

SERVED: April 15, 2016

NTSB Order No. EA- 5778

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 April, 2016

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| MICHAEL P. HUERTA, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Docket SE-19290RM |
| |) | |
| JODY DUCOTE, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| _____ |) | |

ORDER GRANTING PETITIONS FOR RECONSIDERATION

The Administrator and respondent have filed petitions for reconsideration of NTSB Order No. EA-5758, served October 23, 2015 (hereinafter “Remand Order”). The Administrator contends that, pursuant to an order from the Court of Appeals for the District of Columbia Circuit, Huerta v. Ducote, 792 F.3d 144 (D.C. Cir. 2015), we erroneously remanded the case to the law judge for credibility determinations without specific instructions and with an incorrect statement of the scope of the remand. Specifically, the Administrator contends our Remand Order should have clarified whether the law judge’s factual findings in connection with Counts 1–3, after a full evidentiary hearing, are relevant to whether the stale complaint rule requires

Count 4 to be dismissed.¹ In a response to the petition, respondent also urges the Board to clarify the application of the stale complaint rule. In a separate petition, respondent requests modification of our order, urging us to instruct the law judge to determine whether the stale complaint rule applies to Count 4. The Aircraft Owners and Pilots Association (AOPA) also filed an *amicus* brief seeking clarification on the relationship between the law judge's factual findings during an evidentiary hearing and the stale complaint rule. AOPA contends, once the law judge determined the Administrator failed to prove respondent's lack of qualifications in Counts 1-3, "the Administrator must meet another exception to the stale complaint rule in order to proceed with any remaining stale charges."²

Section 821.50 of our Rules of Practice (49 C.F.R. part 821) governs the submission and our review of petitions for rehearing, reargument, reconsideration or modification of an order of the Board. Section 821.50(c) provides the Board will not consider arguments a party could have made on appeal or in reply briefs received prior to the Board's decision. In addition, § 821.50(d) states, "[r]epetitious petitions will not be entertained by the Board, and will be summarily dismissed." In the case *sub judice*, the parties request we clarify the scope of the Remand Order, as well as whether the law judge may dismiss one of the counts of the complaint based on the stale complaint rule. These questions arise solely from our Remand Order and, as such, the parties did not have the opportunity to request such clarification when the District of Columbia Circuit remanded the case to the Board. Therefore, it is appropriate to respond to the parties' requests for clarification at this juncture.

Procedural History

The Administrator's emergency order,³ dated April 16, 2012, sought revocation of respondent's airline transport pilot certificate, based on allegations the law judge later divided into four distinct counts:

- Count 1: Allegation that respondent falsified his logbook by including an entry indicating he performed three night landings in Picayune, Mississippi on March 25, 2010.

¹ The stale complaint rule, codified at 49 C.F.R. § 821.33, provides a respondent may move to dismiss a complaint when the alleged offenses occurred "more than six months prior to the Administrator's advising the respondent as to the reasons for proposed action[s]." However, the six-month limitations period does not apply to cases in which the Administrator alleges the respondent's conduct reflects a lack of qualifications necessary to hold a certificate. *Id.* § 821.33(b). Intentional falsification demonstrates, *per se*, that the respondent lacks the qualifications necessary to hold a certificate. *Huerta v. Ducote*, 792 F.3d at 154. Thus, when the Administrator alleges that respondent intentionally falsified records, the stale complaint rule does not prescribe a six-month limitations period for the Administrator to pursue an action against respondent's certificate.

² Reply of *Amicus Curiae* to Administrator's Pet. for Recon. at 5.

³ Respondent subsequently waived the applicability of the expedited deadlines normally applicable to emergency orders.

- Count 2: Allegation that respondent falsified five logbook entries by inserting inaccurate times and engine cycles, according to incorrect readings on the aircraft's Hobbs meter.
- Count 3: Allegation that respondent falsified a logbook entry concerning a June 10, 2010 flight between Jackson and Picayune, Mississippi.
- Count 4: Allegation that respondent operated passenger-carrying flights to and from an airport in the Bahamas when he did not have the appropriate type rating for the aircraft.

The law judge issued an oral initial decision on July 17, 2012, in which he determined the Administrator failed to prove the allegations in Counts 1-3. The law judge dismissed Count 4, reasoning the stale complaint rule applied to Count 4 because the Administrator failed to prove, in Counts 1-3, that respondent intentionally falsified the logbooks. The law judge stated:

The fourth count, which was the type rating, that was he didn't have the type rating but he went overseas. That's been admitted, but it's also -- since the Administrator has not sustained the burden on the intentional falsification, these allegations about careless and reckless are stale, and as such, will be dismissed under the stale complaint rule. Again, I think that this was a pilot who got caught up in wanting to fly a jet so bad that he might not have been as observant as he should have been, but the allegations of intentional falsification have not been satisfied by a preponderance of the evidence here, and the other count, which has been admitted, is stale, based on the filing of this order some 2½ years after the actual flight.⁴

We affirmed the law judge's decision on alternative grounds. Administrator v. Ducote, NTSB Order No. EA-5664 (2013). As indicated above, the District of Columbia Circuit vacated and remanded our decision. Huerta v. Ducote, 792 F.3d 144 (D.C. Cir. 2015). In our Remand Order, we instructed the law judge to articulate credibility findings with regard to the intentional falsification allegations, Counts 1-3. We did not consider whether a hearing on the merits would resolve questions concerning the applicability of the stale complaint rule. Both respondent, the Administrator, and *amicus* request we clarify the scope of our Remand Order. Specifically, the parties seek an explanation of whether (1) the law judge must issue credibility findings in connection with some or all counts of the complaint; and (2) the law judge may apply the stale complaint rule to dismiss Count 4.

