

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

In the Matter of SHANE K. NISSEN

FAA Order No. 2005-8

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

Served: April 14, 2005

ORDER²

On December 3, 2004, Administrative Law Judge Burton S. Kolko assessed a \$5,000 civil penalty against Respondent Shane K. Nissen.³ The ALJ stated in his Order that Nissen, who is incarcerated failed to fulfill his responsibility to keep the ALJ informed about his current address. The ALJ construed Nissen's failure to respond to a letter written by the agency attorney asking about Nissen's availability for a hearing, as both a constructive withdrawal of the request for a hearing and an admission of the Complaint's allegations, and consequently, no hearing was necessary. Nissen has appealed from the ALJ's order.

While Nissen filed his appeal letter late, good cause exists to excuse its lateness. Also, Nissen's letter is sufficiently detailed to constitute both a notice of appeal and an

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/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's 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.)

appeal brief. The FAA is given 35 days (plus an extra 5 days under 14 C.F.R. § 13.211(e)'s⁴ "mailing rule") from the service date of this Order to file a reply brief.

I. Chronology

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

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 received any communication from Nissen since January 2004. 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 as of October 26, 2004, Nissen had not responded and the U.S. Postal Service had not returned the letter. The agency attorney requested that the ALJ schedule a status conference to determine when and where Nissen would be available for a hearing.

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 keep them informed about his current address. The ALJ 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, a hearing was unnecessary.⁵

⁴ Section 13.211(e) provides as follows:

Additional time after service by mail. Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.
14 C.F.R. § 13.211(e).

⁵ The ALJ sent the Order to Nissen at the following address: Shane K. Nissen, T-76107, ASU-144U, Substance Abuse Treatment Facility, P.O. Box 5248, Corcoran, CA. Oddly, perhaps,

Seventy-three days later, on February 14, 2005, Nissen filed an undated letter, appealing from the Order Assessing Civil Penalty.⁶ In this appeal letter Nissen asserted that he had been in a substance abuse treatment facility until February 7, 2005, and that he currently was incarcerated in a California State Prison. He claimed further that he had not received the Order Assessing Civil Penalty (dated December 3, 2004) until February 8, 2005.

II. Discussion

The Rules of Practice in Civil Penalty Proceedings required Nissen to file a notice of appeal no later than 15 days from the date of the ALJ's written Order Assessing Civil Penalty,⁷ and to perfect his appeal by filing an appeal brief no later than 55 days from the date of the ALJ's Order.⁸ Thus, in this case, Nissen should have filed his notice of appeal by December 20, 2004, and his appeal brief by January 27, 2005. He did not file his letter appealing from the ALJ's Order, however, until February 14, 2005.⁹

according to Nissen's appeal letter, he received that letter after he had been moved to Delano State Prison, NKSP, P.O. Box 4999, Delano, CA, 93216.

⁶ The letter was postmarked February 14, 2005. The date of filing is the postmark date when there is no certificate of service. 14 C.F.R. § 13.210(b).

⁷ Section 13.233(a) provides that "[a] party shall file the notice of appeal not later than 10 days after ... service of the written initial decision on the parties" 14 C.F.R. § 13.233(a). Nissen had an additional 5 days under the "mailing rule," 14 C.F.R. § 13.211(e), in which to file his notice of appeal. Fifteen days after December 3, 2004 (the date of the ALJ's Order) was Saturday, December 18, 2004. Under 14 C.F.R. § 13.212(c), Nissen was required to file his notice of appeal by Monday, December 20, 2004.

⁸ A party must file its appeal brief no later than 50 days after the service of the written decision by the ALJ. 14 C.F.R. § 13.233(c). In this case, Nissen had an additional 5 days under the "mailing rule," 14 C.F.R. § 13.211(e). Consequently, he was required to file his appeal brief no later than Thursday, January 27, 2005.

⁹ He also failed to request an extension of time to file a notice of appeal and an appeal brief.

The Administrator will excuse a late-filed notice of appeal or appeal brief if the party shows that it had good cause for filing the document late.¹⁰ In the Matter of Warbelow's Air Ventures, Inc., FAA Order No. 1999-4 at 2 (July 1, 1999) (good cause shown for late-filing of appeal brief); In the Matter of Woodhouse, FAA Order No. 1995-9 at 4 (May 9, 1995) (good cause found for late-filed notice of appeal). If Nissen did not receive the ALJ's Order Assessing Civil Penalty dated December 3, 2004, because the U.S. Postal Service, the substance abuse treatment facility, or the state prison did not deliver it to him until February 8, 2005, then he has good cause for not responding to the Order by filing a timely notice of appeal and appeal brief.

In addition, Nissen should have perfected his appeal by filing an appeal brief. 14 C.F.R. § 13.233(c). However, he did not file a separate appeal brief. The Administrator has construed notices of appeal that are sufficiently detailed to meet the requirements provided in 14 C.F.R. § 13.233(d) as appeal briefs. *E.g.*, In the Matter of Lewis, FAA Order No. 2005-7 (April 11, 2005); In the Matter of Woodhouse, FAA Order No. 1995-9 at 4. Nissen's letter, postmarked February 14, 2005, presents his arguments and the relief that he wants, and consequently, meets the minimum requirements for an appeal brief.¹¹

Therefore, Nissen's late-filed appeal letter is construed as both a notice of appeal

¹⁰ If the parties do not agree upon an extension of time for perfecting an appeal by filing an appeal brief, then the Administrator may grant an extension if good cause for the extension is shown. 14 C.F.R. § 13.233(c)(2).

¹¹ Until the appeal, the current address that the ALJ, the agency attorney and the Hearing Docket had for Nissen was ASU-144, Substance Abuse Treatment Facility, P.O. Box 5248, Corcoran, CA 93212, Nissen claims in his appeal letter that this was his current address until February 7, 2004. He does not know why he did not receive the letter sent to him by the agency attorney on September 23, 2004, (which was presumably sent to that address.) He suggests that the prison may have misplaced it. He requests that the Order Assessing Civil Penalty be reversed and that a hearing be scheduled immediately.

and appeal brief, and is accepted because good cause is found to excuse its lateness. The agency attorney is given 35 days (plus and additional 5 days under the “mailing rule”) from the date of service of this order to file a reply brief.

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

VICKI S. LEEMON¹²
Manager, Adjudication Branch

Issued this 14th day of April, 2005.

¹² Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (*see* 57 Fed. Reg. 58,280 (1992)), and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.