

SERVED: June 29, 2018

NTSB Order No. EA-5842

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 29th day of June, 2018

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DANIEL K. ELWELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket NA-30077
v.)	
)	
SAMUEL R. MURIUKI,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

1. Background

Respondent appeals Chief Administrative Law Judge Alfonso J. Montano’s April 30, 2018 written order not accepting his late-filed appeal.¹ By that order, the law judge found that respondent failed to file his appeal within 10 days after the date on which the Acting Administrator served the order, in accordance with 49 C.F.R. § 821.53(a), and failed to demonstrate good cause for his late submission. Therefore, there was no basis to accept

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

respondent's appeal of the Acting Administrator's emergency revocation of his airman medical certificates, based on alleged violations of 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2) and 67.307(b)(2).² We deny respondent's appeal.

a. *Facts*

On April 13, 2018, the Acting Administrator issued an emergency order revoking respondent's airman medical certificates.³ The Acting Administrator sent the order via Federal Express standard overnight weekday delivery service, certified mail return receipt requested, and regular mail to respondent's address of record in Little Elm, Texas.⁴ The emergency order included procedures for appeal, which stated that any appeal must be submitted within ten calendar days of the date of service. The date of service was April 13; therefore, the appeal was due no later than April 23, 2018. Respondent did not file his appeal by April 23, 2018.

² The Administrator's emergency order alleged respondent violated 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), which state:

§67.107 Mental.

Mental standards for a first-class airman medical certificate are:

(b) No substance abuse within the preceding 2 years defined as:

(2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation;

§67.207 Mental.

Mental standards for a second-class airman medical certificate are:

(b) No substance abuse within the preceding 2 years defined as:

(2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation;

§67.307 Mental.

Mental standards for a third-class airman medical certificate are:

(b) No substance abuse within the preceding 2 years defined as:

(2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation.

³ Emergency Order of Revocation (EOR) ¶ 1.

⁴ Reply Br. at Exh. A-1, p. 4.

Respondent retained counsel on April 25, 2018, and his counsel contacted the Acting Administrator on April 26, 2018 to ask the Acting Administrator to send the emergency order via electronic mail.⁵ Respondent filed his appeal on April 27, 2018. On April 30, 2018, Chief Administrative Law Judge Alfonso J. Montaña issued an order not accepting respondent's late-filed appeal. On May 1, 2018, respondent filed a notice of appeal of the Chief Judge's decision because there was good cause for the late filing. On May 7, 2018, respondent filed a brief in support of his appeal of the law judge's order. In his brief, respondent acknowledged that his appeal was not filed within ten days as required, but he argues there was good cause for the delay and he acted diligently to initiate the appeal once he was aware of the emergency order. Respondent was away from home for an extended period of time serving his reservist duty and beginning a new job. Although he instituted a procedure for checking his mail while he traveled, that procedure broke down during this trip.⁶

The Acting Administrator submitted a reply in opposition to respondent's motion on May 14, 2018, arguing there was neither good cause nor diligence justifying accepting the late-filed appeal. Finally, respondent filed a supplemental brief in support of his appeal on May 17, 2018, and on May 21, 2018, the Acting Administrator moved to strike respondent's supplemental brief.

b. *Law Judge's Order*

On April 30, 2018, after considering respondent's brief, the law judge issued an order not accepting respondent's late-filed appeal. 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

⁵ *Id.*, Exh. A-2.

⁶ Appeal Br. at Exh. A at ¶ 19.

for filing his appeal was April 23, 2018, and that respondent missed this deadline. Citing § 821.11(a) and Administrator v. Hooper, the law judge stated that respondent must “establish good cause for the delay in its submission” in order for him to accept the documents after the deadline.⁷ Good cause is defined by two criteria: factors outside of respondent’s control prevented him from knowing or acting upon the Acting Administrator’s emergency order and once he was aware, he acted diligently to initiate his appeal. The law judge found that respondent did not meet these criteria for good cause; therefore, he did not accept respondent’s appeal.

c. Issues on Appeal

Respondent contends the law judge erred by not accepting his late-filed appeal based upon good cause. He argues that circumstances beyond his control prevented him from knowing that the Acting Administrator issued an emergency order. However, when he learned of the order, he acted diligently to file his appeal. He further contends that if the Acting Administrator deemed that respondent had constructive knowledge of the emergency order, it was not until April 20, 2018, and respondent filed his appeal within ten days of that date.⁸ The Acting Administrator opposes respondent’s arguments and urges the Board to affirm the law judge’s decision.

2. Decision

On appeal, we review the law judge’s decision *de novo*.⁹

⁷ 14 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).

