SERVED: January 11, 2011

NTSB Order No. EA-5563

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 January, 2011

J. RANDOLPH BABBITT, Administrator, Federal Aviation Administration, Complainant, v. RODNEY LEE ASHMORE, Respondent.	Docket CP–196

OPINION AND ORDER

Respondent, who proceeds pro se, appeals the order affirming the Administrator's civil penalty assessment, issued by Chief Administrative Law Judge William E. Fowler, Jr., on September 14, 2010.[1] We deny respondent's appeal and affirm the assessment of a $5,000 civil penalty.

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

On December 18, 2009, the Administrator issued an order assessing a $5,000 civil penalty against respondent, based on his failure to surrender his third-class medical certificate, under 14 C.F.R. § 67.409(d), after the manager of the FAA's Aerospace Medical Certificate Division ordered, on June 16, 2009, that respondent surrender his certificate.[2] The order alleged that, on October 10, 2008, respondent notified the FAA of an alcohol-related suspension of his driver's license/privileges. Respondent then applied for and received a third-class medical certification on April 15, 2009. Based upon respondent's self-reporting of the alcohol-related suspension, Dr. Warren Silberman, the manager of the FAA's Aerospace Medical Certificate Division, requested additional information from respondent to determine his eligibility to hold a medical certificate. After respondent failed to provide the requested information, Dr. Silberman denied respondent's medical certificate application on June 16, 2009, requesting respondent return his medical certificate to the FAA. When respondent, once again, failed to respond, the Administrator served respondent with a notice of proposed assessment (NOPA) on November 9, 2009. The NOPA informed respondent that, under 49

[2] Section 67.409(d) states that, if the issuance of a medical certificate is wholly or partly reversed by the Federal Air Surgeon; the Manager, Aeromedical Certification Division; or a Regional Flight Surgeon, then the person holding that certificate must surrender it, upon request of the FAA.

U.S.C. § 46301, he was subject to a civil penalty not to exceed $1,100 for each day he failed to surrender his certificate to the FAA. The NOPA provided respondent with a grace period——"IF, WITHIN (10) DAYS OF YOUR RECEIPT OF THIS LETTER, YOU MAIL THE MEDICAL CERTIFICATE YOU HAVE IN YOUR POSSESSION TO THE [counsel for the Administrator] BY CERTIFIED OR REGISTERED MAIL, NO FURTHER ACTION WILL BE TAKEN TO COLLECT THE PROPOSED CIVIL PENALTY AND THE MATTER WILL BE CLOSED." (emphasis omitted).[3]

Respondent received the NOPA in the mail on November 13, 2009,[4] but failed to surrender his medical certificate to the FAA until December 9, 2009——16 days after the grace period expired. On December 18, 2009, the Administrator served respondent with the assessment order. In response to the order, respondent appealed to the law judge. Respondent, however, failed to file a timely answer to the Administrator's complaint; the deadline for respondent's answer was February 9, 2010, and, as of March 30, 2010, respondent had not answered the complaint. As a result, the law judge issued an order entering partial judgment on the pleadings in favor of the Administrator on March 30, 2010. The law judge deferred ruling on the propriety of the

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[3] NOPA at 3.

[4] The Administrator provided the law judge with a copy of the certified mail return receipt signed by respondent, dated November 13, 2009. See Admin. Brief to Affirm $5,000 Assessment, Gov. Ex. 1 at 4.

civil penalty, providing both parties 20 days to submit written arguments.

Respondent's submission to the law judge largely discussed the facts, which the law judge had deemed admitted when respondent failed to answer the Administrator's complaint. The remaining portion of respondent's submission requested the law judge reduce the penalty because of respondent's difficulties in submitting necessary pleadings in a timely manner in pursuit of his appeal.

The law judge found the civil penalty assessed in this case was at the low end of what the Administrator could have sought under the FAA's Enforcement Sanction Guidance Table.[5] He noted that the "$5,000 civil penalty … in this case thus represents a fraction of the $17,600 maximum assessment that could have been made for that 16-day period, at $1,100 per day." Order Affirming Civil Penalty at 3–4. The law judge concluded that respondent offered no legitimate reason to mitigate the sanction from the $5,000 civil penalty, and thus affirmed the Administrator's assessment.

