

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of SHANE K. NISSEN

FAA Order No. 2005-15

Docket No. CP04GL0001
DMS No. FAA-2004-17101¹

Served: December 15, 2005

ORDER²

On December 3, 2004, Administrative Law Judge Burton S. Kolko issued an Order Assessing Civil Penalty against Nissen.³ The ALJ wrote in the Order that at his request, the FAA attorney had written to Nissen, inquiring when Nissen would be released from prison and would be available for a hearing. The ALJ explained that Nissen had not responded to that letter, and the U.S. Postal Service had not returned the agency attorney's letter. As a result, the ALJ concluded, that Nissen had failed to keep him apprised regarding his current address. The ALJ construed Nissen's silence as a constructive withdrawal of the request for a hearing and an admission of the allegations in the Complaint. He held further that a hearing was not necessary, and assessed a \$5,000 civil penalty.

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. Clark Boardman Callaghan publishes the decisions in Federal Aviation Decisions. The decisions are also available through LEXIS and Westlaw. For additional information, see the website.

³ A copy of the Order Assessing Civil Penalty is attached. (The Order is not attached to most electronic versions of this decision, but is an attachment to the version of this decision available on the DMS website.)

Nissen has appealed from the ALJ's order, arguing that he did not receive the letter written by the FAA attorney. Nissen's appeal was late. The Administrator, in FAA Order No. 2005-8, accepted the late-filed appeal, ruling that good cause existed to excuse the late-filing of Nissen's appeal, and gave the FAA time to file a reply brief.

The FAA, in its reply brief, argues that the ALJ correctly construed Nissen's failure to inform the ALJ about his address change and his subsequent failure to reply to the FAA attorney's letter, as an abandonment of the hearing process and a withdrawal of the request for hearing. The FAA argues, in the alternative, that the Administrator should reverse her determination that good cause existed to excuse Nissen's failure to file a timely appeal, and dismiss the appeal.

After consideration of the record and the arguments presented by Nissen and the FAA, Nissen's appeal is granted, the ALJ's order is reversed, and this case is remanded to the ALJ for further proceedings. In addition, Nissen is instructed to keep the ALJ and the FAA attorney apprised of his current mailing address and his availability for a hearing.

I. Chronology

The FAA filed its Complaint on January 8, 2004, after receiving a request for hearing from Nissen. Nissen filed an Answer, dated January 12, 2004. At the time, Nissen was incarcerated at a California state substance abuse treatment facility in Corcoran, California.

On September 23, 2004, the agency attorney wrote to Nissen, at the ALJ's request, inquiring when Nissen would be available for a hearing. The agency attorney explained that the ALJ wanted this information so that he could schedule a hearing. The

FAA attorney sent the letter to Nissen by first-class mail at the substance abuse treatment facility in Corcoran, California, using the same address that Nissen had provided in his request for hearing and Answer. Neither the agency attorney nor the ALJ received any response from Nissen. According to the agency attorney, the letter was not returned.⁴

On October 26, 2004, the FAA filed a “Motion for Status Conference.” In this motion, the agency attorney explained that neither the ALJ nor he had heard from Nissen since January 2004.⁵ The agency attorney requested that the ALJ schedule a status conference to determine when and where Nissen would be available for a hearing. The FAA sent the motion to Nissen, using the California state substance abuse treatment facility in Corcoran, California. According to the agency attorney, the letter was not returned. Nissen did not reply to that motion.

The ALJ issued the Order Assessing Civil Penalty on December 3, 2004. The ALJ wrote that Nissen had not responded to the agency attorney’s letter and had failed to fulfill his responsibility to keep the ALJ informed about his (Nissen’s) current address. The ALJ explained that he construed Nissen’s silence as a constructive withdrawal of the request for a hearing and as an admission of the complaint’s allegations, and as a result, held that a hearing was unnecessary. The ALJ sent the Order to Nissen, using the address at the substance abuse treatment facility in Corcoran, California.

When Nissen failed to contact the FAA attorney about the Order Assessing Civil Penalty, the FAA attorney, requested that an FAA Security Division employee

⁴ Reply Brief at 4.

⁵ The agency attorney wrote further that at the ALJ’s request, he had sent a letter to Nissen on September 23, 2004, asking when Nissen would be available for a hearing, but Nissen had not responded and the U.S. Postal Service had not returned the letter.

investigate whether Nissen was still in the prison facility in Corcoran, California.⁶ The FAA Security Division employee subsequently determined that Nissen was no longer at the state prison facility in Corcoran, California, but now was incarcerated at the North Kern State Prison in Delano, California.

On February 8, 2005, the agency attorney mailed a letter to Nissen at North Kern State Prison, enclosing a copy of the Order Assessing Civil Penalty. According to the agency attorney, he sent this letter to Nissen by U.S. Mail, certified return receipt, and “delivery was verified.”⁷

On February 14, 2005, Nissen filed a letter, appealing from the Order Assessing Civil Penalty.⁸ He explained that he had not received the Order Assessing Civil Penalty, dated December 3, 2004, until February 8, 2005. He asserted that he had been in the substance abuse treatment facility in Corcoran, California, until February 7, 2004,⁹ and was currently in prison in Delano, California. He denied receiving the agency attorney’s letter, dated September 23, 2004, and suggested that “perhaps the prison misplaced it.” He requested that the Order Assessing Civil Penalty be rescinded, and that a hearing be held immediately.

In FAA Order No. 2005-8, the Administrator held that Nissen had good cause for failing to file a timely notice of appeal, and construed Nissen’s letter as both a request for

⁶ Reply Brief at 4.

⁷ Reply Brief at 4.

⁸ Nissen sent a copy of the letter, addressed to the ALJ, directly to the Hearing Docket.

⁹ The agency attorney wrote in the reply brief that someone at the Delano facility informed him that Nissen had been released in February 2004, and subsequently was incarcerated at the Delano facility on December 7, 2004. The agency attorney wrote further “[t]here is no evidence of his [Nissen’s] whereabouts between February and December 2004.” (Reply Brief at 5.)

hearing and an appeal brief. The Administrator gave the FAA additional time in which to file a reply brief. The FAA filed its reply brief on May 20, 2005.

II. Discussion

The ALJ is correct that individuals who request a hearing in a civil penalty matter have the duty to keep the ALJ and the Hearing Docket informed about any address changes. Nonetheless, in this instance, as Nissen's appeal makes clear, he did not intend to withdraw his request for a hearing and his Answer. It cannot be determined on this record whether Nissen received the September 2004, letter, the Motion for a Status Conference, or the original Order Assessing Civil Penalty.¹⁰ These documents were sent to the wrong address (although the fault for this is Nissen's). Rather than find that Nissen has forfeited his right to a hearing, this case is remanded to the ALJ for further proceedings.¹¹

Nissen should be aware, however, that if he fails to advise the ALJ and the FAA of his current mailing address or if he fails to respond to documents sent to him by the ALJ or the FAA attorney, then such failure shall be construed as an abandonment of the hearing process.

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

¹⁰ It should also be noted, in case Nissen actually received some of his mail, that the ALJ never issued an order to show cause why the case should not be dismissed.

¹¹ Likewise, the FAA's request that the Administrator reverse FAA Order No. 2005-8 is denied.