ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1443

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

CHARLES ERWIN,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Appeal from the Federal Aviation Administration
Petition for Review of Final Order Dated September 11, 2020

PETITIONER CHARLES ERWIN'S FINAL REPLY BRIEF

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STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Brief for the Respondent Federal Aviation Administration.

INTRODUCTION

The FAA's response brief attempts to do what the Federal Air Surgeon's Final Order failed to do—provide a rationalization for the decision to withdraw Mr. Erwin's Authorization. This post hoc rationalization is accomplished by making *non sequitur* arguments regarding why Mr. Erwin's Authorization was first withdrawn, doubling down on the untenable assertion that the FAA can unlawfully delegate its duty to establish testing criteria to private third parties, speculating that Mr. Erwin would still be subject to monitoring even if his prior Authorization was reinstated, and, finally, feigning ignorance that its withdrawal of Mr. Erwin's Authorization in no way damaged Mr. Erwin. In short, all of the FAA's arguments fall flat. What appears instead is nothing short of a character assassination by the FAA in an attempt to justify its actions.

ARGUMENT AND AUTHORITIES

I. Summary of the Argument

Mr. Erwin replies to the FAA's response brief by asserting (1) that the Record supports his steadfast abstinence; (2) the FAA's evidence of non-abstinence is insufficient because it presupposes that a 'positive' test means non-abstinence, it inappropriately attempts to supplement the Record, and the FAA

unlawfully delegates ethyl glucuronide (EtG) and ethyl sulfate (EtS) testing to third parties; (3) the Federal Air Surgeon's Final Order fails to explain the decision to affirm the withdrawal of Mr. Erwin's Authorization; and (4) the FAA erroneously assumes it has not damaged Mr. Erwin.

II. The Record Supports Mr. Erwin's Continued Abstinence from Alcohol

The FAA conflates abstinence with negative alcohol tests—Mr. Erwin's Authorization required abstinence from alcohol, not negative alcohol tests. This is an important distinction because abstinence requires a choice. As defined, abstinence is "[t]he practice of refraining completely from indulgence in some act; esp., the practice of not having sex or of not consuming alcoholic beverages or similar addictive substances." Black's Law Dictionary (11th ed. 2019).[1] Similar definitions appear in other dictionaries. *See, e.g.*, Merriam-Webster Dictionary (defining abstinence as "the practice of abstaining from something: the practice of not doing or having something that is wanted or enjoyable").

The Record is replete with evidence showing that Mr. Erwin did not *knowingly* consume alcohol. In other words, he made no choice to indulge in alcohol. This sentiment is shared by the FAA's own expert consultant Dr. Alan Sager who concluded that "[w]e continue to believe that the pilot's positive PEth

[1] Abstain is defined as: "To voluntarily refrain from doing or having something one enjoys, esp. something in which one has a history of overindulging." Black's Law Dictionary (11th ed. 2019).

[sic] test was inadvertent and secondary to his ingestion of food prepared with beer." R. at 155; J.A. at 275.[2]

Even the FAA's counsel recognizes that "Mr. Erwin's inadvertent consumption of food cooked in beer is certainly a possible, *if not plausible*, explanation for his positive test." Resp't Br. at 23 (emphasis added). If even the FAA's counsel believes the most plausible explanation, then it supports the Mr. Erwin's unwavering contention that he maintained his abstinence.

Moreover, the substantial evidence in the Record demonstrates that Mr. Erwin maintained his abstinence. For example:

- Dr. Alan Sager's internal FAA memoranda concluding Mr. Erwin inadvertently consumed food prepared in alcohol (R. at 148, 155; J.A. at 273, 275);

- Mr. Erwin's repeated and unchanging statements that he maintained his abstinence (Pet'r's Br. at fn. 7);

- The affidavit from Mr. Erwin's Human Intervention and Motivational Study aftercare counselor who stated that Mr. Erwin did not relapse in his alcohol-abstinence program (R. at 306; J.A. at 242);

