

SERVED: September 4, 2015

NTSB Order No. EA- 5755

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 September, 2015

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19753
v.)	
)	
ESTEBAN JIMENEZ,)	
)	
Respondent.)	
)	
_____)	

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 May 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 225 days. The law judge’s 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(a) and (c),² and 91.13(a),³ by operating a Robinson helicopter, R44 II, on four separate flights along the coast in southern California only 10-30 feet above the shore, at which beachgoers were visiting and where three of the flights were passenger-carrying flights. We deny respondent's appeal.

A. Procedural Background and Facts

The Administrator ordered suspension of respondent's commercial pilot certificate by order dated December 11, 2014. The Administrator sent the order to respondent at two addresses: a street address and a post office box, both of which were in Sylmar, California. Respondent, who proceeded *pro se*, filed a timely appeal on January 2, 2015, on which he listed his post office box address. On January 6, 2015, the Office of Administrative Law Judges sent a docketing letter to respondent describing the requirement to file an answer to the Administrator's allegations. The Office sent the letter to both the street and post office box addresses. The letter stated:

Failure to file an Answer with the Board, responding to each allegation in the Order/Complaint, may be deemed an admission of the charge or charges not answered. Therefore, the filing of a timely Answer is a very important step in the

² Section 91.119(a) and (c) state as follows:

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

* * * * *

(a) *Anywhere*. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

* * * * *

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

protection of your rights. Your Answer to be timely, must be postmarked within **20 days** from the date the Administrator's Complaint was mailed to you (not 20 days from the date you received it).

On January 7, 2015, the Administrator filed the order as the complaint in the case, alleging the first of the four flights occurred April 18, 2014, during which respondent proceeded approximately 15 feet above the shoreline at around 100 miles per hour, causing surfers in the water to "ditch their surfboards."⁴ The complaint also alleged the second flight occurred on June 12, 2014, in which respondent again operated the helicopter 10-15 feet above the shoreline and over swimmers in the water. Finally, the complaint asserted respondent operated the aircraft on June 15 and 16, 2014, approximately 30 feet above the shoreline and over swimmers in the water. For each of these flights, the complaint alleged respondent operated the helicopter below an altitude allowing for an emergency landing without undue hazard to persons or property if a power unit failed. The complaint alleged respondent carried passengers on the flights he conducted on June 12, 15, and 16, 2014. In light of these allegations, the complaint contended respondent violated 14 C.F.R. § 91.119(a) and (c), as well as § 91.13(a).

Under 49 C.F.R. § 821.31(b), respondent's answer to the complaint was due January 27, 2015. In the absence of an answer, the Administrator filed a motion to deem the allegations admitted on February 10, 2015. Respondent filed an answer on March 4, 2015, but did not reply to the Administrator's motion to deem the allegations admitted. On April 9, 2015, the Administrator filed a motion for judgment on the pleadings.

On April 15, 2015, the law judge issued an Order Deeming the Allegations Admitted. The law judge determined such an order was appropriate, given respondent's lack of a timely answer, combined with respondent's failure to articulate good cause for his delay. On April 24,

⁴ Compl. at ¶ 5.

2015, respondent filed a motion to reconsider the law judge's order deeming the allegations admitted, as well as a reply to the Administrator's motion for judgment on the pleadings. On May 4, 2015, the law judge issued an order denying reconsideration of his previous order. Given the docketing letter the NTSB Office of Administrative Law Judges sent to respondent, the law judge disputed respondent's claim that the NTSB had not communicated with him.

B. Law Judge's Order

On May 6, 2015, the law judge issued the Order Granting Judgment on the Pleadings, which is the source of the instant appeal. The law judge reiterated the necessity of filing a timely answer in response to a complaint, based on the Board's Rules of Practice. The law judge also disposed of respondent's argument that the case could not proceed because the Administrator had not produced evidence, such as affidavits, exhibits, or testimony, in support of its case. The law judge stated the Board considers all material facts to be admitted when a respondent does not file an answer. The law judge disagreed with respondent's due process argument on the basis that any adverse consequences respondent suffered were the result of respondent's own failure to submit a timely answer.

