Board’s decision in *Ramaprakash* affirming the order of Judge Pope in denying the motion to dismiss. In *Administrator v. Ramaprakash*,<sup>341</sup> the majority declared:

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<sup>337</sup> *Id.* (quoting *Ramaprakash*, 2002 WL 226617, at \*3).

<sup>338</sup> *Id.* at \*2.

<sup>339</sup> *Id.* at \*4.

<sup>340</sup> *Id.* at \*2.

<sup>341</sup> N.T.S.B. Order No. EA-4984, 2002 WL 1586404, at \*1 (July 16, 2002).

[W]e decline to *extend* the stale complaint rule under these circumstances, i.e., where the “delay” is non-prejudicial to respondent’s ability to defend against the charges (having admitted all factual allegations) and accrued, essentially, because the Administrator chose to delegate her resources in a manner that would not immediately, but eventually, detect airmen’s non-compliance with a mandatory reporting requirement that respondent admits to not adhering to.<sup>342</sup>

This unfortunate language reaffirms the reality that the Board does not understand *stare decisis*. There was no request that the Board “extend” the stale complaint rule in *Ramaprakash* or *Shrader*. All *Ramaprakash* was seeking was for the Board to enforce the rule as written and to enforce precedent as the Board had articulated in previous decisions. The Board ignored its responsibility to do so. In the order denying reconsideration in *Ramaprakash*, Member Goglia, joined by Member Hammerschmidt, authored a four-page dissent noting that the majority was misinformed in its belief that an airman must demonstrate prejudice in a stale complaint case, since prejudice is presumed as a matter of law.<sup>343</sup> Members Goglia and Hammerschmidt further remarked that the *Ikelar* decision was of no precedential value because there was no articulation of “good cause” for delay in that decision.<sup>344</sup>

Moreover, and very significantly, the dissent noted: “*Ikelar* itself is inconsistent with Board precedent[.]”<sup>345</sup> Member Goglia joined by Hammerschmidt further declared, correctly, that “the *Ikelar* case masses [sic] the mark because it erroneously suggests that the six month period commences when the Administrator ‘learns’ of the violation, instead of from the ‘date’ of the violation, as stated in the stale complaint rule.”<sup>346</sup> Members Goglia and Hammerschmidt also noted that the majority had misconstrued the stale complaint rule in emphasizing the time at the end of the investigation instead of the totality of the Administrator’s actions.<sup>347</sup> The majority in *Ramaprakash* declared in a footnote that it had “placed the Administrator on notice that in future cases we will look more closely at the time that elapses

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<sup>342</sup> *Id.* at \*2 (emphasis added).

<sup>343</sup> *Id.* at \*3.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

<sup>347</sup> *See* *Ramaprakash*, N.T.S.B. Order No. EA-4984, 2002 WL 1586404, at \*3 (July 16, 2002).

between the time the Administrator could have, but did not, learn of the violation[.]”<sup>348</sup> Members Goglia and Hammerschmidt made short work of this double talk declaring: “It is the wrong standard to apply, and it is unfair to airmen, to suggest that the Board is ‘warning’ the FAA by stating in effect that ‘we will let this one go, but don’t do it again.’”<sup>349</sup>

The author obtained a stay order from the Board in *Ramaprakash*, referring the matter to Mark T. McDermott, Esq., for an appeal to the United States Court of Appeals for the District of Columbia.<sup>350</sup> Then, a motion for reconsideration was sought in *Shrader*, which the Board denied on December 30, 2002.<sup>351</sup> Shrader’s motion for reconsideration was denied because, “[t]wo members of the Board (Acting Chairman Carmody and Member Black) would deny the petition, and two Members of the Board (Members Hammerschmidt and Goglia) would grant the petition.”<sup>352</sup>

On October 21, 2003, almost four years after the lodging of the appeals with the Board in *Ramaprakash* and *Shrader*, the United States Court of Appeals for the District of Columbia in *Ramaprakash v. FAA*<sup>353</sup> reversed the Board because the Board had departed from agency precedent without explanation for three separate and distinct reasons. In doing so, Judge (now Chief Justice) Roberts wrote:

Learned Hand once remarked that agencies tend to “fall into grooves . . . and when they get into grooves, then God save you to get them out.” Judge Hand never met the National Transportation Safety Board. In this case, we grant the petition for review because the Board has failed adequately to explain its departures from its own precedent in no fewer than three significant respects.<sup>354</sup>

The court first reversed the Board because the Board reasoned that the gravity of the violation mitigated against enforcing against the stale complaint rule when Board precedent was exactly the opposite. In other words, the more serious the violation, the more dispatch must be exhibited by the Administra-

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<sup>348</sup> *Id.* at \*4 n.1.

<sup>349</sup> *Id.* at \*3.

<sup>350</sup> *Ramaprakash*, N.T.S.B. Order No. EA-4989, 2002 WL 1878787 (Aug. 9, 2002); *Ramaprakash v. FAA*, 346 F.3d 1121 (D.C. Cir. 2003).

<sup>351</sup> *Shrader*, N.T.S.B. Order No. EA-5012, 2002 WL 31906687 (Dec. 30, 2002).

<sup>352</sup> *Id.*

<sup>353</sup> *Ramaprakash*, 346 F.3d at 1121.

