

SERVED: June 3, 2013

NTSB Order No. EA-5660

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 3rd day of June, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-19132
)	
BRUCE MICHAEL ARMSTRONG,)	
)	
Respondent.)	
)	
_____)	

ORDER DENYING PETITION FOR RECONSIDERATION

1. Background

The Administrator filed a timely petition for reconsideration of NTSB Order No. EA-5629. In that decision, the Board dismissed with prejudice the Administrator’s order of revocation which found respondent violated 14 C.F.R. § 61.15(d)¹ by having three implied

¹ Section 61.15(d) provides:

Except for a motor vehicle action that results from the same incident or arises out of the same factual circumstances, a motor vehicle action occurring within 3 years of a previous motor vehicle action is grounds for:

- (1) Denial of an application for any certificate, rating, or authorization issued under this part for a period of up to 1 year after the date of the last motor vehicle action; or

consent-related driving suspensions in a three-year period of time. We determined the Administrator failed to bring the complaint against respondent in a timely manner, and dismissed the case under the Board's stale complaint rule.²

A. *Facts*

On July 30, 2008, and January 20, 2009, the state of New Hampshire's Department of Safety, Division of Motor Vehicles, suspended respondent's motor vehicle driving privileges for two separate violations of the state's implied consent law.³ Respondent timely reported both driving suspensions to the Federal Aviation Administration (FAA) in accordance with 14 C.F.R. § 61.15(e).⁴ In 2009, the FAA brought an enforcement action against respondent under § 61.15(d) for the two driving suspensions. As a result of that action, the FAA suspended respondent's air transport pilot (ATP) certificate for 30 days.⁵

On December 20, 2010, respondent's driving privileges were suspended a third time for yet another violation of New Hampshire's implied consent law. On July 6, 2011, the Administrator issued an emergency order revoking respondent's ATP certificate, based on an alleged lack of qualification due to respondent's three implied consent violations within a three-year period.

B. *The Board's opinion and order*

In the FAA's emergency order, the Administrator alleged a lack of qualification on the part of respondent. Because more than six months had passed between the date of the alleged offense and when FAA brought the complaint, we analyzed this case under our stale complaint rule, codified at § 821.33 of our Rules of Practice. This rule states:

(..continued)

(2) Suspension or revocation of any certificate, rating, or authorization issued under this part.

² 49 C.F.R. § 821.33.

³ Under state driver licensing laws, a licensed driver has given his implied consent to a field sobriety test and/or a breathalyzer or similar manner of determining blood alcohol concentration. In most states, the police must have reasonable grounds for administering a sobriety test. If the driver refuses to comply with the police, the driver is in violation of the implied consent law for motor vehicles.

⁴ The pertinent portion of § 61.15(e) states, "[e]ach person holding a certificate issued under this part shall provide a written report of each motor vehicle action to the FAA, Civil Aviation Security Division ... not later than 60 days after the motor vehicle action."

⁵ Respondent did not appeal the 2009 FAA enforcement action to the NTSB.

Where the complaint states allegations of offenses which occurred more than [six] months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c) [regarding FAA notice to certificate holders of a proposal to amend, modify, suspend, or revoke a certificate], the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(a) In those cases where the complaint does not allege lack of qualification of the respondent:

(1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.

(b) In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section.

Because the law judge found the Administrator failed to prove a lack of qualification by a preponderance of the evidence, we shifted our analysis of the stale complaint issue to paragraph (a) of the rule.

In analyzing the stale complaint issue under § 821.33(a), we determined the FAA neither showed good cause existed for the delay, nor showed the public interest warranted imposition of a sanction, notwithstanding the delay. In finding no good cause existed, we questioned whether the Administrator acted diligently in pursuing this case when the FAA investigator, Christopher Marks, did not explain why it took so long to retrieve respondent's driving record from New Hampshire. Furthermore, we found the record contained no evidence Mr. Marks attempted to expedite the request of this information in any manner. At the hearing, Mr. Marks attempted to justify the FAA's four-month period of apparent inactivity by stating he needed to request copies of respondent's 2008 and 2009 police reports relating to the driving suspensions from New Hampshire. However, he later conceded the FAA already possessed these certified records as part of the 2009 enforcement action against respondent.⁶ Other than this redundant request, the record was devoid of any reason for the delay.

⁶ Tr. 48.

