

SERVED: August 1, 2013

NTSB Order No. EA-5672

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 1st day of August, 2013

_____)	
MICHAEL P. HUERTA,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-19504
v.)	
)	
GREGORY DEAN SMITH,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the written order of Chief Administrative Law Judge Alfonso J. Montaña, served in this proceeding on June 14, 2013.¹ By that order, the law judge denied

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

respondent's motion for leave to file a late appeal and terminated the proceeding. We deny respondent's appeal.

a. *Facts*

On April 29, 2013, the Administrator issued an order revoking respondent's airline transport pilot (ATP), flight instructor and first class airman medical certificates on an emergency basis,² for his alleged refusal to submit to random drug testing.³ Under 49 C.F.R. § 821.53, respondent's deadline for filing an appeal from the emergency order was May 9, 2013.⁴ On June 5, 2013 (29 days after the appeal was due), respondent, through counsel, filed a motion for leave to file a late filed appeal, a late answer, and a motion for expedited review. In the motion, respondent admitted the appeal and answer were not timely filed but asserted good cause existed for accepting the late filed appeal and answer as respondent was not represented by counsel at the time he received the emergency order. Respondent contended serious injustice would occur if the case was dismissed on procedural grounds, as his 40-year career with 25,000 hours of flight time would be lost and he would be unable to make a living.

² This case proceeds pursuant to the Administrator's authority to issue orders immediately effective 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. §§ 821.52-821.57, as amended, 77 Federal Register 63252-53, October 16, 2012.

³ The order alleged respondent refused to submit to random drug testing under 14 C.F.R. § 120.7(o) and failed to remain at the testing site until the testing process was complete under 49 C.F.R. § 40.191(a)(2) and (3).

⁴ The emergency order included appeal rights with instructions, stating "You may appeal from this Emergency Order within ten (10) days from the date of its service, which is April 29, 2013, by filing a Notice of Appeal with the Office of Administrative Law Judges, National Transportation Safety Board... 490 L'Enfant Plaza East, SW, Washington, DC 20594 (telephone (202) 314-6150)." See Administrator's emergency order of revocation, dated April 29, 2013.

On June 6, 2013, the Administrator contacted the NTSB Office of Administrative Law Judges (ALJ) to verify respondent had not made an initial filing prior to filing of the motion. The Office of ALJ confirmed respondent had not filed an appeal to the emergency order of revocation prior to June 5, 2013. On June 6, 2013, the Administrator filed a motion to deem the factual allegations admitted based upon respondent's failure to submit a timely notice of appeal.

b. Law Judge's Order

The law judge's order discussed the procedural history of the case at length. Citing to Administrator v. Harris,⁵ the law judge noted the Board previously held the act of filing an appeal is essentially a *pro forma* task. He concluded respondent's justification for the late filed appeal did not constitute good cause and subsequently denied respondent's motion, granted the Administrator's motion, and terminated the proceeding.

c. Issue on Appeal

Respondent appealed the law judge's order. Respondent contends the law judge erred in finding good cause did not exist for accepting the late filed appeal because respondent was not represented by counsel when he first received the order. The Administrator opposes respondent's arguments, and urges us to affirm the law judge's decision.

2. Decision

On appeal, we review the law judge's decision *de novo*, as our precedent requires.⁶

We reject respondent's argument that good cause exists to excuse his untimely appeal.

The Board strictly adheres to the standards of timeliness set out in our Rules, only excusing

⁵ NTSB Order No. EA-5510 (2004).

⁶ Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013); Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

procedural defects upon a showing of good cause.⁷ To the extent respondent argues good cause exists under a theory of not being represented by counsel, we long have held that delays caused by securing legal representation do not constitute good cause for a late filed appeal.⁸

Furthermore, as the law judge noted, we find the act of filing an appeal is essentially a *pro forma* task.⁹ We find no reason to depart from this long-established jurisprudence.¹⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent'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.