⁸ Appeal Br., pp. 7-10.

⁹ 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).

a. *Acceptance of Respondent's Supplemental Brief*

On May 17, 2018, respondent filed a "Supplemental Brief In Support of Appeal," which included a new affidavit and two new exhibits. The Acting Administrator moved to strike respondent's supplemental brief. Since respondent exceeded the parameters for an additional filing, and neither requested nor was granted leave to file an additional brief, the Acting Administrator's motion is granted pursuant to 49 C.F.R. § 821.48(d).

To present the issues on appeal, the Board expects the appellant will file a single brief and the opposing party will file a single reply. This process eliminates the potential for endless arguments and allows for efficiency in resolving the matter. Thus, under Rule 821.48(d) of the Board's regulations, there are only two options for filing supplemental information. The first option permits a party to "identify new and relevant legal authority, and not to correct omissions in briefing or to respond to a reply brief." The second option allows for a submission only upon specific leave of the Board after a showing of good cause for the filing. Respondent's Supplemental Brief is not an update of new and relevant legal authority; instead it is a response to the Acting Administrator's Reply, which is specifically prohibited by the first option in the regulation. Thus, respondent has not filed a document that may be accepted as a supplement to the legal citations.

To file a response to the Acting Administrator's Reply, respondent should have sought leave of the Board. Respondent failed to do so. The Board historically has refused to consider supplemental briefs when leave was not granted before filing them.¹⁰ On this basis alone, the motion to strike may be granted.

¹⁰ Administrator v. Custard, NTSB Order No. EA-3806 at 2-3 n. 3 (1993); Administrator v. Byrom, NTSB Order No. EA-3866 at 3 n. 4 (1993) ("Since respondent neither requested nor was granted leave to file an additional brief, the motion [to strike] is granted.....")

Moreover, if the Board considered respondent's good cause argument, it would find it insufficient. Respondent argues that good cause exists for his filing because the Acting Administrator raised new issues in its Reply, and it would be a miscarriage of justice not to have the opportunity to refute them. We do not find this to be good cause because we disagree that the Acting Administrator raised new arguments; instead, as expected, the Reply introduced different perspectives on respondent's assertions. Respondent's desire to clarify his assertions in light of the alternatives presented is not a good cause basis to permit the filing. Again, the Board would grant the Acting Administrator's motion to strike.

Last, the Board is capable of reaching an informed decision in this case without the parties' additional pleadings. However, *arguendo*, were the Board to accept respondent's assertions in the Supplemental Brief, we are not persuaded by the arguments. As described fully below, in light of the Board's precedent in similar matters, respondent has not shown that his inability to act on the Acting Administrator's emergency order was outside of his control or that he acted with due diligence.

b. Application of Good Cause Standard to Accept Late-filed Appeal

The Board has long held that it will not entertain untimely appeals without a showing of good cause for delay. The Board strictly adheres to this standard of timeliness, and the requirement for a showing of good cause in cases of untimely appeals.¹¹ Moreover, the Board

¹¹ *Hooper*, *supra*, note 8.

¹² 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).

¹³ The Board has previously refused to adopt the more lenient standard of "excusable neglect" in cases of untimely appeals. See, e.g., *Administrator v. Jimenez*, NTSB Order No. EA-5779 (2016).

¹⁴ Appeal Br. ¶ 19.

considers timeliness in emergency cases to be paramount, given the expedited timeline applicable to emergency orders that Congress has prescribed by statute.¹² Overall, a respondent must establish good cause for his or her delay in submitting an appeal.¹³

Respondent's arguments regarding good cause for his untimely appeal are meritless. Respondent attested that his current address is the address used by the Federal Aviation Administration (FAA) to send the emergency order, and that he is the sole resident.¹⁴ Respondent argues he made prior arrangements to have his mail checked when he traveled away from his home in Texas.¹⁵ Neither respondent's brief nor affidavit address how frequently respondent asked for his mail to be checked. During mid-April 2018, however, the person who regularly checked his mail became unavailable and did not check his mail for at least one week.¹⁶

On April 20, 2018, respondent visited an Aviation Medical Examiner (AME) in Kansas to renew his FAA medical certificate. The doctor told respondent that he could not issue his medical certificate and suggested that he contact the FAA for more information.¹⁷ Respondent did not verify with the person who checked his mail whether he had received correspondence from the FAA. Instead, as suggested by the AME, he made successive calls to the FAA's Aerospace Medical Certification Division to inquire why a medical certificate could not be issued. After uninformative calls on April 20, April 23, and April 24, on April 25, 2018 the FAA

¹⁵ Appeal Br., Exh. A, ¶¶ 2-3.

