

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: March 25, 1993

FAA Order No. 93-12

In the Matter of:)

CARL P. LANGTON)
_____)

) Docket No. CP92AL0417
)
)

DECISION AND ORDER

Respondent Carl P. Langton has appealed from the written initial decision issued by Chief Administrative Law Judge John J. Mathias on July 30, 1992.^{1/} The law judge dismissed Respondent's request for hearing because it was not filed within 15 days after receipt of the Final Notice of Civil Penalty (FNCP).^{2/} As a result of the law judge's decision Respondent became subject to an Order Assessing Civil Penalty

^{1/} A copy of the law judge's written initial decision is attached.

^{2/} Section 13.16(b)(2), 14 C.F.R. § 13.16(b)(2), of the Federal Aviation Regulations (FAR) provides in part: "[a]n order assessing civil penalty may be issued if a person charged with a violation does not request a hearing under paragraph (e)(2)(ii) of this section within 15 days after receipt of a final notice of proposed civil penalty.

Section 13.16(e)(2)(ii), 14 C.F.R. § 13.16(e)(2)(ii), of the FAR provides in part: "[n]ot later than 15 days after receipt of the final notice of proposed civil penalty, the person charged with a violation shall....[r]equest a hearing.

in the amount of \$12,750. For the reasons that follow, the law judge's decision is affirmed.

The facts of this case are not in dispute. On April 9, 1992, Complainant issued Respondent a Notice of Proposed Civil Penalty (NPCP) in the amount of \$12,750, alleging numerous violations of the Federal Aviation Act of 1958, as amended, (the Act) and the Federal Aviation Regulations (FAR).^{3/} The NPCP included a form on which Respondent could indicate how he intended to respond to the NPCP. Respondent only checked off the response that he was financially unable to pay the civil penalty. He did not select the informal conference alternative provided on the form.^{4/}

On May 8, Complainant wrote to Respondent requesting further information concerning his alleged inability to pay the civil penalty, and suggesting that an informal conference to discuss the case could be useful. Complainant gave Respondent additional time until June 1, to request an

^{3/} The principal allegations in the NPCP were that on two occasions Respondent operated an unairworthy, unregistered aircraft in a careless or reckless manner. On both flights Respondent served as pilot in command without possessing airman and medical certificates. One flight ended in a crash, and the other flight carried a passenger on board. The NPCP alleged that Respondent violated Sections 501(a) and 610(a)(2) of the Act, 49 U.S.C. App. §§ 1401(a), 1430(a)(2) and Sections 39.3, 47.3(b)(1), 61.56(b), 91.7(a), 91.13(a), 91.203(a)(2) and 91.409(a)(1) of the FAR, 14 C.F.R. §§ 39.3, 47.3(b)(1), 61.56(b), 91.7(a), 91.13(a), 91.203(a)(2) and 91.409(a)(1).

^{4/} The NPCP response form listed five other alternatives including responses for payment of the civil penalty, submission of evidence, offers of settlement, imposition of penalties without findings, and waiver of penalties under the Aviation Safety Report Program.

informal conference with an agency attorney or to indicate how he wanted to proceed.

On May 14, Respondent's counsel entered his appearance and submitted a Freedom of Information Act (FOIA) request. Respondent's counsel did not request an informal conference. Complainant responded to the FOIA request on May 29.

On June 19, Complainant issued a Final Notice of Proposed Civil Penalty (FNPCP) in the amount of \$12,750. The FNPCP indicated that Respondent had 15 days from the date of receipt to request a hearing or pay the proposed civil penalty. Respondent's counsel and Respondent received the FNPCP on June 22 and 23, respectively. Respondent's hearing request was due on or before July 8. Respondent's counsel did not request a hearing until July 14. On July 15, Complainant issued Respondent an Order Assessing Civil Penalty in the amount of \$12,750. Complainant moved to dismiss Respondent's request for hearing for untimeliness on July 17. The law judge dismissed Respondent's request for hearing on July 30, and this appeal followed.