<sup>354</sup> *Id.* at 1122.

tor.<sup>355</sup> Because the Board's case law recognized that the seriousness of the violation required more dispatch, rather than less dispatch, the court reversed the Board because its ruling in *Ramaprakash* constituted a departure from precedent and was therefore arbitrary and capricious.<sup>356</sup> Second, the court reminded the Board that, under the stale complaint rule, prejudice is presumed and there is no requirement that the airman demonstrate prejudice as a requirement for having the complaint dismissed.<sup>357</sup> The court further noted, "[a]pplying the stale complaint rule to Ramaprakash's case would not 'extend' the rule at all—unless the Board is no longer adopting a presumption of prejudice."<sup>358</sup>

Finally, the court noted that the six-month requirement of the stale complaint rule begins to run not when the Administrator has actual knowledge of a violation, but when the Administrator is in receipt of information concerning possible violations.<sup>359</sup> The United States Court of Appeals for the District of Columbia, in rebuking the Board's conduct in *Ramaprakash*, declared:

This court has observed that "the core concern underlying the prohibition of arbitrary or capricious agency action" is that agency "ad hocery" is impermissible. The statements extracted above indicate that the Board has failed to satisfy this core requirement. They amount to a promise from the Board that at some point in the future, the stale complaint rule may again mean what it once did—depending on "specific facts of future cases." It is impossible at this point to tell whether the Board, in the next stale complaint case, will assess the seriousness of the violation or will not; will insist on a showing of prejudice, or will not; will require FAA diligence in investigating a possible violation as well as in prosecuting a known one, or not. We have it on high authority that "the tendency of law must always be to narrow the field of uncertainty." The Board's unexplained departures from precedent do the opposite. "[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." For the reasons stated we vacate the orders and remand to the Board for further proceedings.<sup>360</sup>

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<sup>355</sup> *Id.* at 1124–25.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 1126–27.

<sup>358</sup> *Id.* at 1127.

<sup>359</sup> *Id.* at 1127–28.

<sup>360</sup> *Id.* at 1130 (citations omitted).

On January 30, 2004, nearly five years after Ramaprakash filed his appeal with the Board, the Board grudgingly dismissed the complaint against Ramaprakash on remand, because “[t]he Court held that we ‘departed from [our] . . . longstanding requirement of prosecutorial diligence in stale complaint case.’”<sup>361</sup> Not only had nearly five years been consumed in litigation before the Board in *Ramaprakash* but also, since the same was true in *Shrader*, the Board was compelled to rule in favor of Shrader after the ruling of the circuit court in *Ramaprakash*.<sup>362</sup> On June 18, 2004, the Board reversed its previous decisions, citing *Ramaprakash v. Federal Aviation Administration*, and declared:

Accordingly, consistent with *Ramaprakash*, we conclude that the Administrator failed to meet the applicable due diligence standard in this case, for after receiving an NDR tape with information about respondent on August 14, 1997, she did not issue to respondent her Notice of Proposed Certificate Action (“NOPCA”) until March 13, 1998 . . . Respondent’s stale complaint motion should have been granted.<sup>363</sup>

It is noteworthy that prior to the Board reversing its previous decisions in *Shrader*, the Board denied a petition for reconsideration in *Shrader* where the Board was deadlocked, with two members in favor of granting the petition for reconsideration and two members opposing it.<sup>364</sup>

The nearly five-year ordeal of the airmen in *Ramaprakash* and *Shrader* refutes any argument that litigation before the Board saves resources because it is expeditious and efficient. Litigation before the Board is neither expeditious nor efficient. The Board does not consider itself bound by its own rules. The Board does not understand Rule 33 of the Board’s Rules of Practice since it clearly believes that public interest is a sub-species of good cause when they are two entirely different concepts, as made clear from a reading of the opinion in *Ramaprakash v. FAA* where the court wrote:

The rule allows a stale complaint to escape dismissal if the FAA can show good cause for the delay, but it also states that a stale complaint can survive if the FAA can show that “the imposition of

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<sup>361</sup> *Ramaprakash*, N.T.S.B. Order No. EA-5076, 2004 WL 187527, at \*2 (Jan. 28, 2004).

<sup>362</sup> *Shrader*, N.T.S.B. Order No. EA-5100, 2004 WL 1375856, at \*1 (June 17, 2004).

<sup>363</sup> *Id.* at \*1 (citation omitted).

<sup>364</sup> *Shrader*, N.T.S.B. Order No. EA-5012, 2002 WL 31906687, at \*1 (Dec. 30, 2002).

a sanction is warranted in the public interest, notwithstanding the delay or reasons therefor.” 49 C.F.R. § 821.33(a)(1). There would appear to be little need for the public interest to be weighed in any determination of whether good cause exists for delay, when the rule provides an independent and adequate avenue by which stale complaints found to implicate the public interest can proceed.<sup>365</sup>

Not only did the Board confuse the “good cause” and “public interest” exceptions to Rule 33 in *RamaPrakash* and *Shrader* but it also made a similar error in *Administrator v. Manin*<sup>366</sup> where the Board made this profoundly incorrect statement of law: “We have long held that the doctrine of laches is relevant to Board cases only in the context of the stale complaint rule.”<sup>367</sup> In *Manin v. NTSB*,<sup>368</sup> the United States Court of Appeals for the District of Columbia corrected the Board, holding: “As the FAA now acknowledges, the Board’s statement describing the ‘long held’ limitation on the applicability of the doctrine of laches was simply not accurate. Board case law establishes that the laches defense may be available even when the stale complaint rule is inapplicable.”<sup>369</sup>

As evidenced by the Board’s behavior in *RamaPrakash*, *Shrader*, and *Manin*, the Board does not understand its own rules nor the import of established legal principles and precedent that governs the Board’s adjudicatory functions. To be blunt, the Board flies by the seat of its pants and makes up the rules to achieve the desired outcome.

