

SERVED: October 28, 2010

NTSB Order No. EA-5558

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 October, 2010

_____)	
)	
In the Matter of)	
)	Docket NA-98
DAN DAVIS,)	
)	
Appellant.)	
)	
_____)	

OPINION AND ORDER

Appellant appeals the order of Chief Administrative Law Judge William E. Fowler, Jr., issued June 17, 2010, in which he terminated the case by not accepting appellant's appeal.¹ The law judge did not accept appellant's May 13, 2010 appeal of the Administrator's November 12, 1996 emergency order of revocation, based on appellant's failure to file a timely notice of appeal.

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

Appellant now appeals the law judge's order, and requests that we allow him to proceed with his appeal of the Administrator's order of revocation. We deny appellant's appeal.

The Administrator issued an emergency order of revocation, dated November 12, 1996, in which the Administrator alleged that appellant was convicted in 1985 of several charges related to distribution of cocaine, fraud, and failure to file income tax returns. The order alleged that appellant was a fugitive from justice, after being paroled in 1990 and being arrested in 1994 for illegal distribution of marijuana and methamphetamines. As a result, the order revoked appellant's airline transport pilot certificate, as well as any other certificates appellant held. Appellant did not reply to the Administrator's 1996 order of revocation.

Appellant now asserts that he did not receive the order of revocation until May 13, 2010, in response to a Freedom of Information Act request that he sent to the FAA for records concerning him. Appellant contends that he did not receive the order, even though he admits that the Administrator's order correctly listed his address of record on its face, and indicated that the Administrator transmitted the order via Federal Express, certified mail - return receipt requested, and regular mail. Appellant argues that his failure to receive the Administrator's order suffices to establish good cause for his

14-year delay in pursuing an appeal. The Administrator contests appellant's arguments, and urges us to affirm the law judge's order.

We agree with the law judge that appellant has not established good cause for his lengthy delay in pursuing an appeal of this emergency case. Our Rules of Practice clearly establish a 10-day timeframe to file an appeal from an emergency order.² We will not accept late-filed appeals, absent a showing of good cause for the delay.³ Moreover, a person whom the Administrator serves with an order cannot avoid service by ignoring his or her mail,⁴ especially when the record establishes that the person was a fugitive from justice at the time of service.⁵ We have also recognized that the Administrator's record retention schedule requires disposition of paper files

² 49 C.F.R. § 821.53(a).

³ See, e.g., 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 v. Warfel, NTSB Order No. EA-5418 at 5-6 (2008) (citing Administrator v. Bruington, NTSB Order No. EA-5335 at 4-6 (2007); Administrator v. Sepulveda, NTSB Order No. EA-5229 at 2 (2006); Administrator v. Beissel, NTSB Order No. EA-5153 at 2-3 (2005)).

⁵ Reply Br., Exh. 2 (statement of factual basis for guilty plea, filed May 14, 2008, in United States District Court, District of South Dakota, and signed by appellant, indicating that appellant made bail in 1994 and remained at large until 2007, when "he was discovered in and ejected from Venezuela").

after a specified period of time.⁶ At the very least, the record indicates that appellant received constructive service of the Administrator's order long before appellant submitted his appeal in May 2010, even though the Administrator has disposed of the litigation file for appellant's case and therefore cannot locate more information concerning the Administrator's service of the order.⁷

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied; and
2. The law judge's order is affirmed.

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

⁶ Administrator v. Dunn, NTSB Order No. EA-4126 at 3 n.3 (1994); see also FAA Order 1350.15C (Aug. 29, 2001) (ordering destruction of case file 5 years after termination of case).

⁷ See Dunn, supra note 6 (holding that constructive service was established by FAA's order indicating the address to which the order was served, which appeared on the face of the order); see also Administrator v. Reid, NTSB Order No. EA-5150 (2005) (holding that constructive service was established after Administrator mailed a second copy of the order of revocation, which, unlike the first copy, was not returned "unclaimed").

Served: June 17, 2010

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

In the matter of

DAN DAVIS,

Docket NA-98

Appellant.

ORDER NOT ACCEPTING APPEAL

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On May 19, 2010, this office received from appellant a letter, dated May 13, 2010 and postmarked May 14, 2010, captioned "R.E. APPEAL FROM EMERGENCY ORDER DATED 11/12/1996 CASE NO. 96NM780003 ATP CERTIFICATE NO. [omitted]," in which he relates that "I was served the enclosed Emergency Order of Revocation May 13, 2010." Attached thereto was a May 5, 2010 letter to appellant from the Manager of the Airmen Certification Branch of the Federal Aviation Administration ("FAA") responding to a Freedom of Information Act ("FOIA") request he had made on January 25, 2010, for copies of his airman certification records. For the reasons set forth below, said appeal cannot be accepted.

Rule 53(a) of the Board's Rules of Practice in Air Safety Proceedings (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]."¹ Where an

¹ Prior to amendments to the Rules of Practice that were promulgated in 2000 and 2003, that provision, which was not substantively changed by either amendment to the rules, was designated as Rule 55(a), and codified at 49 C.F.R. § 821.55(a).

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.²

The Board has previously held that, where the Administrator serves a certificate order on an airman by certified or registered mail, the date of service of the order is the date of its mailing,³ which, in this case, would have been November 12, 1996.⁴ Thus, appellant's attempt to initiate an appeal of that order with the Board more than 13 years later is clearly untimely. Because he has offered no explanation as to why he did not seek to exercise his appeal rights with respect to that order for well over a decade, it must follow that he has not established good cause for that lengthy delay. Accordingly, the undersigned cannot accept his belatedly-filed appeal in this matter.

THEREFORE, IT IS ORDERED that appellant's appeal of the Administrator's November 12, 1996 order of revocation is NOT ACCEPTED for lack of timeliness, and that this proceeding is, therefore, TERMINATED.

Entered this 17th day of June, 2010, at Washington, D.C.

William E. Fowler, Jr.
Chief Administrative Law Judge

² 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).

³ See *Administrator v. Corrigan*, NTSB Order EA-4806 (1999).

⁴ Appellant's statement that he "was served the enclosed Emergency Order of Revocation May 13, 2010," is erroneous. While he possibly received the FAA Airmen Certification Branch Manager's response to his FOIA request for his airman certification records — which may have included a copy of the Administrator's November 12, 1996 certificate order — on that date, he was legally served with that certificate order on the date that it was mailed to him in 1996. *Corrigan, supra*.