

SERVED: January 13, 2011

NTSB Order No. EA-5566

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 11th day of January, 2011

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J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18868
v.)	
)	
PETER JAMES CONVERSE,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the written order of Chief Administrative Law Judge William E. Fowler, Jr., served in this proceeding on September 27, 2010.¹ By that order, the law judge

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

granted the Administrator's motion to dismiss respondent's appeal as untimely.² We deny respondent's appeal.

The Administrator issued the emergency revocation order on April 21, 2010,³ and the record indicates that the Administrator served respondent with the order via Federal Express and certified and regular mail.⁴ The Administrator's order included a recitation of appeal rights, which informed respondent that he could appeal the order within 10 days of the date that the Administrator served the order, and provided contact information for the NTSB's Office of Administrative Law Judges. Given this 10-day deadline, respondent's appeal was due no later than May 3, 2010, under 49 C.F.R. § 821.10; respondent, however,

² The Administrator's emergency order sought revocation of respondent's commercial pilot, mechanic, and second-class airman medical certificates, based on an alleged violation of 14 C.F.R. § 67.403(a)(1), which provides that no person may make or cause to be made a fraudulent or intentionally false statement on any application for a medical certificate.

³ This case initially proceeded pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.5 – 821.57.

⁴ Attached to the Administrator's reply brief are a "Track & Confirm" record from the United States Postal Service, as well as a copy of tracking information from Federal Express, both of which indicate that the order was delivered to respondent's home address the morning of April 22, 2010. Reply Br. at Exh. A-2. The Administrator also attached these records to the motion to dismiss. Respondent does not dispute that the order was delivered to his home on April 22, 2010, via certified and regular mail, as well as Federal Express.

submitted an appeal and motion for leave to file late notice of appeal on May 10, 2010. On May 11, 2010, respondent waived the applicability of emergency procedures. The Administrator subsequently filed a motion to dismiss respondent's appeal as untimely under 49 C.F.R. § 821.53(a),⁵ and respondent opposed the motion. The law judge granted the Administrator's motion and terminated the case, based on a finding that the record established that respondent's notice of appeal was untimely, and that respondent had not established good cause for his delay.

Respondent now appeals the law judge's order, and argues that, because he waived the application of the expedited procedures applicable to emergency cases, his appeal was timely. Respondent also contends that the law judge's denial of his appeal violates his constitutional right to due process.⁶ Lastly, respondent argues that the law judge's dismissal of his appeal was an abuse of discretion, because he had good cause for filing a late notice of appeal; in this regard, respondent asserts that his wife received the Administrator's order on April 22, 2010, but failed to give it to him until May 6, 2010.

⁵ Section 821.53(a) provides 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 on the respondent."

⁶ The Constitution's due process clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Administrator opposes respondent's arguments, and urges us to affirm the law judge's decision.

The Board has long held that it will not entertain untimely appeals without a showing of good cause for delay.⁷ The Board strictly adheres to this standard of timeliness, and the requirement for a showing of good cause in cases of untimely appeals.⁸ Moreover, the Board considers timeliness in emergency cases to be paramount, given the expedited timeline applicable to emergency orders that Congress has prescribed by statute.⁹ Overall, a respondent must establish good cause for his or her delay in submitting an appeal.¹⁰

In the case at hand, respondent's appeal was untimely. Respondent's assertion that the non-emergency deadlines applied

⁷ 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).

⁸ 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).

⁹ See, e.g., Administrator v. Mallory, NTSB Order No. EA-5350 at 9-10 (2008) (citing Air East v. NTSB, 512 F.2d 1227, 1231 (3d Cir. 1975), and discussing the importance of deadlines in emergency cases); see also 49 U.S.C. § 44709(e)(4) (requiring that the Board decide appeals of emergency orders within 60 days).

¹⁰ 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).

to his case is, at best, a misinterpretation of our Rules of Practice. Section 821.52(d) provides that a respondent may waive the accelerated time limits applicable to emergency cases, but that, "such a waiver shall not serve to lengthen any period of time for doing an act prescribed by this subpart which expired before the date on which the waiver was made." This section specifically precludes respondent's proposed application of the 20-day deadline, which would apply in a non-emergency case, to respondent's case, because respondent did not waive the applicability of the emergency procedures until May 11, 2010, which was after his appeal deadline expired. This interpretation is consistent with the plain language of the rule, and with our precedent.¹¹

Respondent's arguments concerning his rights under the due process clause, and regarding good cause for his untimely appeal, are equally meritless. Respondent's discussion of the due process issue consists of one sentence, and appears to be based on his assertion that the non-emergency rules of procedure applied. As stated above, this argument is inconsistent with the plain language of § 821.52(d). With regard to the issue of

¹¹ See, e.g., Administrator v. Gallaway, NTSB Order No. EA-5487 at 3 n.5 (2009) (stating that, "a waiver [of emergency rules] does not obviate the filing deadlines in effect prior to the waiver," and citing Administrator v. Myers, 5 NTSB 997, 998 (1986)).

whether respondent's delay was justified, because he had good cause, we note that we have consistently rejected arguments that a family member's failure to apprise a certificate holder of delivery of an order amounts to good cause for missing a filing deadline.¹² We do not find that respondent had good cause for filing an untimely notice of appeal in this case.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is denied.

