SERVED: July 15, 2015

NTSB Order No. EA-5753

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 14th day of July, 2015

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. DONALD V. ROHRBACH, Respondent.	)	Docket SE-19681

OPINION AND ORDER

1. *Background*

Respondent appeals the Order Granting the Administrator's Motion for Judgment on the Pleadings of Administrative Law Judge Patrick G. Geraghty, issued April 6, 2015.[1] By that decision, the law judge affirmed the Administrator's order of suspension of respondent's commercial pilot certificate for a period of 185 days. The order functioned to affirm the Administrator's complaint, in which the Administrator alleged respondent violated 14 C.F.R.

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

§ 91.119(c),[2] 91.303(e),[3] and 91.13(a),[4] by operating a glider within 200 feet of utility lines and in an aerobatic flight at an altitude of less than 1500 feet above the surface. We deny respondent's appeal.

A. *Procedural Background and Facts*

The Administrator ordered suspension of respondent's commercial pilot certificate by order dated June 12, 2014. Respondent, who proceeded *pro se*, filed a timely appeal on June 30, 2014, using the appeal template available on the Board's Office of Administrative Law Judges website. On July 8, 2014, the Office of Administrative Law Judges sent a letter to respondent describing the requirement to file an answer to the Administrator's allegations. The letter stated, in all capital letters, "THE FILING OF A TIMELY ANSWER IS A VERY IMPORTANT STEP IN THE PROTECTION OF YOUR RIGHTS," and included a copy of the Board's Rules of Practice.

On July 9, 2014, the Administrator filed the order as the complaint in the case, alleging respondent operated a Schweizer SGS 2-32 glider in the vicinity of Dillingham Airfield in Waialua, Hawaii, on May 7, 2013. The complaint stated approximately four passenger-carrying

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[2] Section 91.119(c) states as follows:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> * * * * *
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> (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

[3] Section 91.303(e) prohibits any person from operating an aircraft in aerobatic flight below an altitude of 1,500 feet above the surface.

[4] Section 91.13(a) prohibits careless or reckless operation of an aircraft so as to endanger the life or property of another.

flights occurred. The complaint stated during at least three of the flights, on respondent's transition from downwind to base/final, respondent operated the glider in an aerobatic flight, in that he accelerated by diving, followed by a steep banking turn up and over trees to land. The complaint stated respondent flew part of the downwind and/or base leg within 200 feet of utility lines while doing so was not necessary for landing. Based on these allegations, the complaint asserted respondent violated the aforementioned regulations.

Under 49 C.F.R. § 821.31(b), respondent's answer to the complaint was due on July 29, 2014. Via priority mail, respondent filed an answer to the complaint, dated August 25, 2014. The Office of Administrative Law Judges received the answer on September 2, 2014. On September 4, 2014, citing 49 C.F.R. § 821.17(c), the Administrator filed a Motion to Deem the Allegations Admitted and for Judgment on the Pleadings. On September 11, 2014, respondent filed a Motion to Continue the Proceedings, in which he alleged he did not receive the letter from the Office of Administrative Law Judges, which described the importance of filing a timely answer. Respondent requested the law judge overlook the untimely nature of his answer. On September 25, 2014, the Administrator replied to respondent's motion to continue, requesting the law judge deny the motion. On October 10, 2014, respondent filed a "Motion to Continue Proceedings – Second Attempt," in which he stated the letter from the Office of Administrative Law Judges had fallen behind his desk, unopened.

B. *Law Judge Order*

The law judge's April 6, 2015 order contains a detailed summary of the procedural history of case. The order functioned to dismiss respondent's appeal by granting the Administrator's motion for judgment on the pleadings, due to respondent's failure to file a timely

answer. The law judge cited Administrator v. Diaz,[5] in which the Board applied the standard of good cause in deciding whether to accept an untimely answer. In fulfilling this standard, a respondent must establish good cause existed to excuse the delay in submitting the answer. In his Order Granting the Administrator's Motion for Judgment on the Pleadings, the law judge held respondent's misplacement of the letter from the NTSB Office of Administrative Law Judges did not amount to good cause. Therefore, it could not excuse respondent's month-long delay in filing his answer to the complaint.

