

SERVED: January 31, 2011

NTSB Order No. EA-5571

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 28<sup>th</sup> day of January, 2011

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J. RANDOLPH BABBITT,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
	Complainant,	)	
		)	Docket SE-18818
	v.	)	
		)	
WILLIAM FREDERICK KOCH,		)	
		)	
	Respondent.	)	
		)	
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**OPINION AND ORDER**

The Administrator appeals the July 1, 2010 order terminating proceedings with prejudice that Administrative Law Judge William R. Mullins issued in this matter.<sup>1</sup> By that order, the law judge granted the Administrator's motion to terminate the proceedings, in which the Administrator stated that the FAA

<sup>1</sup> A copy of the law judge's order is attached.

was withdrawing its complaint against respondent. The Administrator now appeals the law judge's order, based on the fact the law judge terminated the proceedings *with prejudice*. Based on the particular facts of this case, we deny the Administrator's appeal.

The Administrator's February 5, 2010 order, which serves as the complaint in this case, alleged that respondent was scheduled to act as captain of a United Parcel Service, Inc., (UPS) flight from Minneapolis, Minnesota, to Dallas/Fort Worth, Texas, on December 15, 2007, in which respondent was required to report for the flight at 3:00 a.m., and depart at 4:00 a.m. The complaint alleged respondent, with two other crewmembers (one who was scheduled to be the first officer, and another who was scheduled to act as flight engineer for the flight), consumed alcohol between approximately 7:00 p.m. and 9:00 p.m. on December 14, 2007, in the lounge of the hotel in which respondent and the other two crewmembers were staying. The complaint further stated that the intended first officer aroused suspicion from the hotel's front desk staff due to his apparent intoxication, that respondent asked the hotel staff to refrain from contacting UPS, and that respondent was aware both crewmembers consumed alcohol within 8 hours prior to the scheduled flight. The complaint stated respondent did not notify UPS of the alcohol consumption, and that respondent

arrived with the other crewmembers for work at 3:30 a.m., and began to perform pre-flight duties with the first officer. The complaint further alleged, upon smelling a strong odor of alcohol in the cockpit, a ramp supervisor instructed respondent and the other two crewmembers to report to the UPS office, where the Minneapolis gateway manager informed all three crewmembers they needed to submit to drug and alcohol testing. The complaint stated that the result of respondent's "breath alcohol test" did not reveal any alcohol concentration, but the results of the samples from the first officer and flight engineer indicated a blood alcohol concentration of "more than 0.04." Compl. at ¶ 17. Based on these allegations, the Administrator charged respondent with violating 14 C.F.R. §§ 121.458(c)<sup>2</sup> and 91.13(a),<sup>3</sup> and ordered a 120-day suspension of respondent's airline transport pilot certificate.

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<sup>2</sup> The regulation provided as follows:

No covered employee shall *use* alcohol *while performing* safety-sensitive functions. No certificate holder having actual knowledge that a covered employee *is using alcohol while performing* safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

14 C.F.R. § 121.458(c) (emphasis added). We note this regulation has since been recodified at 14 C.F.R. § 120.37(c).

<sup>3</sup> Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner, so as to endanger the life or property of another.

Respondent appealed the Administrator's order, after which the parties engaged in discovery, and the law judge scheduled a hearing for June 16, 2010.<sup>4</sup> On June 2, 2010, the Administrator submitted a motion to amend the complaint to include a charge that respondent also violated 14 C.F.R. § 121.458(d)(1).<sup>5</sup> Respondent opposed the motion in a written response. The law judge did not issue a written order concerning the motion, but instead informed counsel for the parties, via a telephone call from his administrative assistant, that the motion to amend the complaint was denied, and the law judge would summarize this denial on the record at the hearing.

On June 11, 2010, the Administrator's attorney filed a subsequent motion to terminate the proceedings, based on the Administrator's withdrawal of the complaint.<sup>6</sup> Respondent replied to the motion, requesting that the law judge issue an order

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<sup>4</sup> Two months prior to the hearing date, the Administrator requested a continuance, which the law judge denied.

<sup>5</sup> Subsection (d)(1) provided as follows:

No covered employee shall perform flight crewmember or flight attendant duties *within 8 hours after using alcohol*. No certificate holder having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

14 C.F.R. § 121.458(d)(1) (emphasis added). We note this regulation has since been recodified at 14 C.F.R. § 120.37(d)(1).