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

¹² Administrator v. Dunn, 5 NTSB 2211, 2212 (1987); see also, e.g., Administrator v. Sepulveda, NTSB Order No. EA-5229 at 2 (2006); Administrator v. Beissel, NTSB Order No. EA-5153 at 2-4 (2005).

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

J. RANDOLPH BABBITT,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-18868

PETER J. CONVERSE,

Respondent.

**ORDER GRANTING ADMINISTRATOR’S MOTION TO
DISMISS RESPONDENT’S APPEAL AS UNTIMELY-FILED**

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*(BY FAX AND
CERTIFIED MAIL)*

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(BY FAX)

In an order issued on April 21, 2010, the Administrator of the Federal Aviation Administration (“FAA”) revoked respondent’s commercial pilot, flight instructor, airman mechanic and airman medical certificates on an emergency basis, for alleged violations of § 67.403(a)(1) of the Federal Aviation Regulations. Thereafter, on May 10, 2010, respondent, through counsel, filed with this office an appeal from that order, which was accompanied by a “Motion for Leave to File Late Notice of Appeal.”¹ Respondent then waived the applicability of the Board’s rules governing emergency proceedings on May 11, 2010.

¹ Also included in respondent’s May 10 submission was an answer to the Administrator’s complaint. The answer was an anticipatory filing, as Rule 31(a) of the Board’s Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. § 821.31(b)) provides that “[t]he order of the Administrator from which an appeal has been taken shall serve as the complaint.” See also Rule 55(a) (codified at 49 C.F.R. § 821.55(a)), as it relates to the timeframe for filing the complaint in emergency proceedings. The Administrator filed the complaint in this matter on May 11, 2010.

The Administrator subsequently filed a motion to dismiss respondent's appeal as untimely under Rule 53(a) of the Board's Rules of Practice (codified at 49 C.F.R. § 821.53(a)), and respondent later submitted a reply to that motion. Having thoroughly reviewed the Administrator's motion, respondent's reply and the record in this proceeding as a whole, the undersigned will, for the reasons set forth below, grant the motion to dismiss and terminate this proceeding on that basis.

Rule 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]." If 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.²

In this case, the Administrator transmitted the emergency order of revocation to respondent, at 2701 Lancaster Drive, Joliet, Illinois 60433-1723, by Federal Express ("FedEx"), certified mail and regular mail, on April 21, 2010.³ The 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 April 21 2010, 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.⁴

The Administrator's motion to dismiss is accompanied by copies of: (1) a FedEx US Airbill for an item transmitted on April 21, 2010 by counsel for the Administrator to respondent at the aforesaid Joliet address, bearing Tracking Number 866344928700;⁵ (2) a FedEx tracking document for that item, which relates that said item was delivered at 9:49 a.m. on April 22, 2010, and notes in the area for reporting delivery details, "Left at front door. Package delivered to recipient address – release authorized;"⁶ (3) a United States Postal Service Certified Mail Receipt (PS Form 3811) for Item 70092250000376513156, which reflects that said item was sent by the FAA Regional Counsel's Office from which the revocation order was issued to respondent at his Joliet address, and that the item was delivered to and signed for by Meghan Converse on April 22, 2010;⁷ and (4) a Postal

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 Administrator's Order at 1.

⁴ *Id.* at 8.

⁵ Ex. A-4 attached to Administrator's Motion to Dismiss.

⁶ Ex. A-5 attached to Administrator's Motion to Dismiss.

⁷ Ex. A-2 attached to Administrator's Motion to Dismiss.

Service tracking document, which indicates that such delivery occurred at 11:35 a.m. on April 22, 2010.⁸

In the one-page motion respondent filed along with his May 10, 2010 appeal, he states that “the Emergency Order of Revocation from which he wishes to appeal was served upon his wife, who failed to deliver it to him until May 6, 2010, after which he immediately sent it to his . . . attorney.” Respondent’s reply to the Administrator’s motion avers that the revocation order “was actually served at [his] address . . . on April 22, 2010;” notes that he waived the applicability of the Board’s rules governing emergency proceedings on May 11, 2010, and maintains that the appeal “was, by reason of the foregoing, filed within the 20 day time period allowed by 49 CFR 821.20 provided for non-emergency order[s] [*sic* — the provision in the Board’s Rules rule governing appeals in non-emergency cases is part of Rule 30, specifically Rule 30(a) (codified at 49 C.F.R. § 821.30(a))⁹].”

