

SERVED: November 2, 2007

NTSB Order No. EA-5335

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of November, 2007

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Dockets SE-17819
	v.)	and SE-17820
)	
PAUL D. BRUINGTON,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent, proceeding pro se, appeals the November 29, 2006 decisional order of Administrative Law Judge Patrick J. Geraghty.¹ The law judge affirmed two² orders suspending

¹ A copy of the law judge's order is attached.

² The Administrator suspended respondent's certificate in two enforcement actions. The first, issued May 3, 2006, suspended respondent's commercial pilot certificate for 120 days, and

respondent's commercial pilot certificate for alleged violations of §§ 91.111(a), 91.113(f) and (g), 91.13(a), 105.17(a) and (b), and 105.5 of the Federal Aviation Regulations, 14 C.F.R. Parts 91 and 105. We deny the appeal.

On September 12, 2006, the Administrator issued the two orders of suspension as two separate complaints, and filed a motion to consolidate the two cases. The Administrator served

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alleged that respondent violated 14 C.F.R. §§ 91.111(a), 91.113(f), 91.113(g), and 91.13(a). Section 91.111(a) prohibits operation of an aircraft so close to another aircraft as to create a collision hazard. Section 91.113(f) provides that an overtaken aircraft has the right-of-way, and requires the pilot of an overtaking aircraft to alter course to the right to pass clear. Section 91.113(g) provides that, on final approach or while landing, an aircraft has right-of-way over other aircraft in flight or operating on the surface, but that a pilot may not use this rule to force an aircraft off the runway if that other aircraft has landed and is making way for an aircraft on final approach. Section 91.113(g) also provides that, when aircraft are approaching an airport to land, the aircraft at the lower altitude has the right-of-way, but such aircraft may not use this rule to cut in front of another aircraft on final approach to land. Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner that endangers the life or property of another.

The order issued September 1, 2006, suspended respondent's commercial pilot certificate for 180 days, and alleged that respondent violated 14 C.F.R. §§ 105.17(a), 105.17(b), 105.5 and 91.13(a). Section 105.17(a) prohibits parachute operations into or through a cloud. Section 105.17(b) prohibits parachute operations at an altitude above 1,200 feet AGL (above ground level) but lower than 10,000 feet AGL and less than 1,000 feet above clouds while less than 2,000 feet horizontally from those clouds. Section 105.5 prohibits parachute operations that create a hazard to air traffic or to persons or property on the surface.

the complaints via certified mail.³ Additionally, a letter from the case manager at the NTSB Office of Administrative Law Judges, sent by non-certified mail, notified respondent that the Board accepted the complaints, and directed respondent to file an answer within 20 days of service of the complaints.

Specifically, the letter advised:

Section 821.31(b) of our Rules requires that you file with this office your answer to the Administrator's Complaint in this proceeding. ... Failure to file an answer with the Board, responding to each allegation in the Order/Complaint may be deemed an admission of the charge or charges not answered. THEREFORE, THE FILING OF A TIMELY ANSWER IS A VERY IMPORTANT STEP IN THE PROTECTION OF YOUR RIGHTS. Your answer, to be timely, must be postmarked 20 days from the date the Administrator's complaint was placed in the U.S. Mail.

Letter from McKenzie to Bruington of 9/13/06 (emphasis in original). Respondent did not file a timely answer to the complaints.

³ The post office returned them marked "unclaimed." Earlier that year, another document sent to the same address had been claimed. See Administrator's November 20, 2006 response in opposition to respondent's motion to file untimely answer at Attachment 2. This case is distinguishable from Tu v. NTSB, 470 F.3d 941 (9th Cir. 2006), in which the United States Court of Appeals for the Ninth Circuit held that the FAA's mailing of documents by certified mail only, when certified mail had been previously returned unclaimed but first class mail had successfully reached respondent, was not "reasonably calculated to reach the intended recipient," and denied respondent due process of law. Tu, 470 F.3d at 946, citing Jones v. Flowers, 547 U.S. 220 (2006).

To be timely, respondent had to file an answer on or before October 2, 2006. On October 24, 2006, the Administrator filed a motion for an order deeming the allegations in the complaint admitted, in accordance with § 821.31(b) of the Board's Rules of Practice. In response to that motion, in a November 14, 2006 letter to the law judge,⁴ respondent indicated that a certified letter he received on October 27, 2006 (presumably the October 24 motion to deem allegations admitted) was the first time he knew that he had missed a deadline. He concluded that he never received the complaint or, if it came in the mail, it was "lost in the shuffle." Letter from Bruington to Geraghty of 11/14/06. Respondent also said that he

was away from home from 9-6-06 to 9-22-06, traveling. We had someone collecting our mail while we were gone. Early on 9-24-06 I left home for Minneapolis and returned home on 9-29-06. During this time my wife recovered our mail, she does not remember seeing any mail from the FAA or the NTSB.