¹⁶ Appeal Br., Exh. A, ¶ 19.

¹⁷ Id. at ¶ 13.

representative said the FAA sent information to respondent in the mail.¹⁸ Following this call, five days after his appointment with the AME, he contacted his sister-in-law and asked her to check whether there was mail from the FAA.¹⁹ It is at this time that respondent asserts that he learned that his mail was not being checked regularly. Because he had no indication of a problem, respondent argues that he should not be held accountable for missing the delivery of the emergency order, and in turn, the deadline for filing his appeal.

Our prior caselaw shows this contention does not establish good cause for respondent's delay in filing his appeal.²⁰ We have long held that our procedural rules should be strictly applied. "[U]ndue laxity in the enforcement of the Board's procedural rules will hinder our administration of justice in the long view by giving one party an unfair advantage over the other, and by removing the essential element of predictability from Board proceedings."²¹ In this case, respondent did not take sufficient steps to ensure he would receive correspondence from the FAA regarding his medical certificates. There is no indication that he alerted the person who checked his mail, or others who helped with his mail, that it was necessary to regularly check his deliveries, or to advise him when he received anything from the FAA.

Not only did he not take sufficient steps regarding his mail in general, he also did not take reasonable steps in light of his knowledge of the Acting Administrator's investigation of his

¹⁸ Id. at ¶¶ 15-18.

¹⁹ Id. at ¶¶ 19-20.

²⁰ See Administrator v. Davis, NTSB Order No. EA-5558 (2010); Administrator v. Warfel, NTSB Order No. EA-5418 (2008); Administrator v. Bruington, NTSB Order No. EA-5335 (2007); Administrator v. Sepulveda, NTSB Order No. EA-5229 (2006); Administrator v. Beissel, NTSB Order No. EA-5153 (2005).

²¹ Administrator v. Hayes, 1 NTSB 2016, 2017 (1972). See also Administrator v. Liles, 2 NTSB 470, 471 (1973) (administrative process defeated by "endless opening and reopening of records" where a respondent has not asserted his rights to present his case, when it was shown that he was given ample opportunity to do so).

alleged violations, for which he received notice in December 2017.²² In Administrator v. Sepulveda, the Board found that the airman was obligated to check the address that he provided to the FAA because he knew from receiving his notice of proposed certificate action that it was where the FAA would send additional mail.²³ Putting aside for the moment the argument of constructive notice, respondent's assumption that not hearing from the person who checked his mail for an extended period of time simply meant there was nothing to report is unreasonable under these circumstances. Respondent had the opportunity and means to contact the person who checked his mail, or others who may help with his mail collection, as he did on April 25, yet he chose not to do so. He also could have contacted the FAA investigator who signed the December 2017 letter detailing the circumstances of the investigation. Therefore, respondent failed to demonstrate the first prong of the justification for good cause to accept the late-filed appeal; we are not convinced that circumstances beyond respondent's control prevented him from knowing about the Acting Administrator's emergency order. Because respondent failed to meet this first prong, the second prong requiring diligence once informed, need not be reviewed. Thus, we find the law judge did not err when he denied respondent's motion to file a late appeal for lack of good cause.

²² Reply Br., Exh. A-3.

²³ Sepulveda, *supra*, note 19 (respondent kept father's address as his official address on file with FAA while respondent was living elsewhere; Board found that respondent was obliged to check that address for FAA mail, especially since notice of proposed certificate action had been sent to him; "situation that caused the delay in respondent's becoming aware of the Order of Suspension was of respondent's own making"); See also, Administrator v. DeLuca, NTSB Order No. EA-5158 (2005) (respondent worked outside the United States, returning for only a few days at a time, and "forgot to open all the letters" he received; Board affirmed law judge's dismissal of respondent's appeal, stating that the Administrator served him at his correct address, noting that, even when respondent became aware of need to file response, did not immediately do so); Administrator v. Beissel, NTSB Order No. EA-5153 (2005) (lack of good cause if respondent knew or should have known Administrator would be issuing order of suspension, but did not advise FAA attorney, who participated in informal conference, that he would be away for an extended period of time, and how he could be reached; Board noted that respondent did not alert mother, with whom he lived, to advise him if he received mail from FAA).

c. Constructive Knowledge

Respondent's other principal argument — that he received constructive notice of the emergency order on April 20, 2018 and the ten-day clock began ticking then — does not comport with our case law and practice. Respondent argues that the AME's inability to issue a medical certificate on April 20 may have been notice of an issue with FAA, and that if the Board accepts this as true notice, respondent filed a timely appeal on April 27. He bases his argument on a single case, Administrator v. Carlos, NTSB Order No. EA-4936 (2002). As the Acting Administrator argues, the circumstances in Carlos are unique and not applicable here. We agree. Carlos lived in a remote area of Alaska, where the mail was delivered by plane to the post office. There was no home delivery; instead, the postal worker would inform the residents when mail was waiting for them. Therefore, in that case, the Board agreed that Carlos' appeal period began on the date he was notified by the postal worker. Respondent, on the other hand, resides in Texas, where mail is delivered daily, and may arrive by express services, certified, or standard delivery. There is no need, or expectation, for the postal worker to inform respondent that he has mail.