Respondent argues on appeal that the law judge's decision should be reversed because the NPCP and the FNPCP were technically defective. According to Respondent, the notices were issued improperly by the agency attorney instead of by the Assistant Chief Counsel for the Alaska Region or by a higher-ranking FAA official.^{5/}

^{5/} Under Section 13.16(c), 14 C.F.R. § 13.16(c), the statutory authority of the Administrator to initiate and assess civil penalties is delegated to the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

The agency attorney who was prosecuting the action signed the notices underneath the typewritten name and title of the Assistant Chief Counsel for the Alaska Region. The notices thus were issued properly by the Assistant Chief Counsel, not by the agency attorney, because the agency attorney signed the notices in the name and under the authority of the Assistant Chief Counsel for the Alaska Region.^{6/}

Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984), cited by Respondent in support of his argument, is inapposite. In Pastrana, an FAA inspector's letter to a pilot's employer resulted in the pilot's removal from flight and pay status. The court held that if the inspector's letter amounted to a suspension of the pilot's certificate, the inspector most likely exceeded his authority in issuing such an order. Id. at 1450. In contrast, as explained above, the Assistant Chief Counsel had the authority to issue both the NPCP and the FNPCP, and the agency attorney signed these notices under that authority.

Respondent argues that he was denied due process because the agency attorney failed to offer or permit Respondent to have an informal conference with the Assistant Chief Counsel

^{6/} The National Transportation Safety Board has reached the same conclusion in certificate actions where FAA staff attorneys sign orders issued in the name and under the authority of the Assistant Chief Counsel for a region. See e.g., Administrator v. Weichert, NTSB Order No. EA-3650, 7 n.9 (August 26, 1992); Administrator v. Smith, 3 NTSB 3942, 3943 (1981); Administrator v. Interair Services, Inc., 3 NTSB 1715, 1718 (1979).

for the Alaska Region. Pursuant to Section 13.16(d)(2)(iii), 14 C.F.R. § 13.16(d)(2)(iii), a person charged in a NPCP may, within 30 days after receipt of the NPCP, submit a written request for an informal conference to discuss the matter with the agency attorney.^{7/} Respondent, however, did not request an informal conference, even after the agency attorney suggested that one would be useful and extended the deadline for requesting one.

In support of his position, Respondent cites two cases holding that in certificate actions the Administrator must give the certificate holder notice of the charges and the opportunity to answer the charges before issuance of an order.^{8/} Those cases, however, involved certificate actions under Section 609 of the Act, 49 U.S.C. App. § 1429, and not civil penalty actions. Furthermore, before the issuance of the FNPCP and the order assessing civil penalty, Respondent was notified of the alleged violations and given the opportunity to request an informal conference, but he failed to take advantage of that opportunity.

The law judge did, as Respondent argues, issue the order

^{7/} The term "agency attorney" includes the Assistant Chief Counsel for a region and the attorney on the staff of the Assistant Chief Counsel for a region who prosecutes the civil penalty action. See Section 13.202, 14 C.F.R. § 13.202. In practice the staff attorney who is prosecuting the civil penalty action is the agency attorney who holds the informal conference.

^{8/} See Oceanair of Florida v. National Transportation Safety Board, 888 F.2d 767 (11th Cir. 1989); Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984).

dismissing Respondent's hearing request prematurely. Respondent had 15 days until August 3, to respond to Complainant's motion to dismiss Respondent's hearing request.^{9/} The law judge issued his order dismissing Respondent's hearing request on July 30. The law judge's error was harmless, however, because as a review of Respondent's arguments in his response to Complainant's motion reveals, there was not good cause for Respondent's untimely request for hearing.^{10/}

In In the Matter of Esau, FAA Order No. 91-24 (June 21, 1991, the Administrator held that an untimely appeal or brief will only be excused for good cause. The same principle is applicable to an untimely request for hearing.

