

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: November 7, 1990

FAA Order No. 90-39

In the Matter of:)

BEVIL HART)

) Docket No. CP89SW0455
)
)
)

DECISION AND ORDER

Respondent Bevil Hart ("Respondent") has appealed from the written initial decision served by Administrative Law Judge Ronnie A. Yoder on March 27, 1990. In his decision, the law judge granted Complainant's motion to strike Respondent's defense and for decision.^{1/} The law judge sustained the \$2,500 civil penalty sought in the complaint. Due to Respondent's failure to perfect his appeal by filing an appeal brief in a timely fashion, I am dismissing Respondent's appeal.

On November 16, 1989, Complainant filed its order of civil penalty, which served as the complaint in these proceedings. Complainant alleged that on November 7, 1988, Respondent had attempted to enter a sterile area at

^{1/} A copy of the law judge's written initial decision is attached.

William P. Hobby Airport in order to board an aircraft, and that a loaded pistol was found in his accessible baggage by screening personnel. Complainant alleged further that Respondent thereby violated section 901(d) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. 1471(d),^{2/} and section 107.21(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. 107.21(a).^{3/} Complainant sought a \$2,500 civil penalty for these alleged violations.

In his answer served on January 10, 1990, Respondent did not contest any of the facts alleged in the complaint. However, Respondent claimed an entitlement to a waiver of the civil penalty, asserting in essence that the FAA failed to

^{2/} Section 901(d) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. 1471(d) provides in pertinent part:

[W]hoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air operation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to civil penalty of not more than \$10,000 which shall be recoverable in a civil action brought in the name of the United States.

^{3/} Section 107.21(a) of the FAR provides:

Except as provided in paragraph (b) of this section, no person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property (1) when performance has begun of the inspection of the individual's person or accessible property before entering a sterile area; and (2) when entering or in a sterile area.

inform him about the Aviation Safety Reporting Program (ASRP) until February 2, 1989, thereby denying him an opportunity to file a report with NASA in a timely fashion.^{4/}

Complainant filed its "Motion to Strike and Motion for Decision on January 12, 1990, arguing that the ASRP is not applicable to Respondent, and that even if the ASRP was applicable to Respondent, Respondent was not entitled to a waiver of penalty under that program because he failed to file a report of his violation to NASA in a timely fashion. Complainant argued further that it was entitled to a decision in its favor under 14 C.F.R. 13.218(f)(5) due to Respondent's failure to deny any of the allegations set forth in the complaint. Respondent filed no response to Complainant's motion.

The law judge held that "[s]ince Respondent's answer asserts no defense other than the 'waiver program' and that defense is unavailing, the motion to strike Respondent's defense and for decision is granted." The law judge served his written decision on March 27, 1990. Respondent served his notice of appeal on April 10, 1990.

^{4/} A prerequisite for eligibility for penalty waiver under the ASRP is that the individual must prove "that, within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA. . . ." Advisory Circular No. 00-46C, Aviation Safety Reporting Program (February 4, 1985).

In accordance with the decision of the United States Court of Appeals for the District of Columbia Circuit in Air Transport Association v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990), on April 13, 1990, the FAA held all civil penalty cases in abeyance until completion of rulemaking on the Rules of Practice in civil penalty actions. 55 Fed. Reg. 15134 (April 20, 1990). Subsequently, the FAA informed Respondent and Respondent's counsel by notice that the newly promulgated procedural rules would become effective on August 2, 1990. This notice stated in pertinent part:

Many of the initiation procedures and the revised rules of practice require persons to take action within a certain time period. To ensure smooth and efficient implementation of the revised procedures and rules, the FAA determined that any time period in the rules that permits or requires action by a party should begin anew on August 2, 1990. Thus, regardless of how much time remained when proceedings in your case were held in abeyance on April 13, 1990, the full period specified in the revised procedures or rules is available when proceedings in your case resume on August 2, 1990.

On August 29, 1990, Respondent filed what he styled as his First Amended Original Answer and First Amended Notice of Appeal.

On September 26, 1990, Complainant filed its Motion to Dismiss, arguing that Respondent's appeal should be dismissed because Respondent's notice of appeal was late and Respondent had not filed an appeal brief. Respondent filed a Reply to

Motion to Dismiss and a Motion for Extension of Time to File Brief on October 19, 1990.

1. Was Respondent's Notice of Appeal filed in a timely fashion?

The law judge's decision was served on March 27, 1990.^{5/} Pursuant to section 13.233(a) of the Rules of Practice, a party is required to file its notice of appeal "not later than 10 days after . . . service of the written initial decision on the parties" 55 Fed. Reg. 27548, 27584 (July 3, 1990). In addition, since the law judge's written initial decision was served by mail, the "mailing rule," section 13.211(e), applies. 55 Fed. Reg. at 27578. Section 13.211(e) provides that "[w]henver a party has a right or a duty to act or to make any response within a prescribed period of time after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period." Id. Hence, since the law judge's decision was served by mail, Respondent's notice of appeal was due on April 11, 1990. Respondent's notice of appeal, filed on April 10, 1990, therefore, was timely.

^{5/} Although the decision is dated March 27, 1990, it indicates that it was served on March 26, 1990. The law judge subsequently issued an Errata Sheet, indicating that his decision actually was served on March 27, 1990.

2. Should Respondent's appeal be dismissed for failure to perfect?

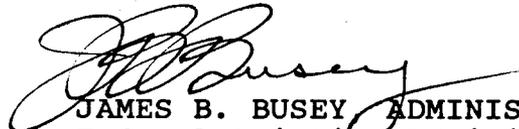
In accordance with the written guidance in the notice to all persons whose civil penalty cases were held in abeyance and section 13.233(c) of the Rules of Practice, 14 C.F.R. 13.233(c), Respondent was required to perfect his appeal by filing an appeal brief no later than 50 days after August 2, 1990. 55 Fed. Reg. 27548, 27584 (July 3, 1990). Therefore, Respondent's appeal brief was due no later than September 21, 1990, and Respondent's request for an extension of time, filed on October 19, 1990, was late.^{6/} Moreover, parties are required by section 13.233(c)(2) to demonstrate good cause for an extension of time in which to perfect an appeal when that request is not agreed upon by the parties. Here, Respondent has failed to demonstrate good cause for the requested extension, as well as for the lateness of the motion for extension of time itself. Consequently, Respondent's motion for an extension of time in which to file his appeal brief is denied and Respondent's appeal is dismissed pursuant to section 13.233(d)(2) of the Rules of Practice, 14 C.F.R. 13.233(d)(2), which provides that "[t]he FAA decisionmaker may dismiss an appeal . . . where a party has filed a notice of appeal, but fails to perfect the appeal

^{6/} The filing of the Amended Notice of Appeal did not toll the period for filing the appeal brief.

by timely filing an appeal brief with the decisionmaker."

55 Fed. Reg. at 27584.

THEREFORE, it is ordered that Respondent's motion for extension of time is denied, and Respondent's appeal is dismissed.^{7/} A civil penalty in the amount of \$2,500 is hereby assessed.^{8/}


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 7th day of November, 1990.

^{7/} I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, he may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. 13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition, I will stay the effectiveness of this decision and order pending disposition of the petition.

^{8/} Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in the footnote above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. 13.16(b)(4) and 13.233(j)(2)).