

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

ANTHONY F. COLUMNA

FAA Order No. 94-30

Served: 9/30/94

Docket No. CP94SO0002

ORDER AND DECISION

Respondent Anthony F. Columna appeals from Administrative Law Judge Burton S. Kolko's order canceling the hearing in this matter and assessing a \$1,000 civil penalty.¹ For the reasons discussed below, the law judge's order is vacated, and the case is remanded to him for a hearing.

On December 22, 1993, Complainant Federal Aviation Administration (FAA) filed a complaint alleging that on May 9, 1993, Respondent violated 14 C.F.R. § 107.25(f)² by: (1) gaining unescorted access into the Air Operations Area at the Miami International Airport; and (2) attempting to gain unauthorized entry at a security checkpoint using someone else's identification. Complainant sought a civil penalty of \$1,000.

¹ A copy of the law judge's order is attached.

² This regulation provides: "No person may use any airport-approved identification medium that provides unescorted access to any security identification display area to gain such access unless that medium was issued to that person by the appropriate airport authority or other entity whose identification is approved by the airport operator." 14 C.F.R. § 107.25(f).

Respondent was required to file an answer to the complaint by January 26, 1994.³ On January 24, 1994, two days before the answer was due, the law judge issued a "Notice of Hearing" informing Respondent that the hearing would be held on April 6, 1994. The notice also contained the following reminder:

Respondent is reminded that he must file a specific answer to the complaint, even though he has filed a written request for a hearing The answer must be placed in the mail by January 26, 1994 (or if later, it must contain an explanation of why it is late) Respondent is put on notice that a failure to file an answer to the complaint may deprive him of the hearing that he seeks; in which case judgment without a hearing may be entered and a civil penalty assessed.

(Emphasis in original.)

On February 8, 1994,⁴ 14 days after the answer was due, Respondent filed his answer to the complaint.⁵ Respondent supplied the following explanation for his lateness:

³ 14 C.F.R. § 13.209(a) requires respondents to "file a written answer to the complaint ... not later than 30 days after service of the complaint." The complaint was filed on December 22, 1993. Thirty days from the filing of the complaint was January 21, 1994. However, Respondent had 5 additional days because the complaint was served by mail. See 14 C.F.R. § 13.211(e), which provides that "[w]hen a party has a ... duty to ... make any response within a prescribed period after service by mail, ... 5 days shall be added to the prescribed period." As a result, Respondent's answer was due on January 26, 1994.

⁴ Respondent states in his notice of appeal/appeal brief that he mailed his answer on February 7, 1994. Nevertheless, the filing date for his answer is February 8, 1994, because that is the postmark date. Section 13.210(b) of the Rules of Practice, 14 C.F.R. § 13.210(b), provides that the date of filing for a mailed document, where there is no certificate of service, is the postmark date.

⁵ Respondent's answer contained the following explanation of the circumstances of the alleged violation:

Respondent was working part-time as an aircraft mechanic for A & B Aircraft Services. A & B Aircraft Services had a contract to do maintenance work for DHL. That morning, Respondent forgot his identification badge, so when he arrived at the airport, he went to the general aviation gate. When he told the Security person at the gate that he had forgotten his badge, he was told that Security did not issue temporary badges and that he would need to see the representative of the company for which he worked.

Respondent saw his supervisor, Mr. Wallis, behind the gate, and waved to him to come over. When Respondent told Wallis about the problem, Wallis had Respondent accompany him to the gate where the DHL offices were located so that they could find the DHL supervisor who could get him a temporary badge. When they could not find the DHL supervisor, Wallis gave Respondent his own identification badge and told Respondent to use [Footnote continues on next page.]

I realize that this answer was to be filed by January 26, 1994. However, due to the delivery time of the notice, I did not receive this until January 26, 1994. Federal Express records will show this. I am truly sorry that it has taken this long to file an answer.

On February 14, 1994, six days after Respondent filed his answer, the law judge issued an order canceling the hearing and assessing a \$1,000 civil penalty against Respondent. The law judge based his order on his belief that Respondent had failed to file an answer. Apparently, the law judge had not yet received Respondent's late-filed answer. The law judge stated:

Ample time has passed for Respondent to place in the mail his answer; yet none has been received. Therefore, under the FAA's Rules of Practice, I infer from the failure to file an answer that Respondent admits the allegations in the complaint and that he withdraws his request for a hearing.

