

SERVED: August 28, 2013

NTSB Order No. EA-5676

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 27th day of August, 2013

_____	)	
MICHAEL P. HUERTA,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket NA-110
v.	)	
	)	
MARK HARRIS,	)	
	)	
Respondent.	)	
	)	
_____	)	

**OPINION AND ORDER**

**1. Background**

Respondent, who proceeds *pro se*, appeals the written order of Chief Administrative Law Judge Alfonso J. Montañó, issued November 19, 2012.<sup>1</sup> By that order, the law judge determined the Board lacked jurisdiction to entertain respondent’s appeal because the record failed to demonstrate the Administrator took formal action to deny respondent’s application for a medical certificate. We deny respondent’s appeal.

<sup>1</sup> A copy of the law judge’s order is attached.

*A. Facts*

Respondent applied for a medical certificate on January 22, 2010. By letter dated May 5, 2010, Dr. William Mills, designee for the Manager, Aerospace Medical Certification Division, determined respondent did not meet the required medical standards under 14 C.F.R.

§§ 67.107(b)(3), 67.207(b)(3) and 67.307(b)(3).<sup>2</sup> On July 14, 2010, Dr. Stephen H. Goodman, Senior Regional Flight Surgeon, Western Pacific Regional Medical Office, affirmed respondent did not fulfill the required medical standards. Nothing in the record indicates respondent sought further reconsideration or appealed this determination.

The Administrator issued respondent an authorization for special issuance of a medical certificate on October 13, 2010. Subsequently, by letter dated August 28, 2012, Sandy Clymer, designee for the Manager, Aerospace Medical Certification Division, sought information from respondent to determine respondent's continued qualification for the special issuance.

Ms. Clymer specifically noted the letter did not serve as a denial of respondent's application for a medical certificate. She informed respondent if he failed to provide the requested medical information within 30 days, the Administrator would deny his application.

On October 24, 2012, respondent filed a petition for review captioned "Emergency Appeal for Hearing before the Administrative Law Judge." The law judge issued an Order Not Accepting Petition For Lack Of Jurisdiction on November 19, 2012. Respondent filed a notice of appeal with a supporting brief on November 23, 2012. However, respondent only sought review of the May 5, 2010 determination that he did not meet the required medical standards.

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<sup>2</sup> Sections 67.107(b)(3), 67.207(b)(3), and 67.307(b)(3) prohibit an airman from having any history of substance abuse that makes or reasonably may be expected to make the person unable to perform safely the duties or exercise the privileges of an airman certificate.

Respondent made no mention of the November 19, 2012 order in his notice of appeal.<sup>3</sup>

On November 28, 2012, the Administrator withdrew respondent's special issuance pursuant to 14 C.F.R. § 67.401(f)(4)<sup>4</sup>.

*B. Law Judge's Written Decision*

In the November 19, 2012 Order, the law judge found he lacked jurisdiction to review the Administrator's decisions concerning both the regular medical certificate and the special issuance. The law judge's order quoted extensively from Ms. Clymer's August 28, 2012 letter to establish respondent had not received a final denial of any certificate. Citing 49 U.S.C. § 44703(d)<sup>5</sup>, the law judge determined absent a final denial, "the Board is wholly without jurisdiction to consider whether [respondent] is entitled to an unrestricted medical certificate."<sup>6</sup> The law judge advised respondent the non-acceptance was "without prejudice to any future petition that may be submitted by [respondent] *for review of a final denial of unrestricted medical certification by the FAA.*"<sup>7</sup>

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<sup>3</sup> Respondent filed a supplemental brief, dated December 17, 2012, and a response to the Administrator's Reply Brief, dated February 20, 2013. The Board's Rules of Practice do not permit a party to file supplemental briefs or responses to a reply brief. See 49 C.F.R. § 821.48(d). Therefore, we did not consider respondent's additional briefs.

<sup>4</sup> Section 67.401(f)(4) provides that a special issuance "may be withdrawn, at the discretion of the Federal Air Surgeon, at any time if...The holder fails to provide medical information reasonably needed by the Federal Air Surgeon for certification under this section."

<sup>5</sup> 49 U.S.C. section 44703(d) states, "[a]n individual whose application for the issuance or renewal of an airman certificate has been *denied* may appeal the denial to the National Transportation Safety Board" (emphasis added).

<sup>6</sup> Order at 2.

<sup>7</sup> Order at 3 (emphasis in original).