On appeal, respondent alleges the law judge erred in affirming the civil penalty and requests that the Board "show [him] grace and dismiss the assessment of [the civil penalty]."

[5] FAA Order 2150.3B, Appendix B.

Appeal Br. at 1. The Administrator opposes respondent's argument, and urges us to affirm the law judge's decision.

We have held that it is the Administrator's burden under 49 U.S.C. § 44709 to articulate clearly the sanction sought, and to ask the Board in a timely manner to defer to that determination.[6] The same burden applies in civil penalty cases under 49 U.S.C. § 46301(d)(5)(C). The Administrator must support the request for deference with evidence showing that the civil penalty has not been selected arbitrarily, capriciously, or contrary to law.[7] Like the law judge, we find the Administrator's choice of sanction in this case to be at the lower end of the permissible range. The Administrator could have assessed over triple the amount that was assessed against respondent. Furthermore, we have compared cases that are factually similar to respondent's case in determining whether the Administrator's choice of penalty was arbitrary, capricious, or not in accordance with law, and believe that the Administrator's assessment of a $5,000 penalty against respondent is consistent with Board precedent.[8]

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[6] Administrator v. Peacon, NTSB Order No. EA-4607 at 10 (1997).

[7] Id.; see generally Administrator v. Oliver, NTSB Order No. EA-4505 (1996) (no deference where the Administrator introduced no evidence regarding applicable or relevant sanction guidance).

[8] Administrator v. Reid, NTSB Order No. EA–5150 (2005) (affirming $5,000 civil penalty against the respondent for failing to surrender his pilot and medical certificates after the

In determining whether the Administrator's choice of sanction is appropriate, we will consider mitigating and aggravating factors.[9] Respondent requests we disapprove the civil penalty but provides no mitigating evidence showing that the proposed sanction is inappropriate under the circumstances. To attempt to justify mitigation, respondent states, "[t]his ordeal has already proven to be quite costly for me. I am seeking to avoid any more losses, both, in finances and time." Appeal Br. at 2. We note, however, that the Administrator provided respondent with ample opportunity to avoid this result; and respondent repeatedly failed to comply with the Administrator's requests in a reasonably diligent manner. For example, Dr. Silberman requested respondent provide him with documentation regarding respondent's medical certificate. Respondent failed to respond. Dr. Silberman requested respondent surrender his medical certificate. Respondent failed to comply. The Administrator served respondent with the NOPA, but also provided him a 10-day grace period during which to surrender the certificate and avoid a civil penalty. Again,

respondent did not appeal the order suspending them, which the Administrator had based on the respondent's failure to report an alcohol-related motor vehicle action).

[9] Administrator v. Simmons, NTSB Order No. EA–5535 at 9 (2010); see also Administrator v. Hackshaw, NTSB Order No. EA-5501 at 23 (2010).

respondent failed to comply in a timely manner. Respondent received the Administrator's complaint, but failed to file an answer to it.[10] At every turn, respondent failed to respond or act in a timely manner to avoid imposition of this civil penalty. The law judge considered all this evidence in affirming the sanction. In summary, we find no basis in law or fact for reducing the law judge's imposition of the $5,000 civil penalty.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's order is affirmed; and

3. The Administrator's order assessing a $5,000 civil penalty 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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[10] We note that the case manager of the NTSB Office of Administrative Law Judges transmitted to respondent a letter acknowledging the receipt of his appeal of the Administrator's complaint. The letter specifically informed respondent that he would be required to submit an answer to the Administrator's complaint within 20 days of the service of the complaint, and stated that, "[f]ailure to file an answer may be deemed an admission of the truth of the allegations in the complaint." The letter further provided a fill-in-the-blank answer form that respondent could have used to provide his answer.

Served: September 14, 2010

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

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J. RANDOLPH BABBITT,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v. Docket CP-196

RODNEY LEE ASHMORE,

Respondent.

