

SERVED: March 23, 1993

NTSB Order No. EA-3838

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 10th day of March, 1993

LOUIS KUHN, JR.,)	
)	
Applicant,)	
)	
v.)	
)	Docket 88-EAJA-SE-9232
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
)	

ORDER DENYING RECONSIDERATION

On consideration of the applicant's petition for reconsideration of Board Order EA-3593 (served June 17, 1992) and the Administrator's response in opposition to the petition, we have concluded that the petition neither establishes error in our original decision nor otherwise presents a valid basis for reconsidering it.¹

¹The Board in Order EA-3593 granted the Administrator's motion to dismiss the applicant's appeal because it was not timely filed. The applicant in his petition both suggests that some standard other than good cause should be employed in determining to accept or reject late filings and once again urges us to find, based largely on factors previously raised and considered, that the untimeliness of his notice of appeal was excusable for good cause shown. We remain of the view that while meeting the deadline may not have been convenient for the applicant, he has not established that compliance could not have been accomplished, or a timely request for more time made,

ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.²

COUGHLIN, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above order. Chairman, VOGT and Member HART did not concur, and submitted the following dissenting statements.

(..continued)

through the exercise of due diligence in the matter.

²We note that although the Administrator's motion to dismiss indicated that the applicant's notice of appeal was filed on the 14th, the certificate of service accompanying the notice is dated May 16, 1990. Thus, the notice of appeal would be untimely even if the 10 days were calculated from the 4th of May. The Board's original order used the date specified in the motion because the applicant did not argue that his notice had been timely filed.

Dissent of Chairman Vogt in Kuhn v. Administrator

I respectfully disagree with the majority's holding that applicant failed to timely appeal the denial of his Equal Access to Justice Act claim.

After prevailing at the trial court, applicant brought an Equal Access to Justice Act claim which was denied by the trial court. Applicant appealed the administrative law judge's denial of the claim. The Administrator moved to dismiss the appeal on the ground that it was not timely. The majority granted the motion. The applicant requests that we reconsider that ruling. Finding that the appeal was timely, I would grant the petition to reconsider and deny the Administrator's motion.

The petition now before the Board developed as follows. On April 20, 1988, the FAA Administrator ordered a thirty day suspension of applicant's Airmen Certificate for violating 49 C.F.R. § 135.227(b) (1) (flying under IFR into known or forecast light or moderate icing conditions without ice protection provisions) and 49 C.F.R. § 91.9 (operating an aircraft in a careless manner so as to endanger the life or property of another). The Administrator's order (complaint in the appeal to the NTSB) was amended on May 13, 1988, to include 49 C.F.R. § 135.227(b) (2) (flying into icing conditions under VFR).

On April 26, 1988, applicant properly appealed to the Board the Administrator's order. The appeal was assigned to Administrative Law Judge Patrick G. Geraghty and subsequently reassigned to Administrative Law Judge William R. Mullins. After a hearing in which evidence was taken, Judge Mullins found in favor of applicant, and dismissed the Administrator's suspension of applicant's Airmen Certificate. The Administrator appealed to the full five member Board, but subsequently dismissed that appeal.

Applicant then brought an Equal Access to Justice Act claim. Judge Mullins considered applicant's claim, and in a written decision dated May 1, 1990, denied the claim - finding that the Administrator was substantially justified in proceeding with the case against applicant. Applicant appealed that denial to the full five member Board. The Administrator moved to dismiss the appeal on the ground that it was not timely filed. By a 4 to 1 majority, with Member Hart dissenting, the Board granted the motion and dismissed the appeal. I was not a member of that Board.

Applicant then filed, pursuant to 49 C.F.R. § 821.50, a petition that the Board reconsider the dismissal of his Equal Access to Justice Act claim. Finding that the applicant's appeal was timely, I would grant the petition to reconsider and deny the Administrator's motion to dismiss.

Applicant was required to file his notice of appeal within ten days of the date he was served with Judge Mullins' Decision and Order. Since the office of Administrative Law Judges never properly served applicant, his appeal was not untimely.

Judge Mullins' May 1, 1990, decision denying applicant's Equal Access to Justice Act claim was never mailed to applicant's proper address and, on or after May 4, 1990, was for the first time placed in the mail to an address where it reached applicant. Applicant filed his notice of appeal on May 14, 1990 - within the ten days allowed for an appeal.

