

SERVED: May 7, 2007

NTSB Order No. EA-5284

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 3<sup>rd</sup> day of May, 2007

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MARION C. BLAKEY,		)	
Administrator,		)	
Federal Aviation Administration,		)	
		)	
Complainant,		)	
		)	Docket SE-17536
v.		)	
		)	
CARL EUGENE McKINNEY,		)	
		)	
Respondent.		)	
		)	
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**OPINION AND ORDER**

Respondent appeals the order of Chief Administrative Law Judge William E. Fowler, Jr., served in this proceeding on January 6, 2006.<sup>1</sup> By that decision, the law judge dismissed respondent's appeal of the Administrator's suspension order as untimely.<sup>2</sup> Respondent requested reconsideration of the order

<sup>1</sup> A copy of the law judge's order is attached.

<sup>2</sup> The order suspended respondent's commercial pilot certificate for 90 days for alleged violations of the Federal Aviation Regulations associated with his operation of a passenger-carrying flight from Atlanta, Georgia, with an intended destination of

terminating his appeal, and the law judge denied that request on March 7, 2006.<sup>3</sup> Airmen must demonstrate good cause for tardiness in filing notices of appeal if they wish to avoid mandatory dismissal. We conclude respondent has not demonstrated good cause and therefore deny the appeal.

#### Background

The Administrator served her suspension order on August 19, 2005. Instructions with the order said an appeal "must be filed within twenty (20) days from the time of service of this Order." Therefore, the notice of appeal had to be filed on or before September 8, 2005. The day after that deadline, on September 9, 2005, respondent filed a late notice of appeal and a second document alternately titled "request for extension of time" or "request for leave to file late notice of appeal." That document explained that counsel was out of his office for prostate surgery and recuperation until September 21, 2005; acknowledged that his office received the suspension order in his absence; and stated that, "the deadline for filing the Notice of Appeal was believed to be twenty (20) days from receipt" of the order.

In dismissing the appeal for lack of timeliness, the law judge noted that the Administrator apparently did not object to the request to file the "admittedly untimely" appeal, but the law

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(..continued)

Myrtle Beach, South Carolina; the flight terminated in an emergency crash landing in the inter-coastal waterway 3 miles from Myrtle Beach's Grand Strand Airport. The accident resulted in the death of one passenger.

<sup>3</sup> A copy of the law judge's order denying the request for

judge nonetheless determined the appeal must be dismissed as a matter of law. He said respondent must show good cause for the delay, and that a finding of good cause generally requires a showing that circumstances beyond the certificate holder's control, despite the exercise of due diligence, prevented him from knowing of the order or acting upon it within the prescribed time limit for filing an appeal.

#### Facts

On the afternoon of Saturday, August 20, 2005, respondent's counsel left the Administrator's counsel a voicemail message, notifying her of his upcoming August 23, 2005 prostate surgery and his planned September 21, 2005 return to the office. He followed that message, on the same day, with a letter to the Administrator, also acknowledging that he was aware the Administrator intended to issue a suspension order "in the near future." See Request for Reconsideration of Order of Termination of Appeal (Recon.), Exhibit (Ex.) A. In the letter, respondent's counsel also requested an extension of time until his return to work "if there are any deadlines that must be met during this period with regard to" respondent's case. Id. He also both referred to, and furthered, negotiations regarding respondent's case. Id.

Prior to his departure for surgery, respondent's counsel "attempt[ed]" to advise his colleagues of the status of various

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(..continued)  
reconsideration is attached.

pending matters that might require attention in his absence. Recon. at 3. He related that opposing counsel [in those "various pending matters"] agreed to "postpone or suspend all scheduled activity requiring his involvement on pending litigation for the four week period" of his absence so that he could "avoid the necessity" to "reassign matters to new attorneys or seek a change of counsel" for his clients during his temporary absence. Id. As to "active litigation matters," respondent's counsel obtained "leaves of absence ... from appropriate federal and state courts." Id.

Apparently, based on the record before us, respondent's counsel did not obtain or confirm any such agreements, leaves of absence, suspensions of activity, or postponements regarding respondent's case. In fact, respondent's counsel learned, on Monday, August 22, 2005, two days after his notifications to the Administrator, and the day before his surgery, that the Administrator had already issued the order of suspension the previous Friday. See Recon.

The Administrator's counsel received respondent's counsel's August 20, 2005 letter on August 22, 2005, at which time she faxed a letter to respondent's counsel's office, advising that the order had been issued before knowledge of counsel's surgery, and also advising him that the deadline for filing an appeal was not within her control and could not be extended by her. Id., Ex. B. On that same day, August 22, 2005, respondent's counsel's secretary e-mailed respondent's counsel, re-typing the text of

the Administrator's letter. Id., Ex. C. Respondent's counsel asked his secretary if the order said anything about the deadline for filing the notice of appeal. Id., Ex. D. He also referred her to another attorney for further information. Id. The secretary told respondent's counsel he had 20 days from the time of service of the order. Id.