In the order, the law judge also discussed the Administrator's choice of sanction, and determined 185 days was appropriate for the alleged violations. The law judge noted Congress's enactment of the Pilot's Bill of Rights[6] recently altered the Board's standard of review for imposition of sanction.[7] In this regard, the law judge stated the Administrator is now entitled to the same amount of deference that the Supreme Court set forth in Martin v. OSHRC.[8] In particular, the Supreme Court in Martin stated the Occupational Safety and Health Review Commission (OSHRC) "should defer to the Secretary [of Labor] only if the Secretary's interpretation [of an ambiguous regulation] is reasonable."[9] The Court further stated, "[t]he

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[5] NTSB Order No. EA-4990 (2002), aff'd *sub nom.*, *Diaz v. Department of Transportation*, 65 Fed. Appx. 594 (9th Cir. 2003) the Board, noting that the submission of an answer is critical to the air safety enforcement appeal litigation process, affirmed an NTSB administrative law judge's ruling declining to accept a respondent's late-filed answer, and, on the basis of the resulting deemed admissions, entering judgment on the pleadings against him. There, the Board and it specifically rejected a contention that the appropriate inquiry should be whether the Administrator was prejudiced by the delay.

[6] Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012).

[7] Order at 7 (citing Pub. L. 112-153, 126 Stat. 1159 (August 3, 2012)).

[8] 499 U.S. 144 (1991).

[9] Id. at 158.

Secretary's interpretation of an ambiguous regulation is subject to the same standard of substantive review as any other exercise of delegated lawmaking power."[10] The law judge summarized this holding, and determined it was appropriate to defer to the Administrator's choice of sanction, although the Pilot's Bill of Rights no longer accords heightened deference to the Administrator's decision. The law judge, therefore, reviewed the proposed sanction of 185 days to determine whether the sanction was appropriate based on the alleged facts. The law judge noted respondent conducted the flights on *three* separate occasions in which he carried passengers. The law judge also stated respondent did not dispute the appropriateness of a 185-day period of suspension. The law judge concluded the order by affirming the Administrator's complaint in its entirety.

C. *Issues on Appeal*

On appeal, respondent requests the Board consider deviating from strict adherence to the Rules of Practice because respondent is an experienced pilot with a longstanding respectable reputation. The affidavit from respondent's attorney, which is attached to respondent's appeal brief, cites Federal Rule of Civil Procedure 60(b), which states, "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding," for various reasons, such as: mistake, inadvertence, surprise, or excusable neglect; the existence of newly discovered evidence; fraud; a void or vacated judgment; or any other reason that justifies relief. Respondent contends that not accepting his answer to the Administrator's

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[10] Id. (citing 5 U.S.C. § 706(2)(A) and Batterton v. Francis, 432 U.S. at 416, 426 (1977)). This holding indicates OSHRC need not provide *heightened* deference to the Secretary of Labor's interpretation of a regulation, but instead should view the Secretary's interpretations with the same amount of deference a reviewing court would view an agency's interpretations under the Administrative Procedure Act, in general.

complaint would lead to an unjust result, and therefore urges us to reverse the law judge's order and accept his answer.

2. *Decision*

When reviewing a decision of an administrative law judge in which the law judge disposed of an appeal by way of granting a motion, the Board employs an abuse-of-discretion standard.[11]

A. *Timeliness of Answer*

The Board's procedural Rules of Practice require the filing of an answer to the complaint within 20 days after service of the complaint.[12] Moreover, the Board's Rules provide "[a] party may file a motion for judgment on the pleadings on the basis that no answer has been filed."[13]

Respondent acknowledges he did not file a timely answer.[14] He requests that we excuse this lack of timeliness because he misplaced a letter from the Office of Administrative Law Judges and did not realize his deadline for filing his answer to the Administrator's complaint. As noted above, we will not accept late-filed answers, motions, or pleadings unless the party requesting our acceptance of the untimely document articulates good cause for the delay.[15]

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[11] Diaz, supra note 5, at 5.

[12] 49 C.F.R. § 821.31(b).

[13] 49 C.F.R. § 821.17(c).

[14] The Administrator and the NTSB Office of Administrative Law Judges directed all correspondence and filings to respondent's address of record. Respondent does not allege improper service of the complaint. See Administrator v. Mazufri, NTSB Order No. EA-5289 at 5-6 (2007) (holding constructive service occurs upon date of mailing to address of record).