### *C. Issues on Appeal*

Respondent expressly appeals the Administrator's determinations concerning his 2010 medical certification application and the subsequent special issuance. Although not expressly raised in his appeal, respondent also impliedly seeks review of the law judge's November 19, 2012 order not accepting jurisdiction.

### **2. Decision**

On appeal, we review the law judge's decision *de novo*, as our precedent requires.<sup>8</sup> Under 49 U.S.C. § 44703, this Board has jurisdiction to review petitions regarding the Administrator's final denial of an application for an airman certificate.

#### *A. 2010 Medical Certificate Application*

With regard to the 2010 medical certificate application, we find the record before us does not demonstrate the Administrator issued a final denial. Under 14 C.F.R. § 67.409(b)(3), a finding that an applicant for a medical certificate does not meet the standards of 14 C.F.R. § 67.107(b)(3) does not constitute a final denial by the Administrator.<sup>9</sup> The May 5, 2010 letter unequivocally indicates the Administrator determined respondent was not eligible for a medical certificate based on 14 C.F.R. § 67.107(b)(3). Therefore, the Administrator's denial was not a final action, subject to appeal. Even if the Administrator had issued a final denial of the

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<sup>8</sup> Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

<sup>9</sup> A denial by a regional flight surgeon or the manager of the Aeromedical Certification Division would be considered a denial by the Administrator, except in instances where the applicant for the certificate "does not meet the standards of §§ 67.107(b)(3) and (c), 67.109(b), or 67.113(b) and (c); 67.207(b)(3) and (c), 67.209(b), or 67.213(b) and (c); or 67.307(b)(3) and (c), 67.309(b), or 67.313(b) and (c)." 14 CFR § 67.409(b)(3); see also Petition of Irwin, NTSB Order No. EA-5148 (2005).

2010 application, we still would not accept respondent's appeal, because he failed to appeal the Administrator's 2010 determination in a timely manner.

*B. Special Issuance*

Respondent also argues we should review the Administrator's decision regarding the special issuance medical certificate. We lack jurisdiction to review such determinations by the Administrator. While 49 U.S.C. § 44703 authorizes the Board to review the final denial of an airman certificate, the decision whether to grant a special issuance medical certificate under 14 C.F.R. § 67.401 is within the Administrator's discretion and, thus, not subject to Board review.<sup>10</sup>

*C. Order Not Accepting Jurisdiction*

The authority Congress granted in 49 U.S.C. § 44703(d) clearly indicates the Board only has jurisdiction once the Administrator has issued a *final* denial of a medical certificate which is not a special issuance. Absent such a denial, the Board lacks jurisdiction to review decisions related to airman certificates. Previous Board cases also clearly establish the Administrator or Federal Air Surgeon must articulate the denial, rather than an aviation medical examiner. As noted above, in some instances, even a denial by a regional flight surgeon or the manager of the Aeromedical Certification Division is not considered a denial by the Administrator.

At the time respondent filed his petition for review, the Administrator had not denied his medical certificate application. Indeed, Ms. Clymer's August 28, 2012 letter explicitly informed respondent "your medical certification has not been denied." Based on the lack of a final denial at the time of respondent's petition, the law judge's decision was proper. Assuming *arguendo*

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<sup>10</sup> Petition of Bartel, NTSB Order No. EA-5622 (2012) (citing Petition of Reder, NTSB Order No. EA-4438 at 4 (1996)).

we were to consider the Administrator's November 28, 2012 withdrawal of respondent's special issuance, which was sent to respondent just days after the law judge's order, as discussed above, the Board lacks jurisdiction to review the Administrator's decisions to grant or deny a special issuance under 49 C.F.R. § 67.401.

*D. Frauds, conspiracies, and criminal acts*

Respondent has alleged numerous frauds, conspiracies and other criminal acts purportedly committed by various FAA employees. The Board is not a criminal court, and is wholly without jurisdiction to consider such allegations. Therefore, we decline to consider these arguments.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The law judge's decision is affirmed.

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

Served: November 19, 2012

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

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Petition of

MARK HARRIS

for review of the denial by the  
Administrator of the Federal Aviation  
Administration of the issuance of  
an airman medical certificate.

