

SERVED: February 8, 2007

NTSB Order No. EA-5267

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 7th day of February, 2007

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MARION C. BLAKEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17906
v.)	
)	
JACK W. KASPER,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the written decision of Administrative Law Judge Patrick G. Geraghty, served in this emergency revocation proceeding on January 5, 2007.¹ By that decision, the law judge dismissed respondent's appeal to the Board of the Administrator's emergency revocation order as untimely.² In the

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

² The Administrator's emergency order revoked respondent's airline transport pilot certificate, and any other airman certificates he holds, for numerous alleged FAR violations associated with his operation and/or exercise of operational

case of untimely appeals, it is incumbent upon airmen to demonstrate good cause for such tardiness to avoid mandatory dismissal. Because we conclude that respondent has not demonstrated good cause, we deny the appeal.³

The Administrator served her emergency order of revocation on October 24, 2006, by sending copies by regular and certified mail to the current address in respondent's official airman records.⁴ The Postal Service delivered three notices to respondent's address of record informing him he had a certified letter to pick up. The notices were delivered on October 26, November 6, and November 11, 2006. Respondent did not claim the certified letter, and the Postal Service delivered the certified letter to the FAA as "unclaimed" on November 20, 2006. The regular mail was not returned as undeliverable. The Administrator also sent two additional letters to respondent, requesting that he surrender his certificate in accordance with the emergency revocation order, on November 14 and December 4, 2006. These letters were both sent by regular and certified mail to respondent's address. The Postal Service delivered the

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control of two turbo jet aircraft in unauthorized commercial operations and/or when the aircraft were not airworthy. A copy of the Administrator's emergency order of revocation is attached.

³ The Administrator filed a reply brief urging us to affirm the law judge's decision.

⁴ The Administrator also sent a copy on the same date by Federal Express, and Federal Express tracking records indicate that the envelope was "left at front door ... release authorized" on October 25, 2006.

certified November 14 letter to the FAA as "unclaimed" on December 8, 2006, after notices delivered to respondent by the Postal Service on November 16, November 18, and December 1, 2006, went unanswered. The record does not reflect the ultimate status of the Postal Service's attempts to deliver the certified December 4 letter, but the record indicates that the Postal Service left notice on December 6 at respondent's address that he had a certified letter to claim, and, as of December 21, 2006, the certified mail had not been claimed. The Administrator's letters of November 14 and December 4, 2006, sent by regular mail, were not returned as undeliverable.

On December 7, 2006, respondent sent by the Postal Service's Priority Mail a letter (dated December 6, 2006) construed as respondent's notice of appeal of the Administrator's emergency order of revocation.⁵ Respondent's December 7, 2006 notice of appeal states, in pertinent part, respondent's explanation of the "circumstances which did not allow me to reply to [the Administrator's] allegations in the required time frame," to wit:

In a previous certificate action of the FAA against my A&P and IA, they required me to be retested for qualification of the certificates. I have been in California for the last 40 days and have accomplished successful retesting. Upon returning to home, I retrieved my mail from the US Post Office. Included in my mail was the new proposed action against my ATP rating. I have replied to their allegations in denial.⁶

⁵ Respondent's notice of appeal was actually received in the Board's Office of Administrative Law Judges on December 11, 2006.

⁶ Respondent's notice of appeal was also construed by the Board's

Enclosed with respondent's December 7, 2006 notice of appeal was a copy of a letter to the Administrator's counsel dated December 5, 2006, construed as respondent's answer, denying the substantive allegations in the Administrator's complaint. Respondent's December 5, 2006 answer also states that, "I am in receipt of your letter dated 10/24/2006. I have been in California until this date taking care of a FAA mandated retake of my A&P and IA."

On December 21, 2006, the Administrator filed a motion to dismiss respondent's late-filed appeal.⁷ On December 29, 2006, the law judge issued an order directing respondent "to respond to [the Administrator's motion to dismiss] by facsimile and by overnight service, no later than close of business on January 3, 2007; otherwise, the pending Motion to Dismiss will be granted." That correspondence was delivered to respondent's address on January 3, 2007.⁸ On January 5, 2007, noting that respondent had

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Office of Administrative Law Judges to be a petition under 49 U.S.C. § 44709(e)(3) for review of the Administrator's determination of an emergency with respect to her revocation order. The Administrator filed an opposition to respondent's emergency challenge petition on December 13, 2006, identifying procedural deficiencies in the petition. On December 18, 2006, Chief Administrative Law Judge William E. Fowler, Jr., issued an order dismissing respondent's emergency challenge petition.