In his response to Complainant's motion to dismiss, Respondent argued that the financial impact of the proposed civil penalty on Respondent, the questionable computation of the \$12,750 penalty, and the underlying circumstances were sufficient good cause to excuse the untimeliness. These

^{9/} Respondent had 10 days under Section 13.218(d), 14 C.F.R. § 13.218(d) to answer Complainant's motion to dismiss. Respondent had an additional 5 days under Section 13.211(e), 14 C.F.R. § 13.211(e) because he was served with Complainant's motion by mail.

^{10/} The fact that Respondent's response to Complainant's motion to dismiss was due shortly after the August 1 lapse of the Civil Penalty Demonstration Program is not good cause for excusing Respondent's prior untimely hearing request. If the law judge had not issued his order prematurely, Respondent would have had an extra 15 days to respond to Complainant's motion after the August 27 resumption of the Civil Penalty Program. See FAA Civil Penalty Administrative Assessment Act of 1992, P.L. No. 102-345, 106 Stat. 923 [the 1992 Act]. The additional time to respond to Complainant's motion would not have changed the outcome in this case.

reasons, however, go to the merits of the case and not to the reason why the hearing request was filed late. When deciding whether good cause exists for excusing untimeliness the focus should not be on the merits of the underlying case but on the reason that the document was filed late. See In the Matter of Costello, FAA Order No. 92-1 (January 9, 1992)

In Respondent's response to Complainant's motion to dismiss, Respondent's counsel explained the delay in filing the hearing request as follows:

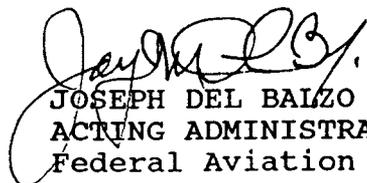
I did not actually see it (the FNPCP) but did see on our mail log that it had arrived and had been routed to my legal assistant....I believe that I called Mr. Brown (the agency attorney) when I saw the entry, probably on June 23, 1992, as I had believed that the next step would be an informal conference. I know that I called him and left him a message on June 24, 1992. To the best of my knowledge, and according to our phone logs, he did not return the call. My legal assistant went on a medical leave of absence to have surgery on July 8, 1992 and because I had told her I was planning to discuss the matter with Mr. Brown when he called back, the file...was put on a shelf I use to hold materials while I am awaiting a return phone call. Unfortunately, I did not think about the Final Notice again, or actually see it, until the afternoon of July 14, 1992.

Respondent's counsel admits having received the FNPCP by June 23 and having put it aside for two weeks while he waited for a return telephone call from the agency attorney. During this time his legal assistant was also aware of the matter. It was clearly stated in the FNPCP that a written hearing request was required to be filed within 15 days, and counsel has not asserted that he was unaware of that requirement. The agency attorney's alleged failure to return a telephone call to Respondent's counsel does not excuse the failure of Respondent's counsel to file a timely hearing request.

This is not a case where counsel was unaware of the receipt of the document requiring a timely response, In the Matter of Safety Equipment and Sign Co., LTD., FAA Order No. 92-76 (December 21, 1992) (counsel's paralegal failed to calendar properly the complaint), or of secretarial error leading to a late filing, In the Matter of Esau, FAA Order 91-24 (June 21, 1991) (secretary, unbeknown to counsel, mailed the appeal brief to the National Transportation Safety Board instead of to the FAA Hearing Docket clerk).

Respondent has not shown good cause for excusing his untimely hearing request.^{11/} A remand to the law judge due to the premature issuance of the dismissal order would serve no purpose.

Accordingly, the decision of the law judge is affirmed.^{12/}


JOSEPH DEL BALZO
ACTING ADMINISTRATOR
Federal Aviation Administration

Issued this 24 day of March , 1993.

^{11/} Statements by Respondent's counsel that his relationship with the agency attorney was strained due to their involvement in another case, do not excuse Respondent's failure to file a timely hearing request.

^{12/} Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).