Sixteen days after surgery, on September 8, 2005, the day the notice of appeal was due, the secretary e-mailed respondent's counsel and recounted her calculation of the due date for the notice of appeal. It is clear that she counted 20 days from the day the office received the order. Id., Ex. E. Respondent's counsel replied that he would review the NTSB rules to see if it was possible to get an extension. Id., Ex. F. He also e-mailed another attorney, asking about forms to extend time or for a notice of appeal. Id., Ex. G. Respondent's counsel got a form that afternoon and forwarded it to his secretary to adapt to respondent's case. Id. Respondent's counsel apparently did not review the NTSB rules, however, because the next day, September 9, 2005, he told his secretary he would look at the adapted form when she prepared it. Id., Ex. H.

Also, on the day after the filing deadline, respondent's counsel filed, by Federal Express, next business day morning delivery, a late notice of appeal and the document requesting an extension of time for leave to file a late notice of appeal.

Law

Under Board precedent, the notice of appeal must be filed within 20 days after it the order of suspension is served on respondent. The Board has held that, for actions served by certified or registered mail, as here, the service date is the date the order was mailed by the Administrator.<sup>4</sup> Simply stated, the Administrator's mailing of the order starts the running of the clock; the mailing of his notice of appeal stops it.

The Board cannot entertain untimely appeals without a showing of good cause for delay. See 49 C.F.R. 821.11(a); Administrator v. Hooper, 6 NTSB 559, 560 (1988). Unfounded mistakes as to procedures do not justify the acceptance of untimely notices of appeal, nor do they constitute good cause for noncompliance. Administrator v. Smith, NTSB Order No. EA-4485 (1996); Administrator v. Near, 5 NTSB 994 (1986).

We review the law judge's decision under a traditional abuse of discretion standard. See Administrator v. Diaz, NTSB Order No. EA-4990 (2002).

Discussion

Respondent says good cause exists because the error that led to late filing was due to counsel's unavoidable temporary absence due to a medical emergency. See Appellant's Brief (Resp. Br.). We do not accept such a characterization of his untimely-filed notice of appeal. We find that the reason for late filing was an

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<sup>4</sup> See Administrator v. Carlos, NTSB Order No. EA-4936 (2002); Administrator v. Corrigan, NTSB Order No. EA-4806 (1999).

inaccurate calculation of the due date. Counsel's illness was not the cause of the error, nor did it prevent timely filing.

Furthermore, when respondent and counsel are aware certificate action is near, they must timely ensure that the Administrator is aware of any plans or circumstances that may affect or prevent correspondence about that action, particularly during ongoing negotiations. See Administrator v. Ordini, NTSB Order No. EA-5160 (2005); Administrator v. Croll, NTSB Order No. EA-5009 (2002); Administrator v. Durst, NTSB Order No. EA-4400 (1995). Here, on his way out of the office for a four-week absence, respondent's counsel notified the Administrator, in the middle of a weekend no less, knowing that his notification would likely not be received before he left. This hardly leaves a reasonable opportunity to coordinate schedules or postpone events. And, as previously noted, respondent's counsel does appear to have actually negotiated and obtained agreements regarding his schedule and delays with other counsel and courts in legal matters in which he was the attorney of record.

We are not unsympathetic to counsel's illness, nor are we unmindful that his attention might not have been focused the day before surgery. But there were other counsel and support staff available in his firm, and he even consulted with an aviation law attorney not in his firm. And, respondent's counsel, by all indications, was focused – directing his secretary to look for information about a deadline to file, and telling her about

another attorney she could call for more information. See Recon., Ex. D.

During his absence, respondent's counsel says, he did not have the file at home, and it was necessary for his secretary to determine the due date. Recon. at 1. The secretary took the file to respondent's counsel's home the evening of September 8, 2005. Id. at 5. But, not having the file during the 17 days from his learning of the suspension and when notice of appeal was due is neither relevant nor persuasive. He was aware a suspension order was issued on August 19, 2005; that a notice of appeal was due in a specified period of time; that timely notice was required to preserve his client's right of appeal; that he must determine the due date; and that he must file a notice of appeal by that date or make a timely request for an extension of time. The order of suspension and respondent's counsel's letter to the Administrator appear to have crossed in the mail. The order arrived at respondent's counsel's office on August 22, 2005, and he was made aware of its arrival that day, before his surgery. Not only did he know the suspension had been issued, he began the initial process of determining the deadline. See Recon., Ex. D.