- Dr. Thomas Kupiec's expert report which concluded "within a reasonable degree of scientific certainty, that the result of Mr. Erwin's urine analysis

[2] The FAA goes to extraordinary lengths to distance itself from Dr. Alan Sager by stating that he is not an employee, but a retained consultant. Regardless of whether he is an employee or independent contractor, Dr. Alan Sager is plainly an expert agent of the FAA, acting on its behalf, reviewing FAA medical files, and providing reports on FAA letterhead. It makes no sense to imply that Dr. Alan Sager's conclusions are somehow diluted due to his position as a consultant versus an employee. If anything, it lends more credence to Dr. Alan Sager's conclusions because he arguably does not suffer from agency bias.

does not represent conclusive evidence of intentional alcohol consumption" (R. at 302; J.A. at 239);

- A reconsideration letter and supporting exhibits cautioning against reliance on ethyl glucuronide (EtG) and ethyl sulfate (EtS) abstinence testing (R. at 353–56; J.A. at 187-90; Pet'r's Br. at fn. 8);

- A negative phosphatidyl ethanol (PeTH) test taken from a sample of Mr. Erwin's blood collected on December 28, 2017 (R. at 344; J.A. at 224);

- A negative ethyl glucuronide (EtG) test taken from a sample of Mr. Erwin's hair collected on December 28, 2017 (R. at 345; J.A. at 225); and

- A negative ethyl glucuronide (EtG) test taken from a sample of Mr. Erwin's nails collected on December 28, 2017 (R. at 346; J.A. at 226).[3]

As demonstrated by the evidence in the Record—and arguably the admission of counsel—Mr. Erwin has maintained by sobriety and abstained from alcohol as required by his Authorization. Neither the FAA's Final Order affirming the withdrawal of Mr. Erwin's Authorization nor the FAA's brief provide any rationale as to why the FAA would have dismissed or disregarded this substantial evidence.

[3] The FAA attempts to create controversy where none exists by stating that Mr. Erwin waited two weeks to have the confirmatory tests performed. Resp't Br. at 27. That's not the case. The 'positive' test results were reported on December 27, 2017, R. at 684; J.A. at 072, and once Mr. Erwin learned of these results, he had the confirmatory tests performed the next morning. R. at 344; J.A. at 224 (specimen collected on 12/28/2017 at 10:25); R. at 345; J.A. at 225 (specimen collected on 12/28/2017 at 10:00); R. at 346; J.A. at 226 (specimen collected on 12/28/2017 at 10:25). The FAA also fails to acknowledge that Mr. Erwin's confirmatory hair and nail samples would have shown alcohol use if Mr. Erwin did indeed fail to maintain his sobriety.

III. The FAA's Evidence of Non-Abstinence is Insufficient

A. A Positive Test Standing Alone is Not Sufficient to Withdraw an Authorization

In essence, the FAA argues that a positive test is sufficient to affirm the withdrawal of an authorization regardless of the countervailing evidence.[4] The only exception, by the FAA's own admission, that the FAA seems to acknowledge is where this is some problem with the testing methodology or process. Resp't Br. at 34. This is problematic because the utilized test cannot differentiate abstinence from a false positive, like incidental exposure. Resp't Br. at 21 ("the test results cannot discern whether Mr. Erwin intentionally or accidentally consumed alcohol…."); Resp't Br. at 25 (admitting that ethyl glucuronide (EtG) and ethyl sulfate (EtS) testing is susceptible to incidental exposure). It's difficult to imagine in what scenario a testing methodology is susceptible to incidental exposure yet remains a "***reliable***, objective tool for the detection of recent drinking…." Resp't Br. at 25 (emphasis added). Ethyl glucuronide (EtG) and ethyl sulfate (EtS) tests are clearly plagued with shortcomings. When the Federal Air Surgeon disregarded

[4] The FAA takes great pains explaining that Mr. Erwin's Authorization was properly withdrawn but seems to miss the crux of the argument. This appeal isn't about the decision to initially withdraw Mr. Erwin's Authorization based on the limited information available at the time, *i.e.*, the 'positive' test; rather, the argument is that the FAA failed to consider the true source of the 'positive' test after it was presented with substantial evidence that Mr. Erwin maintained his sobriety. So, too, the revelation regarding the differing testing standards and delegation of authority to third-party commercial air carriers was not uncovered until *after* the FAA withdrew Mr. Erwin's Authorization.

the countervailing evidence and relied solely on the positive test, these shortcomings became the shaky ground upon which the Final Order rests.