In his order, the law judge also discussed the Administrator's choice of sanction, and determined 225 days was appropriate for the alleged violations, given the gravity of the conduct, and the fact that respondent engaged in at least three separate passenger-carrying flights over a populated beach area when he operated the aircraft. The law judge concluded the order by affirming the Administrator's complaint in its entirety.

C. Issues on Appeal

On appeal, respondent acknowledges he filed his answer late. However, he suggests we should deviate from our long-held practice of requiring a timely answer in response to each

complaint when the Administrator fails to produce evidence, such as affidavits, exhibits, and testimony, contemporaneously with the complaint. He generally contends the law judge's failure to accept his answer results in an infringement on his due process rights, and is prejudicial to him. Respondent states his "inadvertence or mistake is understandable," and we should therefore reverse the law judge's order and accept his late-filed answer.⁵

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.⁶

The Board's procedural Rules of Practice require the filing of an answer to the complaint within 20 days after service of the complaint.⁷ 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."⁸ As a result, no material facts remain in dispute if a respondent does not answer the complaint.

As noted above, respondent acknowledges he did not file a timely answer.⁹ He requests that we excuse this lack of timeliness because the Administrator neither informed him of the

⁵ Appeal Br. at 2.

⁶ Administrator v. Rohrbach, NTSB Order No. EA-5753 at 6 (2015); Administrator v. Diaz, 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.

⁷ 49 C.F.R. § 821.31(b).

⁸ 49 C.F.R. § 821.17(c).

⁹ On most occasions, both the Administrator and the NTSB sent correspondence and documents to both respondent's street address and his post office box address. While respondent does not expressly allege improper service of the complaint, he asserted to the law judge that the NTSB

requirement to file an answer nor attached evidence to the complaint. 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.¹⁰

Based on our consistent application of the good cause standard, we find the law judge did not err in determining the absence of exhibits or other evidence attached to the Administrator's complaint fails to amount to good cause to excuse respondent's delay in filing a timely answer. Neither our jurisprudence nor our Rules of Practice indicate we will deviate from the good cause standard when the Administrator does not attach evidence to a complaint. In contrast, we have affirmed the Administrator's practice of notice pleading.¹¹

Moreover, we disagree with respondent's argument that due process concerns outweigh consistent application of our good cause standard. The Court of Appeals for the Ninth Circuit has held the Board's strict adherence to a procedural rule does not violate a respondent's right to due process.¹² In addition, in Diaz, we specifically rejected such a due process argument. We stated,

(..continued)

did not communicate with him. NTSB precedent, however, establishes constructive service occurs upon the date of mailing a document to the address of record. See Administrator v. Mazufri, NTSB Order No. EA-5289 at 5-6 (2007).

¹⁰ Diaz, *supra* note 6; 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 applying good cause standard); *accord Administrator v. Bandiola and Bagamastad*, NTSB Order No. EA-5677 (2013).

¹¹ 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 Gilbert v. NTSB, 80 F.3d 364, 367-68 (9th Cir. 1996).

“[t]he lack of a hearing on the merits was due solely to counsel’s failure to abide by the Board’s clear rules. That is not a denial of process attributable to the Board.”¹³ Such an analysis certainly applies to the facts of the case at hand.

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 225-day suspension of respondent’s commercial pilot certificate shall begin 30 days after the service date shown on this opinion and order.¹⁴

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

¹³ Supra note 6 at 6. In addition, the Supreme Court has held due process only requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.” Dusenbery v. United States, 534 U.S. 161, 170 (2002) (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-315 (1950)).

¹⁴ 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(f).