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. *Administrator v. Corrigan*, NTSB Order EA-4806 (1999). Since respondent, thus, was served with the Administrator’s order on the April 21, 2010 date of its mailing, his Rule 53(a) 10-day period for filing an appeal from that order ended on May 3, 2010.¹⁰ His argument that he should not be considered to have been served with the order until it was given to him by his wife clearly runs contrary to such Board precedent.¹¹

Respondent’s other principal argument — that his May 11, 2010 waiver extended his period for filing an appeal from the April 21, 2010 order to the 20-day period for the submission of an appeal in a non-emergency matter — does not comport with Rule 52(d) (codified at 49 C.F.R. § 821.52(d)) which provides that, if a certificate holder waives the

⁸ Ex. A-3 attached to Administrator’s Motion to Dismiss.

⁹ Under Rule 30(a), appeals from non-emergency orders “must be filed with the Board within 20 days after the date on which the Administrator’s order was served on the [certificate holder].”

¹⁰ May 1, 2010, which was the tenth day following service of the Administrator’s emergency order of revocation on respondent, fell on a Saturday. Therefore, his deadline for filing an appeal from that order extended to the next day that was not a Saturday, Sunday or Federal holiday, which was Monday, May 3, 2010. See Rule 10 of the Board’s Rules (codified at 49 C.F.R. § 821.10).

¹¹ Moreover, in the absence of *Corrigan*, the undersigned would have been bound to consider the legal doctrine of constructive receipt, under which an addressee is presumed to have received a properly addressed item that has been duly delivered to that addressee’s address. That doctrine was previously applied by the Board on a number of occasions to determine whether — and when — an addressee may be deemed to have been in receipt of a document. In one such case, *Administrator v. Pelzman*, NTSB Order EA-4417 (1996), the Board found that the receipt of a notice of proposed certificate action (“NOPCA”) by an individual’s sister, who suffered from cerebral palsy and significant cognitive impairment, constituted valid constructive service of the NOPCA upon him, although he denied that his sister ever gave the NOPCA to him. Similarly, here, respondent must be deemed to have been in constructive receipt of the Administrator’s order on April 22, 2010, the date in which both the copy of the order that was transmitted to him by FedEx was left at his front door under a signature release and the copy that was sent by certified mail was delivered to his wife. Thus, even ignoring *Corrigan*, respondent’s appeal period would not have extended past May 3, 2010.

applicability of the Board's emergency rules, "such a waiver shall not serve to lengthen any period of time for doing an act prescribed by [the emergency rules] *which expired before the date on which the waiver was made*" (emphasis added).

In view of the above, respondent must, in order to avoid dismissal of his appeal for lack of timeliness, establish good cause for the delay in the appeal's submission. In this regard, 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 that his wife gave him a copy of the Administrator's order on May 6, 2010, which was one day before his Rule 53(a) appeal period ended. Being, thus, aware of the order on that date, respondent could have taken action to file a timely appeal, or at least contacted this office before the expiration of his appeal period to explain the situation, and he would have been advised of his options, including making a timely waiver of the Board's emergency rules in order to extend his timeframe for submitting an appeal from 10 to 20 days.

The undersigned notes that the motion respondent filed with his appeal indicates that he "immediately" transmitted to his attorney the copy of the order he received from his wife on May 6, which resulted in the submission of his appeal on May 10. However, the Board has previously held that there is no good cause for a delay in the submission of an appeal where that delay is attributable to a respondent's attempts to obtain the assistance of counsel to file the appeal on his or her behalf, because the filing of an appeal is essentially a *pro forma* task.¹² Finally, it is noted that respondent, in his reply to the Administrator's motion to dismiss (at 2), posits that a failure to "accept an appeal from a revocation taken on a non-emergency basis, is so arbitrary as to violate Constitutional guarantees of due process." The undersigned does not believe that the dismissal of a late-filed appeal of an FAA action adversely affecting a certificate privilege is a denial of due process.

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

Entered this 27th day of September, 2010, at Washington, D.C.

William E. Fowler, Jr.
Chief Judge

¹² *Administrator v. Harris*, NTSB Order EA-5110 at 2-3 (2004). See also *Administrator v. Ehl*, 5 NTSB 569, 569 (1985).