

SERVED: November 9, 2007

NTSB Order No. EA-5337

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 November, 2007

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
	Complainant,)	
)	Docket SE-17761
	v.)	
)	
LARRY W. GRAHAM,)	
)	
	Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the order granting the Administrator's motion to dismiss of Chief Administrative Law Judge William E. Fowler, Jr., served in this proceeding on January 17, 2007.¹ In

¹ A copy of the law judge's Order Granting Administrator's Motion to Dismiss as Untimely (hereinafter, "Order") is attached.

that Order, the law judge granted the Administrator's motion to dismiss respondent's appeal as untimely, and terminated the proceeding to address the Administrator's order of suspension of respondent's inspection authorization certificate.² We deny respondent's appeal.

The Administrator issued the order of suspension on May 23, 2006, and the record indicates that the Administrator served respondent with the order via certified and regular mail.³ The Administrator's order included a recitation of appeal rights, which informed respondent that he could appeal the order within 20 days of the date that the Administrator served the order, and

² The Administrator's order sought a 90-day suspension of respondent's inspection authorization certificate, based on alleged violations of 14 C.F.R. § 43.15(a)(1), which provides that each person performing an inspection required by the Federal Aviation Regulations perform the inspection so as to determine whether the aircraft, or portion(s) thereof under inspection, meets all applicable airworthiness requirements. In particular, the Administrator's order alleged that respondent, on or about October 28, 2004, performed an annual inspection of a Cessna Model 310 aircraft, and approved the aircraft for return to service. The Administrator's order also alleged that, subsequent to respondent's inspection, the Administrator received a complaint indicating that the upper spar cap on the right wing spar exhibited substantial corrosion; in addition, after an aviation safety inspector for the Administrator inspected the aircraft, the Administrator alleged that several other discrepancies existed.

³ In conjunction with the motion to dismiss, the Administrator provided a photocopy of the return receipt for certified mail, indicating that respondent received the order on or about May 31, 2006. Respondent does not dispute that the Administrator sent the order via certified and regular mail.

provided contact information for the Safety Board's Office of Administrative Law Judges. Given this 20-day deadline, respondent's appeal was due no later than June 12, 2006; respondent, however, submitted an appeal via certified mail postmarked June 14, 2006.⁴ On June 19, 2006, the Administrator filed a motion to dismiss respondent's appeal as untimely, and respondent contested the Administrator's motion on several grounds. 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 the Administrator did not provide proper notice to respondent regarding the order of suspension, and that respondent's delay in submitting his appeal was the result of "excusable neglect." In arguing that the Administrator did not provide respondent with proper notice, respondent states that the date of service of the Administrator's order was unclear because the date on the order was stamped, rather than typed,

⁴ Respondent's appeal bore a certificate of service stating that it was transmitted to the Board's Office of Administrative Law Judges by certified mail and facsimile on June 5, 2006. However, this notice of appeal was accompanied by a cover letter from respondent's counsel, dated June 14, 2006. Moreover, respondent does not contest that he submitted his appeal on June 14, 2006.

and that the instructions on the order regarding how to submit an appeal were not clear.

With regard to respondent's argument concerning "excusable neglect," respondent's appeal brief includes affidavits from respondent, respondent's counsel, and the legal secretary for respondent's counsel, all of which state that respondent's counsel intended to submit the appeal before the deadline, but that counsel's secretary misunderstood counsel's instructions and did not submit the appeal. Respondent argues that his delay in submitting his appeal did not result in prejudice against the Administrator, and did not prejudice the Safety Board. Overall, respondent urges us to accept his untimely appeal on the basis that it was the result of excusable neglect, rather than "conscious indifference." The Administrator opposes each of respondent's arguments, and urges us to affirm the law judge's Order.