Applicant had been represented by counsel, but during or before August, 1989, became pro se. In a notarized document dated August 9, 1989, applicant informed the Court that from that day forward he was proceeding pro se, and he requested that all communication be 'mailed to h-is work address, which he provided.¹ Judge Mullins' May 1, 1990, Decision and Order was not mailed to applicant's work address but was mailed to his home address and on or about May 4, was returned unclaimed to the office of Administrative Law Judges. The home address to which the Decision and Order was sent was apparently a prior address of applicant's, and the envelope was returned with a sticker containing applicant's new address, and which was noted: "FORWARDING TIME EXPIRED". The Decision and Order was then mailed to applicant at his then current home address and he received it on May 10, 1990. Applicant filed his notice of appeal on May 14, 1990. The Decision and Order was never served on applicant at the address that he provided in his August 9, 1989, filing with the court.²

Part 49 C.F.R. § 826.38 governs review by the full Board of the Administrative Law Judge's denial of applicant's Equal Access to Justice Act claim. Applicant "may seek review of the initial decision on the fee application. . . in accordance with Subpart H of Part 821...." 49 C.F.R. § 826.38.

Per Subpart H, § 821.47:

[A] party may appeal from a law judge's order or from the initial decision by filing with the Board and serving upon the other parties (pursuant to § 821.8) a notice of appeal within 10 days after. . . a written decision or an order has been served. (emphasis added)

¹ A copy of that notice of intent to proceed pro se and corresponding change of address notice is attached as Exhibit "A".

² Applicant's notice that he would be proceeding pro se and his corresponding notice that future communications should be sent to his work address were added to the last page of his response to a prior motion to dismiss of the Administrator. On February 1, 1990, Judge Mullins' order denying that motion was served on applicant at the work address applicant provided for service of documents in this case. Nevertheless, the office of Administrative Law Judges did not serve the May 1, 1990, Decision and Order on applicant at his work address.

Judge Mullins' Decision and Order was never served upon applicant, as it was never placed in the U.S. mail in a properly addressed envelope. Thus, the ten day time period for filing a notice of appeal could not have been untimely. Further, applicant filed a notice of appeal well within 10 days from the date he obtained actual knowledge of the Decision and Order. Finally, applicant filed his notice of appeal within 10 days from the date the Decision and Order was placed in the mail to applicant's then current home address - albeit not his address for service of documents in this case. Applicant's notice of appeal was timely filed pursuant to 49 C.F.R. §§ 826.38 and 821.47. To find otherwise is to find that for the purpose of § 821.47, service was completed on the day the administrative law judge's Decision and Order was mailed to an incorrect address, to be subsequently returned to the Board undelivered.

The majority's reliance on Administrator v. Hooper, NTSB order EA-2781 (1988), in reference to whether applicant established good cause to excuse an untimely filing of his notice of appeal is misplaced. Applicant timely filed his notice of appeal. Whether good cause was shown to excuse a late filing is not in issue. I would grant applicant's petition for reconsideration and deny the Administrator's motion to dismiss.

Applicant suggests that the law regarding "final determination" and "final order" is vague and confusing, and in this case act to deny applicant of the clear intent of the Equal Access to Justice Act; and that when considered with the Law Judge's verbal indications of a forthcoming or future finding, constitute reasonable cause for the application to be considered.

Wherefore, applicant asks that Complainant's motion be denied, and the application considered by the Board.

Louis Kuhn, Jr.
Louis Kuhn, Jr.

STATE OF NEBRASKA)
SALINE COUNTY) SS

Sworn to and subscribed before me this 9th day of August, 1989

GENERAL NOTARY-State of Nebraska
G. C. GALLUP
My Comm. Exp. Nov. 1, 1990

Notary Public in and for (General) County, State of Nebraska

Please be advised that due to the costs of this matter, I have elected not to have an attorney hereafter, and that all communication henceforth should be directed to me as follows:

Louis Kuhn, Jr.,
Suburban Air Freight, Inc.
Box 275
Crete, Nebraska
68333

DISSENTING STATEMENT BY ME-3
FOR NOTATION NO. 5738A
August 6, 1992

Dissent by Member Hart: As I stated in my dissent in Board order EA-3593 regarding this matter, I dissent because we are being unthinkingly and unwisely rigid by dismissing, for untimeliness, an appeal by a pro se respondent who received our decision on Thursday after it was originally mailed to the wrong address, and then, instead of filing a notice of appeal the next day, respondent filed it on Monday, the next business day after that.