Because the Board is not a court, no airman can reasonably expect due process. The plight of the airmen in *RamaPrakash* and *Shrader* is not unique. Airmen who possess the necessary resolve and finances will spend years in litigation before the Board with repetitive appeals to the United States Courts of Appeal, as is exhibited by the experience of Dr. Pasternack, who had the good fortune to be represented by Kathleen Yodice, Esq.<sup>370</sup> As was the case with *RamaPrakash* and *Shrader*, it took Dr. Pasternack nearly five years and two appeals to the United States

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<sup>365</sup> *RamaPrakash*, 346 F.3d at 1126.

<sup>366</sup> N.T.S.B. Order EA-5439, 2008 WL 5972912, at \*1 (April 13, 2008).

<sup>367</sup> *Id.* at \*3.

<sup>368</sup> 627 F.3d 1239 (D.C. Cir. 2011).

<sup>369</sup> *Id.* at 1242.

<sup>370</sup> See *Pasternack v. Huerta*, 513 F. App’x 1 (D.C. Cir. 2013); *Pasternack v. NTSB*, 596 F.3d 836 (D.C. Cir. 2010); *Pasternack*, N.T.S.B. Order No. EA-5615, 2012 WL 562137 (Feb. 13, 2012); *Pasternack*, N.T.S.B. Docket No. SE-1813, 2008 WL 4143475 (July 31, 2008).

Court of Appeals for the District of Columbia to be vindicated from allegations that he refused the required DOT drug test.<sup>371</sup> Because the Board is incapable of administering justice and is incapable of affording airmen due process of law, Congress must transfer jurisdiction of airmen certificate in enforcement cases from the Board to federal district courts.

E. DESPITE THE PASSAGE OF THE PILOT'S BILL OF RIGHTS I,  
THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL  
RULES OF EVIDENCE ARE NOT BEING FOLLOWED, AND EFFORTS  
TO REMEDIATE THE ADJUDICATIVE FUNCTIONS  
OF THE BOARD HAVE FAILED

In the author's 2010 NTSB White Paper,<sup>372</sup> the author made nine recommendations to improve and reform the adjudicative functions of the Board, to wit:

- (1) That the language declaring that the Board would be "bound by all validly adopted interpretations of laws and regulations the Administrator carries out of written agency policy guidance" be deleted from 49 U.S.C. § 44709(d)(3) with the goal of ensuring the adjudicative functions of the Board would be unhampered and free of constraints imposed by the FAA;<sup>373</sup>
- (2) That Congress abrogate and abolish Board case law in which the Board has maintained that it does not have jurisdiction over constitutional issues, and that Congress specifically require the Board to rule on constitutional issues, including due process of law challenges under the Fifth Amendment to the Constitution of the United States;<sup>374</sup>
- (3) Not only that deferential language in 49 U.S.C. § 44709(d)(3) be eliminated from that statute but, moreover, that Congress "declare that the Board is not bound

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<sup>371</sup> See Pasternack, N.T.S.B. Docket No. SE-1813, 2008 WL 4143475 (July 31, 2008); Pasternack, N.T.S.B. Order No. EA-5615, 2012 WL 562137 (Feb. 13, 2012); Pasternack v. NTSB, 596 F.3d 836 (D.C. Cir. 2010); Pasternack v. Huerta, 513 F. App'x 1 (D.C. Cir. 2013).

<sup>372</sup> Alan Armstrong, *Call for A Congressional Inquiry into the Arbitrary and Capricious Decisions of the National Transportation Safety Board*, 75 J. AIR L. & COM. 3 (2010) [hereinafter 2010 NTSB White Paper].

<sup>373</sup> *Id.* at 61–62.

<sup>374</sup> *Id.* at 62–63.

by the FAA's interpretation of its laws and regulations and/or of any written policy sanction guidance[;]"<sup>375</sup>

- (4) That Congress require the Board to adopt and apply the Federal Rules of Evidence in aviation enforcement proceedings;<sup>376</sup>
- (5) That Congress mandate that the Board apply the Federal Rules of Civil Procedure in aviation enforcement proceedings;<sup>377</sup>
- (6) That in those cases where the FAA pursued a case that was not substantially justified in law or in fact, "the FAA should be required to pay the actual legal fees and case expenses incurred by the pilot[;]"<sup>378</sup>
- (7) That Congress "declare that obstruction of justice by the FAA will not be tolerated and require the Board to report suspected criminal acts by any Agency employee to the Department of Justice for investigation and/or prosecution[;]"<sup>379</sup>
- (8) That Congress conduct an investigation into the manner in which the Board's legal staff fashions opinions adopted by the Board, and "[i]f Congress finds the Board's legal staff is not receiving adequate supervision, procedural and institutional changes should be implemented by the [Board][;]"<sup>380</sup> and
- (9) "[T]hat oral argument be provided on appeals [to the Board] in every case where the FAA revokes an airman's certificate on an emergency basis as well as in cases representing factually complex issues."<sup>381</sup>

Congress passed the Pilot's Bill of Rights (PBR I) on August 3, 2012.<sup>382</sup> Section 2(a) of the PBR I provided that actions "relating to denial, amendment, modification, suspension, or revocation of an airman certificate, shall be conducted, to the extent practicable, in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence."<sup>383</sup> Accordingly, the author's fourth and fifth recommendations in the 2010 NTSB White Pa-

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<sup>375</sup> *Id.* at 63–64.

<sup>376</sup> *Id.* at 64–65.

<sup>377</sup> *Id.* at 65.

<sup>378</sup> *Id.* at 65–66.