⁷ See, e.g., Administrator v. Near, 5 NTSB 994 (1986); 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); see also 49 C.F.R. § 821.11(a) (stating the Board may grant an extension of time to file any document upon a showing of good cause).

⁸ Administrator v. Harris, NTSB Order No. EA-5510 at 2 (2004).

⁹ Id.

¹⁰ While not dispositive of this case, we also note respondent acknowledged in his brief that he successfully filed timely *pro se* notices of appeal in two other enforcement proceedings. See Appeal Br. at 3.

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

MICHAEL P. HUERTA,
ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-19504

GREGORY DEAN SMITH,

Respondent.

ORDER NOT ACCEPTING RESPONDENT'S LATE-FILED APPEAL AND TERMINATING PROCEEDING

Served: Steven M. Chait, Esq.
Suite 100
6515 Highland Road
Waterford, Michigan 48327

(BY CERTIFIED MAIL AND FAX)

Michael F. McKinley, Esq.
Federal Aviation Administration
Office of Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20591

(BY FAX)

In an order issued on April 29, 2013, the Administrator of the Federal Aviation Administration ("FAA") revoked respondent's airline transport pilot ("ATP"), flight instructor and first-class airman medical certificates on an emergency basis, for his alleged refusal to submit to random drug testing, as defined in 14 C.F.R. § 120.7(o), and 49 C.F.R. §§ 40.191(a)(2) and (3). Thereafter, on June 5, 2013, counsel for respondent filed with this office on respondent's behalf a "Motion for Leave to File a Late Appeal, a Late Answer to the Administrator's Complaint and Request for Expedited Hearing," attached to which were a "Notice of Appeal and Respondent's Answer to Emergency Order of Revocation," "Affirmative Defenses" and brief in support of that motion. The Administrator's counsel subsequently submitted a reply to said motion on June 6, 2013.¹ Upon a review of those

¹ On June 11, 2013, counsel for respondent submitted a response to the Administrator's reply to respondent's motion, in order to correct a misstatement that had been made in the motion, to which the Administrator's counsel filed a sur-response on June 13, 2013. The Board's Rules of Practice in Air Safety Proceedings neither provide for nor bar the submission of filings subsequent to replies

filings, the undersigned has, for the reasons set forth below, determined that respondent's belated appeal cannot be accepted, and will, therefore, terminate this proceeding on that basis.²

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 transmitted to respondent, at Apartment 612, 6278 North Federal Highway, Ft. Lauderdale, Florida 33308-1916, by overnight delivery service, certified mail and regular mail on April 29, 2013.⁴ 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 29, 2013, by filing a Notice of Appeal with the Office of Administrative Law Judges; National Transportation Safety Board; . . . 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 reply to respondent's motion, provided copies of a Federal Express ("FedEx") shipping label for Item 799637487321, addressed to respondent at the aforesaid address, together with FedEx tracking information for that item, which reflects that it was "Delivered" at 3:19 p.m. on April 30, 2013.⁶

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 the Administrator's order in this matter was transmitted to respondent by

in opposition to motions (see Rule 14, codified at 49 C.F.R. § 821.14), and it is the practice of the undersigned to accept and consider such filings to the extent that they lend clarification to matters previously raised in the motion and reply. Respondent's June 11 filing clearly provides such clarification and the Administrator's June 13 responsive submission appears to do so as well, and they will, therefore, be accepted.

² The remainder of respondent's motion is, thus, rendered moot.

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.

⁵ *Id.* at 6.

⁶ Ex. B attached to Administrator's Reply.

multiple means, including certified mail, on April 29, 2013, it must be deemed to have been served on him on that date. Accordingly, respondent's Rule 53(a) appeal period ended on May 9, 2013. Because respondent did not file an appeal in this matter until June 5, 2013, he failed to meet that deadline.