According to Respondent, on the same day that the order canceling the hearing and assessing a civil penalty was issued, February 14, 1994, he received a second notice of hearing informing him of the requirement to file an answer.⁶

Respondent filed a timely notice of appeal from the law judge's order assessing civil penalty. The Administrator later construed Respondent's notice of appeal as an appeal brief, and granted Complainant 35 days to file a reply brief. In the Matter of Columna, FAA Order No. 94-15 (June 15, 1994).

In Respondent's appeal document, he argues that the law judge's order canceling the hearing and assessing a civil penalty was premature because, in his words, "I mailed an answer between January 26th and February 14th."⁷

it to pass through the security gate. Respondent further stated in his answer that he was only following his supervisor's orders, just wanted to do his job, and is very sorry for what happened.

⁶ Respondent referred to this second notice of hearing in his appeal document dated February 19, 1994. No such second notice of hearing is contained in the record on appeal. Moreover, the law judge's office has no record of sending a second notice of hearing.

⁷ January 26, 1994 is the date the answer was due and on which Respondent received the law judge's order reminding him about the deadline for filing the answer. February 14, 1994, is the date the law judge issued his order canceling the hearing and assessing a civil penalty. [Footnote continues on next page.]

Respondent appears to argue that he did not have time on January 26, 1994, to place his answer in the mail because the post office was closed by the time that he received the law judge's order that day.

In its reply brief, Complainant argues that the law judge properly canceled the hearing and issued the order assessing a \$1,000 civil penalty. Complainant contends that Respondent was on notice of the requirement to file an answer within 30 days from the date on the complaint for two reasons:

1. Respondent was provided a copy of the Rules of Practice in September 1993, when Complainant served him with the initial Notice of Proposed Civil Penalty. The requirement to file an answer within 30 days is set forth in the Rules of Practice.⁸
2. The complaint itself specifically notified Respondent that he was required to file an answer within 30 days.⁹

Given these facts, Complainant argues, Respondent's assertion that he had good cause for not filing a timely answer is without merit. Moreover, Complainant asserts, Respondent has failed to explain why, after realizing he was late, he delayed 13 days before filing an answer.

It is also the date Respondent alleges he received a second notice of hearing reminding him of the requirement to file an answer.

⁸ In its reply brief, Complainant offers to provide, at the Administrator's request, an affidavit from Complainant's staff stating that: (1) the standard practice in civil penalty actions is to provide respondents with copies of the FAA Rules of Practice in Civil Penalty Actions when they are served with the initial "Notice of Proposed Civil Penalty"; and (2) this practice was adhered to in this case. Reply Brief at 2, n.1.

⁹ In the middle of the second and last page of the complaint, the following notice appeared:

PLEASE NOTE:

Pursuant to Title 14 CFR Section 13.209(a), you are required to file a written answer to this Complaint, or a written Motion to Dismiss if appropriate, not later than 30 days after the date shown on the Certificate of Service which follows.

Complainant is correct that Respondent had adequate notice to file an answer by January 26, 1994. A reminder from the law judge should not have been necessary.

However, the following statement in the law judge's notice of hearing may have misled Respondent inadvertently: "The answer must be placed in the mail by January 26, 1994 (*or if later, it must contain an explanation of why it is late*)."

(Emphasis added.) It appears from the record that Respondent interpreted the law judge's instruction to mean that January 26, 1994, was not a firm deadline, and that he could mail the answer in later as long as he provided some explanation for doing so.

When Respondent received the law judge's reminder to file the answer on January 26, 1994, he might still have been able to file an answer that day, even if the post office was in fact closed, as he claims. For example, Respondent might have been able to send his answer via an expedited courier service, or he might have been able to put his answer in a mailbox with a pick-up time after the closing of the local post office. The law judge, however, may have inadvertently led Respondent to believe he could take more time.

Under the circumstances, good cause to excuse the late filing of the answer has been shown.¹⁰ The order canceling the hearing and assessing the \$1,000 civil penalty is vacated, and the case is remanded to the law judge for a hearing.


DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 30th day of September, 1994.

¹⁰ 14 C.F.R. § 13.209(f) provides that a person's failure to file an answer *without good cause* shall be deemed an admission of the truth of each allegation in the complaint. Here, however, good cause has been shown.