

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

BEN RAYNER

FAA Order No. 95-19

Served: August 4, 1995

Docket No. CP95EA0155

ORDER DISMISSING APPEAL

Ben Rayner, by counsel, filed a document entitled "Appeal to FAA Decisionmaker to Set Aside Order Assessing Civil Penalty for Lack of Proper Notice, Violation of Due Process and Other Reasons Below" (hereinafter referred to as "Appeal") on May 17, 1995. He previously filed, on May 5, 1995, a document entitled Motion for an Order to Set Aside Order Assessing Civil Penalty Against Respondent Ben Rayner" (hereinafter referred to as "Motion to Set Aside"). In the Appeal, Mr. Rayner's counsel asserts that the administrative law judge informed him that an appeal should be made to the FAA Decisionmaker in this case.

As stated in the Order Assessing Civil Penalty, on April 30, 1994, while skydiving, Mr. Rayner jumped out of a DeHavilland DHC-6 aircraft in the vicinity of St. Mary's Airpark, Leonardtown, Maryland. It was stated further in the Order that Mr. Rayner parachuted into or through clouds over the Airpark, at a time when there were aircraft in the traffic pattern.

The procedural history of this case is as follows:

October 21, 1994 Notice of Proposed Civil Penalty issued.

February 16, 1995	Final Notice of Proposed Civil Penalty issued.
April 14, 1995	Order Assessing Civil Penalty issued.
May 5, 1995	Mr. Rayner files Motion to Set Aside.
May 17, 1995	Mr. Rayner files Appeal.
May 22, 1995	Agency attorney files Agency's Response to and Motion to Dismiss Respondent's Motion to Set Aside Order Assessing Civil Penalty (hereinafter referred to as "Agency's Motion to Dismiss.") ¹
June 12, 1995	Letter from Mr. Rayner's counsel requesting that the Administrator defer ruling on the appeal until Mr. Rayner submits an affidavit regarding lack of service.
June 27, 1995	Agency's Motion to Dismiss Respondent's Appeal to Set Aside Order Assessing Civil Penalty

In both the Motion to Set Aside and the Appeal, Mr. Rayner's attorney argues in vague terms that Mr. Rayner was out of the country for much of the winter, that the Final Notice of Proposed Civil Penalty and the Order Assessing Civil Penalty were sent to Mr. Rayner's old address, and that when Mr. Rayner returned to United States on April 23, 1995, he received his mail which was forwarded to him by the person living at Mr. Rayner's former address.

Preliminarily, this appeal presents the issue whether there can be an appeal from an order assessing civil penalty. The Rules of Practice do not specifically provide for such an appeal. The Rules of Practice *do* provide specifically for the filing of a motion to dismiss a late-filed request for hearing instead of a complaint by an agency attorney. 14 C.F.R. § 13.218(f)(2)(i). A request for hearing must be filed no later than 15 days after receipt of a final notice of proposed civil penalty.

¹ The Agency's Motion to Dismiss was filed in response to Mr. Rayner's Motion to Set Aside, rather than Mr. Rayner's Appeal.

14 C.F.R. § 13.16(e)(2)(ii). If a request for hearing is not filed in accordance with 14 C.F.R. § 13.16(e)(2)(ii), then the agency attorney may issue an order assessing civil penalty. 14 C.F.R. § 13.16(b)(2). If the law judge denies a motion to dismiss a late-filed request for hearing, finding that the request for hearing was timely, then the agency attorney shall file the complaint, 14 C.F.R. § 13.218(f)(2)(i), and withdraw the order assessing civil penalty. However, the agency attorney should not be allowed to cut off the law judge's jurisdiction to review the timeliness of the filing of a request for hearing simply by filing an order assessing civil penalty. In the Matter of Houston, FAA Order No. 94-37 at 4 n.3 (December 9, 1995). To hold otherwise, that the law judge may not review whether Complainant abided by 14 C.F.R. § 13.16(b)(2) when issuing an order assessing civil penalty, would be patently unfair.

In this case, the Order Assessing Civil Penalty was issued because Mr. Rayner failed to file a request for hearing after the issuance of the Final Notice of Proposed Civil Penalty. However, Mr. Rayner's Motion to Set Aside raises the issue of when he received the Final Notice of Proposed Civil Penalty, and consequently, when his request for hearing was due. Mr. Rayner's attorney states in the Motion that Mr. Rayner denies all of the alleged violations and demands a hearing. Consequently, Mr. Rayner's Motion to Set Aside dated May 5, 1995, is construed as a request for a hearing. Furthermore, the Agency's Motion to Dismiss is construed as a motion to dismiss a late-filed request for hearing.

According to Mr. Rayner's Appeal, a law judge informed counsel for Mr. Rayner that an appeal should be made to the Administrator.² If, indeed, a law judge did inform Mr. Rayner's counsel that an appeal should be made to the Administrator, then that was inappropriate for two reasons. First, the Administrator should not be called upon to rule upon the timeliness of a "request for hearing" unless a party disagrees with the decision of the law judge on that issue. Second, if there was such a communication between a law judge and Mr. Rayner's counsel, it appears to have been *ex parte*. There is no record in the Hearing Docket file of any written or oral communication between Mr. Rayner's counsel and a law judge. For that matter, there is no record of this case having been assigned to a law judge. Also, it is clear from the Agency's Motion to Dismiss Respondent's Appeal to Set Aside Order Assessing Civil Penalty dated June 27, 1995, that the agency counsel was not a party to any such communication between a law judge and Mr. Rayner's counsel.

For the reasons stated above, Mr. Rayner's Appeal to the Administrator is dismissed as premature. The agency attorney's motion to dismiss Mr. Rayner's late-filed request for hearing shall be decided by the law judge to be assigned to this case.



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 4th day of August, 1995.

² Mr. Rayner's attorney wrote as follows: "A motion to set aside was made before the Administrative Law Judge who informed us that the appeal should be made to the FAA Decisionmaker in this case."