[15] Diaz, supra note 5; Administrator v. Hooper, 6 NTSB 559, 560 (1988), on remand from Hooper v. Nat'l Transp. Safety Bd., 841 F.2d 1150 (D.C. Cir. 1988) (asserting the Board must strictly adhere to timeliness standards in the absence of good cause); see also Administrator v. Montague, NTSB Order No. EA-5617 (2012) (rejecting standard of excusable neglect and

Misplacing a letter from the NTSB Office of Administrative Law Judges that emphasizes the importance of filing a timely answer does not amount to good cause. First, the Board's Rules of Practice do not require the dissemination or receipt of such a letter; the NTSB Office of Administrative Law Judges opts to send such letters to respondents as a courtesy. Second, as noted above, the Board's Rules of Practice clearly articulate the requirement to file a timely answer. Third, longstanding Board jurisprudence stands for stringent adherence to deadlines. The Board has held that incorrectly calculating a deadline will not fulfill the good cause standard.[16]

Based on our consistent application of the good cause standard, we find the law judge did not err in determining respondent's misplacement of a letter from the NTSB Office of Administrative Law Judges would not excuse his delay in submitting an answer. This strict adherence to deadlines imposed by the Board's Rules of Practice also demonstrates the law judge's rejection of the late-filed answer in the case *sub judice* was not unjust, because it was foreseeable under our jurisprudence. In addition, we note while a longstanding favorable reputation in the aviation community is commendable, it cannot serve as a basis for finding good cause exists to justify a delay in filing a timely answer under the Rules of Practice. In this regard, respondent has not explained how an auspicious reputation is relevant to one's adherence to deadlines. Overall, in the absence of an answer to the Administrator's charges, the allegations are deemed admitted.

B. *Sanction*

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applying good cause standard); accord Administrator v. Bandiola and Bagamastad, NTSB Order No. EA-5677 (2013).

[16] Bandiola and Bagamastad, supra note 15 at 6-7 (2013) (quoting Administrator v. Hamilton, NTSB Order No. EA-3496 at n.4 (1992), in which the Board stated, "[c]ounsel [are] expected to know and abide by procedural deadlines").

On appeal, respondent does not expressly challenge the law judge's affirmation of the 185-day suspension period, but instead asserts an equitable argument concerning the general notion that issuing a sanction for respondent's conduct, in the absence of a hearing, would lead to an unjust result. To the extent respondent seeks to dispute the appropriateness of the sanction of 185 days suspension of his commercial pilot certificate, we note the law judge analyzed the choice of sanction by determining whether the sanction was a suitable reprimand for the conduct at issue. We find no error in the law judge's judgment in this regard.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's Order Granting the Administrator's Motion for Judgment on the Pleadings is affirmed; and

3. The 185-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date shown on this opinion and order.[17]

HART, Chairman, DINH-ZARR, Vice Chairman, and SUMWALT and WEENER, Members of the Board, concurred in the above opinion and order.

[17] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

Served: April 6, 2015

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

* *

MICHAEL P. HUERTA,
ADMINISTRATOR
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket SE-19681

DONALD V. ROHRBACH,

Respondent.

* *

ORDER GRANTING THE ADMINISTRATOR'S
MOTION FOR JUDGMENT ON THE PLEADINGS

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PROCEDURAL HISTORY

On June 12, 2014, the Administrator of the Federal Aviation Administration ("FAA") issued an Order of Suspension, suspending the commercial pilot certificate of respondent, Donald V. Rohrbach, for a period of 185 days. The basis for that certificate action was that respondent had allegedly: violated 14 C.F.R. § 91.119(c), by operating a glider within 200 feet of utility lines when not necessary for landing; violated 14 C.F.R. § 91.303(e), by operating the glider in aerobatic flight at an altitude of less than 1,500 feet above the surface;

and violated 14 C.F.R § 91.13(a), by operating the glider in a careless or reckless manner so as to endanger the lives or property of others.[1]

The Administrator's Order of Suspension contained the following factual allegations:

1. You are now, and at all times mentioned herein were, the holder of Commercial Pilot Certificate No. [omitted].
2. On or about May 07, 2013, starting at approximately 1:00 p.m. local time, you acted as pilot in command of a Schweizer SGS 2-32 glider, Civil Registration No. N5761S, on approximately four passenger carrying flights, in the vicinity of Dillingham Airfield, Waialua, Hawaii.
3. During at least three of the above referenced flights, on your transition from downwind to base/final, you operated N5761S in aerobatic flight, in that you accelerated by diving, followed by a steep banking turn up and over trees to land. These maneuvers were not necessary for normal flight.
4. You flew part of your downwind and/or base leg within 200 feet of utility lines.
5. Flying within 200 feet of utility lines was not necessary for landing.