<sup>379</sup> *Id.* at 66–67.

<sup>380</sup> *Id.* at 67.

<sup>381</sup> *Id.*

<sup>382</sup> Pilot's Bill of Rights No. 112-153, 126 Stat. 1159 (2012).

<sup>383</sup> *Id.* § 2(a) (emphasis added).

per were implemented by Congress in PBR I. Additionally, Section 2(c) of the PBR I deleted the deferential language found in 49 U.S.C. § 44709(d)(3) (relating to revocations or suspensions) and also deleted the deferential language found in 49 C.F.R. § 44710(d)(1) (relating to efforts by airman to gain certification).<sup>384</sup> Accordingly, the first recommendation in the 2010 NTSB White Paper was adopted by Congress in the passage of the PBR I.

Congress rejected and did not implement the author's second recommendation that the Board be required to address constitutional issues, including due process challenges, under the Fifth Amendment to the United States Constitution.<sup>385</sup> Consequently, any airman who appeals to the Board will inevitably find that the Board continues to refuse to address constitutional issues or constitutional challenges because the Board maintains that "we do not have jurisdiction to review the constitutionality of regulations issued by the Administrator or the Secretary of Transportation."<sup>386</sup> Accordingly, while a federal district court would readily adjudicate and rule upon constitutional challenges, the Board refuses to do so.<sup>387</sup>

The third recommendation in the 2010 NTSB White Paper, that the Board should not be bound by the FAA's interpretations of its laws and regulations, is presently recognized in three federal statutes relating to the suspension, modification, and revocation of certificates; appeals from airmen seeking certification; and revocation of certificates for controlled substances violations.<sup>388</sup> Congress did not implement the author's sixth recommendation that airmen recover their actual attorney's fees.<sup>389</sup> Congress also did not implement legislation requiring the Board to report criminal misconduct on the part of the FAA to the Department of Justice.<sup>390</sup> In passing the PBR I, Congress did not conduct any investigation into the manner in which the Board's legal staff fashions opinions for the Board.<sup>391</sup> Congress

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<sup>384</sup> *Id.* § 2(c).

<sup>385</sup> *Id.* at 1–8.

<sup>386</sup> Lybyer, N.T.S.B. Order EA-4822, 2000 WL 193000 (Feb. 10, 2006).

<sup>387</sup> *Id.*

<sup>388</sup> *See, e.g.*, 49 U.S.C. § 44709(d)(3) (2012). "When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator." *Id.* Similar language appears in 49 U.S.C. § 44703(d)(2) (2016) and 49 U.S.C. § 44710(d)(1) (2012).

<sup>389</sup> 2010 NTSB White Paper, *supra* note 373, at 65–66.

<sup>390</sup> 2010 NTSB White Paper, *supra* note 373, at 67.

<sup>391</sup> 2010 NTSB White Paper, *supra* note 373, at 67.

did not require in passing the PBR I that airmen involved in emergency revocation cases or in factually complex cases be guaranteed oral argument before the Board.<sup>392</sup>

This leaves us with the author's fourth and fifth recommendations in the 2010 NTSB White Paper—that is, that Congress require the Board to adopt the Federal Rules of Evidence to be employed in aviation enforcement proceedings and that Congress require the Board apply the Federal Rules of Civil Procedure in aviation enforcement proceedings.<sup>393</sup> While the Board pays lip service to the fourth and fifth recommendations of the author's 2010 NTSB White Paper and to Section 2(a) of PBR I, as a practical matter, the Federal Rules of Evidence and the Federal Rules of Civil Procedure are not being applied in aviation enforcement proceedings before the Board.

On August 7, 2012, Board Chief Judge Montaña executed an Order “In the Matter of All Pending Cases.”<sup>394</sup> The PBR I Order recites, *inter alia*, that proceedings governed by 49 U.S.C. §§ 44703, 44709 “shall be conducted to the extent practicable, in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.”<sup>395</sup> The Chief Judge, in passing the PBR I Order, recognized that prior to the enactment of the PBR I, the Federal Rules were “considered by the Board as instructive rather than controlling.”<sup>396</sup> While the PBR I Order announces implementation of the Board's observance of and adherence to the Federal Rules of Evidence and the Federal Rules of Civil Procedure “to the extent practicable,”<sup>397</sup> execution of that order has not defeated or curtailed institutional bias at the Board in favor of the FAA.

In *Knight*,<sup>398</sup> the FAA asserted that the respondent had “refused” a DOT drug test because he failed to provide a sufficient quantity of urine with “no adequate medical basis” for the failure.<sup>399</sup> In order for the Administrator to carry his burden of proof under 49 C.F.R. § 821.32 and make out a prima facie case, it was essential that the FAA prove that the respondent

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<sup>392</sup> 2010 NTSB White Paper, *supra* note 373, at 67.

<sup>393</sup> 2010 NTSB White Paper, *supra* note 373, at 64–65.

<sup>394</sup> Order, Alfonso J. Montaña, Chief Administrative Law Judge, NTSB, August 7, 2012 [hereinafter PBR I Order].

<sup>395</sup> *Id.* at 1.

<sup>396</sup> *Id.* at 1 n.1.

<sup>397</sup> *Id.* at 1.

<sup>398</sup> N.T.S.B. Docket No. SE-30308 (Sept. 28, 2017) (on file with author).

<sup>399</sup> Adm'r Complaint, at ¶ 15, *Knight*, N.T.S.B. Docket No. SE-30308 (Dec. 19, 2016) (on file with author).

