

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

JIMMY LEE HARKINS

FAA Order No. 94-22

Served: June 22, 1994

Docket No. CP93AL0214

DECISION AND ORDER

Respondent Jimmy Lee Harkins has appealed from the written initial decision of Administrative Law Judge Burton S. Kolko.¹ The law judge dismissed Respondent's request for hearing and assessed the \$5,000 civil penalty sought in the complaint, because Respondent failed to file an answer to the complaint.²

The complaint, served on May 24, 1993, advised Respondent of the requirement that he file an answer within 30 days after service of the complaint.³ However, Respondent did not file an answer. As a result, Complainant filed a motion to deem the allegations in the complaint admitted. The law judge then issued an Order to Show Cause on August 23, 1993, giving Respondent until September 10, 1993, to file an answer and explain his late filing. Respondent still did not file an answer, nor did he respond to the law judge's order. On September 21, 1993, the law judge issued an Order Assessing Civil Penalty deeming the

¹ A copy of the law judge's written initial decision is attached.

² The complaint alleged that Respondent knowingly shipped one pallet of camping equipment containing 5 gallons of gasoline on a cargo plane in violation of the Hazardous Materials Regulations, 49 C.F.R. §§ 171.2(a); 172.200(a), 202(a)(1)-(3), 204(a), 204(c)(1)-(3), 300, 301(a), 400(a), 602(b)(3).

³ Section 13.209(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 13.209(a), provides in relevant part: "[a] Respondent shall file a written answer to the complaint ... not later than 30 days after service of the complaint."

allegations in the complaint admitted.⁴ The order advised Respondent of the requirements for filing an appeal with the Administrator under Section 13.233 of the Federal Aviation Regulations (FAR), 14 C.F.R. § 13.233.

By letter dated October 4, 1993, addressed to the law judge, Respondent explained that he had not knowingly committed the violations alleged in the complaint, and that he still wanted a hearing. That letter, and subsequent correspondence from Respondent to the law judge, was forwarded to the appellate docket clerk because the law judge's jurisdiction had terminated upon issuance of his final order. In the Matter of Barnhill, FAA Order No. 92-32 (May 5, 1992). Respondent's letter of October 4 to the law judge may be construed as a notice of appeal because it provided notice of Respondent's intent to challenge the law judge's decision. See In the Matter of Metz, FAA Order 89-4 (November 13, 1989) (letter showing that Respondent challenged the law judge's initial decision may be construed as a notice of appeal to the Administrator).

On October 25, 1993, Respondent again wrote to the law judge, stating that he was not certain what information the "written brief" was to contain.⁵ When Respondent failed to file an appeal brief⁶ by the November 15, 1993, deadline,⁷ Complainant filed a motion to dismiss Respondent's appeal for failure to perfect.

Respondent still has not filed an appeal brief. If Respondent's letters of October 4 and 25 are construed as an appeal brief, then the sole issue on appeal

⁴ Section 13.209(f), 14 C.F.R. § 13.209(f), provides: "[a] person's failure to file an answer without good cause shall be deemed an admission of the truth of each allegation contained in the complaint."

⁵ In that letter Respondent alluded to an "appeal letter" of October 12, 1993. No such letter appeared in the docket. The appellate docket clerk wrote to Respondent requesting a copy of the October 12 letter. Respondent never responded.

⁶ Section 13.233(c), 14 C.F.R. § 13.233(c), provides in relevant part: "a party shall perfect his appeal, not later than 50 days after ... service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker."

⁷ Under Section 13.211(e), 14 C.F.R. § 13.211(e), Respondent received an additional 5 days to file his appeal brief because he was served with the written initial decision by mail.

becomes whether there was good cause for Respondent's failure to file an answer. If no appeal brief is found to have been filed,⁸ then Respondent's appeal should be dismissed for failure to perfect.⁹

Assuming that Respondent perfected his appeal, Respondent has not established good cause for failing to file an answer. See In the Matter of Playter, FAA Order 90-15 (March 19, 1990) (no good cause found for failure to file an answer where the complaint contained an explicit statement of the requirements for filing an answer), *aff'd*, Playter v. FAA, 933 F.2d 1009 (6th Cir. 1991). Complainant advised Respondent of the requirement to file an answer both in the complaint and in the motion to deem the allegations admitted. In the Order to Show Cause, the law judge not only advised Respondent that he was required to file an answer, but also explained to him how to draft one. The law judge wrote:

This office cannot advise Respondent any more than can agency counsel, other than to tell Respondent that he must file an answer to the complaint, even though he has filed a request for a hearing. Without an answer to the complaint the request for hearing has no legal significance. Respondent must sit down with the complaint and in his own words take each allegation in the complaint and state in writing whether he admits or whether he denies that allegation. If he has no information on which either to admit or deny a particular allegation in the complaint he may so state. The document containing his answer to the allegations in the complaint must be sent to every address on the service list attached to this order.

The Order to Show Cause warned Respondent that if he failed to file an answer by September 10, 1993, the allegations in the complaint would be deemed admitted and he would be assessed the \$5,000 civil penalty. In spite of that

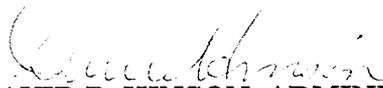
⁸ The requirements for appeal briefs are found in Section 13.233(d)(1), 14 C.F.R. § 13.233(d)(1), which provides that: "[a] party shall set forth, in detail, the party's specific objections to the initial decision or rulings in the appeal brief. A party shall also set forth, in detail, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal."

⁹ Section 13.233(d)(2), 14 C.F.R. § 13.233(d)(2), provides: "[t]he FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon the motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief with the FAA decisionmaker."

warning, Respondent again failed to answer the complaint, though the record indicates that he received the Show Cause Order, and he has not alleged non-receipt of any document mailed to him by the law judge or by agency counsel. That being the case, it is clear that Respondent had ample opportunity to file an answer before the law judge dismissed his case and imposed the sanction.¹⁰

Though a \$5,000 civil penalty is not insignificant, especially when imposed on an individual respondent, in this case there is no basis in the record to do other than to affirm the law judge's decision. Indeed, when Respondent failed to file an answer despite repeated opportunities to do so, the law judge had no choice but to impose the sanction requested in the complaint. Procedural rules must be enforced in a non-arbitrary manner to ensure the integrity of the civil penalty process, even where this results in severe consequences.

For the reasons noted above, the decision of the law judge is affirmed.¹¹


 DAVID R. HINSON, ADMINISTRATOR
 Federal Aviation Administration

Issued this 21st day of June, 1994.

¹⁰ In his letter of October 4, 1993, to the law judge, after the law judge had dismissed his case, Respondent wrote:

1. I respectfully plead not guilty to having knowing [sic] broken any laws that I knew of.
2. I didn't knowingly try and cut any corners or get by the laws.
3. I just want you to hear my side of this matter and you decide what went wrong, maybe all of us can learn from this experience, I know I have.

If this was an attempt by Respondent to file an answer, it was inexcusably late, because Respondent has not shown good cause for the delay in filing of more than 3 months.

¹¹ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).