C. *Petition for reconsideration*

In this petition for reconsideration, the Administrator asserts the Board erred in reaching the stale complaint issue because the FAA predicated the case on a violation requiring a finding as a matter of law that respondent lacked the qualification necessary to hold an ATP certificate. Section 821.50(c) of our Rules of Practice requires a petition for reconsideration “state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon.” The Administrator’s arguments focus on the issue of whether respondent lacks the qualification to hold an ATP certificate. We will address these issues to ensure no confusion exists concerning our prior decision.

2. *Decision*

We reiterate the following facts concerning the case at issue. The Administrator provided no evidence of or any explanation regarding the Administrator’s delay in bringing the charges against respondent. The Administrator simply contended the FAA investigator needed to re-request information from respondent’s New Hampshire driving record that was already in the FAA’s possession.⁷

We find the Administrator failed to make a sufficient showing under both paragraphs (a) and (b) of 49 C.F.R. §821.33, the stale complaint rule. The FAA contends it demonstrated respondent’s lack of qualification as a matter of law and suggests we should not have considered paragraph (a) of the stale complaint rule, which requires a finding that good cause existed for the Administrator’s delay when the complaint does not present an issue of a lack of qualification. We disagree. Such a suggested reading is contrary to the plain language of the rule, which states:

In those cases where the complaint alleges lack of qualification of the respondent, ***the law judge shall first determine whether an issue of lack of qualification would be presented*** if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. ***If not, the law judge shall proceed as in paragraph (a) of this section.***⁸

The Administrator rests his position on the language in the rule stating, “if all the allegations ... are assumed to be true.” We have long applied this standard, and our law judges, in general, have declined to dismiss cases on the basis the complaint, as assumed to be true, indicated the respondent lacked the qualification necessary to hold a certificate.

We do not, however, believe the rule provides wholesale leniency to the Administrator. If we adopted the Administrator’s interpretation of our stale complaint rule, in any given case the Administrator could simply assert an allegation involving lack of qualification and thus vitiate

⁷ To the extent redundant practices, such as this, exist in the FAA, we caution the Administrator to reassess the validity of these practices when attempting to bring an emergency case against a respondent.

⁸ 49 C.F.R. § 821.33(b) (emphasis added).

the stale complaint rule. Such an interpretation of our regulation could produce absurd and unfair results. For example, the FAA could charge a fairly minor violation, yet tack on a more serious one even though it knows it could not fulfill the burden of proof on it, all in order to avoid the six-month deadline in the stale complaint rule. Indeed, previous Board cases have established the gravity of a violation as a reason to be less, rather than more, lenient in finding good cause for delay.⁹ The United States Court of Appeals for the District of Columbia Circuit acknowledged the stale complaint rule stems from the fact that “unsafe conditions require speedy remedy” and the rule “is meant to advance, not retard, safety enforcement.”¹⁰

We also have acknowledged the Administrator utilizes the general practice of “notice pleading” in cases under the Board’s Rules of Practice.¹¹ In this case, the Administrator notified respondent of the general allegations and charges against him in accordance with this standard. However, to survive a motion to dismiss under the stale complaint rule in a case in which more than six months have passed since the alleged violation, we hold the Administrator must plead the complaint in such a manner as to provide sufficient specificity as to the seriousness of the alleged violation. This is not a *per se* new holding with regard to the stale complaint rule, rather it provides clarity to the interrelationship between paragraphs (a) and (b) of our stale complaint rule for our law judges and future litigants.

This specificity must be apparent on the face of the complaint, to enable the law judge to conclude that respondent lacks the qualification necessary to hold a certificate, when assuming the truth of the allegations. As discussed below, prior Board jurisprudence supports this finding that the law judge must consider whether the complaint legitimately demonstrates, not merely alleges, that an issue of lack of qualification exists. Should the Administrator choose to proceed with a complaint that does not *specifically* plead facts concerning a violation that unequivocally indicates a lack of qualification, it is incumbent upon the Administrator to ensure the complaint is timely under our stale complaint rule.

In this case, we find the allegations in the emergency order are generally pleaded—merely stating the elements of the offense and nothing more.¹² This set of facts leads us to

⁹ Administrator v. Dill, NTSB Order No. EA-4099 (1994).

¹⁰ Ramaprakash v. FAA, 346 F.3d 1121, 1126 (2003) (citing Dill, *supra* note 9 at 10).

