

SERVED: November 2, 2009

NTSB Order No. EA-5487

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 29th day of October, 2009

<hr/>)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18585
v.)	
)	
WALTER CRAIG GALLAWAY,)	
)	
Respondent.)	
)	
<hr/>)	

OPINION AND ORDER

Respondent appeals the written decision of Chief Administrative Law Judge William E. Fowler, Jr., served in this proceeding on July 7, 2009.¹ By that decision, the law judge

¹ A copy of the law judge's order is attached.

granted the Administrator's motion to dismiss respondent's appeal as untimely.² We deny respondent's appeal.

The Administrator issued an emergency revocation order on April 15, 2009,³ which the record indicates was served on respondent via certified and regular mail,⁴ as well as by hand delivery and express mail. The Administrator's order included a recitation of appeal rights, which informed respondent that he could appeal the order within 10 days of the date that the Administrator served the order, and provided contact information for the National Transportation Safety Board's Office of Administrative Law Judges. Given this 10-day deadline, respondent's appeal was due no later than April 27, 2009, under 49 C.F.R. § 821.10; respondent, however, submitted an appeal and

² The Administrator's emergency order sought revocation of respondent's private pilot certificate, based on alleged violations of 14 C.F.R. §§ 61.23(a)(3)(i), which requires a person exercising the privileges of a private pilot certificate to hold a third-class medical certificate, and 91.13(a), which prohibits operation of an aircraft in a careless or reckless manner, so as to endanger another.

³ This case initially proceeded pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52–821.57.

⁴ In conjunction with the Administrator's motion to dismiss, the Administrator's counsel provided a photocopy of a "Track & Confirm" record from the United States Postal Service, which indicates that "W. Galloway" [sic] signed for the order on April 17, 2009. Mot. to Dismiss at Exh. 1. Respondent does not dispute that the Administrator sent the order via certified and regular mail.

motion to file out of time on May 5, 2009. On May 7, 2009, respondent waived the applicability of emergency procedures.⁵ On May 15, 2009, the Administrator filed an opposition to respondent's motion and a cross-motion to dismiss respondent's appeal as untimely. The law judge determined that respondent had not established good cause for his delay, and granted the Administrator's motion.

Respondent now appeals the law judge's order, and argues that good cause existed to excuse his delay. In particular, respondent contends that, when he received the Administrator's order, he contacted an attorney who agreed to represent him. Respondent asserts, however, that the attorney needed emergency surgery and was hospitalized, which necessitated him finding a new attorney to represent him. Respondent contends that his original attorney's inability to represent him constitutes good cause for his delay in filing his notice of appeal, and requests that we consider the principles of equity, rather than our case law and Rules of Practice, in determining whether his attorney's hospitalization constituted good cause. The Administrator opposes respondent's arguments, and urges us to affirm the law judge's decision.

⁵ We note that such a waiver does not obviate the filing deadlines in effect prior to the waiver. See, e.g., Administrator v. Myers, 5 NTSB 997, 998 (1986) (noting that such a waiver must be filed before the expiration of the 10-day period in which to file an appeal in an emergency case).

The Board has long held that it will not entertain untimely appeals without a showing of good cause for the delay.⁶ The Board strictly adheres to this standard of timeliness, and the requirement for a showing of good cause in cases of untimely appeals.⁷ Moreover, the Board considers timeliness in emergency cases to be paramount, given the expedited timeline applicable to emergency orders that Congress has prescribed by statute.⁸ Overall, a respondent must establish good cause for his or her delay in submitting an appeal.⁹

In the case at hand, respondent's assertion that his original attorney's inability to represent him constitutes good

⁶ See, e.g., Administrator v. Near, 5 NTSB 994 (1986); see also 49 C.F.R. 821.11(a) (stating that the Board may grant an extension of time to file any document upon a showing of good cause).

⁷ Administrator v. Hooper, 6 NTSB 559, 560 (1988), on remand from Hooper v. Nat'l Transp. Safety Bd., 841 F.2d 1150 (D.C. Cir. 1988).

⁸ See, e.g., Administrator v. Mallory, NTSB Order No. EA-5350 at 9-10 (2008) (citing Air East v. NTSB, 512 F.2d 1227, 1231 (3d Cir. 1975), and discussing importance of deadlines in emergency cases); see also 49 U.S.C. § 44709(e)(4) (requiring that the Board decide appeals of emergency orders within 60 days). While we acknowledge respondent subsequently waived the applicability of emergency procedures to this case, we note that the case originally proceeded as an emergency.

