

SERVED: February 2, 2024

NTSB Order No. EA-5966

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 30th day of January, 2024

_____)	
MICHAEL WHITAKER, ¹)	
Administrator,)	
Federal Aviation Administration,)	
)	Docket No.: SE-30994
Complainant,)	
)	
v.)	
)	
STEWART O. DUNLAP)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

1. Background

Respondent appeals the Administrative Law Judge Alisa M. Tapia’s February 2, 2023, written order granting the Administrator’s motion to dismiss respondent’s appeal of the Administrator’s order revoking respondent’s remote pilot and airman medical certificate (“revocation order”).² By the dismissal order, the law judge found that in accordance with 49 C.F.R. § 821.30(a), respondent failed to file his appeal within 20 days after the date on which the

¹ The original caption for this matter was Billy Nolen, Acting Administrator, Federal Aviation Administration v. Stewart O. Dunlap.

² A copy of the law judge’s order is attached.

Administrator issued the revocation order.³ For the reasons set forth below, we affirm the law judge's dismissal order.

A. Procedural Background and Facts

On May 25, 2021, the Administrator issued a revocation order, referencing FAA Enforcement Investigative Report (EIR) No. 2021XC780002 and revoking respondent's remote pilot and airman medical certificate issued on November 27, 2019. Also on May 25, 2021, the Administrator issued a revocation order, referencing FAA EIR No. 2021XC790019 and revoking the registration of civil aircraft N29623, Piper model PA-32RT-300T, serial number 32R7987123. Aircraft N29623 was registered to Stew Industries, LLC ("Stew Industries"). Respondent was the managing member of Stew Industries and owner of N29623. These revocation orders explained that on October 21, 2020, respondent acted as pilot in command of N29623, which was used to transport approximately 27 pounds of marijuana, a controlled substance as defined by the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Administrator served both revocation orders on respondent by certified mail. The revocation orders indicated that respondent's appeal was due within 20 days of May 25, 2021 – or June 14, 2021 – and explained to respondent how to file an appeal.⁴

³ 49 C.F.R. § 821.30(a) states:

Appeal. Where the Administrator has issued an order...revoking a certificate, the affected certificate holder (respondent) may file with the Board an appeal from the Administrator's order. The respondent shall simultaneously serve a copy of the appeal on the Administrator. The appeal must be filed with the Board within 20 days after the date on which the Administrator's order was served on the respondent, except as provided with respect to emergency and other immediately effective orders under § 821.53(a).

⁴ The Administrator's revocation order instructed respondent as follows:

You may appeal from this Order within twenty (20) days from the date of its service, which is May 25, 2021, by filing a Notice of Appeal with the National Transportation Safety Board (NTSB) Office of Administrative Law Judges by email (ALJappeals@ntsb.gov); U.S. first class mail, personal delivery, or

On June 17, 2021, respondent filed an appeal of the Administrator's revocation order that referenced EIR No. 2021XC780002 by sending an e-mail to the Board and the Administrator and attaching the notice of appeal.⁵ Although respondent signed the notice of appeal on June 10, 2021, he did not file it with the Board until June 17, 2021. On June 25, 2021, respondent filed an appeal of the Administrator's revocation order corresponding to EIR No. 2021XC790019 by sending an e-mail to the Board and the Administrator and attaching the notice of appeal. In this e-mail, respondent indicated that he had not received the revocation order from the Administrator, stating, "I assume it did not make it in the mail, or is going to be sent." On June 25, 2021, at 10:11 am, the Office of Administrative Law Judges (OALJ) e-mailed respondent asking whether the appeal for EIR 2021XC790019 was "in addition to [the appeal for EIR No. 2021XC780002] filed on June 17, 2021."⁶ On June 25, 2021, at 10:26 am, respondent replied that it was.⁷ On July 27, 2021, the Administrator filed a motion to dismiss respondent's appeal as untimely. On February 2, 2023, the law judge entered an order granting the Administrator's motion to dismiss.

B. Law Judge's Order

In the February 2, 2023, order, the law judge granted the Administrator's motion and dismissed for untimeliness respondent's appeal of the Administrator's revocation order for EIR No. 2021XC780002.⁸ In so holding, the law judge indicated that it was undisputed that respondent's deadline to file the appeal was June 14, 2021, and that respondent admitted filing the

overnight delivery (Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, SW, Washington, DC 20594); or FAX ((202) 314-6158).

⁵ See Reply Br. at 13.

⁶ See Appeal Br. at 2.