In an attempt to distance itself from the defects associated with ethyl glucuronide (EtG) and ethyl sulfate (EtS) testing, the FAA cites heavily to public safety considerations in its response brief. Public safety is certainly a consideration, but it does not displace all other considerations. If this were the case, the FAA could simply do whatever it wanted and then raise public safety as an absolute bar for its actions. The reality is that this decision impacts an Airman's livelihood, and the FAA may not disregard countervailing evidence in the name of public safety.

The FAA continues its reliance on public policy considerations and frames the decision to affirm the withdrawal of Mr. Erwin's Authorization as a binary decision to uphold public safety or not. Specifically, the FAA states that "when faced with two possible explanations for the positive alcohol test… [it] erred on the side of public safety." Resp't Br. at 22. There is no support for this rationale in the Record. In fact, we don't know what possible explanations for the 'positive' alcohol test the FAA considered in initial decision to withdraw Mr. Erwin's Authorization or in its later decision affirming that withdrawal. That reasoning is absent from the Record. This binary choice the FAA purportedly wrestled with is purely hyperbolic and should be disregarded. *Walter O. Boswell Mem'l Hosp. v.*

Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) (citing *Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23 (D.C. Cir. 1979)) ("To review more than the information before the Secretary at the time she made her decision risks our requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations[.]").

Additionally, there is no support in the Record for the FAA's assertion that Mr. Erwin's attendance at Metro Atlantic Recovery Residences "signaled an adverse change in his medical condition." Resp't Br. at 22. Again, this is mere post hoc rationalization. The only rationale provided by the FAA is that Mr. Erwin's Authorization was withdrawn "due to [his] positive alcohol test." R. at 308; J.A. at 173. Because the Record contains none of these possible explanations, the FAA cannot now raise arguments that it weighed and contemplated two possible decisions and subsequently "erred on the side of public safety" or that Mr. Erwin's withdrawal was based in whole or in part on his attendance at Metro Atlantic Recovery Residences. Resp't Br. at 22.[5]

The FAA also implies the Federal Air Surgeon may act with impunity and ignore the conclusions of Dr. Alan Sager and the other expert opinion of Dr. Thomas Kupiec. The FAA does so by going to the same watering hole it did

[5] It's also a mischaracterization that Mr. Erwin voluntarily entered treatment at Metro Atlantic Recovery Residences. His employer gave him two options: (1) attend inpatient treatment at the Metro Atlantic Recovery Residences and sign a new employment contract (the so-called "last chance contract"); or (2) terminate his employment. R. at 124; J.A. at 267. There is simply no basis to assert that Mr. Erwin voluntarily attended treatment because his abstinence was unstable.

before—a binary decision between either upholding public safety or not. *See, e.g.*, Resp't Br. at 32. But this time there's a new twist in that the Federal Air Surgeon "[w]hen faced with reasonable, but differing expert views, the Federal Air Surgeon chose to err on the side of safety and conclude that Mr. Erwin's positive test showed that he had not been total abstinent from alcohol." Resp't Br. at 32. While the FAA correctly argues that deference should be given for choosing one expert opinion over the other, it fails to recognize ***there was no contrary expert opinion***. Instead, Dr. Thomas Kupiec concluded that "the result of Mr. Erwin's urine analysis does not represent conclusive evidence of intentional alcohol consumption," R. at 302; J.A. at 239, and Dr. Alan Sager concluded that "[w]e continue to believe that the pilot's positive PEth [sic] test was inadvertent and secondary to his ingestion of food prepared with beer." R. at 155; J.A. at 275.

