

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

VIRGINIA S. TAYLOR

FAA Order No. 98-1

Served: February 18, 1998

Docket No. CP95WP0231

ORDER DISMISSING APPEAL

On February 6, 1997, Administrative Law Judge Burton S. Kolko issued a written initial decision finding that Respondent Virginia S. Taylor had violated 14 C.F.R. § 91.11 and assessing a \$1,000 civil penalty.¹ Because Taylor has not proven that she filed a notice of appeal in a timely fashion or that she had good cause for failing to do so, her notice of appeal is dismissed.

If Taylor wished to appeal from the law judge's written initial decision, she was required, under 14 C.F.R. §§ 13.233(a) and 13.211(e), to file a notice of appeal with the FAA Hearing Docket within 15 days of service of the initial decision.²

Thus, her notice of appeal was due no later than February 21, 1997. However, the

¹ A copy of the written initial decision is attached.

² A review of the service list of the law judge's written initial decision indicates that the law judge's office served Ms. Taylor but not her attorney. While this failure to serve the attorney directly *might* constitute good cause for the failure to file a timely notice of appeal, it does not excuse an almost 8-month delay. See In the Matter of Continental Airlines, Inc., FAA Order No. 97-28 at 5, 1997 FAA LEXIS 1138 at *7-8 (September 26, 1997) (law judge served former agency attorney; held that this circumstance does not constitute good cause for filing notice of appeal 1 year late). Taylor was responsible for contacting her attorney once she received her copy of the initial decision to discuss an appeal, and, as a result, at best, only a short delay in filing a notice of appeal would have been justified.

FAA Hearing Docket did not receive any document that could be construed as a notice of appeal until October 2, 1997. On that date, the FAA Hearing Docket received a document entitled "Petition for Leave to Department of Transportation for Discretionary Review of Initial Decision." The document itself is not dated (and it apparently was not signed by the attorney, but instead by someone else who failed to indicate that he or she was signing for counsel.) Appended to this document is a page entitled "Proof of Service" indicating that the document was mailed on September 26, 1997. In a cover letter, it was written as follows:

The petition was previously filed, and the Litigation Department confirmed it had been received. However, the Docketing Clerk informed my office that it had not received the Petition. To ensure that all interested parties have a copy, I am serving it again.

Letter from Saunders V. Dorsey, Esq., dated September 19, 1997, to Chris G. Zuales, Esq.; the Honorable Burton S. Kolko, Administrative Law Judge; the Federal Aviation Administration, Litigation Department; and the Federal Aviation Administration, Appellate Docket Clerk.

It should be noted that none of the above-mentioned FAA or DOT offices received such a petition dated prior to September 19, 1997. The Litigation Division has never received such a petition dated prior to September 19, 1997, and Mr. Dorsey's office apparently misunderstood the member of the Litigation Division who was contacted. At the time of the inquiry from Mr. Dorsey's office, no one from the Litigation Division had any knowledge of this case, and a check of the FAA Hearing Docket computer records at the time indicated that no such petition had been received by the FAA Hearing Docket Clerk.³

³ Sheila Skojec, a Senior Attorney in the Litigation Division, was contacted by Mr. Dorsey's office. Ms. Skojec explained that the Litigation Division had not received the petition. She explained further that while Taylor's case was docketed in the FAA Hearing Docket's

Subsequently, Mr. Dorsey filed an affidavit in which he averred in pertinent part as follows:

- That Saunders V. Dorsey filed a Petition for Leave to Department of Transportation for Discretionary Review of Initial Decision;
- That Saunders V. Dorsey assigned service of this petition to his law clerk, John Catchings.⁴
- That John Catchings served said Petition on the FAA.
- That there is no Proof of Service in the file maintained by Saunders V. Dorsey.
- That service was verified by the FAA's Litigation Department when Saunders V. Dorsey's office called the FAA to determine when the Petition would be set for a hearing. The receipt of the Petition was verified, then the call was transferred to the Appellate Division. A return call was received by the Appellate Department, which indicated they did not have a copy of the Petition. A subsequent copy of the Petition was served on all previous parties and the Appellate Department.

computer records, there was no notation in the records indicating that the FAA Hearing Docket had received the petition either. Ms. Skojec referred Mr. Dorsey's office to Stephanie McClain, the FAA Hearing Docket clerk.