The Board has long held that it will not entertain untimely appeals without a showing of good cause for delay. 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). Moreover, unfounded mistakes regarding the calculation of procedural deadlines do not allow for the acceptance of untimely notices of

appeal, nor do they constitute good cause for noncompliance. See, e.g., Administrator v. Smith, NTSB Order No. EA-4485 (1996); Administrator v. Slay & Knowles, NTSB Order No. EA-3956 (1993). The Board strictly adheres to this standard of timeliness, and requirement for a showing of good cause in cases of untimely appeals. 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). As such, 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).

In the case at hand, we find respondent's arguments unpersuasive. First, the Administrator's order clearly included a date on the first page, indicating that the Administrator issued it on May 23, 2006.⁵ We have previously held that where the Administrator transmits a certificate order by certified or registered mail, the date of service of an order is the date on which the Administrator mailed the order to the certificate

⁵ We note this case would have been greatly simplified by a proper certificate of service, in accordance with 49 C.F.R. § 821.10. In its absence, the date of postmark and other extrinsic evidence of the date mailed became important. See 49 C.F.R. § 821.7(a)(4).

holder. Administrator v. Corrigan, NTSB Order No. EA-4806 (1999). Moreover, the order included instructions for appeal, which notified respondent that the deadline for the appeal was within 20 days, and provided contact information for the Board's Office of Administrative Law Judges, which frequently responds to inquiries regarding appeal deadlines.

Nevertheless, we take an opportunity to reiterate what we said in our recent decision in Administrator v. McKinney,⁶ acknowledging that the deadline for submitting an appeal of the Administrator's order may confuse respondents who are inexperienced in interpreting such administrative rules. We admonish the Administrator to reconsider the standard text included in orders, and encourage him to amend the text to include a definition of "service" and to include the actual deadline on which each respondent's appeal is due.

We also reject respondent's argument that his delay was excusable. Respondent's counsel's oversight regarding submission of the appeal does not suffice to establish good cause for respondent's delay. Although we acknowledge that counsel's secretary's failure to submit the appeal is unfortunate, we have previously held that attorneys or agents of

⁶ NTSB Order No. EA-5284 at 5 (2007), citing Administrator v. Ordini, NTSB Order No. EA-5160 at 3 (2005); and Administrator v. Decuir, NTSB Order No. EA-5048 (2003).

respondents are responsible for the actions of their employees. See Administrator v. Slay & Knowles, supra (stating that counsel's responsibility to ensure that client's brief is filed on time is not altered by delegation of the administrative task of computing the filing deadline to a subordinate).

At this juncture, we face a record wherein the evidence of the date on which the Administrator actually mailed the order at issue is sparse: the date stamp on the Administrator's order is the sole indicator before the law judge, and thus the Board, that the Administrator issued the order on May 23, 2006. Where the Administrator seeks to establish that the Board must dismiss a case based on a respondent's lack of timeliness, the Administrator should be prepared in the future to provide a certificate of service, an affidavit from a person who mailed the subject notification or, at a minimum, establish the office's common course of business through the affidavit of someone who regularly affixes date stamps and handles the transmittal of such orders. Although the evidence on this record does not conclusively establish the date of the Administrator's mailing, respondent did not contest that the Administrator mailed the order on May 23, 2006, and did not provide a copy of the envelope in which the Administrator mailed the order. See Respondent's Br., Exh. B (respondent's counsel's

affidavit, indicating that he received the Administrator's order on or about May 23, 2006).

Moreover, we remind parties that they must ensure that the record contains adequate evidence such that law judges can base their conclusions on a sufficient factual foundation before the case proceeds to the Board. In the case at hand, the Administrator should have included all the evidence regarding the timeliness of the appeal, including, where direct evidence is not available, items such as affidavits as to the notification and mailing practices of the FAA regional counsel's office that is serving process in a particular case. In sum, the Administrator should have produced more evidence, including a more particularized declaration from the office that dealt with the order.

Overall, given that respondent has acknowledged his tardiness, and provided us with no basis to depart from our good cause standard, nor established good cause for his untimely appeal, we must deny his appeal.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

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