“[f]ail[ed] to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation that there was no adequate medical explanation for the failure (see § 40.193(d)(2)) [.].”<sup>400</sup> Because it was readily apparent that the Administrator would require expert testimony from the medical review officer and the referral physician to show that there was “no adequate medical basis [for the refusal],” respondent propounded interrogatories to the Administrator, asking the Administrator to disclose expert witnesses in accordance with Federal Rule of Civil Procedure 26(a)(2)(A), (C).<sup>401</sup> Respondent (1) asked that the Administrator disclose expert witnesses;<sup>402</sup> (2) requested that the Administrator provide a report from any such expert witness;<sup>403</sup> and (3) requested that the Administrator provide a complete copy of the curriculum vitae for each expert witness.<sup>404</sup>

In response to respondent’s interrogatory number three, concerning expert witnesses, the Administrator asserted on January 10, 2017 that “[n]o expert witness is expected to be called.”<sup>405</sup> With regard to respondent’s request for Production No. 7, seeking a copy of the expert’s report, the Administrator’s response was that the request was “not applicable.”<sup>406</sup> With regard to respondent’s request for Production No. 9, seeking a copy of the curriculum vitae of each expert witness, the Administrator once again intoned that the request for production was “not applicable.”<sup>407</sup>

On May 15, 2017, at 2:00 p.m., the trial court conducted a telephone conference with counsel for the Administrator and respondent and announced that a hearing would be convened in Atlanta, Georgia, beginning July 18, 2017.<sup>408</sup> While the pleading confirming the telephone conference recited the date of the

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<sup>400</sup> 49 C.F.R. § 40.191(a)(5) (2010) (emphasis added).

<sup>401</sup> Respondent’s First Discovery Requests to the Adm’r, Knight, N.T.S.B. Docket No. SE-30308 (Dec. 19, 2016) (on file with author).

<sup>402</sup> *Id.* at Interrogatory No. 3.

<sup>403</sup> *Id.* at Request for Production No. 7.

<sup>404</sup> *Id.* at Request for Production No. 9.

<sup>405</sup> Complainant’s Responses to Respondent’s First Discovery Requests to the Adm’r, at Interrogatory No. 3, Knight, N.T.S.B. Docket No. SE-30308 (Jan. 10, 2017) (on file with author).

<sup>406</sup> *Id.* at Response to Request for Production No. 7.

<sup>407</sup> *Id.* at Response to Request for Production No. 9.

<sup>408</sup> *Id.* at Respondent’s Unopposed Motion for Continuance, May 16, 2017, ¶ 1.

phone call was May 25, the correct date was May 5, 2017,<sup>409</sup> but the matter of consequence is that there was no prehearing order issued before the FAA filed supplemental discovery responses on July 3, 2017.<sup>410</sup> Notwithstanding the fact that there was no prehearing order following the May 5, 2017, conference,<sup>411</sup> the trial court made this startling ruling in denying the respondent's first motion for summary judgment:

*When I originally scheduled the hearing in this proceeding, I issued a pre-hearing order, in which I directed the parties to exchange information, including the identity of any expert witness, no less than 21 days before the commencement of the hearing. Thus, to the extent the Administrator may need expert testimony to make out a prima facie case at hearing, he has complied with the timeframe I ordered in identifying prospective experts. I also note that the question of whether or not the Administrator has made out a prima facie case is one properly addressed after he has presented his case in chief at hearing.*<sup>412</sup>

It is noteworthy that after the respondent filed his first motion for summary judgment, his second motion for summary judgment, and his affidavit in support of his second motion for summary judgment (which were subsequently supplemented with the deposition testimony of respondent's treating physician, a board-certified urologist)<sup>413</sup> the FAA filed a document with the Board on July 3, 2017, purporting to supplement discovery describing the medical review officer, Dr. Barnett, and the referral physician, Dr. Lee, as "lay opinion witnesses."<sup>414</sup> However, the FAA's supplemental disclosure was not in compliance with

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<sup>409</sup> *Id.*

<sup>410</sup> See Adm'r's Supplemental Discovery Responses, Knight, N.T.S.B. Docket No. SE-30308 (July 3, 2017) (on file with author); Notice of Hearing and Prehearing Order, Knight, N.T.S.B. Docket No. SE-30308 (July 21, 2017) (on file with author).

<sup>411</sup> See Notice of Hearing and Prehearing Order entered by Chief ALJ Montañó, Knight, N.T.S.B. Docket No. SE-30308 (July 21, 2017) (on file with author).

<sup>412</sup> Order Denying Parties' Cross-Motions for Summary Judgment, at 3, Knight, N.T.S.B. Docket No. SE-30308 (Sept. 5, 2017) (emphasis added) (on file with author).

<sup>413</sup> Respondent's First Motion for Summary Judgment, Knight, N.T.S.B. Docket No. SE-30308 (June 7, 2017) (on file with author); Respondent's Second Motion for Summary Judgment, Knight, N.T.S.B. Docket No. SE-30308 (June 23, 2017) (on file with author), together with Respondent's Affidavit, Knight, N.T.S.B. Docket No. SE-30308 (on file with author).

