

It was stated in the FNPCP as follows:

Unless you mail or personally deliver, in writing, your request for a hearing in this matter, on or before 15 days after you receive this Final Notice, we will issue an Order Assessing Civil Penalty and you will have no further right to a hearing. If you do not submit a written request for a hearing, you must pay the proposed civil penalty.

Your request for a hearing must be sent to the Hearing Docket, Federal Aviation Administration, 800 Independence Ave., SW, Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk, and a copy must be sent to the undersigned FAA attorney. Your request must be dated and signed, in accordance with Section 13.16 of the Federal Aviation Regulations, sent to you with the Notice of Proposed Civil Penalty (14 C.F.R. 13.16).

(Emphasis added). The FNPCP, issued under the authority of R.R. Hagadone, Assistant Chief Counsel,^{3/} was signed by Eddie L. Thomas, Managing Attorney, South Branch, Office of the Assistant Chief Counsel.

Respondent requested a hearing by letter addressed to the Hearing Docket in Washington, DC, dated December 13, 1990. Respondent also sent a copy to the agency attorney via certified mail, but he addressed the envelope to Mr. Thomas using the address of the Hearing Docket, rather than Mr. Thomas's office address in Atlanta, Georgia. The Hearing Docket did not forward the agency attorney's copy of

^{3/} R.R. Hagadone is the FAA's Assistant Chief Counsel for the Southern Region. His office is in Atlanta, Georgia.

the request for hearing to Mr. Thomas's office in Atlanta, Georgia, until approximately 3 months later when requested to do so by a paralegal in Mr. Thomas's office.^{4/} On March 20, 1991, the Office of the Assistant Chief Counsel for the Southern Region received the request for hearing forwarded by the Hearing Docket Clerk, and 5 days later, Complainant filed the complaint.

On November 15, 1991, Judge Yoder conducted a telephonic prehearing conference with Frank Abrams, Respondent's counsel, and Valerie Dorsett, who replaced Mr. Thomas as the agency attorney assigned to this case. The law judge questioned whether the complaint had been filed in accordance with 14 C.F.R. § 13.208(a), which requires the agency attorney to file the complaint "not later than 20 days after receipt by the agency attorney of a request for hearing."^{5/} The law

^{4/} In March, 1991, Jean Leonard, the senior paralegal specialist in the Office of the Assistant Chief Counsel for the Southern Region, called the Hearing Docket Clerk regarding another matter. Ms. Leonard asked the Hearing Docket Clerk to compare the requests for hearing filed in civil penalty cases arising in the Southern Region with the complaints filed by the Assistant Chief Counsel for the Southern Region. They found five cases, including Respondent's, in which requests for hearing had been filed with the Hearing Docket but copies had not been received by Ms. Leonard's office.

^{5/} Section 13.208(a) of the Rules of Practice, 14 C.F.R. § 13.208(a) provides in pertinent part:

Section 13.208. Complaint.

(a) Filing. The agency attorney shall file the original and one copy of the complaint with the hearing docket clerk, ... not later than 20 days after receipt by the agency attorney of a request for hearing.

judge ordered Ms. Dorsett "to submit for the record all documents relating to the establishment and functioning of the FAA Docket Section." (PHC-I at 32).

Subsequently, Complainant filed a memorandum in support of its position that the complaint had been filed in a timely fashion and attached a memorandum dated May 9, 1991, from John H. Cassady, Deputy Chief Counsel of the FAA, to the Manager, Program Management Staff, AGC-10. (The Hearing Docket Clerk reports to the Manager, Program Management Staff.) In this memorandum, the Deputy Chief Counsel wrote that "AGC-10 and AGC-2 [the Deputy Chief Counsel] will not consult or otherwise discuss any matter regarding the procedural handling of a particular case or cases or documents in the Hearing Docket."

On December 23, 1991, a second telephonic prehearing conference was held. During that conference, the law judge requested that Complainant's counsel submit additional information pertaining to the relationship between the Deputy Chief Counsel and the Manager, Program Management Staff.

Complainant filed a second memorandum in support of its position that the complaint had been timely filed. In this memorandum, counsel for Complainant asserted, based upon consultation with the Deputy Chief Counsel, that the May 9, 1991, memorandum accurately reflects the relationship between the Deputy Chief Counsel and the Manager, Program Management Staff. She wrote:

Specifically, AGC-10 and AGC-2 do not consult or otherwise discuss any matters regarding the handling of a particular

case or cases or documents in the Hearing Docket. Further, there is a complete separation of functions between AGC-10 and AGC-2 regarding the Hearing Docket.... Insofar as the case at bar is concerned, there has been no communication between Mr. Cassady's office and the Hearing Docket.

