FLIGHT-WATCH

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NINTH CIRCUIT COURT OF APPEALS DECLARES THAT FAA CANNOT USE CERTIFIED MAIL AS NOTICE OF SUSPENSION OF A CERTIFICATE IF THE FAA KNOWS THE AIRMAN IS NOT RECEIVING CERTIFIED MAIL

The case arose out of allegations that an airman had flown his aircraft at less than a safe altitude over Mount Rushmore National Memorial and Crazy Horse Mountain on September 23, 2002. Four days after the alleged event, the FAA dispatched two letters of investigation to the airman declaring the matter was under investigation. Both certified letters were returned as refused on October 18, 2004. Ten days later, the FAA sent two letters of investigation by first class mail containing the same letters of investigation. The airman the letters of investigation dispatched by first class mail and responded within ten days.

On January 2, 2003, the FAA sent a letter to the airman by first class mail declaring that it had concluded its investigation and the matter was being forwarded to the Office of the Regional Counsel.

On March 6, and again on March 10, 2003, the FAA sent Notices of Proposed Certificate Action (NOPCA) proposing to suspend, for one hundred twenty days, the airman's certificate. One NOPCA was sent by certified mail. The other NOPCA was sent by first class mail. As is customary, the NOPCA gave the airman a series of options such as surrendering his certificate, responding with an explanation in writing, requesting an informal conference, or requesting that the FAA issue an Order of Suspension in order that he could appeal to the National Transportation Safety Board (NTSB).

The FAA declared that it sent the Notices of Proposed Certificate Action both by certified and first class mail because the initial letters of investigation sent by certified mail had been "refused." Specifically, the FAA sent the NOPCAs by first class mail "in order to insure that [the airman] had actual notice that the enforcement actions had been initiated." The NOPCA sent by certified mail was returned as "unclaimed." However, within ten days of the first class mailing, the airman responded to the NOPCAs and requested that suspension orders be issued so that he could appeal directly to the NTSB.

After a record had been established that certified letters were not being received by the airman, the FAA, on March 28, 2003, sent an Order of Suspension by certified mail only. Then, again, on April 8, 2003, the FAA sent the airman a second suspension order, once again only by certified mail. Both the March 28 and April 8, 2003 Orders of Suspension gave the airman 20 days from the date of service to appeal to the NTSB.

With regard to why the FAA elected to send the Orders of Suspension only by certified mail, the FAA said, "Once [the airman] had the Notice [Proposed Suspension] in hand and had requested the issuance of the Order of Suspension (the "Order") we assumed that he would not continue to ignore certified mail. Therefore, we served the Orders in the normal manner

which is by certified mail alone." In both the Order of Suspension of March 28, and the Order of Suspension of April 8, 2003, the FAA declared that the airman had 20 days from the time of service to file an appeal with the NTSB. However, both Orders of Suspension dispatched by certified mail were returned to the FAA as "unclaimed" on April 24 and April 28, 2003. There was no evidence in the record as to why the FAA suddenly became convinced that the airman would get certified mail in April 2003 when he had failed to receive certified letters in September and October of 2002.

On May 19, 2003, the FAA sent both a certified letter and a first class letter demanding that the airman surrender his certificate. In those letters, the FAA attached the Orders of Suspension which had been dispatched by certified mail, but returned as unclaimed. On May 30, 2003, within 20 days of receiving the first class mail copies of the demand letters, the airman responded by requesting an appeal to the NTSB.

The FAA moved to dismiss the airman's appeal claiming he did not have good cause for filing his Notice of Appeal after the 20 day appeal period had expired. The airman had responded by saying that he had been out of the country for business reasons when the suspension orders were issued. While he had made arrangements to insure that he received his first class mail in his absence, he had made no such arrangements for certified mail because earlier correspondence he received from the FAA had been dispatched by first class mail. Therefore, he did not authorize any of his employees at his address of record to sign for or pick up "certified mail." Administrative Law Judge William Fowler dismissed the appeal as untimely reasoning that the FAA was statutorily authorized to give notice by certified mail alone. Judge Fowler further found that the airman should have anticipated that orders would be sent by certified mail and his lack of diligence undermined his claim of good cause. A divided panel of the NTSB agreed with Judge Fowler's reasoning and affirmed the dismissal of the airman's appeal.