Despite the substantial evidence that Mr. Erwin maintained his abstinence, the Federal Air Surgeon disregarded both expert opinions and all other support in the Record to arrive at an erroneous decision premised on a single flawed test. As a result, Mr. Erwin was deprived of his livelihood.

B. The FAA Impermissibly Attempts to Support the Federal Air Surgeon's Final Order with Scientific Literature that Was Never Considered

Under the guise of "background" information, the FAA (again) attempts to provide post hoc rationalization for its interpretation of ethyl glucuronide (EtG) and ethyl sulfate (EtS) testing.[6] The problem here—as it was with the FAA's post-hoc explanation of Mr. Erwin's Authorization withdraw—is that none of the cited and attached scientific literature appears in the Record. *AT&T Info. Sys., Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (quoting *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977)) ("we have made clear that '[t]he new material should be merely explanatory of the original record and should contain no new rationalizations.'").

There is simply no mention in the Record or the Final Order itself that the Federal Air Surgeon reviewed any of the proffered literature when making the decision to affirm the withdraw of Mr. Erwin's Authorization. Quite simply, the FAA is literally trying to stack the appellate Record in its favor following the

[6] Ironically, the FAA levels the accusation that Mr. Erwin's brief "cherry-picks literature" cautioning that ethyl glucuronide (EtG) and ethyl sulfate (EtS) tests may be unreliable. Resp't Br. at 25. Somehow the FAA fails to recognize this literature is contained in the Record and, thus, should have been reviewed and considered by the Federal Air Surgeon when making the decision to reverse or affirm the withdrawal of Mr. Erwin's Authorization.

issuance of the Final Order. All references to scientific literature not contained in the Record should be excluded by the Court.

C. The FAA Impermissibly Delegated its Duties to Third Parties

There is no dispute that the Federal Air Surgeon may mandate individualized requirements in an authorization; rather, the problem here is that adherence to these requirements cannot be delegated to the airlines and administered using differing standards. *See Nat'l Ass'n of Regul. Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1143–44 (D.C. Cir. 1984) (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) ("Had the Commission so acted and had the Congress so intended it to act, that would amount to a 'legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.'"); *see also Perot v. Fed. Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996) ("We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor such as the CPD.").

The FAA does not have its own threshold requirements for ethyl glucuronide (EtG) and ethyl sulfate (EtS) testing. The FAA has admitted that it delegated the testing requirements contained in Mr. Erwin's Authorization to his employer. Resp't Br. at 34. Nothing in the FAA's controlling statutes or promulgated rules

permits this delegation of authority. Yet, that is exactly what has occurred. The FAA implies that because Mr. Erwin's employer participates in the Human Intervention Motivational Study, this delegation of testing authority is permissible. Id. Noticeably absent from this argument, however, is any clear authorization allowing this delegation of authority.

Perhaps more disturbing is that the FAA has also impermissibly delegated authority to for-profit, commercial airlines to establish their own testing thresholds.[7] The FAA mischaracterizes Mr. Erwin's example in his brief that allowing differing standards for similarly situated Airmen ultimately leads to different agency actions for identical behavior—there was never an insinuation that the Federal Air Surgeon should "ignore [Mr. Erwin's] positive alcohol test because there *may* be other pilots abusing alcohol that have evaded the FAA's detection." Resp't Br. at 35 (emphasis in original). Rather, the example was proffered to show that the FAA's unlawful delegation of authority to the airlines results in due-process violations. In effect, the FAA is allowing individual airlines to impose

[7] Though the FAA has now added the 'positive' test to the Record, it did not include the entire documentation package from Quest. The documentation package makes clear that the criteria for determining whether a test is 'positive' is whether the sample exceeds the "client specific cutoff"—*i.e.*, the threshold Delta established. Mr. Erwin's December 14, 2017 Quest Documentation Package; *see also* R. at 684; J.A. at 072 (stating that Quest's client is "CLS/DELTA"). Mr. Erwin, obviously, would have brought the oversight of failing to include the entire documentation package to the attention of the FAA if it had properly supplemented the Record pursuant to Fed. R. App. P. 10(e)(2).