<sup>414</sup> Adm'r's Supplemental Discovery Responses, Knight, N.T.S.B. Docket No. SE-30308 (July 3, 2017) (on file with author).

any prehearing order, since no such order was entered until eighteen days after the supplemental disclosure, i.e., on July 21, 2017.<sup>415</sup>

There never was any designation filed on the record disclosing either Dr. Barnett or Dr. Lee as an expert witness as required by the Federal Rules of Civil Procedure 26(a)(2)(A), (C).<sup>416</sup> Respondent Knight, in addition to bringing his first motion for summary judgment, also filed a motion to exclude any testimony from the medical review officer and the referral physician, and further moved to strike their testimony based upon the failure of the FAA to disclose these experts as required by Federal Rule of Civil Procedure 26(a)(2)(C).<sup>417</sup>

In *Musser v. Gentiva Health Services*,<sup>418</sup> the plaintiffs waited until after the defendant had moved for summary judgment to disclose their witnesses, and the district court, pursuant to Federal Rule of Civil Procedure 37(c)(1), excluded the expert testimony and granted summary judgment to the defendant. The United States Court of Appeals for the Seventh Circuit affirmed the sanction and grant of summary judgment holding, stating that “[f]ormal disclosure of experts is not pointless. Knowing the identity of the opponent’s expert witness allows a party to properly prepare for trial. Gentiva should not be made to assume that each witness disclosed by the Mussers *could be an expert witness at trial*.”<sup>419</sup> The conduct forbidden in *Musser* is exactly what

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<sup>415</sup> Notice of Hearing and Prehearing Order entered by Chief ALJ Montaña, Knight, N.T.S.B. Docket No. SE-30308 (July 21, 2017) (on file with author).

<sup>416</sup> *Gyrodta, Inc. v. Atlantic Inertial Sys., Inc.*, No. CV 08-7897-GHK, 2011 WL 13116732, at \*2 (C.D. Cal. Oct. 11, 2011)

Plaintiff did not sufficiently put Defendants on notice that so-called ‘lay expert’ witnesses would provide Rule 702 testimony . . . Rule 26(a)(2)(A) requires parties to answer a simple question: Will any witness provide expert testimony? Plaintiff’s oxymoronic designation of these witnesses as ‘lay experts’ does not clearly answer this question, and thus does not satisfy the requirement of Rule 26(a)(2)(A).

*Id.*

<sup>417</sup> See Respondent’s Motion to Exclude Any Testimony from Randy Barnett, D.O., Knight, N.T.S.B. Docket No. SE-30308 (June 6, 2017) (on file with author); Respondent’s Motion for Sanctions Pursuant to Rule 37(c)(1), FRCP to Exclude Any Testimony from Nicola Lee, M.D., Knight, N.T.S.B. Docket No. SE-30308 (June 15, 2017) (on file with author); and Respondent’s Motion, Pursuant to Rule 37(c)(1), to Strike and Exclude Any FAA Expert Testimony for Failure to Designate Rule 702 Experts as Required by Rule 26(a)(2)(C), Knight, N.T.S.B. Docket No. SE-30308 (July 21, 2017) (on file with author).

<sup>418</sup> 356 F.3d 751, 757 (7th Cir. 2004).

<sup>419</sup> *Id.* (emphasis added).

the FAA did in *Knight*, and the Board Chief ALJ specifically endorsed this improper and unlawful practice.<sup>420</sup>

In *Knight*, after respondent filed his first and second motions for summary judgment, the FAA, on July 3, 2017, portrayed Doctors Barnett and Lee (the medical review officer and referral physician) as fact witnesses who would provide “lay opinion testimony.”<sup>421</sup> Not only were the FAA’s discovery responses evasive by portraying the medical review officer and referral physician as only providing “lay opinion testimony” but also the Administrator’s responses were further evasive since the Administrator said that the doctors would testify “to the extent necessary.”<sup>422</sup> The Administrator’s responses in *Knight* were clearly inadequate under Federal Rule of Civil Procedure 37(a)(4) and did not constitute an expert witness designation as required by Federal Rules of Civil Procedure 26(a)(2)(A), (C).<sup>423</sup> As evidenced by this article, the Chief ALJ, out of concern for the “paruresis for a day defense”<sup>424</sup> ignored Federal Rules of Civil Procedure 26(a)(2)(A) and (C), 37(a)(4), and 26(g)(1)<sup>425</sup> and pronounced the FAA had made a timely disclosure of expert witnesses based upon a prehearing order that did not exist at the time the FAA’s supplemental disclosures were served.<sup>426</sup>

The Board has previously affirmed orders granting summary judgment on behalf the Administrator, and, in doing so, has specifically recognized the binding precedent of the United States Supreme Court in the form of *Celotex Corp. v. Catrett*.<sup>427</sup> In

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<sup>420</sup> See Order Denying Parties’ Cross-Motions for Summary Judgment, at 3, *Knight*, N.T.S.B. Docket No. SE-30308 (Sept. 5, 2017) (on file with author).

<sup>421</sup> See Adm’r’s Supplemental Discovery Responses, at ¶¶ 1, 2, *Knight*, N.T.S.B. Docket No. SE-30308 (July 3, 2017) (on file with author); see also Notice of Hearing and Prehearing Order, *Knight*, N.T.S.B. Docket No. SE-30308 (July 21, 2017) (on file with author).

<sup>422</sup> *Id.*

<sup>423</sup> *Musser*, 356 F.3d at 757 (“Gentiva should not be made to assume that each witness disclosed by the Mussers could be an expert witness at trial.”).

<sup>424</sup> *Knight* Transcript, *supra* note 17, at 621–25.

<sup>425</sup> *Musser*, 356 F.3d at 757; *Gyrodata, Inc. v. Atlantic Inertial Sys., Inc.*, No. CV 08-7897-GHK, 2011 WL 13116732, at \*2 (C.D. Cal. Oct. 11, 2011).