Respondent's counsel seems to blame his secretary for not delivering the file to his home in a more expeditious manner, asserting that the delay was due to her error in calculating the due date. Recon. at 1. He states further that if he had been at



his office he would have reviewed the file at the time of receipt.<sup>5</sup>

Also, respondent's counsel stated that he would not have had to rely on his secretary's erroneous calculation had he been able to properly calculate the deadline. But counsel did exactly that; he relied on her calculation even though he had time and opportunity to review the rules. Counsel's secretary's e-mail message contained her entire basis for calculating the due date, and all counsel had to do was verify it. Upon reviewing her calculation, he was on notice she used the date the order was received as the date of service. He should have, and could have, timely reviewed the rules and a calendar. We find it significant that he was working on the case to the extent that he filed the appeal only 1 day late – and 12 days before his announced return to the office. We conclude that he was not too ill to timely file; he simply failed to accurately interpret the Board's rules and compute the deadline properly. The Board has been clear regarding such interpretive errors. See Smith and Near, supra.

We find that there was time and opportunity for respondent's counsel to refer to the rules. The shift of responsibility to his secretary will not be entertained. Counsel corresponded with

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<sup>5</sup> We do not discuss whether his surgery was an emergency, other than to note there is no proffer to establish that, as opposed to something less than an emergency, and to note that respondent has the burden to show there was good cause for lack of timeliness. We need not decide this; we find, even assuming, *arguendo*, that the characterization as an emergency is accurate, that other factors lead us to conclude he has not shown good cause for late filing.

his office before surgery and on, or perhaps even before, the due date of the notice of appeal. On the day it was due, he e-mailed his secretary, saying he would review the Board's rules about an extension. Id., Ex. F.

Respondent cites LeMaster v. Winnemucca, 113 F.R.D. 37 (D. Nev. 1986), for the proposition that illness may provide a basis for a finding of good cause. In context, the case lends little support for respondent's position. LeMaster failed to complete service of process within the time allowed by the Federal Rules of Civil Procedure. The defendants moved to dismiss, but LeMaster showed that his attorney's cancer forced counsel to spend up to 3 days a week at the hospital for extensive chemotherapy and radiation treatments. LeMaster, in turn, cited Islamic Republic of Iran v. Boeing Company, 739 F.2d 464, 465 (9<sup>th</sup> Cir. 1984), where illness of counsel also justified failure to meet deadlines. LeMaster describes Iran as a case where "the illness is so physically and mentally disabling that counsel is unable to file ... and is not reasonably capable of communicating to co-counsel his inability to file." 113 F.R.D. at 38-39. In Iran, the illness lasted 36 hours, and counsel's secretary suffered the same bout of diarrhea and vomiting, and at the same time, that incapacitated counsel. Iran, supra at 465. Our case is nothing like those of LeMaster, Iran, or other cases respondent cites. We do not find that counsel was incapacitated, or unable to act, or without support staff capable of acting in his stead.

In short, counsel appears to have been engaged and capable of filing a notice of appeal or requesting a timely extension. He simply made a mistake in interpreting the Board's rules regarding the service date of the Administrator's order of suspension, and the resulting due date of the notice of appeal. We find that the law judge was well within the bounds of his discretion when he dismissed respondent's appeal.

FAA Practices on Service of Orders

We are compelled to comment again on FAA practice in this area, although the parties have not raised it. Recently, we noted "the need for improvement in FAA's practices and policies concerning service of orders in enforcement matters." Ordini, supra. "While the term 'served' is understood to mean 'mailed' by the cognoscenti who are familiar with FAA enforcement cases, in other legal contexts this term can be understood to mean 'received'." Id. at 8. In Administrator v. Decuir, NTSB Order No. EA-5048 (2003), we said, "the confusion that precipitated the late appeal ... could have been eliminated had the ... order reflected the actual date by which the appeal needed to be filed." Id. at 9. We understand some confusion might result if the FAA incorrectly calculates the deadline, but that also serves to highlight the confusion of respondents in trying to do so and urges us to again ask the Administrator to be more sensitive to this matter and to, at the very least, define the service date in her enforcement orders. See id.

Conclusion

In the context of late-filed notices of appeal and appeal briefs, the Board consistently follows the good cause policy established on remand from Hooper v. NTSB and FAA, 841 F.2d 1150 (D.C. Cir. 1988). That is, "[the Board] 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, timely appeal briefs or timely extension requests to submit those documents have not been filed." Administrator v. Hooper, 6 NTSB 559, 560 (1988). The Board publishes decisions addressing late-filed notices of appeal and appeal briefs, even those issued under delegated authority by the General Counsel, and respondent cites us no case, and we are aware of none, where we have not followed this policy. Nor does respondent cite any case, nor are we aware of any since our decision in Hooper, in which we applied that standard in a manner that is inconsistent with the result here.

Administrator v. Beissel, NTSB Order No. EA-5153 at 4 (2005)  
(footnote omitted).

Upon a thorough review of the record, and despite our comments on the Administrator's service of orders here and in Ordini and Decuir, we discern no error in the law judge's order dismissing respondent's appeal as untimely. His action was correct in law and, therefore, he certainly did not abuse his broad discretion.

**ACCORDINGLY, IT IS ORDERED THAT:**

The law judge's order dismissing respondent's appeal of the order of suspension as untimely filed is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.