

SERVED: November 13, 2008

NTSB Order No. EA-5418

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 12th day of November, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18295
v.)	
)	
DAVID THOMAS WARFEL, JR.,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the July 23, 2008 decisional order of Chief Administrative Law Judge William E. Fowler, Jr.¹ By that decision, the law judge granted the Administrator's motion to dismiss respondent's appeal of the Administrator's emergency revocation of his airline transport pilot and first-class

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

medical certificates, based on alleged violations of 14 C.F.R. §§ 61.15(e) and 67.403(a)(1).² The law judge's granting of the Administrator's motion to dismiss was based on respondent's failure to file his appeal within 10 days after the date on which the Administrator served the order, in accordance with 49 C.F.R. § 821.53(a). We deny respondent's appeal.

On May 14, 2008, the Administrator issued the emergency revocation order. The Administrator sent the order via Federal Express overnight delivery service, certified mail, and regular mail to respondent's address of record in North Benton, Ohio, as well as to an address that the Administrator determined was respondent's alternate address, in Alliance, Ohio.³ The Administrator subsequently sent an e-mail message to respondent on June 13, 2008, and attached a copy of the order. Respondent filed his appeal on June 26, 2008. On July 14, 2008, the Administrator filed a motion to dismiss respondent's appeal, and

² Title 14 C.F.R. § 61.15(e) requires certificate holders to report certain "motor vehicle actions" to the Administrator within 60 days of the action. Section 67.403(a)(1) provides that, "no person may make, or cause to be made ... [a] fraudulent or intentionally false statement on any application for a medical certificate" or other documents. We also note that respondent has waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

³ The Administrator obtained the alternate address in Alliance, Ohio, from researching credit bureau records.

respondent submitted a reply in opposition to the Administrator's motion on July 17, 2008.

In support of his motion to dismiss respondent's appeal, the Administrator provided copies of respondent's airman information record, confirming that respondent's official address was the North Benton, Ohio, address to which the Administrator sent the order; and respondent's application for a medical certificate, on which respondent listed his North Benton address, among other documents. With respondent's opposition to the Administrator's motion, he provided a declaration, on which he stated that he maintained one mailing address, which was the North Benton address to which the Administrator had sent the order. Respondent's declaration also stated that he "did not pick up any mail from the [North Benton, Ohio] address during the period March 16, 2008 to June 23, 2008." In respondent's opposition to the motion, he stated that he "did not have actual notice and personal knowledge of the Acting Administrator's action until June 16, 2008," and asserted that this lack of actual notice constituted good cause for his delay in submitting his appeal.

After considering the motion and respondent's response, the law judge issued an order granting the Administrator's motion. The law judge recited the Board's rule regarding the deadline for filing such appeals, codified at 49 C.F.R. § 821.53(a), and

recited Board precedent with regard to calculating such deadlines. The law judge concluded that respondent's deadline for filing his appeal was May 27, 2008, and that respondent missed this deadline. The law judge also concluded that respondent's statement that he did not check his mail from March 16, 2008, until June 23, 2008, did not constitute good cause for his failure to file his appeal brief in a timely manner.

Respondent has appealed the law judge's decision, and argues again that he did not receive actual notice of the Administrator's order until June 16, 2008. Respondent asserts that he was often away from home for extended periods of time, because he was completing training for a new job, and visiting friends. Respondent contends that we must consider his absence from his mailing address and lack of actual notice as good cause for his late appeal. The Administrator opposes respondent's argument, and urges us to affirm the law judge's decision.

We have long held that we adhere 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) (on remand from Hooper v. Nat'l Transp. Safety Bd., 841 F.2d 1150 (D.C. Cir. 1988)). Our Rules of Practice provide that, "[a]n

appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order was served." 49 C.F.R.

§ 821.53(a). In enforcing this timeliness requirement, our Rules of Practice provide that we will not grant requests for an extension of a deadline absent a showing of good cause. 49

C.F.R. § 821.11(a). In this regard, we have long applied the good cause standard to late-filed appeals. See, e.g., Administrator v. Beissel, NTSB Order No. EA-5153 at 4 (2005).

We find that respondent has provided no basis to overturn the law judge's decision. With regard to respondent's statement that he did not check his mail for an extended period of time because he was traveling, this assertion does not constitute good cause. Beissel, supra, at 2-3 (stating that the respondent's failure to change his address on file with the FAA or notify the FAA that he would not be checking his mail for a period of time, and his failure to instruct his mother to open his mail and advise him of correspondence from the FAA, did not constitute good cause); see also Administrator v. Bruington, NTSB Order No. EA-5335 at 4-6 (2007) (rejecting good cause argument when the respondent was away from home for approximately 3 weeks and did not recall seeing any correspondence from the FAA upon his return); Administrator v. Sepulveda, NTSB Order No. EA-5229 at 2 (2006) (rejecting good

cause argument when the respondent kept his father's address as his official address with the FAA, but did not check that address for mail because he was living elsewhere).