<sup>426</sup> Adm’r’s Supplemental Discovery Responses, *Knight*, N.T.S.B. Docket No. SE-30308 (July 3, 2017) (on file with author); Notice of Hearing and Prehearing Order, *Knight*, N.T.S.B. Docket No. SE-30308 (July 21, 2017) (on file with author).

<sup>427</sup> See *Martinez*, N.T.S.B. Order No. EA-5409, 2008 WL 4603570, at \*3 (Oct. 7, 2008) (“In this regard, we recognize that Federal courts have granted summary judgment when no genuine issues of material fact exist.”) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986)); *Manin*, N.T.S.B. Order No. EA-5439, 2008 WL 4972912, at \*3 (Apr. 13, 2008) (“In this regard, we recognize that Federal

*Celotex Corp. v. Catrett*,<sup>428</sup> the plaintiff brought an action for the death of her deceased husband but was unable to produce any evidence in support of her allegations that the decedent had been exposed to any asbestos products of Celotex.<sup>429</sup> Just like the FAA in *Knight*, in response to interrogatories, the plaintiff could not provide “any witnesses who could testify about the decedent’s exposure to petitioner’s asbestos products.”<sup>430</sup> The district court’s grant of summary judgment to Celotex was reversed by the United States Court of Appeals for the District of Columbia which reasoned, incorrectly, it was the burden of Celotex “to *negate* such exposure.”<sup>431</sup> Not only did the majority of a divided panel of the D.C. Circuit believe it was the obligation of the movant to negate the elements of the plaintiff’s prima facie case but the majority also “declined to consider petitioner’s argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial.”<sup>432</sup> According to the dissenting judge, “[t]he majority’s decision ‘undermines the traditional authority of trial judges to grant summary judgment in meritless cases.’”<sup>433</sup>

The United States Supreme Court, in reversing the United States Court of Appeals for the District of Columbia in *Celotex*, declared:

Under Rule 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be “no genuine issue as to any material fact,” since the complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts imma-

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courts have granted summary judgment when no genuine issues of material facts exist.”); Singleton, N.T.S.B. Order No. EA-5437, 2009 WL 870356, at \*11 n.6 (Mar. 24, 2009).

<sup>428</sup> *Celotex Corp.*, 477 U.S. at 319.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 320.

<sup>431</sup> *Id.* at 319.

<sup>432</sup> *Id.* at 322.

<sup>433</sup> *Id.*

terial. The moving party is “entitled to a judgment as a matter of law” because the non-moving party has failed to make a sufficient showing of an essential element of her case with respect to which she has the burden of proof. “[T]h[e] standard [for granting summary judgment] mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a)[.]”<sup>434</sup>

Not only did the Supreme Court declare that the moving party is entitled to judgment if he can demonstrate that the opposing party cannot make out a prima facie case but the Court also declared, “we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim.”<sup>435</sup> Since the Administrator, by his own admissions, had no expert witnesses, the respondent was entitled to summary judgment in *Knight*.<sup>436</sup> However, because of the institutional bias the FAA enjoys before the Board, and despite the fact there are numerous cases where the FAA has prevailed in a motion for summary judgment,<sup>437</sup> the Board’s Chief Law Judge denied both the respondent’s first motion for summary judgment and second motion for summary judgment despite the fact that they were supported by the unopposed testimony of respondent’s treating physician and urologist.<sup>438</sup> The FAA had failed to demonstrate that there is a material question of fact as required by Federal Rule of Civil Procedure 56(c), since the testimony of respondent’s urologist was uncontradicted that he suffered from a medical condition, i.e., “an ascertainable physiological condition” that prevented him from providing 45mL of urine.<sup>439</sup>

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<sup>434</sup> *Id.* at 322–23 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

<sup>435</sup> *Id.* at 323.

<sup>436</sup> *Id.* at 322–23.

<sup>437</sup> See Singleton, N.T.S.B. Order No. EA-5437, 2009 WL 870356, at \*11 n.6 (Mar. 24, 2009); Martinez, N.T.S.B. Order No. EA-5409, 2008 WL 4603570, at \*3 (Oct. 7, 2008); Manin, N.T.S.B. Order No. EA-5439, 2008 WL 4972912, at \*3 (Apr. 13, 2008).

<sup>438</sup> See Order Denying Parties’ Cross Motions for Summary Judgment, Knight, N.T.S.B. Docket No. SE-30308 (Sept. 5, 2017) (on file with author).

<sup>439</sup> See De. Tr. Bryan E. Hill, M.D., 28/23-25, 29/1-25, 21/24-25, 22/1-21, 18/1-25, 19/1-25, 20/1-25, Knight, N.T.S.B. Docket No. SE-30308 (on file with author); Respondent’s Exhibit 28, Knight, N.T.S.B. Docket No. SE-30308 (on file with author); 49 C.F.R. § 40.193(e) (2018). Dr. Hill testified based upon his knowledge, training, skill, experience, and education to a reasonable degree of medical and scientific probability that on August 26, 2016, respondent Knight was unable to provide a 45mL specimen of urine because he had an “ascertainable physiological condition, e.g., a urinary system dysfunction” within the purview of 49 C.F.R. § 40.193(e). *Id.*