<sup>6</sup> The Administrator's motion did not request that the law judge terminate the case without prejudice.

terminating the proceedings with prejudice, thereby precluding the Administrator from pursuing any charges against respondent based on the events of December 15, 2007. On July 1, 2010, the law judge issued his order terminating the proceedings with prejudice, in which he also commented, "the undersigned advised the [p]arties telephonically that the [m]otion to [a]mend would be denied based on the lack of opportunity for an informal conference and because of the [s]tale [c]omplaint [r]ule." Order at 2.<sup>7</sup>

On appeal, the Administrator argues that the law judge's bases for terminating the proceedings with prejudice are erroneous. The Administrator first asserts the law judge based his dismissal on the fact the Administrator issued the notice of proposed certificate action on June 13, 2008, but did not issue the order of suspension until February 5, 2010. The Administrator contends the Board has held that a delay between the notice and the order does not provide a basis for dismissal.

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<sup>7</sup> Section 821.33 of the Board's Rules of Practice, commonly known as the stale complaint rule, provides that a respondent may move to dismiss the Administrator's allegations when the Administrator has based the complaint on allegations of offenses that occurred more than 6 months prior to the Administrator's advising the respondent as to the reasons for the Administrator's proposed action. In the case at hand, given that respondent's alleged offense occurred in December 2007, and that the Administrator sought to allege a violation of § 121.458(d)(1) on June 2, 2010, the law judge indicated that the stale complaint rule would preclude the § 121.458(d)(1) allegation.

The Administrator also argues the law judge erred in basing his decision on the fact respondent had already spent considerable time in preparing for his defense, because respondent did not file "an inordinate number of pleadings" in his defense. The Administrator further contends the law judge erred in: basing his ruling on the Administrator's motion to amend the complaint; determining that the Administrator failed to provide respondent with an opportunity for an informal conference, pursuant to 49 U.S.C. § 44709(c)<sup>8</sup>; and concluding that the Administrator's attempted amendment to the complaint was contrary to the stale complaint rule. Respondent disputes each of the Administrator's arguments, and urges us to affirm the law judge's order.

We fully recognize the key issue in this case is the resolution of whether the law judge erred when he dismissed the Administrator's complaint with prejudice. We understand that respondent's potential eligibility for fees under the Equal Access to Justice Act (EAJA)<sup>9</sup> is related to the law judge's

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<sup>8</sup> Title 49 U.S.C. § 44709(c) requires the Administrator to provide the certificate-holder with "an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked."

<sup>9</sup> See 5 U.S.C. § 504; see also 49 C.F.R. pt. 826. The EAJA requires an award of certain attorney's fees and other specified costs that a qualified prevailing party incurs in defending against a charge that a federal agency brings, unless the agency shows that it was substantially justified in pursuing its complaint.

ruling and thus this inquiry. Recently, the D.C. Circuit clarified that, for a party to have "prevailed" under the EAJA: (1) there must be a "court-ordered change in the legal relationship" of the parties; (2) the judgment must be in favor of the party seeking fees; and (3) the judicial pronouncement must be accompanied by judicial relief.<sup>10</sup> In Turner and Coonan, the court found that the law judge's failure to dismiss the case with prejudice meant the parties' legal relationship did not change, and the applicants did not attain judicial relief. Therefore, the applicants in Turner and Coonan had not attained "prevailing party" status, according to the D.C. Circuit, and were ineligible for fees under the EAJA.

In resolving this case, we believe the issue of when a law judge may dismiss a case or specific elements of a complaint "with prejudice" is a case-specific inquiry. Initially, we note that we have previously stated that we will not review or comment on the Administrator's prosecutorial discretion in bringing a case against a certificate holder, as our jurisdiction is limited to deciding appeals of such cases.<sup>11</sup> For

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<sup>10</sup> Turner and Coonan v. NTSB, 608 F.3d 12 (D.C. Cir. 2010) (citing District of Columbia v. Straus, 590 F.3d 898, 901 (D.C. Cir. 2010)).

<sup>11</sup> See, e.g., Administrator v. Rigsby, NTSB Order No. EA-3860 at 4 (1993) (quoting Administrator v. Foster, NTSB Order No. EA-2883 at 19 (1989), wherein we stated, "the Board has no role in monitoring the Administrator's exercise of prosecutorial

this reason, we decline to set forth a standard under which law judges would possess broad authority to dismiss with prejudice matters the Administrator might subsequently have authority to pursue. Instead, law judges should examine the facts and circumstances of each case to determine whether dismissal with prejudice is appropriate under the application of the Board's rules.