⁹ The Board has previously refused to adopt the more lenient standard of "excusable neglect" in cases of untimely appeals. See, e.g., Administrator v. TPI International Airways, Inc., NTSB Order No. EA-3931 (1993) (denying respondent's petition for reconsideration, which urged the Board to adopt standard of excusable neglect).

cause for his delay is not persuasive. First, the record for this case indicates that respondent contacted and retained his current counsel on April 28, 2009; however, respondent's counsel did not submit his appeal until May 5, 2009. In this regard, respondent did not provide any evidence, such as affidavits or other records, to support his statement that his original attorney had been hospitalized and was unable to represent him. Moreover, the Board has previously emphasized that a notice of appeal need not contain arguments or any text beyond a few lines to indicate that a party is appealing.¹⁰ Based on this record, we find that respondent has not established good cause.

To the extent that respondent requests that we consider his arguments in the context of equity, we remind respondent that, as we stated in Hooper, supra note 7, we uniformly adhere to a policy requiring dismissal of late-filed appeals. As such, we will not alter our good cause standard in order to suit certain circumstances. Overall, respondent has neither provided us with a basis to depart from our good cause standard, nor established good cause for his untimely appeal.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above opinion and order.

¹⁰ Administrator v. Nix, NTSB Order No. EA-5435 at 2 (2009).

Served: July 7, 2009

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

J. RANDOLPH BABBITT,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-18585

WALTER CRAIG GALLAWAY,

Respondent.

ORDER DISMISSING RESPONDENT’S APPEAL AS UNTIMELY-FILED

Served: Charles W. Arnold, Esq.
Suite 303
401 West Main Street
Lexington, Kentucky 40507

(BY CERTIFIED MAIL AND FAX)

Robert Spitzer, Esq
Federal Aviation Administration
Eastern Region
1 Aviation Plaza
Jamaica, New York 11434

(BY FAX)

In an order issued on April 15, 2009, the Administrator of the Federal Aviation Administration (“FAA”) revoked respondent’s private pilot certificate on an emergency basis, for alleged violations of §§ 61.23(a)(3)(i) and 91.13(a) of the Federal Aviation Regulations (“FAR,” codified at 14 C.F.R.). Thereafter, on May 5, 2009, respondent, through counsel, transmitted to this office by fax both an appeal from that order and a “Motion to File Out of Time.”¹ Counsel for the Administrator later submitted a combined opposition to respondent’s motion and cross-motion to dismiss his appeal as untimely-filed on May 15, 2009. No further submissions relating to the timeliness of respondent’s appeal have since been received from the parties,² and consideration of those motions will, there-

¹ Thereafter, on May 7, 2009, respondent waived the applicability of the Board’s rules governing emergency proceedings in this matter.

² Under Rule 14(c) of the Board’s Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.14(c)), respondent was permitted to file a reply to the Administrator’s cross-motion. He has, however, apparently elected not to do so, and to rely exclusively on the arguments he made in his May 5 motion for acceptance of his belatedly-submitted appeal.

fore, now be undertaken. Having thoroughly reviewed the aforesaid filings and the record in this proceeding as a whole, the undersigned will, for the reasons set forth below, deny respondent's motion, grant the Administrator's motion, and terminate this proceeding due to respondent's failure to submit his appeal on a timely basis.

Under Rule 53(a) of the Board's Rules of Practice (codified at 49 C.F.R. § 821.53(a)), "an appeal from an emergency or other immediately effective order of the Administrator must be filed [with the Board] within 10 days after the date on which the Administrator's order was served on the [certificate holder]."³ Where an appeal is filed beyond that 10-day time limit, it must be dismissed unless the certificate holder in question establishes good cause for the delay in its submission.⁴

In this case, the Administrator's emergency order of revocation was transmitted to respondent, at Post Office Box 3168, Wheeling, West Virginia 26003, which is his address of record on file with the FAA,⁵ by hand delivery, Express Mail, certified mail and regular mail on April 15, 2009.⁶ The order included a recitation of appeal rights, which instructed respondent that:

You may appeal from this Emergency Order within ten (10) days from the date of its service, which is APR 15 2009 [stamped], by filing a Notice of Appeal with the Office of Administrative Law Judges; National Transportation Safety Board; Room 4704; 490 L'Enfant Plaza East, SW; Washington, DC 20594 (telephone (202) 314-6150). The National Transportation Safety Board's (NTSB's) Rules of Practice in Air Safety Proceedings, 49 C.F.R. part 821, subpart I apply to appeals of Emergency and Other Immediately Effective Orders.⁷

The Board has previously held that, where the Administrator transmits a certificate order by certified or registered mail, the date of service of the order is the date on which it was *mailed* to the certificate holder. *Administrator v. Corrigan*, NTSB Order EA-4806 (1999). Since the Administrator's order in this matter was transmitted to respondent by multiple means, including certified mail, on April 15, 2009, it must be deemed to have been served on him on that date. Accordingly, respondent's Rule 53(a) appeal period ended on April 27, 2009.⁸ Because respondent did not file his appeal in this matter until

³ Rule 52(d) of the Board's Rules (codified at 49 C.F.R. § 821.52(d)) provides that, if a certificate holder waives the applicability of the Board's emergency rules, "such a waiver shall not serve to lengthen any period of time for doing an act prescribed by [the emergency rules] which expired before the date on which the waiver was made."

⁴ In this regard, see Rule 11(a) of the Board's Rules (codified at 49 C.F.R. § 821.11(a)), and *Administrator v. Hooper*, 6 NTSB 559, 560 (1988), on remand from *Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150 (D.C. Cir. 1988).

⁵ See Ex. 3 attached to Administrator's Motion to Dismiss and Reply to Respondent's Motion to File Out of Time (hereinafter "Administrator's Motion and Reply").

⁶ Administrator's Order at 1.

⁷ *Id.* at 5.

⁸ April 25, 2009, which was the tenth day following service of the Administrator's emergency order of revocation on respondent, fell on a Saturday. Therefore, his deadline for filing an

May 5, 2009, he failed to meet that deadline. Therefore, as has been noted above, in order to avoid dismissal of his appeal, respondent must establish good cause for the delay in its submission.

In his “Motion to File Out of Time,” respondent relates that “[s]hortly after [he] received” the Administrator’s order, he contacted Layden C. Sadecky, Esq., to represent him in this matter; that “after [respondent] contacted Mr. Sadecky, Mr. Sadecky was hospitalized for surgery and, therefore, was unable to represent [him];” that respondent then contacted the attorney who is currently representing him in this matter on April 28, 2009, “and informed him of the pending order and explained that Mr. Sadecky had been hospitalized and would be unable to represent him in this matter;” and that “but for Mr. Sadecky’s hospitalization, [respondent] would have filed his notice of appeal within the time provided in [§] 821.53(a).”⁹ On that basis, respondent maintains that he had good cause for the delay in the submission of his appeal, since he had, “in a timely manner, retained counsel to file his appeal, and reasonably believed that the appeal would be filed by [said] counsel within the required ten day period. It was only the unexpected illness and hospitalization of [Mr. Sadecky] that caused the appeal not to be filed.”¹⁰ In addition, respondent asserts that the Administrator was not prejudiced by the delay in the submission of his appeal.¹¹

The Administrator’s May 15 responsive filing includes a copy of a United States Postal Service tracking document for the copy of the order that was transmitted to respondent by Express Mail, which indicates that it “was delivered at 2:37 PM on April 17, 2009,” and “was signed for by W GALLOWAY.”¹²

It is the view of the undersigned that good cause generally requires a showing that circumstances beyond the certificate holder’s control prevented the certificate holder from either knowing of the Administrator’s order or acting upon it within the prescribed time limit for filing an appeal, despite the exercise of due diligence. Here, respondent — by virtue of the April 17, 2009 delivery of the copy of the order that had been sent to him by Express Mail — was clearly aware of the issuance of the order prior to the expiration of his appeal period on April 27, 2009. In urging that his May 5 appeal not be dismissed as untimely, respondent indicates that the attorney he initially engaged to file an appeal on his behalf unexpectedly became ill and required hospitalization before doing so, and that he did not retain substitute counsel until April 28, 2009, which was one day after his appeal period

appeal from that order extended to the next day that was not a Saturday, Sunday or Federal holiday, which was Monday, April 27, 2009. See Rule 10 of the Board’s Rules (codified at 49 C.F.R. § 821.10).