As the law judge followed clear and long-standing precedent in this matter, we find no abuse of discretion.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

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

Served: July 23, 2008

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

ROBERT A. STURGELL,
ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-18295

DAVID THOMAS WARFEL, JR.,

Respondent.

**ORDER GRANTING ADMINISTRATOR'S MOTION
TO DISMISS RESPONDENT'S APPEAL AS UNTIMELY**

Served: David Holtzman, Esq.
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(BY FAX)

(BY FAX AND CERTIFIED MAIL)

In an order issued on May 14, 2008, the Administrator of the Federal Aviation Administration ("FAA") revoked respondent's airline transport pilot and first-class medical certificates on an emergency basis, for alleged violations of §§ 61.15(e) and 67.403(a)(1) of the Federal Aviation Regulations ("FAR," codified at 14 C.F.R.), and pursuant to FAR §§ 61.15(f), and 67.403(b) and (c)(1). Respondent, through counsel, subsequently filed an appeal from that order with this office on June 26, 2008.¹ Thereafter, on July 14, 2008, counsel for the Administrator submitted a motion to dismiss respondent's appeal on the basis that it was not timely filed. Respondent's counsel then submitted on respondent's behalf, on July 17, 2008, a "Showing of Good Cause for Filing His Appeal on June 26, 2008," which the undersigned deems to be a reply in opposition to the motion to dismiss.² Upon a thorough review of the Administrator's

¹ Respondent later waived the applicability of the Board's rules governing emergency proceedings on July 1, 2008.

² The Administrator's counsel subsequently filed a "Rebuttal" to respondent's reply on July 18, 2008, and counsel for respondent submitted a "Response" thereto on July 22, 2008. It should

motion, respondent's reply and the record in this proceeding as a whole, and for the reasons set forth below, the undersigned will grant the motion to dismiss and terminate this proceeding on that basis.

Rule 53(a) of the Board's Rules of Practice (codified at 49 C.F.R. § 821.53(a)) provides that "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]." 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.³

In this case, the Administrator's emergency order of revocation was addressed to respondent at both 17986 Western Reserve Road, North Benton, Ohio 44449-9640, and 1527 South Liberty Avenue, Alliance, Ohio 44601-4233 (the latter of which was designated an "Alternate Address"), and was transmitted by Federal Express ("FedEx") overnight delivery service, certified mail and regular mail on May 14, 2008.⁴ That 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 May 14, 2008, 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.⁵

The Administrator has, in connection with the motion to dismiss, provided copies of: (1) a computerized airman information record, which confirms that the North Benton address to which the revocation order had been sent was respondent's official address of record on file with the FAA since October 25, 2007;⁶ (2) an application for first-class

be noted that the Board's Rules of Practice in Air Safety Proceedings neither provide for nor bar the submission of filings with respect to motions other than replies in opposition thereto (see Rule 14, codified at 49 C.F.R. § 821.14), and it is the practice of the undersigned to consider such additional filings only to the extent that they lend clarification to matters previously raised in the motion and reply.

³ 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).

⁴ Administrator's Order at 1, 7.

⁵ *Id.* at 6.

⁶ Ex. A-2 attached to Administrator's Motion to Dismiss. The undersigned also notes that this is the address which respondent provided as his return address in both a March 10, 2008 letter he wrote to the FAA's Civil Aviation Security Division to report an alcohol-related motor vehicle action (Ex. A-12 attached to Administrator's Motion to Dismiss) and an Express Mail envelope in which he returned his certificates to the FAA in response to the emergency order of revocation on July 10, 2008 (Ex. A-11 attached to Administrator's Motion to Dismiss).

medical certification completed by respondent on October 17, 2007, on which he lists the North Benton address as his address;⁷ (3) a statement from a special agent with the FAA's Security and Investigations Division, relating that an April 7, 2008 search for an alternate address conducted through a credit bureau disclosed the Alliance address;⁸ (4) FedEx tracking documents, which relate that the copy of the order that was transmitted to the North Benton address was "Delivered" there at 12:24 p.m. on May 15, 2008, and the copy of that order that was sent to the Alliance address was "Delivered" there at 1:57 p.m. on May 15, 2008, with notations that both were "Left at front door" under an authorized signature release,⁹ and (5) copies of the envelopes in which the copies of the order that had been mailed to both addresses by certified and regular mail were returned to the FAA office from which they were mailed, each bearing the notation "RETURN TO SENDER NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD."¹⁰

In his one-page reply to the Administrator's motion to dismiss, respondent states that he "did not have actual notice and personal knowledge of the . . . Administrator's [certificate] action until June 16, 2008." Attached to that reply is a sworn statement by respondent, in which he attests that "I have had one mailing address," which is 17986 Western Reserve Road, North Benton, Ohio (¶ 2); that "I did not pick up my mail from th[at] address . . . during the period from March 16, 2008 to June 23, 2008" (¶ 3); and that "I first learned of the [r]evocation of my FAA license on June 16, 2008 by an email dated June 13, 2008 from Linda M. Lake with the FAA" (¶ 4).¹¹

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, but, where the order is transmitted *solely by other means* (e.g., regular mail or overnight delivery service, such as FedEx), the date of service is the date on which the certificate holder actually or constructively received it. *Compare Administrator v. Corrigan*, NTSB Order EA-4806 (1999), and *Administrator v. Carlos*, NTSB Order EA-4936 (2002).¹² Since the Administrator's order in this matter

⁷ Ex. A-3 attached to Administrator's Motion to Dismiss.