The author submits that the foregoing rulings of the Chief ALJ in *Knight* demonstrate that it is impossible to obtain a fair hearing before the Board or its law judges. The FAA does not have to disclose expert witnesses since disclosure of physicians as “lay opinion witnesses” and as “potential experts” is sufficient for purposes of the Chief ALJ even though such a ruling is directly contradicted by a substantial body of federal court precedent, as well as the Federal Rules of Civil Procedure and the Federal Rules of Evidence.<sup>440</sup> Despite the foregoing body of law and despite the fact that, by virtue of the PBR I, the Board is required to follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence, the Chief ALJ denied motions to exclude the testimony of the medical review officer and referral physician declaring, “[r]espondent’s motions to exclude the testimony of Drs. Lee and Barnett are unsupported by Board case law and are not persuasive.”<sup>441</sup> The Board’s Chief ALJ, in making the foregoing ruling, refused to even acknowledge that the standards he was supposed to follow under Section 2(a) of the PBR I were the Federal Rules of Evidence and FRCP rather than “Board case law.”<sup>442</sup> It is also noteworthy that the Chief ALJ created a conflict as a pretext for denying summary judgment where no conflict existed, since the FAA failed to comply with Federal Rule of Civil Procedure 56(c)(4) and did not file any affidavits or sworn testimony in opposition to Knight’s first and second motions for summary judgment.<sup>443</sup>

Any seasoned trial lawyer will find litigating before the Board extremely frustrating. In effect, there are no rules. Under the mantle of concerns for air safety and public interest, the Board is complicit with the FAA to ensure that even in cases where no material question of fact exists, the case goes to trial so the ALJ can make “credibility” assessments in favor of the FAA justified

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<sup>440</sup> See, e.g., FED. R. CIV. P. 26(a)(2)(A), 26(a)(2)(C), 26(g), 37(a)(4), 37(c)(1); FED. R. EVID. 701, 702, 704, 705; *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757 (7th Cir. 2004); *Gyrodata, Inc. v. Atlantic Inertial Sys., Inc.*, No. CV 08-7897-GHK, 2011 WL 13116732, at \*2 (C.D. Cal. Oct. 11, 2011).

<sup>441</sup> See Order Denying Respondent’s Motions to Exclude Any Testimony of Randy Barnett, D.O. and Nicola Lee, M.D., at 2, *Knight*, N.T.S.B. Docket No. SE-30308 (Sept. 8, 2017) (on file with author).

<sup>442</sup> *Id.*

<sup>443</sup> See Order Denying Parties’ Cross-Motions for Summary Judgment, at 4, *Knight*, N.T.S.B. Docket No. SE-30308 (Sept. 5, 2017) (“However, the credibility of the history respondent gave Dr. Hill must be assessed by the trier of fact.”) (on file with author).

only as being based upon “safety in air commerce or air transportation and the public interest[.]”<sup>444</sup>

### III. CONCLUSION

When Congress passed the PBR I providing that the Federal Rules of Evidence and Federal Rules of Civil Procedure would be enforced in aviation enforcement proceedings before the Board, there was hope that this would signal a reform of the manner in which litigation is conducted before the Board. However, the institutional bias that the Board confers upon the FAA to the detriment of the pilot has not been eradicated by the passage of the PBR I. “The definition of insanity is doing the same thing over and over again, but expecting different results.”<sup>445</sup> To allow the Board to continue to adjudicate airman enforcement and certification cases while expecting different results is insane. While Senate Bill 755, the Fairness for Pilots Act, would, if enacted into law, permit de novo review of Board decisions in federal district court,<sup>446</sup> it does not confer original jurisdiction of airmen certification and enforcement actions in federal district court. Consequently, the proposed legislation will not solve the problem. Decades of case law demonstrates that the Board, as an adjudicatory mechanism, does not work. The Board consistently exhibits bias in favor of the Administrator. The Board consistently adjudicates cases in an arbitrary and capricious manner. The Board consistently refuses to sanction misconduct on the part of the FAA Administrator, and while there is limited authority for the proposition that the Board may in extreme cases actually consider due process,<sup>447</sup> the Board maintains it does not have jurisdiction to reach constitutional questions.<sup>448</sup>

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<sup>444</sup> 49 U.S.C. § 44709(d)(1)(A) (2012).

<sup>445</sup> This quote has been attributed to the noted physicist, Albert Einstein.

<sup>446</sup> Fairness for Pilots Act, S. 755, 115th Cong. § 2(b)(1)(A) (2017) (“[T]he district court shall review the denial, suspension, or revocation de novo[.]”).

<sup>447</sup> Mashadov, N.T.S.B. Order No. EA-5627, 2012 WL 1795820, at \*2 (May 1, 2012) (“[T]he fact that the Administrator would bring an international falsification case to revoke all of respondent’s certificates, yet not move to admit the very document the Administrator accuses respondent of falsifying, strains credulity. Due process demands we not overlook this error[.]”); Randall, 3 N.T.S.B. 3624, 3626 (1981) (“The fact that the Administrator may be authorized to use FDR tapes in an enforcement proceeding does not, as the law judge appears to have assumed, entitle him to disregard a policy he has adopted[.]”).

<sup>448</sup> Lybyer, N.T.S.B. Order No. EA-4822, 2000 WL 193000, at \*1 (Feb. 10, 2000).

An airman has a constitutional right to due process before his license is revoked or suspended.<sup>449</sup> An airman has a statutory right that any proceeding brought by the FAA to revoke or suspend his license will be adjudicated “in an impartial manner.”<sup>450</sup> These constitutional guarantees of due process of law for pilots are not being met by the existing adjudicatory mechanisms provided by the Board. The time has come to transfer jurisdiction of airman certification and enforcement cases from the Board to the federal district courts.

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<sup>449</sup> U.S. CONST. amend. V; 5 U.S.C. §§ 554, 556, 557, 558 (2018); *White v. Franklin*, 637 F. Supp. 601, 610–11 (N.D. Miss. 1986).

<sup>450</sup> 5 U.S.C. § 556(b).