Respondent's motion argues that he has "strong substantive defenses" to the Administrator's charges," and that "[s]erious in justice [*sic*] will occur if the matter is decided solely on procedural grounds, a 40 year career covering 25,000 hours of flight time will be lost, and [he] will be unable to make a living."⁷ However, in *Hooper, supra* n. 3, the Board, in response to a remand from the Court of Appeals for the District of Columbia Circuit, affirmed "that it 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 . . . have not been filed." 6 NTSB at 560. Respondent must, therefore, establish good cause for the belated submission of his appeal in this matter in order to avoid its dismissal.

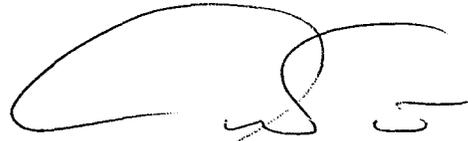
It is the view of the undersigned that good cause generally requires a showing that circumstances beyond the certificate holder's control prevented the certificate holder from either knowing of the Administrator's order or acting upon it within the prescribed time limit for filing an appeal, despite the exercise of due diligence. Here, respondent, in his motion, appears to attribute his failure to submit a timely appeal to the fact that he was not represented by counsel when he first received the order, and notes that he did so upon retaining counsel. Nevertheless, respondent, by virtue of the April 30, 2013 delivery of the copy of the order that had been transmitted to him by FedEx, was aware of the order's issuance nine days before his appeal period expired on May 9, 2013. That order specifically informed him both that he had 10 days from the date of service of the order to file an appeal with this office, and that the date of service of the order was April 29, 2013. Respondent has not shown that he was unable to file an appeal in this matter before his deadline for doing so passed — indeed, in another proceeding in which he later retained the same counsel that represents him here (*Administrator v. Smith*, Docket SE-19465), respondent filed a timely appeal *pro se* from a March 29, 2013 order suspending his ATP certificate for 60 days, for alleged operational violations of FAR §§ 91.13(a) and 91.123(a). Clearly, he could have filed a timely appeal *pro se* from the Administrator's subsequently-issued order in this matter as well.⁸ As respondent provides no other reasons for the delay in the submission of his appeal in this matter, the undersigned must find that there is no basis for a finding of good cause here and, as a result must, deny his motion for acceptance of that appeal.

⁷ Respondent's Motion at 2.

⁸ Assuming, *arguendo*, that respondent did not have such prior experience of filing an appeal with this office *pro se*, good cause would, nevertheless, not exist for any delay in the submission of his appeal beyond his deadline for doing so attributable to his seeking counsel to file the appeal on his behalf. This is because the Administrator's revocation order provided him with contact information for this office and, upon inquiry to this office, he would have been informed that it was not necessary for him to obtain counsel prior to filing an appeal because all he was required to do to initiate an appeal under the Board's Rules was transmit a written statement — a letter would have been sufficient — that he desired to appeal the Administrator's order to the Board. In this regard, the Board has previously held that the act of filing an appeal is essentially a *pro forma* task. *Administrator v. Harris*, NTSB Order EA-5110 at 2-3 (2004); *see also Administrator v. Ehl*, 5 NTSB 569 (1985).

THEREFORE, IT IS ORDERED that respondent's motion for acceptance of his late-filed appeal is DENIED and that this proceeding is hereby TERMINATED.

Entered this 14th day of June, 2013, at Washington, D.C.

A handwritten signature in black ink, consisting of a large, sweeping loop followed by several smaller, more defined strokes.

Alfonso J. Montañó
Chief Administrative Law Judge

APPEAL (DISPOSITIONAL ORDER IN EMERGENCY PROCEEDING)

Any party to this emergency proceeding may appeal this order by filing a written notice of appeal within 2 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 5 days after the date on which the notice of appeal was filed. Briefs shall be served by either overnight mail, or fax confirmed by first-class mail, 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

In addition, one copy of the brief must be submitted. 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 7 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.

The Board directs your attention to Rules 7, 52, 56(c) and 57 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.52, 821.56(c) and 821.57) for further information regarding appeals in emergency proceedings.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.