The Board notes, however, respondent's acknowledgement that the information he received from the AME on April 20, 2018 was significant. Coupled with respondent's obligation to be aware of what he received in the mail, we find respondent's choice to only make successive calls to the AMCD was lacking. In prior cases the Board has rejected the argument that family members' failures to inform respondents of deliveries of orders equates to good cause for the delay in filing. Similarly, respondent's reliance on the person who checked his mail to inform him of important mail without his regular interaction is unreasonable. On April 20, 2018, respondent knew something was amiss with the FAA. Yet it wasn't until the fourth call to the

FAA, placed five days after his AME appointment, that he contacted anyone who might collect his mail. Once again, respondent's actions do not demonstrate due diligence.

The law judge followed clear and long-standing precedent in this matter, and we find no reason to overturn his decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's order not accepting respondent's late-filed appeal is affirmed.

SUMWALT, Chairman, DINH-ZARR AND WEENER, Members of the Board, concurred in the above opinion and order.

Served: April 30, 2018

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

DANIEL K. ELWELL,
ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Complainant,

v.

Docket NA-30077

SAMUEL R. MURIUKI,
Respondent.

**ORDER NOT ACCEPTING
RESPONDENT'S LATE-FILED APPEAL**

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In an order issued on April 13, 2018, the Administrator of the Federal Aviation Administration revoked respondent's medical certificates on an emergency basis, upon a finding that he lacked the qualifications to hold the certificates under 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), of the Federal Aviation Regulations, based on a pre-employment drug test that was positive for amphetamines. On April 27, 2018, respondent, through counsel, filed an appeal from that order by e-mail and facsimile.

Respondent has not provided any reason for the untimely submission of the appeal, so I have determined that it cannot, therefore, be accepted. Rule 53(a) of the Board's Rules of Practice (49 C.F.R. § 821.53(a)) provides that an appeal from an emergency 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 respondent." When an appeal is filed beyond that 10-day time limit, it cannot be entertained unless the respondent establishes good cause for the delay in its submission.¹

¹ In this regard, see Rule 11(a) (§ 821.11(a)), and *Adm'r 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).

The order was transmitted to respondent by Federal Express overnight delivery; U.S. Certified Mail, return-receipt requested; and First-Class Mail on April 13, 2018. The order included a recitation of appeal rights, which instructed respondent:

You may appeal from this Emergency Order within ten (10) days from the date of its service, which is April 13, 2018, by filing a Notice of Appeal with the Office of Administrative Law Judges; National Transportation Safety Board....

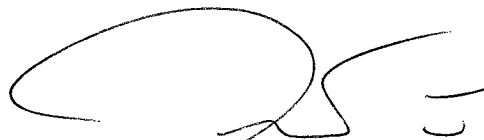
The Board has previously held that, where the Administrator transmits a certificate order by certified or registered mail, the date of service of the order is the date on which it was mailed to the certificate holder. *Administrator v. Corrigan*, NTSB Order EA-4806 (1999). Because the order was transmitted to respondent by multiple means, including certified mail, on April 13, 2018, it must be deemed to have been served on him on that date. Thus, respondent's Rule 53(a) appeal period ended on April 23, 2018. Because he did not file his appeal until April 27, 2017, he failed to meet that deadline, and he must, as noted above, show good cause for the delay in the appeal's submission in order for it to be accepted.

With late-filed appeals, good cause requires a showing that: (1) circumstances beyond the certificate holder's control prevented him from either knowing of the Administrator's order or acting upon it within the prescribed filing period, despite the exercise of due diligence, and (2) once he became aware of the order's issuance or was no longer prevented from acting upon it, he acted diligently in initiating an appeal.

Accordingly, there is no basis for a finding of good cause for the belated submission of the appeal here and, as a consequence, that appeal cannot be accepted.

THEREFORE, IT IS ORDERED that respondent's appeal in this matter is hereby NOT ACCEPTED.

Entered this 30th day of April, 2018, at Washington, D.C.



Alfonso J. Montaña
Chief Administrative Law Judge