⁷ *Id.*

⁸ Order at 2.

appeal after this deadline.⁹ The law judge rejected respondent’s explanation that he wished to file both appeals – for EIR No. 2021XC780002 and for EIR No. 2021XC790019 – simultaneously, but that he could not do so timely because he had not received the Administrator’s order of revocation for EIR No. 2021XC790019 by June 14, 2021.¹⁰ The law judge explained that respondent did not act diligently because he failed to request an extension for simultaneous filing and instead allowed time to pass.¹¹ The law judge further rejected respondent’s claim that separate filings would have caused confusion since “[t]he Administrator assigned specific case numbers for each order [and] [b]oth orders were independent of each other.”¹² The law judge also rejected respondent’s claim that the COVID-19 pandemic affected the timeliness of his filing, explaining that respondent had received the revocation orders prior to the June 14, 2021, deadline.¹³ Thus, the law judge found respondent lacked good cause for his untimely filing of the appeal. On February 11, 2023, respondent timely appealed to the full Board. Respondent filed an appeal brief on February 27, 2023, and the Administrator filed a reply brief on March 28, 2023.

C. Issues on Appeal

Respondent argues that good cause for the untimely filing exists because: 1) the OALJ’s e-mail to respondent reflects confusion about two separate appeals; and 2) due to COVID-19-related postal delivery delays, respondent’s receipt of the revocation order on June 9, 2021, left him inadequate time “to understand the conditions of the order and respond.” The Administrator opposes respondent’s arguments.

2. Decision

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2-3.

¹² *Id.* at 3.

¹³ *Id.*

On appeal, we review the law judge's decision *de novo*.¹⁴ The Board has long held that it will not entertain untimely appeals without a showing of good cause for delay.¹⁵ The Board strictly adheres to this standard of timeliness and the requirement for a showing of good cause in cases of untimely appeals.¹⁶ Good cause is determined by two criteria: 1) factors outside of respondent's control prevented him from knowing or acting upon the Administrator's emergency order; and 2) once he was aware, he acted diligently to initiate his appeal.¹⁷

We find no error in the law judge's determination that respondent's untimely filing of the appeal lacked good cause. We disagree with respondent that there was confusion by the OALJ about his two appeals such that it rises to the level of a good cause. The OALJ merely sought a confirmation that respondent wished to docket a separate appeal. Even if there was confusion by the OALJ, it was dispelled by respondent within a fifteen-minute timeframe. We also disagree with respondent that a hypothetical delay in his receipt of the revocation order due to the COVID-19 pandemic constituted good cause. Respondent has not provided any proof that such delay actually took place: respondent provided no postmarked envelope in which the Administrator's order arrived and no tracking information to show he indeed received it on June 9, 2021.¹⁸ Even if respondent received the revocation order on June 9, 2021, respondent does not explain what preparation he required beyond the filing of the notice of appeal, which respondent had filled out

¹⁴ *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).

¹⁵ 49 C.F.R. § 821.11(a); *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).

¹⁶ *Hooper*, 6 NTSB 559.

¹⁷ *Administrator v. Miller*, N.T.S.B. Order No. EA-5921 at 3 (2022) (citing *Administrator v. Harris*, N.T.S.B. Order No. EA-5875 at 7 (2020); *Administrator v. Capeles*, N.T.S.B. Order No. EA-5870 at 3 (2020)).

¹⁸ *See, e.g. Administrator v. Ziv*, NTSB Order No. EA-5897, at 4-5 (2021).

and signed on June 10, 2021. Regardless of the date of respondent's actual receipt of the revocation order, where the Administrator serves a certificate order by certified or registered mail, the date of the service of the order is the mailing date.¹⁹ Thus, the notice of appeal was due June 14, 2021, which is 20 days after the mailing date of May 25, 2021. For these reasons, we find no factors outside of respondent's control that prevented him from filing the appeal in a timely manner, and thus need not reach the question of whether respondent acted diligently when he filed the appeal on June 17, 2021. We therefore find that the law judge did not err in her finding that no good cause existed for respondent's untimely filing of the appeal concerning the Administrator's revocation order referencing EIR No. 2021XC780002.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's dismissal order is affirmed.

HOMENDY, Chair; GRAHAM and CHAPMAN, Members of the Board, concurred in the above opinion and order.

¹⁹ See *Administrator v. Corrigan*, NTSB Order No. EA-4806 (1999); 49 U.S.C. § 46103(b).

Served: February 2, 2023

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

BILLY NOLEN,
ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

Docket SE-30994

STEWART O. DUNLAP,

Respondent.

ORDER GRANTING THE ACTING ADMINISTRATOR'S
MOTION TO DISMISS FOR UNTIMLINESS

SERVICE:

Stewart O. Dunlap
Stewartodunlap71@gmail.com
(By Email Only)

Annjenet Chennault, Esq.
Office of Chief Counsel, AGC-300
Aviation Litigation Division,
FAA – Southwest Team
Annjenet.n.chennault@faa.gov
(By Email Only)

On May 25, 2021, the Acting Administrator of the Federal Aviation Administration (hereinafter, Administrator) issued an order revoking Stewart Dunlap's (hereinafter, Respondent) remote pilot and airman medical certificate under 49 U.S.C. § 44106. On June 17, 2021, Respondent filed an appeal of that order. On July 27, 2021, the Administrator filed a motion to dismiss Respondent's appeal based on untimeliness. *See* 49 Code of Federal Regulations (CFR) § 821.14. On July 29, 2021, Respondent filed his reply.