⁷ The Administrator's motion to dismiss was served upon respondent and the Board's Office of Administrative Law Judges via overnight, certified, and regular mail.

⁸ Federal Express tracking records indicate that attempts to deliver a copy of the law judge's order to respondent's address were made on December 30, 2006, and January 2, 2007, before Federal Express actually accomplished delivery on the morning of January 3, 2007. The order was also sent to respondent by

not responded to the Administrator's motion to dismiss, the law judge issued his order dismissing respondent's appeal because the Administrator had accomplished effective service upon respondent and respondent had not established good cause for his untimely notice of appeal.

On appeal, respondent does not address the circumstances for which he did not respond to the Administrator's October 24, 2006 emergency order of revocation until December 7, 2006. Rather, respondent's four-page letter, and the attached documents, focuses predominately on the merits of the Administrator's charges.⁹ Most of this material was never presented to the law judge, and respondent makes no effort to explain why he did not respond to either the Administrator's motion to dismiss or the law judge's order directing him to do so. Nonetheless, the threshold issue we must first decide is whether respondent establishes error in the law judge's order dismissing respondent's late-filed appeal due to no showing of good cause for its tardiness. Because we find that respondent has not demonstrated good cause, we need not, indeed, cannot, reach the merits of his challenge to the Administrator's allegations.¹⁰

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regular mail.

⁹ The Administrator has also filed a motion to dismiss respondent's appeal as untimely perfected. We do not reach the Administrator's motion in light of our decision based on other procedural grounds.

¹⁰ Respondent also appears to request oral argument. That request is denied, for there is no need for such extraordinary measures to resolve the relevant, procedural issue of whether

Pursuant to Rule 53(a) of the Board Rules of Practice in Air Safety Proceedings, respondent's appeal of the Administrator's emergency order of revocation was due "within 10 days after the date on which the Administrator's order was served," which in this instance, pursuant to the provisions of Rule 10, was November 3, 2006. See 49 C.F.R. §§ 821.53 and 821.10.¹¹ As we stated recently in Administrator v. Beissel:

In the context of late-filed notices of appeal and appeal briefs, the Board consistently follows the good cause policy established on remand from Hooper v. NTSB and FAA, 841 F.2d 1150 (D.C. Cir. 1988). That is, "[the Board] intends to adhere uniformly to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents have not been filed." Administrator v. Hooper, 6 NTSB 559, 560 (1988). The Board publishes decisions addressing late-filed notices of appeal and appeal briefs, even those issued under delegated authority by the General Counsel, and respondent cites us no case, and we are aware of none, where we have not followed

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respondent has shown good cause for failing to timely file his notice of appeal. See 49 C.F.R. § 821.48(e).

¹¹ See also 49 U.S.C. § 46103(b)(2); Administrator v. Corrigan, NTSB Order No. EA-4806 at 7-9 (1999) (date of service via certified mail is date of mailing). As the law judge observed, and the Administrator argues on appeal, the service issues that troubled the Ninth Circuit in its review of Administrator v. Tu, NTSB Order No. EA-5117 (2004), are not present here. Unlike the facts in Tu, the Administrator in this case utilized multiple means in addition to certified mail to effectuate service of her emergency order of revocation; moreover, the Administrator did not discover evidence that her chosen methods of service were ineffective, for, in fact, the Federal Express delivery of her emergency order was accomplished and the copy sent via regular mail was never returned. See Chin Yi Tu v. NTSB, 470 F.3d 941, 946 (9th Cir. 2006).

this policy. Nor does respondent cite any case, nor are we aware of any since our decision in Hooper, in which we applied that standard in a manner that is inconsistent with the result here.

NTSB Order No. EA-5153 at 4 (2005) (internal reference omitted).