Served: May 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-19753

ESTEBAN JIMENEZ, *

Respondent. *

Service:

Sanjay Sobti, Esq.
U.S. Law Center
495 East Rincon Street
Suite 120
Corona, CA 92879
(Certified Mail and FAX)

Lisa J. Toscano, Esq.
FAA Western-Pacific Region
P.O. Box 92007
Los Angeles, CA 90009
(by FAX only)

ORDER GRANTING JUDGMENT ON THE PLEADINGS

Complainant has filed a Motion for Judgment on the Pleadings pursuant to Rule 821.17(c). That Rule provides that a judgment on the pleadings is warranted when, wherein either no answer has been filed, or that, upon pleadings filed, it is demonstrated there are no material issues of fact in genuine dispute - thus, that judgment is warranted as a matter of law.

Respondent has filed a Reply to Complainant's Motion for Judgment, and in opposition thereto interposes two objections: (1) Respondent has requested reconsideration of the Order of April 15, 2015, which granted Complainant's Motion to Deem the Allegations of the Complaint admitted; (2) Complainant's Motion for Judgment is not supported by exhibits, testimony, affidavit or other evidence.

Addressing Respondent's objection No. 1: Respondent's reconsideration request has been considered, and for the reasons stated, both in the initial Order of April 15, 2015, and the reconsideration Order of May 4, 2015, the Order of April 15, 2015, deeming the Complainant's allegations admitted was re-affirmed.

It is noted that Respondent's objection No. 2, as raised herein, was also asserted in his Reply to the Motion to Deem Allegations Admitted. That objection was rejected, as Complainant's Motion was made pursuant to the provisions of Rule 821.31(b), and was supported by the Board's case/docket file which established that Respondent had failed to file, as required by Rule 821.31(b), a timely answer, or to show good cause as to excuse the untimely filing. Thus, the Complainant's allegations were deemed admitted, and Respondent's untimely answer was not accepted.

Respondent's objection No. 2, likewise, does not act as ground to reject Complainant's Motion for Judgment. Respondent correctly states that Complainant must establish that there does not remain any genuine dispute as to a material fact, and that the record evidence is to be viewed favorably to the opposing party. The argument, however, overlooks the fact that by reason of all of the factual allegations of the Complaint having been deemed admitted, there are no material facts to be disputed. The allegations of the Complaint are established as a matter of law, and Complainant may, in support of his Motion for Judgment, rely upon the Orders of April 15 and May 4, 2015, without a requirement of further evidence.

As to a claim of due process, herein Respondent's arguments have been considered, and any adverse consequences are the result of his failure to act in a timely manner, or to articulate a good cause as to excuse his failure.

In this matter on the Orders entered, all of the facts are established, and no material fact remains disputed, and therefore it is concluded that Complainant's Motion for Judgment on the Pleadings should be and hereby is: **GRANTED**.

As consequence thereof, it is further found and concluded that Respondent has acted in violation of the provisions of Section 91.119(b) and (c); and Section 91.13(a), Federal Aviation Regulations (FARs).

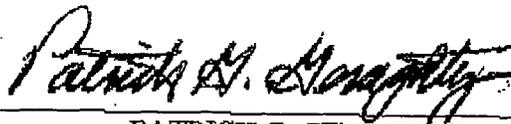
On the issue of appropriate sanction, Complainant has requested deference to his choice of sanction of a period of 225 days suspension of all of Respondent's airman certificates. The facts

established herein reveal that Respondent, on four (4) separate occasions, operated an aircraft in violation of the FARs cited in the Complaint and affirmed herein, that is, each occasion is a separate violation. I also, upon consideration of the circumstances of each flight, conclude that the four (4) violations of Section 91.13(a) are not residual violations, rather that on their intentional commission were reckless acts potentially endangering life or property of others. In my judgment, just one occasion of the violations found would warrant a sanction 60 to 90 days suspension, thus where there are four (4) separation occasions of reckless violation of the cited FARs, I find that the requested suspension of 225 days is reasonable and in the public interest in air safety.

The GRANT of Complainant's Motion for Judgment on the Pleadings is found, therefore, to affirm the Complaint as issued.

SO ORDERED.

ENTERED this 6th day of May, 2015, at Denver, CO.



PATRICK G. GERAGHTY
JUDGE