THE ADMINISTRATOR'S MOTION TO DISMISS

In the Motion, the Administrator argued that it issued the order of revocation to Respondent by certified mail-return receipt requested and first-class mail on May 25, 2021. Under the Board rules, the Administrator argued that Respondent's deadline for filing an appeal was June 14, 2021. Respondent did not file his appeal until 3 days after the deadline on June 17, 2021. The Administrator pointed out that

Respondent offered no explanation or good cause to justify his untimely appeal. The Administrator respectfully requested that the Board dismiss Respondent's appeal as untimely.

In his Reply, Respondent contended that the Administrator issued two orders. One revoked his medical certificate (2021XC80002), and the other revoked his aircraft registration (2021XC790019). Respondent alleged that he received the first order on June 9, 2021. The next day, Respondent prepared his appeal but waited to file it until he received the second revocation order. He planned to file both appeals together to avoid confusion. As time passed, Respondent became concerned and appealed the first order on June 17, 2021. He filed the second appeal on June 25, 2021. Respondent requested that the Board consider Covid-19 mailing delays in resolving the Motion. Respondent argued that the mail delay could have been avoided if both orders had been sent by email.

Based on the pleadings, and the applicable Board Rules of Practice, I find the Acting Administrator's Motion should be granted. My rationale follows.

DISCUSSION

Respondent's appeal of the Administrator's Order was untimely. The regulations provide, in relevant part, where the Administrator has issued an order amending, modifying, suspending, or revoking a certificate, the affected certificate holder may file with the Board an appeal from the Administrator's order. The respondent shall simultaneously serve a copy of the appeal on the Administrator. The appeal must be filed with the Board within 20 days after the date on which the Administrator's order was served on the respondent.

The facts are undisputed. On May 25, 2021, the Administrator issued two revocation orders against Respondent. One order revoked Respondent's remote pilot and airman medical certificate. The second order revoked his entity's aircraft registration. On that day, the Administrator mailed the revocation orders to Respondent by certified and first-class mail. Respondent had twenty days from the service date to file his appeals before the Board. Hence, Respondent's deadline to file both appeals was June 14, 2021.

Respondent admits his appeals to the Board were filed after the deadline. Respondent contends he received the Administrator's Order of revocation against his certificate on June 9, 2021. At that time, Respondent had not received the Administrator's second order of revocation of his entity's aircraft registration. To avoid confusion, Respondent contends that he waited to file his appeal until he received the Administrator's second revocation order and file both appeals simultaneously. After some concern, Respondent filed his notice of appeal to the first revocation order to the Board on June 17, 2021, and the second on June 25, 2021.

Respondent failed to establish good cause. On a written request filed with the Board and served on all other parties and for good cause shown, the law judge or the Board may grant an extension of time to file any document. *See* 49 C.F.R. § 821.30(a). To establish good cause, respondent must show factors outside of his/her control that prevented respondent from acting upon the Administrator's revocation order and that he/she acted diligently to initiate the appeal.

Respondent neither filed an extension nor acted diligently. If Respondent's representation is accurate, Respondent could have requested an extension to allow him to file both appeals simultaneously. Instead, Respondent chose to wait and allow time to pass before filing the appeals. Respondent received both Administrator's orders of revocation before the deadline. Respondent eventually appealed the first order,

albeit three days after the deadline, and the second appeal eleven days after the deadline. That being the case, Respondent failed to act diligently to initiate the appeal process.

Respondent's argument is unpersuasive. Respondent contends that to avoid confusion, he held back filing his appeal of the Administrator's first order of revocation until he received the second order of revocation against his aircraft registration. In addition, Respondent argues Covid-19 delays should also be considered in his failure to meet the deadline.

It is unclear how filing separate appeals of two independent revocation orders would cause confusion. The Administrator assigned specific case numbers for each order. Both orders were independent of each other. In short, Respondent's contention that waiting past the deadline to file both appeals simultaneously because it would be less confusing is not convincing.

As to Respondent's argument that Covid-19 played a part in his untimely appeal. Respondent had what he needed to file his first appeal. As to the second order, Respondent has not asserted that he received it past the deadline. Both appeals were received before the deadline; thus, Respondent could have filed his appeals within the time allowed, and Covid-19 played no part in Respondent's delay.

The Administrator's motion should be granted. It has long been held that the Board's 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 removing the essential element of predictability from Board proceedings." *See Administrator v. Hayes*, 1 NTSB 2016, 2017 (1972).

Based on the pleadings, Respondent, without good cause, failed to file his appeal by the deadline. *See* 49 C.F.R. § 821.30(a). As a result, I find no basis to accept the appeal.

THEREFORE, IT IS ORDERED that the Acting Administrator's motion to dismiss Respondent's appeal for lack of timeliness is hereby GRANTED.

Entered this 2nd day of February 2023, at San Antonio, TX.

Alisa M. Tapia

Alisa M. Tapia
Administrative Law Judge