

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

DANIEL A. MARTINEZ

FAA Order No. 2000-7

Served: March 30, 2000

Docket No. CP99NM0012
DMS No. FAA-1999-5984¹

ORDER²

Respondent Daniel A. Martinez has filed an appeal from the Order Assessing Civil Penalty issued by Administrative Law Judge Burton S. Kolko on November 23, 1999. When Mr. Martinez perfected his appeal by filing a document that shall be construed as an appeal brief, he attached documentary evidence to support his claim that he cannot afford to pay the \$2,200 civil penalty assessed against him. However, Mr. Martinez failed to address the only issue before the Administrator at this juncture in the proceedings: whether Mr. Martinez had good cause for failing to file an answer and for failing to respond to the order to show cause issued by the law judge on October 7,

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the use of the following Internet address: <http://dms.dot.gov>. For additional information, see 65 Fed. Reg. 1654, 1671 (January 11, 2000).

² The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, see 65 Fed. Reg. 1654, 1671 (January 11, 2000).

1999. Mr. Martinez will be granted an additional opportunity to address that key issue by filing a supplemental brief no later than May 4, 2000.³

On July 12, 1999, Complainant filed the complaint in this matter.⁴ Under Sections 13.209(a) and 13.211(e) "the mailing rule," of the Rules of Practice, 14 C.F.R. §§ 13.209(a) and 13.211(e), Mr. Martinez was required to file an answer to the complaint no later than August 16, 1999. Mr. Martinez did not file the required answer. As a result, on October 7, 1999, the law judge issued an order to show cause why the request for hearing should not be dismissed, why the complaint should not be deemed admitted, and why an order assessing a \$2,200 civil penalty should not be issued. Mr. Martinez did not reply to that order either, and consequently, on November 23, 1999, the law judge issued an order assessing a \$2,200 civil penalty. The law judge regarded Mr. Martinez's failure to respond to the Order to Show Cause as a constructive withdrawal of the request for a hearing and an admission of the allegations in the complaint. In light of those findings, the law judge held that it was not necessary to hold a hearing, and he assessed a \$2,200 civil penalty.

³ See fn. 6, *infra*.

⁴ The agency attorney alleged in the complaint as follows:

- Mr. Martinez violated 14 C.F.R. § 121.317(g) by smoking a cigarette while a "No Smoking" sign was lit on Northwest Airlines Flight No. 645 from Minneapolis, Minnesota, to Denver, Colorado, on December 28, 1998;
- Mr. Martinez violated 14 C.F.R. § 121.317(h) by smoking in the lavatory on that flight;
- Mr. Martinez violated 14 C.F.R. § 121.317(k) by failing to comply with instructions given to him by crewmembers regarding compliance with Sections 121.317(g) and (h);
- Mr. Martinez violated 14 C.F.R. § 91.11 by interfering with crewmembers in the performance of their duties during this flight.

By letter dated December 1, 1999, Mr. Martinez wrote to the law judge and stated:

I am currently unemployed and attending School. I am asking the Court [to] assess a penalty that I would be able to repay thru (sic) Community Service. I had previously responded to requests showing why this penalty should not be imposed and I may not have responded in a timely manner. But I am currently seeking another method through the Court that would allow me sufficient time to repay this debt. So that I may take care of my obligation in a responsible manner.

I do agree that I was in error and did not follow the rules and laws regarding smoking on the airline. But I do feel the penalty amount of \$2,200.00 is something I would not be able to repay in a timely manner and it would cause hardship on my family.

The law judge transmitted this document to the Hearing Docket for consideration by the Administrator. The law judge noted in his order forwarding the appeal that "Respondent should perfect his appeal by promptly sending to the Appellate Docket ... a financial statement such as an income tax return that would support his allegation of financial hardship." Order Transmitting Appeal to Appellate Docket, served on December 7, 1999. Following the law judge's advice, Mr. Martinez sent a letter dated December 29, 1999, to the Hearing Docket, and attached copies of his W-2's for 1998. He also wrote in his letter that he had been unable to work during 1998 due to major intestinal surgery and a broken leg. He said nothing about why he had not responded to the Order to Show Cause or why he had failed to file an answer.

By letter dated February 23, 2000, the agency attorney forwarded a copy of Mr. Martinez's letter to the Hearing Docket, not realizing that the Docket was already in receipt of the original. The agency attorney noted in the letter that "it is our position that this should not be construed as an appeal brief."

Mr. Martinez's letter dated December 29, 1999, contains sufficient detail to constitute an appeal brief, and hence it will be construed as an appeal brief. However, this letter addresses the issue of financial inability to pay the civil penalty, rather than the issue of why Mr. Martinez failed to respond to the law judge's order and why he had previously failed to file an answer to the complaint. Ordinarily, such appeals are denied when the respondent fails to demonstrate good cause for failing to file an answer. *See e.g.*, In the Matter of McDermott, FAA Order No. 99-8 (August 31, 1999). However, in this instance, Mr. Martinez's appeal will not be denied because the law judge may have misled Mr. Martinez inadvertently so that he thought that the issue on appeal was whether he could afford the penalty that had been assessed.⁵ While the financial information submitted by Mr. Martinez appears consistent with his claim of financial inability to pay the \$2,200 civil penalty,⁶ that information sheds no light on the question why Mr. Martinez failed to file a timely answer or response to the order to show cause.

Hence, Mr. Martinez will be granted an additional 30 days from the service date of this order in which to file a supplemental appeal brief. The supplemental brief may be in the form of a letter to the Administrator. Mr. Martinez should explain in his supplemental brief why he did not file an answer to the complaint dated July 12, 1999,

⁵ If the Administrator decides that good cause exists to excuse Mr. Martinez's failure to file his Answer on time, then the Administrator will remand the case to the law judge for further proceedings. Then the law judge would resolve the question of whether a \$2,200 civil penalty presents an undue financial hardship for Mr. Martinez.

⁶ While the Administrator has not made any judgment as to whether the submitted information would suffice to actually *prove* financial hardship, Complainant is urged to take Mr. Martinez's financial circumstances into consideration.

and why he failed to respond to the law judge's order to show cause dated October 7, 1999.⁷ The supplemental brief should be filed at the following address:

Hearing Docket Clerk
Federal Aviation Administration
800 Independence Avenue S.W.
Room 926A
Washington, D.C. 20591

Mr. Martinez must also serve a copy of his supplemental brief on the agency attorney. The agency attorney is granted 30 days from the date of service of Mr. Martinez's supplemental brief to file a reply.

Once the briefs are received, the Administrator will decide whether good cause existed to excuse Mr. Martinez's failure to file an answer and to reply to the order to show cause. It should be understood, however, that if Mr. Martinez fails to file a timely supplemental brief as directed in this order, a \$2,200 civil penalty will be assessed.

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration



VICKI S. LEEMON⁸
Manager, Adjudication Branch

Issued this 29th day of March, 2000.

⁷ Mr. Martinez has been granted 30 days in which to file his supplemental brief. He has an additional five days in which to file by action of the "mailing rule", 14 C.F.R. § 13.211(e). As a result, **Mr. Martinez must place his supplemental brief in the mail no later than May 4, 2000.**

⁸ 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.