In his order served on April 7, 1992, the law judge explained that he considered the information submitted by Complainant to be inadequate, and, consequently, ordered Complainant to respond to 12 multi-part interrogatories regarding the relationship of the Deputy Chief Counsel with the Hearing Docket. Complainant replied in writing on April 24, 1992, declining to respond to the interrogatories propounded by the law judge.^{6/}

On October 13, 1992, the law judge issued a written order dismissing the complaint as late-filed. The law judge held that during a telephone conversation with Respondent's counsel on January 10, 1991, Mr. Thomas was notified that the request for hearing had been filed. The law judge concluded that Complainant's failure to file the complaint until March 25th constituted a waiver of any right Complainant had to claim that the request for hearing had been served improperly.

The law judge held further that Respondent's failure to send the copy of the request for hearing directly to

^{6/} Complainant asserted that the law judge was not authorized to conduct such investigations under the Rules of Practice and that answers to those interrogatories were not reasonably necessary to the adjudication of this case.

Mr. Thomas in Atlanta was due to the failure of both the rule and the FNPCP to specify the address to which the copy should be sent. Thus, he concluded, Complainant, not Respondent, was responsible for the misdirection of the agency attorney's copy of the request for hearing. He held further that "[i]n any event, mailing to [the] attorney at agency headquarters is ipso facto delivery to the attorney" Order at 12.

Judge Yoder also wrote that the Hearing Docket Clerk had assumed responsibility for forwarding the request for hearing once she accepted it. He found the Hearing Docket Clerk's 3-month delay in forwarding the request for hearing to have been unreasonable. Finally, the law judge held that Respondent's delivery of the request for hearing to the Hearing Docket may have constituted delivery to the agency attorney. He concluded, based upon Complainant's failure to respond to the law judge's interrogatories, that on December 17, 1990, the Hearing Docket Clerk was under the supervision and administrative control of the Deputy Chief Counsel. Hence, Judge Yoder held, the Hearing Docket Clerk's receipt of the request for hearing was imputable to the Deputy Chief Counsel, who is an agency attorney under the Rules of Practice (14 C.F.R. § 13.202).

Section 13.208(a) requires the agency attorney to file the complaint with the Hearing Docket "not later than 20 days after receipt by the agency attorney of a request for hearing." 14 C.F.R. § 13.208(a). The triggering event

is the receipt by the agency attorney of the request for hearing.

The question to ask in this case, therefore, is when did the agency attorney receive the request for hearing. The records reflect that the agency attorney's office did not receive the request for hearing until March 20, 1991. If March 20th was the operative date, then the complaint was not filed late, because it was filed only 5 days later, well within the timeframe set by 14 C.F.R. § 13.208(a).

However, the more than 3-month delay between the mailing of the request for hearing and the Southern Region's receipt of their copy is troubling. Although the Hearing Docket Clerk is not an agent for the agency prosecutor, her office is part of the FAA and, at least in hindsight, it is clear that she should have forwarded the agency attorney's copy of the request for hearing to the Southern Region immediately.

That is not to say, however, that a respondent may serve an agency attorney by using the address of any FAA office. The agency attorney should be served at the FAA office at which that agency attorney works. If service at any FAA facility were permitted, then Complainant would be unfairly disadvantaged in light of the extensiveness of the FAA.^{7/}

^{7/} Complainant argues in its appeal brief that "an examination of the preamble to the final rule for the Rules of

(Footnote 7 continued on next page.)

Complainant is sufficiently responsible for the misdirection of the copy of the request for hearing to Washington, DC, rather than Atlanta, Georgia, that the complaint will be considered late-filed. Although Respondent's interpretation of the FNPCP's boilerplate language regarding service upon the agency attorney may not be the most reasonable, it is understandable. After all, Eddie Thomas, the agency attorney, works for the FAA and, as set forth in that boilerplate, the FAA's address is 800 Independence Avenue, SW, Washington, DC, 20591. See supra at 2. Respondent may not even have realized that Mr. Thomas was based in Atlanta because the only place that the location of Mr. Thomas's address was mentioned was on the envelope and

(Footnote 7 continued from previous page.)

Practice for FAA Civil Penalty Actions reveals that the FAA was concerned that documents with timeliness requirements should be efficiently and properly served by and upon all parties." Appeal Brief at 10. As Complainant points out, the FAA did indeed express, in light of its own size and structure, an understanding for the need to serve the proper person within a large organization. See 55 Fed. Reg. 27548, 27557 (1990).

The Administrator does recognize that fairness and efficiency require that the agency attorney be served with a copy of the request for hearing, as well as other documents requiring responses in a relatively short period of time. If the agency attorney is to have the amount of time provided in the Rules of Practice to submit such responses, the agency attorney should be served at his or her own office with the request for hearing, or answer, or whatever the document is that requires a response. However, in this case, it appears that Respondent was trying to do that, but misunderstood the boilerplate language of the FNPCP and, as a result, thought that Mr. Thomas was located in Washington, DC. The FNPCP could have been more clearly written.

the letterhead of the FNPCP. The letterhead only appears on the first page of the FNPCP, not on the page with Mr. Thomas's signature and the boilerplate instructions regarding the filing of the request for hearing.^{8/} This mistake is also understandable in light of the fact that this case arises from an alleged passenger gun violation and Respondent, unlike most FAA certificate holders, was, until this matter, unfamiliar with the FAA's structure.