Id. The Administrator opposed respondent's motion to file his untimely answer. The Administrator also renewed his motion for an order deeming the complaints' allegations admitted and moved for "judgment on the pleadings and Summary Judgment."

After consolidating the cases on November 21, 2006, the law judge issued a decisional order on November 29, 2006, denying

⁴ Respondent stated that the letter was his "motion that a late answer ... be accepted."

respondent's motion to accept a late-filed answer, granting the Administrator's motion to deem the allegations of the complaints admitted, granting the Administrator's motion for judgment, affirming the complaints, and terminating the consolidated proceeding. Respondent contends, in effect, that this deprived him of due process. We disagree.

We have long held that our procedural rules should be strictly applied. "[U]ndue laxity in the enforcement of the Board's procedural rules will hinder our administration of justice in the long view by giving one party an unfair advantage over the other, and by removing the essential element of predictability from Board proceedings."⁵

The Board's Rules of Practice require that a respondent file an answer specifying which allegations he or she denies, and identifying any affirmative defenses that the respondent intends to raise, within 20 days of the date on which the Administrator served the complaint. 14 C.F.R. § 821.31(b). A primary purpose of this rule is to "ascertain in advance of the hearing the scope and nature of the issues the airman wants to

⁵ Administrator v. Hayes, 1 NTSB 2016, 2017 (1972). See also Administrator v. Liles, 2 NTSB 470, 471 (1973) (administrative process defeated by "endless opening and reopening of records" where a respondent has not asserted his rights to present his case, when it was shown that he was given ample opportunity to do so).

have adjudicated.”⁶ Moreover, parties are responsible for knowing our Rules of Practice.⁷ “We have consistently ruled that failure timely to file an answer, in the face of our clear rules and the letter from the case manager stressing the importance of filing a timely answer,” may lead to our deeming the allegations in the complaint admitted.⁸

In this case, respondent did not take sufficient steps to make sure he would receive correspondence from the Administrator regarding his certificate. There is no indication that he alerted his wife, or others who monitored his mail, to advise him when he received something from the FAA, despite the fact that these allegations were being investigated.⁹

⁶ See Administrator v. Blaesing, 7 NTSB 1075 (1991); see also Administrator v. Ocampo, NTSB Order No. EA-5113 (2004).

⁷ See, e.g., Administrator v. Hamilton, NTSB Order No. EA-3496 (1992) (counsel expected to know and abide by deadlines); and Administrator v. Sanderson, 6 NTSB 748 (1988) (lack of counsel does not excuse failure to follow rules).

⁸ See Administrator v. Diaz, NTSB Order No. EA-4990 (2002) (citing Blaesing, supra; Sanderson, supra; Administrator v. Taylor, 4 NTSB 1701 (1984); and Administrator v. Mommsen, 4 NTSB 830 (1983)).

⁹ See Administrator v. Sepulveda, NTSB Order No. EA-5229 (2006) (respondent kept father’s address as his official address on file with FAA while respondent was living elsewhere; Board found that respondent was obliged to check that address for FAA mail, especially since notice of proposed certificate action had been sent to him; “situation that caused the delay in respondent’s becoming aware of the Order of Suspension was of respondent’s own making”); Administrator v. DeLuca, NTSB Order No. EA-5158 (2005) (respondent worked outside the United States, returning for only a few days at a time, and “forgot to open all the

The law judge did not err when he denied respondent's motion to file a late answer. Respondent did not file a timely answer, and he has not demonstrated good cause for his delay in doing so. Not only did he not take sufficient steps regarding his mail in general, he also did not take steps to notify the FAA counsel with whom he was interacting during the investigation of his alleged violations as to the fact that he would be away from his home for extended periods of time. As the law judge followed clear and long-standing precedent in this matter, we find no abuse of discretion.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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letters" he received; Board affirmed law judge's dismissal of respondent's appeal, stating that the Administrator served him at his correct address, noting that, even when respondent became aware of need to file response, did not immediately do so); Administrator v. Beissel, NTSB Order No. EA-5153 (2005) (lack of good cause if respondent knew or should have known Administrator would be issuing order of suspension, but did not advise FAA attorney, who participated in informal conference, that he would be away for an extended period of time, and how he could be reached; Board noted that respondent did not alert mother, with whom he lived, to advise him if he received mail from FAA).