* *

ORDER AFFIRMING
ADMINISTRATOR'S CIVIL PENALTY ASSESSMENT

Served: Rodney Lee Ashmore
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On December 18, 2009, the Administrator of the Federal Aviation Administration ("FAA") issued an order assessing respondent with a civil penalty of $5,000, for an alleged violation of § 67.409(d), stemming from his alleged failure to surrender a third-class medical certificate that had been issued to him by a Designated Medical Examiner on April 15, 2009, after the Manager of the FAA's Aerospace Medical Certification Division, on June 16, 2009, reversed the issuance of that certificate and requested its surrender.[1]

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[1] FAR § 67.409(d) provides as follows:

"§ 67.409 Denial of medical certification.

* * * * *

(d) If the issu[ance] of a medical certificate is wholly or partly reversed by the Federal Air Surgeon; the Manager, Aeromedical Certification Division; or a Regional Flight Surgeon, the person holding that certificate shall surrender it, upon request of the FAA."

After respondent, acting *pro se*, filed an appeal from that order with this office, the Administrator reissued the order of assessment as the complaint in this proceeding. Subsequently, on March 30, 2010, the undersigned issued an Order entering a partial judgment on the pleadings in favor of the Administrator, based on respondent's failure, without good cause, to have filed a timely answer to the complaint.[2] In that Order, all of the factual allegations of the Administrator's complaint were deemed to have been admitted, and, on the basis of those deemed admissions, it was found that respondent had violated FAR § 67.409(d), as charged in the complaint. However, in view of the sizable amount of the civil penalty assessed against respondent for that FAR violation, a determination as to the propriety of the sanction was deferred so that the parties could first have an opportunity to present arguments pertaining to the suitability of the $5,000 civil penalty imposed by the Administrator. The parties have since made their submissions on that issue, and the undersigned, having thoroughly reviewed those filings and the record in this proceeding as a whole, will, for the reasons set forth below, affirm the Administrator's assessment in full.

Associated with the Administrator's submission on the subject of sanction is a copy of a November 9, 2009 notice of proposed assessment ("NOPA"),[3] which informed respondent that he was, under 49 U.S.C. § 46301, subject to a civil penalty not to exceed $1,100 *for each day* his violation of FAR § 67.409(d) continued,[4] but that "**IF, WITHIN (10) DAYS OF YOUR RECEIPT OF THIS LETTER, YOU MAIL THE MEDICAL CERTIFICATE YOU HAVE IN YOUR POSSESSION TO THE UNDERSIGNED** [(counsel for the Administrator)] **BY CERTIFIED OR REGISTERED MAIL, NO FURTHER ACTION WILL BE TAKEN TO COLLECT THE PROPOSED CIVIL PENALTY AND THE MATTER WILL BE CLOSED.**"[5] Despite this, the Administrator relates that "[r]espondent neither replied to the Notice nor surrendered his certificate during the 10-day grace period. [He] eventually surrendered his medical certificate on December 9, 2009. However, because [he] surrendered the certificate after the 10-day grace period, the Administrator issued an Order of Assessment on December 18, 2009, assessing [him] $5,000 for failing to surrender his medical certificate as requested."[6] The copy of the NOPA that the Administrator has provided includes a photocopy of a Domestic Return

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[2] As of the date of the issuance of that Order, this office had received from respondent neither an answer nor an explanation of the reason(s) for his failure to have filed one.

[3] Ex. G-1 attached to Administrator's Submission on Sanction.

[4] NOPA at 2.

[5] NOPA at 3 (emphasis original).