⁹ Respondent’s Motion to File Out of Time at 1-2.

¹⁰ *Id.* at 2-3. Respondent also suggests that believed that he needed an attorney to file an appeal on his behalf because “portions of the emergency order were not correct.” *Id.* at 2.

¹¹ *Id.* at 2.

¹² Ex. 1 attached to Administrator’s Motion and Reply. In the motion and reply, the Administrator notes that the certified mailed copy of the order was returned by the Post Office to the Regional Counsel’s Office from which it was transmitted as unclaimed (see Administrator’s Motion and Reply ¶ 4 and Ex. 2 attached thereto), and that the copy of that order which sent to respondent by regular mail was not returned to that office (Administrator’s Motion and Reply ¶ 5).

expired. However, respondent does not note when he first became aware of his original counsel's situation, nor does he explain why he did not contact this office to recount what had happened and inquire as to what alternatives might be available to him (such as filing an appeal *pro se* or requesting an extension of time for submitting an appeal) before his appeal period expired.¹³ Moreover, even taking into account the inability of respondent's original counsel to act on his behalf together with any reluctance he may have had to initiate an appeal on his own without the benefit of counsel, the submission of an appeal a full seven days after substitute counsel was obtained, when respondent's appeal period had already expired prior to the retention of such new counsel, is indicative of a lack of due diligence. As a result, the undersigned must conclude that respondent did not have good cause for the belated submission of his appeal in this matter on May 5, and that the Administrator's motion to dismiss that appeal must, therefore, be granted.¹⁴

¹³ In this regard, see *Administrator v. Morgan*, NTSB Order EA-5027 (2003), where the Board opined (at 2), in response to an explanation that the respondent's counsel's untimely submission of the appeal was due to a "last minute necessity" that had arisen in another case on which said attorney was working, that (emphasis added):

We do not see this circumstance as preventing or precluding either the timely filing of the required notice, *which need not be more than a line or two long*, or a timely telephonic request of the Board for an extension of time to prepare and file such a pro forma document.

Cf. Administrator v. Slay and Knowles, NTSB Order EA-3956 (1993); *Administrator v. Dirksen*, NTSB Order EA-4699 (1998) (counsel's miscalculation of a filing deadline does not provide good cause for the late filing).

¹⁴ Respondent's citation, in his motion, to *Yi Tu v. Nat'l Transp. Safety Bd.*, 470 F.3d 941 (9th Cir. 2006), is inapposite here. There, the Court of Appeals for the Ninth Circuit determined that the Administrator's service of two orders affecting an airman's pilot certificate was deficient, and thus deprived him of due process, because those orders were transmitted to him exclusively by certified mail, and the Administrator was aware that prior certified mailings to him relating to the matters that gave rise to those certificate actions had been returned undelivered, but that he had consistently responded both to simultaneous or followup first-class mailings of those communications and other mailings that had been made to him solely by means of first-class mail. Here, unlike in *Yi Tu*, respondent was not served with the Administrator's revocation order solely by a means that had previously proven to be unsuccessful, and he actually received a copy of the Administrator's order well in advance of the expiration of his appeal period. Also — unlike the aggrieved owner of realty that was subject to a tax delinquency public sale, and who had moved from the property in question prior to the transmission of the state's original delinquency notice (which was returned unclaimed, as were subsequent mailings to him at that address pertaining to the delinquency) in *Jones v. Flowers*, 547 U.S. 220, 126 S.Ct. 1708 (2006) — respondent here was not served at an address which the Administrator had reason to believe was old or incorrect. Thus, there is no basis for a finding in this case that the Administrator served respondent with the order of revocation on April 15, 2009 in a manner that deprived him of due process under *Jones* and *Yi Tu*.

THEREFORE, IT IS ORDERED that respondent's motion for acceptance of his late-filed appeal is DENIED;

IT IS FURTHER ORDERED that the Administrator's motion to dismiss respondent's appeal for lack of timeliness is GRANTED; and

IT IS FURTHER ORDERED that this proceeding is hereby TERMINATED.

Entered this 7th day of July, 2009, at Washington, D.C.

William E. Fowler, Jr.
Chief Administrative Law Judge

APPEAL (DISPOSITIONAL ORDER)

Any party to this proceeding may appeal this order by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this order). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this order. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080
FAX: (202) 314-6090

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.