Analysis

First, we acknowledge Count 3, alleging respondent intentionally falsified flight logs he provided to the Administrator, was at issue on remand. In this regard, we instruct the law judge to resolve the parties' factual disputes in connection with Count 3: the law judge should issue a

⁴ Initial Decision at 279-280.

credibility determination after considering the testimony provided at the July 2012 hearing and facts in evidence that support or discredit that testimony.⁵

Second, as the Court of Appeals for the District of Columbia Circuit indicated, the law judge did not make any credibility determinations in connection with Count 4.⁶ The law judge appears to have determined only that Count 4 was stale under the stale complaint rule.

The Court also clarified the stale complaint rule does not prescribe a six-month limitations period to allegations of intentional falsification because such allegations, by their nature, indicate a lack of qualifications.⁷ Assuming that the intentional falsification allegations in Count 4 are true, Count 4 of the complaint was not subject to dismissal under the stale complaint rule, because it indicates respondent lacks the qualifications necessary to hold his certificate. Therefore, the law judge's dismissal of Count 4—to the extent he based his analysis on the perceived application of the stale complaint rule—was erroneous.⁸

The stale complaint rule does not distinguish between appeals that have proceeded to an evidentiary hearing and appeals that the parties, an administrative law judge, or the Board have resolved in the absence of a hearing. The parties and *amicus* request “the Board clarify the issue of whether the stale complaint rule can be applied to dismiss otherwise stale claims on the merits when the Administrator fails to establish lack of qualifications after an evidentiary hearing, as the ALJ did in this case.”⁹

Our remand to the law judge does not turn on whether § 821.55 permits dismissal of a “stale claim” on the merits in case in which the Administrator failed to “establish” a lack of qualifications in a hearing or by some other means. As the D.C. Circuit explicitly stated, the stale complaint rule does not require the Administrator to *establish* anything to be exempt from the stale complaint rule. Instead, the Administrator need only *allege* a lack of qualifications,¹⁰ as the Administrator did in the case *sub judice*. Such an allegation suffices to permit procession of the case to a hearing on the merits, notwithstanding an apparent delay or lack of timeliness. Our

⁵ See Administrator v. Porco, NTSB Order No. EA-5591 at 13-20 (2011), *aff'd*, Porco v. Huerta, 472 Fed.Appx. 2 (D.C. Cir. 2012) (per curiam) (discussing importance of determining whether factual support for a law judge's credibility determinations exists in the record, and confirming the Board employs an arbitrary and capricious standard of review in reviewing law judges' credibility determinations).

⁶ See Ducote, 792 F.3d at 156.

⁷ *Id.* at 154-55.

⁸ Supra note 5.

⁹ *Amicus* reply at 1; Adm'r Pet. For Recon. At 8-9; Respondent's Reply to Adm'r Pet. For Recon. at 1.

¹⁰ Ducote, 792 F.3d at 153 (stating, “[n]othing in [§ 821.33] requires the Administrator to ‘demonstrate,’ anything at that preliminary pleading stage. To the contrary, the rule is explicit that the stale complaint analysis will ‘assume[]’ the truth of ‘allegations,’ not require their ‘unequivocal[]’ establishment.”).

holding in this regard is consistent with our jurisprudence and at least one relevant Court of Appeals decision.¹¹

Our intention in remanding this case to the law judge is to obtain a resolution of Count 4. As a result, we further instruct the law judge to issue findings on the merits of the allegations that constitute Count 4 of the complaint. Taking into account the foregoing discussion, we instruct the law judge to determine whether the Administrator proved respondent lacked the requisite type rating when he operated passenger-carrying flights in the Bahamas, which is the subject of Count 4. The law judge should make factual findings concerning the count, and articulate his rationale for determining the appropriate sanction, if he concludes the Administrator fulfilled the burden of proving the charges that constitute Count 4.

ACCORDINGLY, IT IS ORDERED THAT:

The parties' petitions are granted. NTSB Order No. EA-5758 (2015) is modified as described herein. The law judge is hereby instructed to determine whether the Administrator proved, by a preponderance of the evidence, the charges alleged in Counts 3 and 4 of the complaint.

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

¹¹ Schlagenhauf v. FAA, No. 92-1989, 1993 WL 128571, at *3 (4th Cir. Apr. 26, 1993) (unpublished per curiam decision) (describing the appropriate sequence as follows: “[w]here the complaint alleges lack of qualifications, the law judge must first determine whether an issue of lack of qualifications would be presented if all allegations are assumed to be true. If the issue presents itself, he must put the parties on notice of that fact and proceed to the hearing.”); Administrator v. Brassington, NTSB Order No. EA-5180 at 13 (2005) (declining to dismiss the Administrator’s remaining claims as stale, and stating “the complaint as a whole, which included charges of falsification, presented [an issue of lack of qualifications].”).