Respondent, acting *pro se*, filed an appeal from that Order of Suspension with the NTSB Office of Administrative Law Judges ("ALJ") on June 30, 2014, and that appeal was received by the ALJ Office on July 7, 2014. Respondent's appeal utilized the NTSB's Notice of Appeal form (NTSB Form 2005.2), which is accessible on the NTSB's website. On July 8, 2014, the ALJ Office's Acting Case Manager mailed to respondent a letter acknowledging the receipt of his appeal. That acknowledgement letter informed respondent that: (1) the Board's Rules of Practice in Air Safety Proceedings require him to submit an answer to the Administrator's complaint within 20 days of the date on which the complaint is served on him, which is the date on which it is mailed to him; (2) those rules further require him to admit or deny each and every paragraph of the complaint's factual allegations; and (3) a failure on his part to admit or deny any of the complaint's allegations of

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[1] The aforesaid provisions of 14 C.F.R. read as follows:

"§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * * *

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

§ 91.303 Aerobatic flight.

No person may operate an aircraft in aerobatic flight —

* * * * *

(e) Below an altitude of 1,500 feet above the surface."

fact could be deemed an admission of the allegation(s) not answered. The acknowledgement letter then specifically continued, "***THEREFORE, THE FILING OF A TIMELY ANSWER IS A VERY IMPORTANT STEP IN THE PROTECTION OF YOUR RIGHTS***" (emphasis original). Accompanying that letter were several enclosures, including a copy of the Board's Rules of Practice.

On July 9, 2014, the Administrator reissued suspension order as the complaint in this proceeding. The Administrator mailed the complaint to respondent, thereby serving him with the complaint, on July 9, 2014. Accordingly, under Rule 31(b) of the Board's Rules of Practice in Air Safety Proceedings, 49 C.F.R. Part 821, respondent's deadline for filing an answer to the complaint became July 29, 2014.[2]

Respondent subsequently filed an answer to the complaint, which was dated August 25, 2014. The answer was transmitted to the NTSB ALJ Office by Priority Mail, and arrived in an envelope that does not bear a postmark. It was received by the ALJ Office on September 2, 2014. Counsel for the Administrator has noted that the postmark on the envelope in which a copy of the answer was served on the Administrator indicates that it was mailed on August 23, 2014.

On September 4, 2014, the Administrator filed a Motion to Deem Allegations Admitted and for Judgment on the Pleadings in this matter (hereinafter "Motion for Judgment on the Pleadings"), pursuant to Rule 821.17(c) of the Board's Rules of Practice. In that motion, the Administrator asserts that respondent filed his answer to the complaint over three weeks beyond the July 29, 2014 deadline, and argues that, because respondent thus failed to file a timely answer, the factual allegations set forth in the complaint should be deemed admitted by him. The Administrator further contends that the 185-day suspension of respondent's commercial pilot certificate proposed for the violations established by the deemed admissions of the complaint's factual allegations is reasonable and supported by FAA Order 2150.3B, Appendix B (that agency's Sanction Guidance Table). On that basis, the motion argues that the Administrator is entitled to judgment as a matter of law, and that a judgment on the pleadings should, therefore, be entered in the Administrator's favor in this proceeding.

On September 11, 2014, respondent filed a Motion to Continue Proceedings, in which he states (at 1) that he "has no record of having received" the NTSB ALJ Office's July 8, 2014 acknowledgment letter, but that he "did receive a notice in mid-July indicating that all correspondence and pleadings in this case be directed directly to Judge Montaño." Respondent is apparently referring to a notice assigning the case to me as the Administrative Law Judge to hear and decide the case, which was mailed to the parties on July 14, 2014. Respondent requests in his motion that I "overlook" the belated submission of his answer to the complaint and deny the Administrator's Motion for Judgment on the Pleadings.

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[2] Rule 821.31(b) provides that "[t]he respondent shall . . . file with the Board an answer to the complaint *within 20 days after the date on which the complaint was served by the Administrator*," and that "[f]ailure by the respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered" (emphasis added).

