SERVED : March 2, 1994

NTSB Order No. EA-4088

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 February, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-12374

ELMER RAYMOND SMITH,

Respondent.

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on May 5, 1992, following an evidentiary hearing.[1] The law judge dismissed an order of the Administrator suspending respondent's

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[1] The initial decision, an excerpt from the hearing transcript, is attached.

airman certificates for 20 days for violating 14 C.F.R. 61.15(e) .[2] Although respondent admitted that he did not file the report required by this rule, the law judge found that there was "substantial compliance" with the rule. We grant the appeal in part. We reverse the law judge's decision and conclude that there has been a technical violation of the rule, but further find in this case that safety in air commerce or air transportation and the public interest do not require affirming the Administrator's order to the extent it suspends respondent's certificate. Before addressing the merits of the appeal, however, we must resolve a pending procedural matter.

Respondent's reply to the Administrator's appeal was originally due 30 days from July 8, 1992. Apparently, respondent's counsel was under the mistaken belief that extensions of time were available from the Administrator, and did not need Board approval. According to respondent (the Board did not receive a copy of the letter) , the Administrator agreed to respondent's request for an extension of time (apparently to August 30, 1992), and respondent appears to have taken this as a

[2]This rule requires that each person holding a certificate must file a written report of any "motor vehicle action" to the FAA's Civil Aviation Security Division no later than 60 days after the action. A "motor vehicle action" is defined in § 61.15(c) (2) to include:

> A conviction after November 29, 1990, for the violation of any Federal or state statute relating to the operation of a motor vehicle while intoxicated by alcohol or a drug, while impaired by alcohol or a drug, or while under the influence of alcohol or a drug [.1

grant of an extension to that date. Respondent then consulted the Administrator, seeking another extension, to September 8, 1992. The Administrator had no objection. A Copy of respondent's confirming letter to the Administrator was, this time, received by the Board, whereupon staff contacted respondent, advising counsel that only the Board could grant extensions of time, and that respondent's reply brief was considerably late, with no extension request having been granted. Respondent was directed to file a motion for an extension of time to cover the entire period (from August 9th[3]) Respondent has filed that motion, and in support of it has argued that, by copying the Board with confirming letters, counsel believed she was satisfying the requirements of our rules of practice, 49 C.F.R. 821.11.[4]

The Administrator, in reply, although offering no objection to our accepting respondent's reply brief, suggests that respondent's professed confusion offers the opportunity to clarify our standard for late-filed reply briefs and late-filed requests for extensions of time to file reply briefs.[5]

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[3]Thirty days from July 8th fell on a Saturday, August 7. Accordingly, the original due date of respondent's reply brief was the following Monday, August 9.

[4]We find it difficult to credit this argument. Indeed, if our rules were consulted, counsel would find that only written requests for extensions are contemplated. See 49 C.F.R. 821.11.

[5]Respondent has replied to the Administrator's response. This is an impermissible reply to a reply, and will be stricken.

Since the date of the Administrator's request, we have done so. The Administrator correctly notes that Administrator v. Hooper, NTSB Order EA-2781 (1988), does not apply to reply briefs.[6] See Application of George O. Grant, NTSB Order EA-3919 (1993) (Hooper does not control, as it applies a good cause test for late filing only to appeal briefs and notices of appeal). In Grant, we addressed the question of late filed pleadings in the context of the Administrator's late-filed answer to an Equal Access to Justice Act application. The law judge found that accepting the Administrator's late answer would not prejudice applicant. We reviewed under that same standard. Notably, the Administrator, in that case, urged acceptance of his late-filed answer on the ground that the Board has in the past looked at whether the other party would be prejudiced in deciding whether to accept a late-filed reply. See, e.g., Administrator v. Kelso, 5 NTSB 400 (1985). We are satisfied, especially in light of our discussion in Grant, that no further clarification is necessary. And, as the Administrator does not oppose our accepting respondent's late reply and we can see no prejudice in our doing so, we grant the late motion for an extension of time.