[6] Administrator's Submission on Sanction at 1-2. The undersigned notes that the complaint alleged (at ¶ 10) that, as of the date of the issuance of the assessment order, respondent had not surrendered his medical certificate. That allegation was, in the March 30, 2010 Order (at 4), deemed admitted based upon respondent's failure file a timely answer to the complaint. The Administrator's acknowledgment in the submission on sanction that respondent surrendered his certificate on December 9, 2009 neither abrogates the validity of the finding that he violated FAR § 67.409(d) nor demonstrates that the amount of the civil penalty assessed against him for that violation was excessive. The latter point is addressed *infra.*

Receipt (PS Form 3811), which reflects that the NOPA was delivered to and signed for by respondent on November 13, 2009.[7]

Respondent devotes much of his submission on sanction to a discussion of the complaint's factual allegations, which, as is noted above, were deemed admitted as true in the March 30 Order by virtue of respondent's failure, without good cause, to file a timely answer. As is relevant to the issue of the propriety of the civil penalty amount assessed against him, he relates that "[t]his whole process has been quite confusing and, regrettably, I did not act within the timelines requested of me. As a father and business owner/operator, I am constantly busy with various activities that require my time. Unfortunately, I did not always respond to the issues outlined in this case in a timely fashion. For that, I regret allowing this issue to become a case at all . . . . I submitted my information to [the Aerospace Medical Certification Division manager] and subsequently have surrendered my medical certificate. I hope this letter makes it clear that the $5000 penalty is not appropriate considering the nature of this case and I hope that you feel the same way."[8]

49 U.S.C. § 46301 states in relevant part (emphasis added):

> § 46301. Civil Penalties
>
> (a) General penalty. — (1) A person is liable to the United States Government for a civil penalty of not more than $25,000 (or $1,100 if the person is an individual or small business concern) for violating —
>
> * * *
>
> (B) a regulation prescribed under any provision to which clause (A) of this paragraph applies [including FAR § 67.409(d)]
>
> * * *
>
> (2) *A separate violation occurs under this subsection for each day the violation . . . continues*.

The FAA's Enforcement Sanction Guidance Table (FAA Order 2150.3B, Appendix B) provides that the appropriate sanction for failure to surrender a suspended or revoked certificate, authorization or other approval is a moderate civil penalty per day, "with the total c[ivil] p[enalty] generally $5,000 to $11,000" (*see* Fig. B-11 at p. B-52).[9] In this case, the 10-day grace period respondent was given in the NOPA to surrender the third-class medical certificate he had first been directed to surrender in June 2009 ended on November 23, 2009, but he did not surrender that certificate until December 9, 2009, which was 16 days after that grace period expired. The $5,000 civil penalty that was assessed by the Admin-

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[7] *See* NOPA at 5 (certificate of service page). *See also* Ex. G-2 attached to Administrator's Submission on Sanction, which is a Postal Service tracking document that notes that the NOPA was "[d]elivered, November 13, 2009, [at] 8:38 am."

[8] Respondent's Submission on Sanction at 2.

[9] Under 49 U.S.C. § 44709(d)(3), "the Board is bound by . . . written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds [it] arbitrary, capricious, or otherwise not in accordance with law."

istrator against respondent in this case thus represents a fraction of the $17,600 maximum assessment that could have been made for that 16-day period, at $1,100 per day, as authorized by 49 U.S.C. § 46301(a)(1) and (2).[10] Because: (1) the Sanction Guidance Table provides for the imposition of a separate moderate civil penalty for each day a certificate holder fails to surrender a certificate after a surrender request is made by the FAA; (2) the aggregate civil penalty of $5,000 that the Administrator has imposed against respondent here is at the low end of that which is "generally" assessed for an ongoing violation of that type; and (3) respondent has offered no legitimate basis to support any mitigation of that sanction, the undersigned will affirm the Administrator's $5,000 civil penalty assessment in this matter.

THEREFORE, IT IS ORDERED that the $5,000 civil penalty assessed against respondent by the Administrator for respondent's failure to surrender his third-class medical certificate after being directed to do so is hereby AFFIRMED; and

IT IS FURTHER ORDERED that this proceeding is TERMINATED.

Entered this 14th day of September, 2010, at Washington, D.C.

_____
William E. Fowler, Jr.
Chief Administrative Law Judge

[10] Moreover, as is indicated above, the actual period of respondent's violation of FAR § 67.409(d) was far longer than 16 days, given that he was originally directed to return his medical certificate on June 16, 2010. Thus, in theory, a civil penalty could have been assessed against respondent for a violation period exceeding 170 days, had the Administrator chosen to do so.