FLIGHT-WATCH

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NTSB RELENTS IN MISAPPLICATION OF STALE COMPLAINT RULE AND ACQUIECES IN DIRECTIVE FROM THE UNITED STATES COURT OF APPEALS

In Volume 118 of Flightwatch issued in March of 2002, we discussed the Stale Complaint Rule found at 49 C.F.R. § 821.33. In essence, the FAA is required to give notice to a pilot within six months of an alleged violation. While, under the Stale Complaint Rule, the FAA is supposed to give notice within six months, there are certain exceptions. The first exception is if "good cause existed for the delay." 49 C.F.R. § 821.33(a)(1). A second basis for not applying the Stale Complaint Rule is if "a sanction is warranted in the public interest." A third reason for not applying the Stale Complaint Rule and dismissing the charges would be if the NTSB Administrative Law Judge found that the facts supported a conclusion that the pilot lacked qualifications to be an airman by virtue of his conduct, lack of knowledge, or skill. 49 C.F.R. § 821.33(b)(1).

Over the course of 27 years of law practice, I have been fortunate to have cases dismissed involving substantial legal issues, such as allegations of illegal air taxi operations, cheating on written FAA examinations, and so forth. In other words, I have had cases dismissed raising *very serious* issues. Nevertheless, because the FAA could not demonstrate that good cause existed for the delay and the Board did not find the cases should go forward in the public interest, or that the facts evidenced a lack of qualifications, the charges against these pilots were dismissed. It is my impression that repeated alleged illegal Part 135 flights and cheating on written FAA examinations to acquire one's credentials as a pilot are more significant and substantial violations than failing to report a DUI conviction to the FAA under F.A.R. § 61.15(e), (f). For that reason, it was my decision to file a Motion to Dismiss in the case of *Administrator v. Tilak S. Ramaprakash*, NTSB Docket Number SE-15534, when the FAA had acquired the National Driver Register ("NDR") tape on my client on May 16, 1997, but did not issue a Letter of Investigation until February 6, 1998 (nearly 10 months later). While

Judge Pope declined to grant my Motion to Dismiss in *Administrator v. Ramaprakash*, Judge Mullins, in the case of *Administrator v. Shrader*, NTSB Docket Number SE-15472 granted the Motion to Dismiss based on stale complaint where the facts were virtually identical to those in *Ramaprakash*.

In *Ramaprakash,* we appealed the order of Judge Pope denying our Motion to Dismiss. In *Shrader*, the FAA appealed Judge Mullins' Motion to Dismiss based on stale complaint. When those cases were appealed to the Full Board, the Members of the NTSB affirmed Judge Pope in *Ramaprakash* by a vote of 3 to 2, and reversed Judge Mullins in *Shrader* based upon a vote of 3 to 2. Members Goglia and Hammerschmidt were the two members who voted for the pilots in these two cases. We filed Petitions for Reconsideration in both cases. Our Petition for Reconsideration in Ramaprakash was denied. I then referred the case to Mark McDermott, Esq. and Peter Wiernicke, Esq. in Washington, D.C. to pursue an appeal to the United States Court of Appeals for the District of Columbia. The basis for that decision was their success in *Andrew W. Van Dyke v. NTSB and FAA*, U.S. Ct. App. D.C., Case Number 01-1202 (April 23, 2002), in which they were successful in reversing a finding made by the NTSB that the pilot made an improper turn in a traffic pattern when the only witness to sponsor this testimony never actually saw the event occur. He merely overheard a report over the radio, and the pilot testified that after announcing his intentions, he performed a turn in a different direction. Messrs. McDermott and Wiernicke were successful in demonstrating to the District of Columbia Court of Appeals that there was *no evidence* to support the finding made by the Board. In *Shrader*, the Board elected to wait until one Member left the Board and denied the Petition for Reconsideration when the Board was deadlocked by a vote of 2 to 2, with Members Goglia and Hammerschmidt again voting on behalf of the pilot and finding that the case should have been dismissed.