different standards for Federal licensure of Airmen. Obviously, if the FAA could show that the identical testing threshold standards were applied for all commercial airline pilots, it would have stated as much in its response brief. Mr. Erwin, unfortunately, does not have access to every testing threshold used by the airlines that are regulated by the FAA. Regardless, the Federal Air Surgeon's decision to affirm the withdrawal of Mr. Erwin's Authorization should be set aside because the testing methodologies and thresholds are ultimately premised on unlawful delegations of authority, which violate the due-process rights of similarly situated Airmen subject to the FAA's oversight.

IV. The Federal Air Surgeon's Decision in the Final Order Was Not Reasonably Explained

The FAA's Final Order remains deficient because the Federal Air Surgeon fails to provide any rationale to affirm the withdrawal of Mr. Erwin's Authorization. The Federal Air Surgeon "must articulate a 'rational connection between the facts found and the choice made.'" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

There is no mention in the Final Order of the conclusions of the FAA's own retained expert that the test was due to Mr. Erwin's inadvertent consumption of food prepared in beer. For that matter, there is no discussion of how the Federal

Air Surgeon weighed or dismissed any of the evidence showing that Mr. Erwin had remained abstinent.

The FAA states that the Federal Air Surgeon didn't need to say more in the Final Order and then implied this brevity was warranted considering the volume of applications the FAA received. Resp't Br. at 37–38. Not so. *See Pub. Citizen, Inc. v. F.A.A.*, 988 F.2d 186, 197 (D.C. Cir. 1993) ("The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result[.]"). Fortunately for Mr. Erwin (and all other Airmen), constitutional standards do not evaporate simply because an agency is too busy. The Federal Air Surgeon's failure to provide a discernable rationale in the Final Order does not now require the Court to do so. Contrary to the FAA's urging, there is no basis for the Court to affirm the withdrawal of Mr. Erwin's Authorization. And the FAA's notion that a single 'positive' test standing on its own permits the end of a pilot's livelihood is ludicrous.

V. The FAA Has Erroneously Predetermined Mr. Erwin's Fate If His Authorization Is Retroactively Reinstated

Apparently, the FAA has predetermined that Mr. Erwin would still be subject to continued monitoring requirements even if his May 17, 2017 Authorization was retroactively reinstated. Resp't Br. at 39. This is alarming for a number of reasons. Indeed, the retroactive reinstatement of Mr. Erwin's Authorization would demonstrate more than four years of sobriety and recovery

and may qualify him for an unrestricted medical certificate.[8] Even the FAA's counsel admits that unrestricted medical certificates are available for pilots who establish clinical evidence of "recovery, including sustained total abstinence from the substance(s) for not less than the preceding 2 years." Resp't Br. at 5 (quoting 14 C.F.R. § 67.107(a)(4)). It appears that Mr. Erwin would be a perfect candidate for an unrestricted medical certificate under the FAA's promulgated rules.

The retroactive reinstatement of Mr. Erwin's Authorization would also allow him to void the "last chance contract" his employer required him to sign. It's disingenuous for the FAA to state that this is nothing more than a "private employment dispute," because, as the FAA well knows, its actions in withdrawing Mr. Erwin's Authorization put the entire chain of events into motion. In essence, the FAA pushed Mr. Erwin in front of a bus (his employer) and now feigns zero responsibility for the resulting consequences.

CONCLUSION

Mr. Erwin's May 17, 2017 Authorization should be retroactively reinstated so that he can be properly evaluated for an unrestricted medical certificate and seek to void his current employment contract, which is wholly a result of the false 'positive' alcohol test.

[8] The FAA suggests that there is evidence to support continued monitoring even if Mr. Erwin's Authorization was retroactively reinstated. These arguments, however, are based on the erroneous presupposition that there was a 'positive' alcohol test to begin with.

Respectfully Submitted,

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I hereby certify that on this 29th day of April, 2021, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Docket Activity to the following ECF registrants:

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