Notwithstanding these concerns, we do not believe the Administrator's brief on appeal includes a factually or legally sufficient reason for reversing the law judge's order. We first address the Administrator's argument concerning our stale complaint rule, as we believe this procedural rule is the most important facet to address under these facts with regard to the Administrator's discretion in pursuing certificate enforcement actions.

The Administrator contends the law judge erred in determining that the attempted amendment to the complaint was contrary to the stale complaint rule. The Administrator cites little support for this proposition, only arguing that Administrator v. Stadter, 5 NTSB 2248 (1987), supports such an amendment. In Stadter, we held that an addition of another regulatory subsection to the complaint did not violate the stale

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discretion").

complaint rule, because the Administrator's addition of another regulatory subsection in the complaint merely amounted to a typographical error. In the case at hand, the Administrator's attempted inclusion of the § 121.458(d)(1) charge amounts to more than a typographical correction, as it added a material charge and would have meant that respondent would need to defend against an alleged violation of the "8-hour rule," rather than simply defend against a charge that he knew a crewmember performed a safety-sensitive function "while using" alcohol. This is a material difference. Consistent with our previous holdings, we find the stale complaint rule may prevent the Administrator from adding another regulatory charge once the permissible time period<sup>12</sup> has passed without good cause.<sup>13</sup>

The stale complaint rule remains, in the end, a procedural rule that calls on the law judge to assess whether good cause for the delay exists. In Turner and Coonan, the D.C. Circuit rejected the argument that the stale complaint rule functions as

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<sup>12</sup> Under the stale complaint rule, the permissible time period is 6 months between the Administrator's discovery of the violation and the Administrator's issuance of the NOPCA.

<sup>13</sup> Administrator v. Metro Air System, Inc., 2 NTSB 22, 24 (1973) (stating that, at the commencement of the hearing, the Administrator sought to amend the complaint by adding a "citation of an additional section of the regulations," and the law judge did not abuse his discretion by denying the motion to amend, as the "respondent did not have fair notice of the new charges and therefore did not have a reasonable opportunity to prepare his [defense]").

a statute of limitations. Specifically, the D.C. Circuit stated as follows:

[The stale complaint rule] merely authorizes [a law judge], upon motion, to dismiss a complaint the FAA files more than six months after the alleged events occurred if and only if the FAA fails to show either that "good cause existed for the delay" or that "the imposition of a sanction is warranted in the public interest." A provision that requires an additional showing in order to file a complaint after a certain time is not a statute of limitations and does not change the legal relationship between the parties in any meaningful way.

608 F.3d at 16. Accordingly, we believe evaluating each case and the arguments on appeal individually is the most appropriate manner in which to address such arguments regarding the stale complaint rule.

In addition, we are mindful of the fact that it would have been immensely helpful, and certainly preferable, for the law judge to have issued a separate, written order denying the Administrator's motion to amend the complaint, which included the law judge's rationale, and then a second opinion specifically addressing his decision to dismiss the case with prejudice. Instead, the law judge's order at issue here was multi-faceted: it included his rationale for not allowing the Administrator to amend his complaint, while also terminating the case with prejudice. Had the law judge clearly separated these two issues, the parties' arguments likely would have been more focused, as their arguments on appeal likewise mix together two

potential applications of the stale complaint rule: (1) the rule as it applies to adding a new allegation to an existing complaint (as discussed above), and (2) whether the rule applies to prevent the Administrator from somehow pursuing a case again (as was the issue in Turner and Coonan). Under the factual circumstances in this particular case, and in light of the Board's Rules of Practice, the Administrator had no viable way of pursuing charges anew against respondent, based on the events of December 15, 2007. Therefore, we find the stale complaint rule favors denial of the Administrator's appeal with regard to both aspects discussed above.

The other arguments in the Administrator's appeal brief also do not give us reason to reverse the law judge's decision. First, the Administrator argues that the law judge erred in determining that the lengthy period between the Administrator's NOPCA and issuance of the order of suspension sufficed to render dismissal with prejudice appropriate. The law judge's order, however, did not include that specific reason as the sole basis for his determination.<sup>14</sup> Regardless, even were we to conclude

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<sup>14</sup> The order provides as follows:

The length of time that has lapsed since the issuance of the Notice of Proposed Certificate Action, and the amount of time expended by this [r]espondent in trial preparation, as evidenced in the Court's file, and the last minute attempt to amend the [c]omplaint—which was denied, is sufficient to justify a termination of these proceedings with prejudice to any further action

the law judge's opinion did contain a procedurally inaccurate statement, the mistake caused him to err in the Administrator's favor concerning the time period the Administrator would have to overcome in response to a stale complaint motion. The law judge did not create a more difficult burden for the Administrator; in any event, a stale complaint motion would have remained exceedingly challenging under these facts for the Administrator to overcome, were he to refile. Second, the Administrator asserts the law judge erred in basing his termination of the case on the fact that respondent spent time in preparing his defense of the § 121.458(c) charge. While the law judge mentioned this in his order, we believe it was within the context of his reasons for not allowing the Administrator to amend the complaint to add the § 121.458(d)(1) charge, and did not serve as a basis for terminating the case with prejudice, which is the only aspect of the law judge's order the Administrator now appeals. Third, the Administrator asserts the law judge erred in determining that the Administrator failed to provide respondent with an opportunity for an informal conference. We interpret the law judge's order as stating that the Administrator did not provide respondent with an opportunity

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(..continued)

by the Administrator.

Order at 2.

to discuss the § 121.458(d)(1) charge at an informal conference, as the record establishes that the Administrator's attorney attempted several times to schedule an informal conference with respondent's attorney regarding only the §§ 121.458(c) and 93.13(a) charges.<sup>15</sup>

We also believe the Administrator's other arguments are unavailing. The Administrator contends the law judge erred in basing his ruling on the Administrator's motion to amend the complaint. Again, we believe the law judge's order included a discussion of his rationale for denying the Administrator's motion to amend, and then consisted of his granting of the Administrator's motion to dismiss the case. Therefore, in summary, we do not believe the law judge erred in dismissing this case with prejudice, based on the unique facts of this particular case.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is denied; and
2. The law judge's decision is affirmed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

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<sup>15</sup> The Administrator correctly notes that we have previously held that 49 U.S.C. § 44709(c) requires the Administrator to provide an *opportunity* for an informal conference. Administrator v. Zink, NTSB Order No. EA-5262 at 9-11 (2006) (citing Administrator v. Windwalker, NTSB Order No. EA-4638 (1998)).

SERVED JULY 1, 2010

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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J. RANDOLPH BABBITT \*  
Acting Administrator \*  
Federal Aviation Administration, \*  
Complainant, \*

v. \*

WILLIAM F. KOCH, \*  
Respondent. \*

Docket No.: SE-18818  
JUDGE MULLINS

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ORDER TERMINATING  
PROCEEDINGS WITH PREJUDICE

The Administrator has filed a Motion to Terminate Proceedings and in that Motion, Counsel for the Administrator withdrew the Complaint filed herein. That Motion did not request that the order to terminate be with or without prejudice.

Respondent has replied to that Motion, seeking to have the matter dismissed with prejudice.

The Notice of Proposed Certificate Action in this matter was issued on June 13, 2008, and the Order of Suspension was issued on February 5, 2010, seeking a 120-day suspension of Respondent's Airline Transport Pilot Certificate for alleged regulatory violation of FAR 121.458(c) and FAR 91.13(a). The undersigned served a Notice of Hearing dated April 2, 2010, setting the matter for hearing on June 16, 2010, in

St. Paul, MN.

By Motion dated June 2, 2010, the Administrator sought to amend the Complaint to allege an additional violation of FAR 121.458(d)(1). Respondent objected to this Amendment because no informal conference had been afforded Respondent, citing Oceanair of Florida, Inc. v. NTSB, 888 F.2d 767 (11<sup>th</sup> Cir. 1989), and further, that this late change would be in violation of the Board's Rule concerning Stale Complaints, 49 C.F.R. § 821.33. Due to time constraints and the pending trial, the undersigned advised the Parties telephonically that the Motion to Amend would be denied based on the lack of opportunity for an informal conference and because of the Stale Complaint Rule. The Parties were further advised that the Order denying the Motion would be dictated into the record at trial.

The Administrator filed his Motion To terminate Proceedings, which was dated June 11, 2010, and received in this Office on June 14, 2010. Although the Administrator may withdraw a complaint without leave of the Court, the termination of proceedings requires a Judicial Order. The length of time that has lapsed since the issuance of the Notice of Proposed Certificate Action, and the amount of time expended by this Respondent in trial preparation, as evidenced in the Court's file, and the last minute attempt to amend the Complaint—which was denied, is sufficient to justify a termination of these proceedings with prejudice to any further action by the Administrator.

Therefore, this matter is hereby terminated with prejudiced.

**AND IT IS SO ORDERED.**

**ENTERED this 1<sup>st</sup> day of July 2010 at Arlington, Texas.**

  
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WILLIAM R. MULLINS  
ADMINISTRATIVE LAW JUDGE