The airman appealed from the decision of the NTSB to the United States Court of Appeals for the Ninth Circuit. In a remarkably cogent and brief opinion, the Ninth Circuit held:

> The FAA denied Tu (the pilot) due process by not providing him with adequate notice of the suspension orders. It thereby denied Tu the opportunity to file a timely appeal. The lack of appeal led to the suspension of his pilot's license, an essential to his business as a pilot.
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> Due process does not require the FAA to provide a pilot with actual notice before taking adverse action with respect to his or her pilot's license…Due process, however, does require notice reasonably calculated, under all the circumstances, to provide a pilot notice of an adverse action related to his or her pilot's license, thereby, affording the pilot an opportunity to present objections or appeal…
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> Certified mail has been deemed constitutionally sufficient notice where "it was reasonably calculated to reach the intended recipient *when sent*…Accordingly, the "government [must] consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to produce notice in the ordinary case."…In addition, where mailed notice is returned unclaimed, the government must take additional steps to insure notice, if it is practicable to do so….

As authority for its decision, the United States Court of Appeals for the Ninth Circuit referenced the United States Supreme Court decision of *Jones v. Flowers*, 126 S.Ct. 1708 (2006). In that case, the Arkansas Commissioner of State Lands attempted on two occasions to give notice to the landowner by certified mail that the landowner's home would be sold if delinquent taxes were not paid. Both certified letters were returned "unclaimed." A few weeks before the tax foreclosure sale, the Commissioner published a notice of public sale in the *Arkansas Democrat Gazette*. The home owned by Mr. Jones with a value of $80,000.00 was sold to Linda Flowers for $21,042.15. Upon learning of the sale, Mr. Jones filed a lawsuit in the Arkansas State Court claiming that the Commissioner and Flowers had taken his property without due process of law by failing to provide adequate notice of the tax sale. The trial court granted a motion for summary judgment of the Commissioner and Ms. Flowers. The Arkansas Supreme Court affirmed holding that under the circumstances, certified mail was constitutionally adequate notice. However, the United States Supreme Court reversed, holding "that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to

provide notice to the property owner before selling his property, if it is practicable to do so." *Jones*, 126 S.Ct. at 1713.

Based upon the principles decided in *Jones v. Flowers*, the Ninth Circuit Court of Appeals concluded that the FAA provided constitutionally defective notice in the case against Mr. Tu. The Ninth Circuit reasoned that the March 22 and April 8, 2003 suspension orders sent by certified mail were not "reasonably calculated to reach the intended recipient *when sent*." (Citing *Jones v. Flowers*). The Ninth Circuit Court of Appeals, in elaborating on why the FAA's notice was constitutionally defective made the following holding:

> The FAA knew certified mail sent to Tu had previously been returned on two separate occasions as "refused" or "unclaimed." What is more, knowing that certified mail was ineffective to reach Tu, the FAA had sent correspondence leading up to the suspension order by first class mail. First class mail worked. Tu responded in a timely manner. Nevertheless, the FAA sent orders suspending Tu's license – triggering the 20-day appeal deadline – by certified mail alone. Unsurprisingly, these orders sent by certified mail were returned to the FAA as unclaimed.
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> Moreover, when one suspension order was returned unclaimed and the receipt for the other suspension order was not returned, the FAA failed to take additional reasonable steps to notify Tu of the suspension orders. Specifically, the FAA failed to mail the suspension orders by first class mail.
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> That the FAA reverted to sending Tu letters demanding the surrender of his pilot's license by both certified and first class mail – only after his suspension became unappealable – shows that it would have been practicable to send the suspension orders by first class mail in the first instance. It also shows that when the FAA actually desired to inform Tu it did so by first class mail. A reasonable agency actually desirous of notifying an individual of his right to be heard would not resort to a "mechanical adherence" to the minimum form of notice authorized by regulation in the very instance when timely notice is most crucial. *Dobrata v. INS*, 311 Fed.3d 1206, 1213 (9th Cir. 2002).
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> Under the circumstances of this case, we hold the FAA denied Tu due process when it failed to provide adequate notice of the suspension of Tu's pilot's license, thereby, denying Tu the opportunity to appeal. Accordingly, Tu's petition is GRANTED.

Mr. Tu was represented by C. Edward Adams, Esq. of Adams and Peterson, LLC, Gig Harbor, Washington. James A. Barry, Esq. appeared on behalf of the United States Department of Transportation, Office of General Counsel, Washington, D.C.; and Ronald S. Battacchi appeared on behalf of the Federal Aviation Administration, Office of Chief Counsel, Washington, D.C. The Ninth Circuit opinion was written by Judge Carlos T. Bea, and we at *Flightwatch* learned of this case from Mark T. McDermott, Esq. who practices in Washington, D.C.

Chin Yi Tu v. National Transportation Safety Board, NTSB Administrative Law Judge William E. Fowler, Jr.; Administrator, Federal Aviation Administration Marion C. Blakey, United States Court of Appeals for the Ninth Circuit, Case No. 04-76454 (Dec. 14, 2006).

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Alan piloting the Kate during the Greater Georgia Air Show—10/15/06

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