

SERVED: August 7, 2008

NTSB Order No. EA-5401

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 7th day of August, 2008

ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18282
v.)	
)	
JOANNA L. PFEISTER,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent seeks review of the decision of Administrative Law Judge Patrick G. Geraghty granting the Administrator's motion to dismiss respondent's appeal¹ for failure to prosecute, based on respondent's failure to appear at the administrative hearing below. The Board affirms the law judge's decision dismissing respondent's appeal.

¹ Respondent appealed the Administrator's order suspending, on an emergency basis, respondent's first-class medical certificate.

We find that respondent was afforded ample notice of her rights and of the time and place of the hearing.² She nevertheless did not appear personally or through an attorney.³

² Respondent appealed the Administrator's order by letter dated June 6, 2008 (received by NTSB's Office of Administrative Law Judges (OALJ) June 9, 2008). Respondent specifically requested "a formal hearing before an Administrative Law Judge for the NTSB." On June 9, 2008, OALJ sent respondent an express mail letter acknowledging receipt of the notice of appeal and advising her to call OALJ regarding the expedited basis of the hearing. (Service was also attempted by facsimile, but the telephone line was disconnected, so OALJ personnel left two messages on respondent's home phone. Respondent did not return the calls. The next day OALJ learned that the Administrator was also having trouble faxing to respondent and that respondent also had not returned their phone messages.) The OALJ letter advised respondent that she must file an answer to the complaint within 5 days after service and that if she did not waive emergency procedures she would receive a formal notice within the next few days setting the time and place of the hearing. On June 10, 2008, the Administrator filed the emergency order of suspension as the complaint, requesting that the hearing be held in Gardena, California. The Administrator attempted service of the complaint on respondent by facsimile. This attempted service was again unsuccessful. When follow-up phone calls again went unanswered, the Administrator served respondent by express mail. The case was assigned to Judge Geraghty on June 11, 2008, and his office served notice of hearing on respondent on June 16, 2008, "by Fax and Priority Mail, Signature Requested," for a July 1, 2008 hearing. On June 20, 2008, the June 9, 2008 acknowledgment letter sent to respondent via express mail was returned to OALJ unclaimed. OALJ personnel called respondent and left a message, and tried to send a facsimile message to respondent informing her that the package had been returned to OALJ unclaimed, but the facsimile again failed. The acknowledgment letter was mailed to respondent again that day via priority mail.

³ Respondent also did not file an answer to the Administrator's complaint, but the Administrator did not move to dismiss the appeal for failure to file a timely answer. Respondent did, however, surrender her certificate as requested, but mailed it to OALJ rather than to the Administrator. Furthermore, respondent did not appeal from the law judge's decision within 2 days of the law judge's appealable order, as required by § 821.57(a) of the Board's Rules of Practice, and the Administrator has moved to dismiss the appeal as untimely for this reason. To be timely, respondent had to file her notice of appeal on or before July 3, 2008, and a brief supporting her appeal on or before July 8,

In support of her objection to the law judge's ruling, respondent argues, without attempting to demonstrate that her noncompliance was legally justified or excusable, that she was "unaware of the hearing and unaware that [her] attendance was required." Respondent further indicates that she "also lacked the financial wherewithal to travel all the way to Gardena, California," from her home in Carmel, a distance of approximately 336 miles.⁴

A brief review of the procedural events leading up to the dismissal is warranted. On June 3, 2008, the Administrator issued an emergency order of suspension of respondent's airman medical certificate for violation of 14 C.F.R. § 67.413(a) of the Federal Aviation Regulations (FARs),⁵ in that she had not

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2008. Respondent filed her "notice of appeal, appeal and brief in support of this appeal" on July 12, 2008. We deny the Administrator's motion to dismiss, however, and do not dismiss for lack of timeliness. There is no indication in the file that respondent was served with the law judge's decision after the hearing.

⁴ The Administrator did not file a brief in reply.

⁵ Section 67.413(a) provides:

§ 67.413 **Medical records.**

(a) Whenever the Administrator finds that additional medical information or history is necessary to determine whether an applicant for or the holder of a medical certificate meets the medical standards for it, the Administrator requests that person to furnish that information or to authorize any clinic, hospital, physician, or other person to release to the Administrator all available information or records concerning that history. If the applicant or holder fails to provide the requested medical information or

presented to the FAA, on reasonable request, additional medical information necessary to determine whether she, as an applicant for a medical certificate, met the medical standards to hold it. The order of suspension alleged the following facts, in pertinent part:

1. On April 11, 2007, you applied for and were issued a First Class Medical Certificate and Student Pilot Certificate.

2. Subsequent to the issuance of the ... Medical Certificate and Student Pilot Certificate ... the Administrator received information that you may have failed to fully disclose your previous medical ... history relative to [a surgical operation] on your application for said certificate.