⁴The Administrator has held that clerical error by a support staff member in the performance of a properly delegated ministerial task may constitute good cause for a late-filed notice of appeal. See In the Matter of Safety Equipment and Sign Co., FAA Order No. 92-76, 1992 FAA LEXIS 280 (December 21, 1992) (good cause found for failure to file answer on time where the paralegal to respondent's counsel failed to show him the complaint that had been received -- despite instructions to show counsel all incoming mail -- and as a result, respondent's counsel was unaware of the complaint and the need to prepare the answer); In the Matter of Esau, FAA Order No. 91-24 at 2, 1991 FAA LEXIS 282 at *2-3 (June 21, 1991)(good cause for late-filing of notice of appeal in case in which agency attorney's secretary -- prior to the due date -- mistakenly sent the notice of appeal to the National Transportation Safety Board); cf. In the Matter of Langton, FAA Order No. 93-12, 1993 FAA LEXIS 199 at *9-11 (March 25, 1993) (counsel was aware that he had to file a request for hearing but failed to do so; the fact that his legal assistant put the file on the "hold" shelf does not constitute good cause for the failure of the attorney to file a request for hearing on time).

If Taylor's counsel had demonstrated that he had prepared the notice of appeal in timely fashion, but then the legal assistant failed to serve it on time, there might have been a showing of good cause for the late-filing. However, Taylor's counsel has not shown that he prepared the notice of appeal and gave it to his legal assistant on or before the date on which the notice of appeal had to be served.

- Saunders V. Dorsey does not have a Proof of Service for the original service of the Petition, and cannot obtain a copy of one, as Mr. Catchings is no longer employed by Saunders V. Dorsey.

Affidavit dated October 12, 1997, by Saunders V. Dorsey, Esq.

In none of these recent documents from Mr. Dorsey has he stated that he had prepared the notice of appeal by February 21, 1997, and gave it to his law clerk to be served by that date. Likewise, he has not provided any date of service for that document, and for that matter, while he asserts that Mr. Catchings served the petition on the FAA, he has provided no substantiating evidence even for that claim. "The party filing a document has the burden of proving the date on which it filed the document," In the Matter of Hampton Air Transport Systems, Inc., FAA Order No. 97-11 at 3-4, n.11, 1997 FAA LEXIS 48 at *4 (February 20, 1997).

In light of the foregoing, it can only be held that Taylor has failed to prove that she filed a notice of appeal in a timely fashion. A late-filed notice of appeal will only be excused upon a showing of good cause for the late-filing. *E.g.*, In the Matter of Air St. Thomas, FAA Order No. 97-38 at 4, FAA LEXIS 1442 at *6 (November 17, 1997). Taylor has neither acknowledged filing her notice of appeal nor has she provided an explanation for this failure.

Therefore, Taylor's Petition for Leave to Department of Transportation for Discretionary Review of Initial Decision is dismissed because Taylor has neither proven that the notice of appeal was timely filed nor that good cause for the

late-filing existed. The \$1,000 civil penalty assessed by the law judge remains in effect.⁵

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration



VICKI S. LEEMON⁶
Manager, Adjudication Branch

Issued this 18h day of February, 1998.

⁵ Respondent may file a petition for reconsideration of this order under 14 C.F.R. § 13.234. Section 13.234 provides that a petition for reconsideration is due to be filed within 30 days of the date of service of the Administrator's final decision. 14 C.F.R. § 13.234(a). The petition for reconsideration, should Respondent choose to file one, should be sent to the Federal Aviation Administration, 800 Independence Avenue, SW, Room 924A, Washington, D.C. 20591, Attn: Hearing Docket Clerk.

⁶ Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (*see* 57 Fed. Reg. 58,280 (1992)) and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.