Nonetheless, throughout this proceeding respondent has not made any real effort to demonstrate good cause for his untimely notice of appeal. Indeed, the only explanation at all that respondent has provided is the statement in his notice of appeal that he was "in California for the last 40 days" and returned home to find the Administrator's emergency order of revocation. Respondent provides no explanation of when, exactly, he left his home or when he returned, or the particulars of any arrangements he made regarding receipt of his mail while he was purportedly away from his home. As we observed in similar circumstances in Administrator v. Ordini, NTSB Order No. EA-5160 at 6 (2005), "a pilot who is absent from his address of record for an extended period without arranging for his mail to be forwarded or picked up - especially one involved in a pending enforcement matter - runs a risk of missing deadlines set forth in documents sent to him during that time."

Moreover, even if we were to assume, *arguendo*, that respondent had good cause for not receiving a copy of the Administrator's emergency order of revocation until he allegedly returned from California, our analysis would still shift to an assessment of respondent's diligence in pursuing an appeal once he belatedly became aware of the revocation order. The record is

clear that respondent was aware of the Administrator's emergency order for at least 2 days, and quite possibly significantly longer, before filing on December 7 his notice of appeal (via a method that, while not expressly prohibited in the procedural rules associated with emergency enforcement proceedings, ultimately took another four days to reach the NTSB Office of Administrative Law Judges). See Administrator v. Coudray & Goodman, NTSB Order No. EA-5198 (2005). As we said in Administrator v. Croll,

[A]ssuming, for purposes of argument, that respondent's absence from home during the period within which an appeal needed to be filed would have justified an extension of time to file one, it would only have warranted an extension of the deadline through the date ... he actually became aware of the order and its expired deadline for filing an appeal. It would not justify an extension of five days beyond that date. In other words, the respondent's failure to notify the Board immediately of his desire to appeal from the Administrator's order, orally or in writing, precludes a finding on the facts before us that good cause exists to excuse the untimeliness of his notice of appeal.

NTSB Order No. EA-5009 at 5-6 (2002); see also Administrator v. DeLuca, NTSB Order No. EA-5158 at 4-5 (2005). We note that notwithstanding respondent's claim that but for being in California he would have filed his appeal sooner, respondent's apparent lack of diligence in responding to the Administrator's concerns have continued well past his professed absence from his household. To date, respondent has not provided any response to the Administrator's motion to dismiss, nor has he provided any

substantive response to the law judge's order that he respond to the Administrator's motion, or any explanation for why he failed to do so. Thus, while respondent's post-appeal behavior is not dispositive as to whether respondent had good cause for being late in submitting his December 7 notice of appeal, it certainly does not ameliorate respondent's apparent lack of diligence in this matter. Such a lack of attentiveness is particularly obvious where respondent has failed, despite repeated encouragement, to offer any evidence of his own diligence in responding to the Administrator's emergency order of revocation.

Ultimately, respondent provides no evidence to support his inference that it was not possible to receive notice of the Administrator's emergency order sooner than he claims he did. Indeed, respondent is quite vague as to when, exactly, he did actually receive the Administrator's order; although respondent's notice of appeal, mailed on December 7, states that he had been in California "the last 40 days," respondent asserts in his answer that he had "been in California until this date [i.e., December 5]." In summary, respondent has fallen far short of meeting the strict onus upon him to demonstrate the good cause necessary to avoid the requirement that this Board dismiss his late-filed appeal. See Administrator v. Diaz, NTSB Order No. EA-4990 (2002) at 3 (stating that, "our procedural rules should be strictly applied....[U]ndue laxity in the enforcement of our Rules of Practice will hinder the administration of justice in the long view by giving one party an unfair advantage

over the other, and by removing the essential element of predictability from Board proceedings") (internal quotations and citations omitted). Respondent had numerous opportunities to make such a showing, assuming such a showing was possible, but he failed to respond to even the law judge's exhortations to do so.

In short, upon a thorough review of the record, we discern no error in the law judge's order dismissing respondent's appeal as untimely.

ACCORDINGLY, IT IS ORDERED THAT:

The law judge's order dismissing respondent's appeal of the Administrator's emergency order of revocation as untimely filed is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.