Turning to the merits of the Administrator's appeal, respondent was arrested in May 1991 for driving while impaired by alcohol (DWI). He testified, unrebutted, that within a few days

[6] We stated in Hooper (slip op. at 3-4) that, absent a showing of good cause, we would dismiss "all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents [i.e., notices of appeal and appeal briefs] have not been filed."

of the incident he called the Los Angeles Flight Standards District Office (FSDO) to seek advice on the ramifications of a conviction on the charge and was reminded of the related reporting requirements on the medical application. Respondent testified, again unrebutted, that during this conversation he was not told of the S 61.15 requirement that he separately report any conviction to the FAA's Security Division within 60 days. The law judge credited this testimony (Tr. at 98) and we have no basis on the record to reject his finding.

Respondent was convicted of the DWI on June 10, 1991.' Eleven days later, in applying for renewal of his medical certificate, he completed a medical application on which he reported the conviction by checking "yes" on ¶ 21v (record of traffic convictions) . Respondent did not provide additional information in the "Remarks" section of the application, but the record establishes that respondent explained the circumstances of his DWI arrest and conviction to the designated medical examiner (DME) performing the physical and reviewing respondent's application. The DME approved respondent's application for a first class medical certificate.

On October 1, 1991, the FAA's Aeromedical Certification Division (ACD) sought further details from respondent concerning the DWI conviction reported on his application. Exhibit R-4.[7]

[7]Section 67.25 of the Federal Aviation Regulations provides that the application approval by a DME may be withdrawn within 60 days by the Federal Air Surgeon, and that, also within 60 days, the FAA may require additional information. There is no explanation why the FAA's letter (Exhibit R-4) was so late.

Respondent quickly provided that information in a letter dated October 7, 1991. Exhibit R-3.

At the hearing, counsel for the Administrator attempted to prove that respondent knew his obligation but purposely failed to file the § 61.15 report. Counsel suggested that respondent tried to minimize the reporting of his conviction, hoping it would be overlooked in the absence of the § 61.15 report and the absence in his application of an explanation in the "Remarks" section. According to respondent, his failure to include an explanation was an oversight at most, and not intentional. Exhibit R-3 and Tr. at 49. Respondent, as noted earlier, answered further that he did not know, and was not told, of the reporting requirement of § 61.15.

On appeal, the Administrator contends that, with respondent's failure to comply with S 61.15, the law judge had no discretion to act other than to affirm the complaint and that, even if "substantial compliance" was an acceptable standard, respondent did not substantially comply because he did not provide all the details required by S 61.15. Even if substantial compliance were a valid defense, in this case we would not find that respondent substantially complied with § 61.15(e) because he did not submit any information, in any form, to FAA's Security Division. We also find, however, and limited to the particular facts of this record, that respondent should not suffer a certificate suspension for his reporting failure.

As noted, the unrebutted evidence in this record is that respondent called the Los Angeles FSDO to seek assistance in addressing his situation, and was not told of the § 61.15(e) reporting requirement. He was only reminded of his obligation to report a conviction on his medical application, which he did. The Administrator attempts to show that respondent, in fact, knew of the § 61.15(e) reporting requirement. Yet, the materials presented by the Administrator at the hearing do not prove this point. Three press releases regarding new § 61.15 (Exhibits A-3-5) , distributed widely to associations and aviation media (and apparently to some pilots, although not directly to respondent) , focus on other aspects of the rule. Where the press releases direct that pilots report convictions within 60 days, they do not direct where or how the report is to be made. A letter to airmen, the only document introduced in which the FAA indicates that the 60-day report is to be made to the Security Division, is dated February 21, 1992, well after respondent's June 1991 conviction.

The law judge found only that respondent knew he hand to report in some fashion to the FAA within some period of time. Tr. at 97. The law judge also suggested that the FAA contributed to respondent's belief that the reporting requirement existed in the medical application context only. Tr. at 98. We see insufficient reason on the record to alter these findings in a manner more favorable to the Administrator.