Thereafter, on September 25, 2014, the Administrator filed a Reply to Respondent's Motion to Continue Proceedings, in which it is argued that respondent's claimed ignorance of his requirement to file an answer within 20 days from the date of the complaint's service does not constitute good cause. In support of that position, the Administrator notes (at 2) that the certificate of service that accompanied the complaint reflected that "the complaint was sent [to respondent] by both regular mail and by registered, return receipt mail,[3] on July 9, 2014. The certified receipt was returned 'undeliverable.' . . . . The regular mail, however, was not returned to the FAA." The Administrator asserts (*id.*) that, "[a]s Respondent answered the complaint, albeit late, he likely received the copy sent by regular mail."

The Administrator further argues (at 2-3) that respondent does not indicate how he knew to file an answer to the complaint despite his purported failure to receive the July 8, 2014 letter from the ALJ Office's Acting Case Manager informing him that he was required by the Board's Rules to file an answer in a timely manner. The Administrator asserts that both the original Order of Suspension and the copy of that order that was subsequently served on respondent as the complaint in this proceeding informed him that the Board's Rules of Practice in Air Safety Proceedings apply to this proceeding and are available on the NTSB's website (http://www.ntsb.gov/legal/alj.html). In addition, the Administrator notes that it would appear respondent visited that website, as he utilized NTSB Form 2005.2 — which is only accessible on the website — for filing his appeal. The Administrator further points out that the website both discusses the appeal process and provides responses to frequently asked questions which include, under the heading "IMPORTANCE OF TIME-LINES," a statement that "the answer to the complaint must be filed by the certificate holder/respondent within 20 days of the date on which the FAA serves the complaint."

The Administrator maintains that respondent has not established that his failure to file a timely answer to the complaint in this case was due to circumstances beyond his control, and argues that respondent has, therefore, not shown good cause for the belated filing of his answer. On that basis, the Administrator argues that the Motion for Summary Judgment should be granted, and respondent's Motion to Continue Proceedings should be denied.

On October 20, 2014, respondent file a "Motion to Continue Proceedings – second attempt," which states in its entirety (emphasis original):

> COMES NOW the Respondent in defense of filing an Answer to Complaint in a time-frame of more than 20 days.
>
> Respondent is at a disadvantage. Limited time and resources, limited internet access, and dealing with a well-funded FAA legal office with boiler-plate responses accumulated in indexed databases, by topic. I'm sure there have been instances where a FIRST-TIME offender, attempting for the FIRST TIME to navigate this appeal process, has been afforded some leniency in mission the 20-day deadline. I forge ahead in this attempt to have a chance to keep my flying privileges from being suspended. I know that any hearing I have before this Court is slanted in favor of the [Admin-

[3] A review of the record discloses that the complaint was transmitted by the Administrator to respondent by both regular mail and *certified* mail, return receipt requested.

> istrator's] complaint, anyway. There is no presumption of innocence afforded to me; thus the FAA Legal Department blinds the Court from my showing the [Administrator's] complaint flawed, especially as regards operations/procedures regarding glider aircraft at Dillingham Airfield.
>
> As a note of kismet: The same day I received this latest Motion from [the Administrator], to deny my Motion to Continue, I FOUND the unopened July packet from NTSB containing the "20-day" item. It had fallen behind my desk; and I discovered it when something else fell behind the desk.

DISCUSSION

The Administrator's Order of Suspension was issued on June 12, 2014, and was served by the Administrator on respondent at respondent's address of record. Respondent filed an appeal from that order with the NTSB ALJ Office on June 30, 2014, utilizing NTSB Form 2005.2 to file his appeal. That form can only be accessed through the NTSB website, which also provides specific information as to when an answer to the Administrator's complaint must be filed. On July 8, 2014, the ALJ Office sent respondent a letter, which acknowledged its receipt of his appeal, and which also informed him of 20-day timeframe for filing an answer and emphasized the importance of his filing a timely answer to the complaint following the complaint's filing. The Administrator filed the complaint in this case on July 9, 2014, and served respondent with a copy of the complaint at his address of record on that date. On July 14, 2014, the NTSB ALJ Office sent a notice to both the Administrator and respondent informing them that I had been assigned to hear and decide this case. The July 14, 2014 notice was also sent to respondent at his address of record.

Respondent filed his answer to the Administrator's complaint on August 23, 2014, which was more than three weeks after his July 29, 2014 deadline for doing so. The Administrator then filed the Motion for Judgment on the Pleadings on September 4, 2014 and respondent, on September 11, 2014, filed his Motion to Continue Proceedings in reply.