¹¹ See, e.g., Administrator v. Roberts, NTSB Order No. EA-5556 (2010), and Administrator v. Darby, NTSB Order No. EA-5521 (2010), in which the Board applied the principles of “notice pleading,” which Black’s Law Dictionary defines as “a procedural system requiring that the pleader give only a short and plain statement of the claim, showing that the pleader is entitled to relief, and not a complete detailing of all the facts.” Black’s Law Dictionary 1271 (9th ed. 2009) (citing Fed. R. Civ. P. 8(a)).

¹² The emergency order of revocation simply stated,

2. On or about July 30, 2008, your driver’s license was suspended by the Department of Safety, Division of Motor Vehicles, State of New Hampshire, for an “Implied Consent” offense.

conclude the complaint did not serve to present an issue of a lack of qualification, as the text of § 821.33(b) requires. We hold this analysis consistent with prior Board cases, as Dill and a variety of our law judges' conclusions concerning stale complaint rule motions counsel in favor of an equitable balancing of the aspects of the stale complaint rule (lack of qualification, public interest, and good cause for the delay) as a whole.¹³

In this decision, we also seek to clarify our jurisprudence with respect to § 821.33(a). In Dill, the Board included a discussion of the rationale for the stale complaint rule, and indicated it is incumbent on the Administrator to act with dispatch when a serious safety issue has occurred. The Board stated, "the rule will ordinarily bar untimely prosecution, and thereby act as a stimulus to diligent safety enforcement."¹⁴ In Dill, the Board was careful to note the exceptions in the rule to the requirement to present an issue involving lack of qualification—good cause for the delay and public interest. However, the Board applied both paragraphs of the rule, to evaluate whether the Administrator alleged a lack of qualification *and* pursued the charges with diligence:

The rule does not bar prosecution of undiscovered violations, however old. Board precedent requires only that, where the Administrator does not become aware of the alleged violations until after they have occurred, the FAA should process the facially stale charges "with greater dispatch than they would have received had they been discovered more or less contemporaneously," in order to avoid dismissal. If the Administrator fails to meet that burden, by showing that he exercised reasonable prosecutorial diligence after his receipt of the information concerning the possible violations, the Board has not hesitated in finding that the

(..continued)

3. On or about January 20, 2009, your driver's license was suspended by the Department of Safety, Division of Motor Vehicles, State of New Hampshire, for an "Implied Consent" offense.

4. On or about December 20, 2010, your driver's license was suspended by the Department of Safety, Division of Motor Vehicles, State of New Hampshire, for an "Implied Consent" offense.

By reason of the foregoing facts and circumstances, you violated Section 61.15(d) of the Federal Aviation Regulations, by reason of the fact that the motor vehicle actions described in paragraphs 2, 3, and 4 above, occurred within [three] years of each other.

...

As a result of the foregoing, the Administrator finds you lack the qualifications necessary to hold an [ATP] certificate or any other airman certificate.

¹³ See Administrator v. Hawes, NTSB Order No. EA-3830 at 4-5 (1993); Administrator v. Heyl, NTSB Order No. EA-5420 at 19-20 (2008).

¹⁴ Dill at 10.

FAA has failed to overcome the presumption that a respondent has been prejudiced in his ability to defend against the charges.¹⁵

In this regard, the stale complaint rule provides sufficient exceptions to permit an equitable tolling to allow pursuit of charges based on previously undiscovered violations. However, in this case, the Administrator was on notice of respondent's third implied consent violation for more than six months, but simply conducted a prolonged and redundant investigation of the case. Without any evidence to establish good cause existed for this delay, we cannot apply the good cause exception.

3. *Conclusion*

As we acknowledged in our original decision, three implied consent-related driving suspensions within a three-year period constitute serious violations. Based upon the evidence in the record before us, we find the Administrator failed to provide a complaint pleaded with sufficient specificity to establish an issue of a lack of qualification. As a result, under an equitable balancing, the complaint cannot survive a motion to dismiss under our stale complaint rule. We find, under the circumstances, the Administrator failed to give these alleged unsafe conditions the speedy administrative actions our caselaw demands.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's petition for reconsideration is denied.¹⁶

HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order. HERSMAN, Chairman, did not participate.

¹⁵ Dill at 10-11 (quoting Administrator v. Carter, NTSB Order No. EA-3730 at 5 (1992)).

¹⁶ As this case proceeded as a waived emergency, respondent has surrendered his ATP certificate. With this order, the Administrator should return immediately respondent's certificate.