3. By letter dated January 28, 2008, from Stephen H. Goodman, M.D., Regional Flight Surgeon of the Western Pacific Regional Medical Office, you were advised of the above, and specifically requested to provide a current ... status report regarding your ... surgery including the date ... and current ... functioning.

4. You were also advised that it appeared that your responses to questions 18u "Admission to Hospital" and 18x, "Other illness, disability, or surgery" appeared to be discrepant in that you checked, "No," indicating that you had not ever in your life had either an admission to a hospital or other surgery.

5. You were requested to provide appropriate responses to those questions, along with an explanation and submit a copy of documents regarding your legal name change.

6. By letter dated January 30, 2008, you responded to the request providing documentation regarding your name change, but essentially refused to provide any of the other requested information. You attached a 2-page

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history or to authorize the release so requested, the Administrator may suspend, modify, or revoke all medical certificates the airman holds or may, in the case of an applicant, deny the application for an airman medical certificate.

letter from James B. Friel, DPE Program Manager from the San Jose Flight Standards District Office, and took the position that since Mr. Friel accepted the documentation presented for your pilot certification, you need not present it to Dr. Goodman's office.

7. By letter dated February 13, 2008, from [Dr. Goodman], you were advised that by virtue of your failure to provide the information requested in the January 28, 2008 letter, it was determined you were not qualified for any class of medical certificate. You were further requested to voluntarily surrender for cancellation any unexpired medical certificates in your possession.

8. By letter dated February 19, 2008, you again refused to provide the requested medical information, reiterating your position that the documents had been acceptable to Mr. Friel, and thus, you deemed yourself in full and complete compliance with the requirements of section 67.413....

9. By letter dated March 4, 2008, from [Dr. Goodman], you were provided a copy of your April 11, 2007 application for the First Class Medical Certificate and Student Pilot Certificate for completion of Items needing correction, and you were advised that in lieu of submitting the requested ... status report and current ... functioning you could submit a written report from your treating professional(s) or your Aviation Medical Examiner attesting to your current ... status and stability and stating all medications being prescribed for you to treat any medical ... condition.

10. To date, you have not provided the requested information, nor surrendered your unexpired medical certificates.

11. In the absence of the requested medical information, the Acting Administrator is unable to determine your qualification to hold an airman medical certificate.

Based on those alleged facts, the Administrator suspended, on an emergency basis, any airman medical certificates held by respondent. The period of suspension was stated to be in effect until respondent presented the requested medical records to the regional flight surgeon, and respondent had been notified, in

writing, that she is qualified to hold an airman medical certificate.

On July 1, 2008, neither respondent, nor anyone acting on her behalf, appeared at the administrative hearing below.⁶ The Administrator moved for dismissal on the basis of failure to prosecute. The law judge granted the motion.

We find respondent's explanation that she was unaware of the hearing lacking in credibility. Based on the efforts to keep her apprised of the procedural events associated with her appeal of the Administrator's suspension of her medical certificate, respondent was certainly on notice that she needed to be diligent in her receipt of and response to mail and telephone calls regarding the ongoing action related to her certificate. No hearing on the merits was held because of respondent's failure to exercise diligence as to the receipt of correspondence regarding

⁶ The law judge indicated on the record that, because this was an emergency case, his secretary, in accordance with standard practice, called respondent's phone number several times to inquire whether respondent desired to waive emergency procedures, and his secretary left the number that respondent should call. The law judge stated that there was never any response to his secretary's phone calls. He also stated that he personally called respondent's phone number, trying to get that same information, and that he left return phone numbers, but never received a return call from respondent. The law judge remarked that the notice of hearing, served via certified mail, had been returned marked "unclaimed," but that regular mail had not been returned. He stated, therefore, that it is presumed that regular mail was received. The law judge also noted that counsel for the Administrator had also called respondent several times, and that none of the phone calls from counsel or support staff had been returned. In addition, the law judge also noted on the record that OALJ's initial mailing, via express mail, of the letter acknowledging receipt of respondent's appeal had been returned, but that when the letter was re-mailed via priority mail it was not returned.

this enforcement action during the time period from June 6, 2008, until the hearing on July 1, 2008, or because of her decision to ignore said communications. Because of her failure to prosecute her appeal in accordance with Board procedures, it is respondent, and not the Board, who bears responsibility for any loss of her opportunity to litigate the Administrator's order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The decision of the law judge dismissing respondent's appeal is affirmed.

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