In light of the foregoing, it is held that while the agency attorney did not actually receive his copy of the request for hearing until March 20, 1991, Complainant bears sufficient responsibility for the misdirection of the request for hearing that Complainant will be held responsible for its late receipt of the request for hearing. For this reason, the complaint will be deemed to have been late-filed, and this matter is dismissed.

^{8/} In Respondent's reply brief, Respondent counsel argues that regardless of what the FAA business practice is, his client's copy did not have the letterhead with the Southern Region's address. Since this is Respondent's affirmative defense, he has the burden of proof on this issue, and the Administrator finds that he failed to meet that burden. The Administrator can take notice of the fact that the FAA's business practice is to send out FNPCPs on the letterhead of the office of the agency attorney handling the particular case. Respondent's counsel provided no evidence to support his assertion that his client's copy did not have the letterhead.

The Administrator reverses the law judge's finding that Complainant waived the right to argue that Respondent improperly served the request for hearing once Respondent's counsel informed the agency attorney that the request for hearing had been filed. The underlying factual finding -- that Respondent's counsel informed Mr. Thomas by January 10, 1991, that the request for hearing had been filed -- was not supported by reliable, probative and substantial evidence. The only "evidence" on this point was provided by Respondent's counsel during a telephonic prehearing conference. Moreover, Respondent's counsel contradicted himself during questioning by the law judge when he explained what he had said to Mr. Thomas on this point.^{10/}

^{9/} See 14 C.F.R. § 13.233(b)(1).

^{10/} Mr. Abrams explained that during early January, 1991, he had had conversations with Mr. Thomas concerning this matter. When Judge Yoder asked him whether these conversations concerned the fact that a request for hearing had been filed, Mr. Abrams replied, "No. Concerning matters relating to this case." (PHC-I at 14). He then stated that Mr. Thomas had been aware on January 10, 1991, of the fact that a request for hearing had been sent by Respondent. He referred to a note on his calendar to the effect that he had contacted Mr. Thomas or his office on January 10, 1991. (PHC-1 at 14-15). He said that he did not recall the exact nature of the conversation. (PHC-I at 15).

Judge Yoder later questioned him as follows:

Law Judge My question was whether you had specific conversations with him concerning the request for hearing. I thought your earlier response was that you did as of January.

Mr. Abrams We did as of January.

Law Judge We did as of January.

(PHC-I at 18).

The Administrator is also disturbed by the law judge's conduct in this proceeding. The resolution of this case did not require the law judge to probe into the relationship between the Deputy Chief Counsel and the Manager, Program Management Staff, and yet the law judge raised this issue himself and persistently sought information about it.^{11/}

The law judge was also in error to the extent that he held that service upon the Hearing Docket Clerk was tantamount to

^{11/} Professor Kenneth Culp Davis has explained that:

[T]he affirmative responsibility to present relevant evidence is primarily that of the parties, not that of the presiding officer, although the practice nicely stated by a court in 1941 has probably remained about constant: "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that the facts are clearly and fully developed." Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 652 (D.C. Cir. 1941).

3 K. Davis, Administrative Law Treatise § 17.13 at 321 (2d ed., 1980). In this case, Judge Yoder went beyond this obligation by ordering Complainant to respond to a detailed set of interrogatories. In so doing, he at least appears to have been no longer presiding over the proceedings impartially.

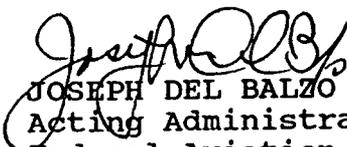
Furthermore, the Administrator is unaware of any legal requirement that there be a separation of functions that includes the ministerial duties of the Hearing Docket. For that matter, the Attorney General's Manual on the Administrative Procedure Act provides support for the proposition that such separation is unnecessary:

It is clear that nothing in the separation of functions requirements of section 5(c) [of the Administrative Procedure Act] is intended to preclude agency officials, regardless of their functions, from participating in necessary administrative arrangements, such as the efficient scheduling of hearings.

Id. at 105.

service upon the agency attorney. Section 13.16(f) provides that the original request for hearing must be filed with the Hearing Docket Clerk and a separate copy must be mailed to the agency attorney. Under the law judge's interpretation, the clause "and shall mail a copy of the request to the agency attorney" set forth in the second sentence of 14 C.F.R. § 13.16(f) would be rendered meaningless.

As a result of the foregoing, Complainant's appeal is granted in part and rejected in part, and the law judge's decision is affirmed in part and reversed in part. This case is dismissed.


JOSEPH DEL BALZO
Acting Administrator
Federal Aviation Administration

Issued this 24 day of March, 1993.