In *Administrator v. Diaz*, NTSB Order EA-4990 (2002), affirmed *sub nom.*, *Diaz v. Department of Transportation*, 65 Fed. Appx. 594 (9th Cir. 2003), the Board, noting that the submission of an answer is critical to the air safety enforcement appeal litigation process, affirmed an NTSB administrative law judge's ruling not accepting a respondent's late-filed answer, and, on the basis of the resulting deemed admissions, entering judgment on the pleadings against him. There, the Board held that the standard to be applied in deciding whether a late-filed answer should be accepted is whether the respondent has shown good cause for the delay in its submission.[4]

Respondent here has stated that he did not receive the July 8, 2014 NTSB ALJ Office's appeal acknowledgment letter, which was sent to his address of record, provided information as to his timeframe for submitting an answer, and stressed — in bold, under-

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[4] NTSB Order EA-4990 at 4-5. *See also* Rule 11(a) of the Board's Rules of Practice (codified at 49 C.F.R. § 821.11(a)), and *Administrator v. Hooper*, 6 NTSB 559, 560 (1988), on remand from *Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150 (D.C. Cir. 1988).

lined and italicized lettering — the importance of filing an answer to the Administrator's complaint within that timeframe. Respondent has admitted that he received other documents that the ALJ Office sent to his address of record. He has also acknowledged that he received both the Administrator's Order of Suspension and the complaint at his address of record. In his Motion to Continue Proceedings – second attempt, he admitted that he, in fact, received the July 8, 2014 package from the ALJ Office, but insisted that he only found it behind his desk after he received the Administrator's September 25, 2014 reply to his initial Motion to Continue Proceedings.

Respondent's initial assertion that he did not file a timely answer to the complaint because he did not receive the July 8, 2014 appeal acknowledgment letter from the NTSB ALJ Office is not credible. I also find not credible his subsequent claim that he received that letter but it was lost behind his desk and he did not, therefore, discover it until after he received the Administrator's September 25, 2014 reply. Despite his assertion that he did not receive the letter informing he had to file an answer to the Administrator's complaint, he nevertheless filed his answer over three weeks after his deadline for doing so had passed, but before he either received the Administrator's Motion for Judgment on the Pleadings or purportedly saw the ALJ Office's July 8, 2014 acknowledgment letter for the first time. Respondent has made no attempt to explain how he knew to file an answer to the complaint despite his purported non-receipt of the acknowledgment letter until after he submitted his answer.

Moreover, assuming *arguendo* the truth of respondent's statement that he first discovered the July 8, 2014 acknowledgment letter "unopened . . . . behind [his] desk" after receiving the Administrator's September 25, 2014 reply to his initial Motion to Continue Proceedings, such a scenario suggests that the acknowledgment letter was, in fact, duly delivered to him, but that he misplaced the letter before opening it. This reflects a lack of diligence on respondent's part in monitoring his mail. That inattentiveness, in turn, is reflective of an absence of good cause, as respondent's purported lack of knowledge of the contents of the acknowledgment letter — which he blamed for his failure to file a timely answer — was clearly not due to circumstances beyond his control.

Thus, based on my review of the entire record in this case, as well as the arguments advanced by both parties, I must find that respondent had not established good cause for the untimely filing of his answer to the Administrator's complaint in this matter. Therefore, I must, under *Diaz*, *supra*, deem all of the factual allegations set forth in the Administrator's complaint to have been admitted by respondent. Since those allegations are also sufficient to establish violations of 14 C.F.R §§ 91.13(a), 91.119(c) and 91.303(e),[5] I must also find,

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[5] The alleged violation of 14 C.F.R. § 91.13(a) appears to have been charged on a residual basis, rather than independently of the alleged §§ 91.119(c) and 91.303(e) violations. The Board has long held that the finding of a violation of an operational regulatory provision, such as §§ 91.119(c) or 91.303(e), without more, is sufficient to establish a "residual" or "derivative" violation of § 91.13(a) (formerly codified at 14 C.F.R § 91.9, through August 17, 1990). *See, e.g.*, *Administrator v. Cory*, 6 NTSB 536, 538 (1988); *Administrator v. Dutton*, 7 NTSB 521, 523 (1990); *Administrator v. Thompson*, 7 NTSB 714, 716 n.7 (1991); *Administrator v. Pritchett*, 7 NTSB 784, 787 n.17 (1991); *Administrator v. Kachalsky*, NTSB Order EA-4847 at 7 n.11 (2000). Because there is no charge of an independent § 91.13(a) violation in this case, it is unnecessary for the complaint to contain

as a matter of law, that respondent violated those regulations during the subject flights he conducted on May 7, 2013.