As a general rule, airmen are expected and obliged to know the regulations to which they are subject, and ignorance of them is no defense. The reporting regulation was in effect at the time of respondent's conviction and its language is absolutely clear (respondent does not argue to the contrary). For that reason, we have found a technical violation. However, we do not have mere ignorance here. We have unrebutted factual evidence, accepted by the law judge, that respondent was given incomplete advice by the FAA when he sought to satisfy his regulatory obligation. And we have inadequate grounds in the FAA's presentation to find (as the law judge refused to find) that respondent knew of his obligation to report to the Security Division as well as report on his next medical application. Indeed, the advisory materials offered by the Administrator here that predate respondent's conviction suggest the contrary: that the FAA could have contributed to a misunderstanding by respondent. Any misunderstanding, of course, would have been confirmed by his conversation with the FSDO. Thus, although ignorance of the rule does not excuse respondent's violation, the evidence on the record that 1) respondent attempted to comply with all related regulatory requirements and sought FAA assistance in doing so; and 2) the FAA contributed to respondent's failure through its erroneous advice to him, warrants a conclusion that respondent should not be further penalized for his failure.

We think this conclusion is consistent with the purpose of the rule, as explained by the Administrator, and does no damage to the Administrator's enforcement interests.[8] According to the Administrator's appeal,

> the intent of the rule was not just to assure that the FAA has some notice of motor vehicle action, but also . . . that it has prompt and detailed notice so that an unqualified pilot may swiftly be detected, investigated, and removed from the system before he causes harm.
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> The rule has two purposes: (1) to remove from navigable airspace pilots who, through a record of alcohol- or drug-related motor vehicle actions, demonstrate an unwillingness or inability to comply with certain safety requirements; and (2) to provide a review, after a motor vehicle action, of a pilot's medical file to determine if there is a basis for reevaluating his eligibility for medical certification.

Appeal at 16. At the hearing, counsel for the Administrator was concerned that an airman's next medical could be considerably removed in time from a drug- or alcohol-related driving conviction. Tr. at 87.

Respondent here, however, had his medical only 11 days after his conviction. At that exam, he thoroughly briefed the DME on the conviction. The FAA, thus, had notice of the matter, and had it well within the 60-day reporting period.[9]

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[8]The Board traditionally declines to review prosecutorial choices of the Administrator. Nevertheless, it is not apparent to us how prosecuting respondent here furthers aviation safety.

[9]The Administrator does not argue that the DME did not inform FAA headquarters officials of the details provided him by respondent or that advice given to the DME is not equal to advice given to the Aeromedical Certification Division. We note that the designated medical examiner is the Federal Air Surgeon's agent and there was testimony to this effect at the hearing. Tr. at 19 (the DME is designated by the Administrator to receive notice and information about infractions such as DWIS) . And, the

(continued. ..)

As noted above, there is, moreover, no indication that the FAA was concerned that respondent's DWI, in the words of the appeal, "demonstrate[d] an unwillingness or inability to comply with certain safety requirements." The Administrator has taken no further action, since the October letter, with regard to respondent's medical certificate, nor does the Administrator argue here that respondent's DWI conviction compromises the public safety and makes him unfit to hold a certificate.

Based on the evidence before us, the Administrator clearly had sufficient' information to make the judgments he urges are crucial to the purpose of the reporting requirement of § 61.15, and he has offered absolutely no evidence that the FAA's need to know of alcohol-related driving convictions or the purpose of § 61.15 was thwarted in this instance. The Administrator admits as much with his entire focus, in his appeal, on fact patterns considerably different from the one before us -- fact patterns where the medical application is completed well after DWI conviction(s) . We have recognized that possibility and limited our ruling accordingly. In finding that neither aviation safety nor the public interest requires that a sanction be imposed here, we analyze the Administrators rule in the peculiar circumstances of this case; we do not, contrary to the Administrator's argument, usurp the FAA's regulatory policy role. We reiterate

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9(.. continued)
"yes" answer to ¶ 21v, combined with the lack of a "no change" comment in the Remarks section, also put the reader on notice of a new conviction.

that the Administrator has not established, much less argued, that the FAA's interests in obtaining timely information from pilots with a recent history of DWI offenses (see Appeal at 13) and acting on that information were in any way thwarted in this instance.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's Motion for Extension of Time is granted and his late-filed reply to the Administrator's appeal is accepted;

2. Respondent's Reply to the Administrator's Response to Respondent's Motion for Extension of Time is rejected;

3. The Administrator's appeal is granted to the extent that we reverse the initial decision; and

4. The Administrator's order is affirmed to the extent it alleged that respondent violated 14 C.F.R. 61.15(e), and is dismissed to the extent it sought a suspension of respondent's airman certificate.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT and HALL, Members of the Board, concurred in the above opinion and order.