⁸ Ex. A-4 attached to Administrator's Motion to Dismiss. That statement suggests that said search may have been occasioned by difficulty in affecting delivery of a letter of investigation to respondent at the North Benton address.

⁹ Exs. A-9 and A-10 attached to Administrator's Motion to Dismiss.

¹⁰ Exs. A-5 through A-8 attached to Administrator's Motion to Dismiss.

¹¹ In the motion to dismiss (at 3), the Administrator noted that a follow-up copy of the revocation order was transmitted as an attachment to an e-mail that had been sent to respondent on June 13, 2008, at an e-mail address that was previously obtained by the Security and Investigations Division's special agent who had searched for an alternate address for him.

¹² There is a historical reason for this dichotomy. The *Corrigan* decision represented a departure from prior practice — rooted in an earlier Board decision, *Administrator v. Hayes*, 1 NTSB 1693 (1972) — under which the Administrator's order was considered served when it was first actually or constructively received by the certificate holder. In *Hayes*, the Board held that its own rules on service in air safety proceedings — which generally provide that documents are deemed served on the date of their mailing — do not apply until the matter reaches the stage of an appeal, and that applicable FAA rules would, thus, govern until that time. However, no specific FAA rule on service

was transmitted to respondent by multiple means, including certified mail, on May 14, 2008, it must be deemed to have been served on him on that date.¹³ As a result, respondent's Rule 53(a) appeal period ended on May 27, 2008.¹⁴ Because respondent did not file his appeal in this matter until June 26, 2008, he failed to meet that deadline. Thus, as has been noted above, he must, in order to avoid dismissal, establish good cause for the delay in the submission of his appeal.

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 acknowledges both that he resided at the North Benton address to which a copy of the Administrator's order was transmitted on May 14, 2008, and that he "did not pick up [his] mail from th[at] address . . . during the period from March 16, 2008 to June 23, 2008." His decision to ignore his mail for that period of over three months can be viewed as nothing other than a lack of due diligence on his part in monitoring his mail, which does not excuse his failure to discover any of the three copies of the order that were sent to him at that address, including the one that was left at his front door by FedEx overnight delivery service. Under these circumstances, the undersigned must find that respondent has not demonstrated good cause for the belated submission of his appeal in this matter,¹⁵ and that the Administrator's motion to dismiss his appeal as untimely-filed must thus be granted.

was then identified by the Administrator, and the Board, therefore, found that principles of general law, which look to actual or constructive receipt, determine when service occurs. In connection with the *Corrigan* case, however, the Administrator identified § 1005(c) of the Federal Aviation Act of 1958, as amended (and subsequently recodified at 49 U.S.C. § 46103(a)(2)), as an applicable FAA rule of law governing service. Under that statutory provision, "[t]he date of service made by certified or registered mail is the date of mailing." The Board subsequently held in *Carlos* that, where service is accomplished "by a method other than one specifically enumerated in the statute . . . the statute does not apply and is not dispositive in determining the date of service." NTSB Order EA-4936 at 4. For this reason, the *Hayes* doctrine remains applicable only in cases where the method of service of the Administrator's order does not include certified or registered mail. *Id.*

¹³ Furthermore, respondent constructively *received* the order on May 15, 2008, when the copy that was transmitted to his address of record and acknowledged current address in North Benton was left there by FedEx under a signature release. See, e.g., *Administrator v. Pelzman*, NTSB Order EA-4417 (1996), where the Board found that the receipt of a notice of proposed certificate action ("NOPCA") by an airman's sister, who suffered from cerebral palsy and mental retardation, constituted valid constructive receipt of the NOPCA by him, although he denied that his sister ever gave the NOPCA to him.

¹⁴ May 24, 2008, which was the tenth day following the Administrator's service of the order of revocation on respondent, fell on a Saturday, and Monday, May 26, 2008 was Memorial Day. Thus, under Rule 10 of the Board's Rules (codified at 49 C.F.R. § 821.10), respondent's deadline for filing an appeal from the Administrator's order extended to the next day that was not a Saturday, Sunday or Federal holiday, which was Tuesday, May 27, 2008.

¹⁵ Moreover, respondent's delay in submitting an appeal from the Administrator's order until ten full days after he belatedly became aware of its issuance reflects a further lack of diligence that would negate a finding of good cause.

THEREFORE, IT IS ORDERED that the Administrator's motion to dismiss respondent's appeal for lack of timeliness is GRANTED, and that this proceeding is hereby TERMINATED on that basis.

Entered this 23rd day of July, 2008, 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.