I now turn to the issue of the propriety of the 185-day suspension of respondent's commercial pilot certificate that was ordered by the Administrator. The Administrator's Motion for Judgment on the Pleadings argues that this proposed sanction is reasonable, and is supported by FAA's Sanction Guidance Table. The Administrator requests that I take judicial notice of this and give deference to the sanction imposed in the Order of Suspension on that basis. The Sanction Guidance Table recommends a 30-to-120 day suspension for failure to maintain the required minimum altitude in sparsely populated areas (Fig. B-3-h-(22) at p. B-25), and a suspension of 90-to-180 days for "[a]crobatic flight on airway, over congested area, below minimum altitude, etc." (Fig. B-3-h-(30) at p. B-25).[6] The Administrator argues that respondent committed both such violations *on each of three separate passenger carrying flights.* Thus, the Sanction Guidance Table would warrant an even greater period of suspension than that which was imposed by the Administrator here.

In August 2012, Public Law 112-153 (known as the Pilot's Bill of Rights) was signed into law. That statute applies to all cases before the Board involving reviews of actions of the Administrator denying airman certification under 49 U.S.C. § 44703, or amending, modifying, suspending or revoking airman certificates under 49 U.S.C. § 44709. It is noteworthy that the Pilot's Bill of Rights specifically strikes from 49 U.S.C. § 44703 language which provides that, in cases involving airman certificate denials, the Board "is bound by all the validly adopted interpretations of laws and regulations the Administrator carries out unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law," and from 49 U.S.C. §§ 44709 and 44710 language that, in cases involving amendments, modifications, suspensions or revocations of airman certificates, the Board "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 relating to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law."

While the undersigned is no longer bound to give deference to the FAA by statute, that agency is entitled to the judicial deference due all other Federal administrative agencies under the Supreme Court decision in *Martin v. Occupational Safety and Health Review Commission, et al.*, 499 U.S. 144, 111 S. Ct. 1171 (1991). In applying the principle of judicial deference to the interpretations of laws, regulations and policies that the FAA Administrator carries out, the undersigned must analyze and weigh the facts and circumstances in each case to determine if the sanction selected by the Administrator is appropriate.

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specific factual allegations of careless or reckless acts to support a finding that a violation of § 91.13(a) occurred.

[6] As is noted above (n.5, *supra*), the Administrator's 14 C.F.R. § 91.13(a) charge is residual to the operational violations with which respondent has been charged. It does not, therefore, warrant any enhancement of the sanction to be imposed for the operational violations established here.

Here, I note that respondent has not addressed the period of suspension sought to be imposed by the Administrator in any of the submissions he has made. None of those submissions address any of the Administrator's substantive arguments as to why the sanction imposed by the Administrator in this matter is appropriate. Moreover, based on my review of the record in this proceeding as a whole, including the submissions of the parties relating to the Administrator's Motion for Summary Judgment, I find the 185-day suspension of respondent's commercial pilot certificate imposed by the Administrator in the Order of Suspension to be eminently reasonable for the violations alleged and established by virtue of respondent's deemed admissions. Accordingly, I will enter a judgment on the pleadings here, affirming both the regulatory violations charged and the sanction imposed in the Administrator's Order of Suspension.

THEREFORE, IT IS ORDERED that the factual allegations set forth in the Administrator's complaint in this proceeding (Paragraphs 1 through 5) are deemed admitted as a consequence of respondent's failure to have filed a timely answer or established good cause for that failure;

IT IS FURTHER ORDERED that, based on such deemed admissions, respondent is found to have violated 14 C.F.R. §§ 91.19(a), 91.119(c) and 91.303(e), as charged by the Administrator in the complaint;

IT IS FURTHER ORDERED that the 185-day suspension of respondent's commercial pilot certificate for those violations is AFFIRMED; and

IT IS FURTHER ORDERED that this proceeding is hereby TERMINATED.

Entered this 6th day of April, 2015, at Washington, D.C.

Alfonso J. Montaño
Chief Administrative Law Judge

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.