In Volume 127 of Flightwatch, issued in December of 2002, we reported that Mr. Ramaprakash had filed his appeal with the United States Court of Appeals for the District of Columbia. In

Volume 138 of Flightwatch, issued in November of 2003, we reported on the fact that the District of Columbia Court of Appeals reversed the NTSB and found that the NTSB had *departed from established precedent* by failing to dismiss the charges against Mr. Ramaprakash based upon the Stale Complaint Rule. The D.C. Court of Appeals then remanded the case to the NTSB for further proceedings.

On January 30, 2004, the NTSB rendered its opinion and order in *Ramaprakash* [NTSB Order Number EA-5076] and declared as follows:

> "In our previous Opinion and Order, *Administrator v. Ramaprakash*, NTSB Order Number EA-47 (2002), we rejected Respondent's claim that the Stale Complaint Rule required that the Administrator's charges be dismissed, and upheld the law judge's decision affirming the Administrator's charges. In doing so, we relied on our decision in *Administrator v. Ikeler*, NTSB Order Number EA-4695 (1998), which determined that due diligence for purposes of applying our Stale Complaint Rule in the context of certain alleged reporting violations should be judged from the point when comparison of National Driver Register (NDR) information and the results of "NLETS" National Database Query indicated that the airman incurred an alcohol-related motor vehicle action. Thus, in the present case, we concluded that the Administrator proceeded with due diligence, since the Administrator issued a Letter of Investigation to Respondent six days after her NLETS query resulted in the discovery of a match, and, therefore, that the stale complaint motion was properly denied. In *dicta*, however, we also sought to explain why a Respondent who admittedly violated F.A.R. 61.15 (e) – a regulation that mandates self-disclosure, and which is supported by an enforcement program analogous to the Internal Revenue Service's reliance on audits to ensure full disclosure in the filing of accurate tax returns – should not, as a matter of policy, be the beneficiary of

the Stale Complaint Rule under the facts in this record. In short, we believed that it was fair and consistent with precedent that the Administrator's due diligence not be measured from the time she received arguably constructive knowledge of a reporting violation, but, rather, from the time her actual comparison of available information revealed that an airman had incurred an alcohol-related motor vehicle action.

"The Court disagreed. The Court held that we "departed from [our]… long-standing requirement of prosecutorial diligence in stale complaint cases." See *Ramaprakash v. FAA*, 346 F. 3d, 1121 (D.C. Cir. 2001). We read the Court's opinion to stand for the proposition that in F.A.R. 61.15(e) cases such as this one, the Administrator's due diligence, for purposes of a challenge under the Stale Complaint Rule shall be assessed by reference to the time when FAA personnel received NDR information which may include information about an airman that could support a conclusion that reporting requirements had not been observed. We therefore conclude that the Administrator *must* be found to have failed to meet the applicable due diligence standard in the present case, for, after receiving an NDR tape with information about Respondent on May 16, 1997, she did not issue her Letter of Investigation (as a result of an NLETS query conducted a few days beforehand, and a subsequent confirmation that Respondent had not reported the alcohol-related motor vehicle action) until February 10, 1998. Respondent's stale complaint motion, therefore, should have been granted.

The Board, in a unanimous vote, granted the appeal of Mr. Ramaprakash and dismissed the FAA's Order of Suspension. In foot

footnote 3 of its Opinion and Order, the Board acknowledged that the D.C. Court of Appeals found that the Board "improperly 'considered the nature and seriousness of [Respondent's] F.A.R. violation in determining whether the FAA had shown good cause [under the stale compliant rule' and that we should not have engaged in an 'analysis of the role that prejudice plays under the Stale Complaint Rule.' *Id.*"

The language in footnote 3 of the Board's Opinion and Order of January 30, 2004, is important. It is important because there is a distinction between *good cause* existing for delay, as opposed to a case having to go forward in the *public interest*. Unfortunately, in *Ramaprakash*, the Board confused the two concepts and said the case should go forward because of the *seriousness of the charges* without ever finding that the FAA had demonstrated good cause existed for delay. The two concepts are different, the but Board seems to have confused them, as noted by the D.C. Court of Appeals.

In summary, it now appears that the Stale Complaint Rule is alive and well, thanks to a determined pilot, a discerning U.S. Court of Appeals for the District of Columbia, and colleagues in Washington who had the patience and determination to see the matter through to a just conclusion.

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