Docket NA-110

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**ORDER NOT ACCEPTING PETITION  
FOR LACK OF JURISDICTION**

Served: Mark Harris  
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*(BY CERTIFIED MAIL)*

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*(BY FAX)*

On October 24, 2012, petitioner transmitted to this office an "Emergency Appeal for Hearing Before the Administrative Law Judge," in which he requests that the Board direct the Federal Aviation Administration ("FAA") to issue him an airman medical certificate. In that request, he indicates that he has been denied medical certification and/or had such certification revoked by the FAA based on a history of alcohol abuse, alcohol dependence and/or alcohol-related motor vehicle action(s), which he denies. Petitioner has, in connection with his request, provided copies of a series of letters from FAA officials, dated May 5 and July 14, 2010, and August 28, 2012, which pertain to the issue of his pursuit of medical certification. In the August 28, 2012 letter — which is the only one with respect to which his October 24, 2012 submission may be deemed a timely-filed petition for review under Rule 24(a) of the Board's Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.24(a)) — petitioner was informed by the Manager of the FAA's Aerospace Medical Certification Division that (emphasis original):

This will acknowledge receipt of your most recent application, and correspondence from Dr. Charles. R. Harper notifying us that he has withdrawn his sponsorship due to a conflict of interest.

We appreciate the information provided, and regret it is insufficient to enable us to complete our evaluation of your eligibility for airman medical certification.

Please note that your medical certification has not been denied; however, if no reply is received within 30 days from the date of this letter, we will have no alternative except to deny your application in accordance with Title 14 of the Code of Federal Regulations (CFRs), section 67.413 [which provides that, when the FAA finds that additional medical information or history is necessary to determine whether an applicant meets the medical standards to hold an airman medical certificate, the applicant must furnish such information to the FAA or authorize the release of that information from medical professionals, and that, if the applicant fails to do so, the FAA may deny his or her application].

It is your responsibility to provide the medical data necessary to determine [your] eligibility for medical certification. No consideration can be given for issuance until all requested information is received in its entirety.

\* \* \*

Due to your history of alcohol dependence, for further second-class medical certification consideration, you must provide the following for the Aerospace Medical Certification Division's review:

1. A current psychiatric evaluation from Dr. Michael Haberman or his designee, in accordance with your Authorization of Special Issuance dated October 13, 2012 (copy enclosed).
2. You will need to engage with a different HIMS Independent Medical Sponsor and have him/her submit a narrative agreeing to become your sponsor and to the conditions as set forth in your current authorization letter. You can find a listing of HIMS Independent Medical Sponsors near you at website <http://www.faa.gov/pilots/amelocator>.

\* \* \*

**Following receipt and review of the above information, we will notify you whether additional information is required.**

Petitioner states that he "found this absurd, could not afford to pay for an evaluation, and did not find it possible to jump through hoops to satisfy these absurd requirements [and] opted to let the FAA revoke his medical certificate and appeal to the National Transportation Safety Board."<sup>1</sup>

Under 49 U.S.C. § 44703(d), "an individual whose application for the issuance or renewal of an airman certificate *has been denied*" by the Administrator of the FAA may seek review of that determination by the Board (emphasis added). Here, the record fails to reflect that the FAA has taken formal action to deny petitioner's current medical certificate application, and the Board is wholly without jurisdiction to consider whether he is entitled to an unrestricted medical certificate in the absence of an administratively final

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<sup>1</sup> Petitioner's Petition ¶ 46.

certificate denial action by the FAA.<sup>2</sup> Accordingly, petitioner's petition cannot be accepted. It should, however, be noted that such non-acceptance of the petition herein is without prejudice to any future petition that may be submitted by petitioner *for review of a final denial of unrestricted medical certification* by the FAA.

THEREFORE, IT IS ORDERED that petitioner's petition for review of a denial of medical certification by the Federal Aviation Administration is NOT ACCEPTED for lack of jurisdiction, and that this proceeding is hereby TERMINATED.

Entered this 19th day of November, 2012, at Washington, D.C.

  
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Alfonso J. Montaña  
Chief Administrative Law Judge

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<sup>2</sup> There is also no evidence that the FAA Administrator has revoked any current (*i.e.*, non-expired) medical certificate held by petitioner, although it appears from the Aerospace Medical Certification Division Manager's August 28, 2012 letter that he once held a special issuance (restricted) medical certificate and petitioner's petition (at ¶ 35) suggests that he held a special issuance certificate at one time. Petitioner is hereby apprised that the grant or denial of special issuance status is a matter that is wholly within the discretion of the FAA, and that the Board has no authority whatsoever to review a special issuance denial. In this regard, *see, e.g., Petition of Doe*, 5 NTSB 41, 43 (1985); *Petition of Sleeter*, 5 NTSB 686, 688-89 (1985); *Petition of Reder*, NTSB Order EA-4438 at 4 (1996).

## **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.**