

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: AIR FLORIDA EXPRESS, INC.

FAA Order No. 2002-9

Docket No. CP00SO0004
DMS No. FAA-2000-7260¹

Served: April 16, 2002

ORDER DENYING APPEAL²

Air Florida Express has appealed from Administrative Law Judge Burton S. Kolko's order assessing a \$7,500 civil penalty, dated November 1, 2000, against Respondent Air Florida Express, Inc. (attached). The ALJ based the order assessing civil penalty upon Air Florida Express's failure to file an answer, which he construed both as a constructive withdrawal of the earlier-filed request for hearing and as an admission of the allegations set forth in the complaint. The ALJ explained that in either case, there was no need to hold a hearing. Air Florida Express's appeal is denied.

On March 23, 2000, the agency attorney sent Air Florida Express a Final Notice of Proposed Civil Penalty, informing it that the FAA proposed to assess a \$7,500 civil penalty. Air Florida Express then sent a written request for a hearing to the agency attorney. The agency attorney filed the complaint on April 11, 2000, in accordance with

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 following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, as well as indexes of the decisions, the Rules of Practice in civil penalty actions, and other information, are available on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callahan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. For additional information, see the website.

14 C.F.R. § 13.208(a).³ Under 14 C.F.R. § 13.209(a) and 13.211(e),⁴ Air Florida Express had 35 days or until May 16, 2000, to file its answer. Air Florida Express, however, did not file its answer until November 15, 2000.

Section 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 contained in the complaint.” 14 C.F.R. § 13.209(f). The Administrator has held that a late-filed answer will only be excused if good cause is shown for the delay in filing. *E.g.*, In the Matter of Stevenson, FAA Order No. 2000-29 (December 29, 2000).

Air Florida Express’s attorney argues as follows on appeal:

AIR FLORIDA was initially represented by its President, Pervez Khan. The undersigned interviewed Mr. Khan who advised that he had received no response to the initial request for hearing served on March 30, 2000, and was therefore unaware of his need to file a response to the Administrator’s Complaint.

³ Section 13.208(a) of the Federal Aviation Regulations provides in pertinent part:

Filing. The agency attorney shall file the original and one copy of the complaint with the hearing docket clerk ... not later than 20 days after receipt by the agency attorney of a request for hearing.

14 C.F.R. § 13.208(a). The agency attorney asserted in the complaint that the agency received Air Florida Express’s request for hearing on April 3, 2000.

⁴ Section 13.209(a) of the Federal Aviation Regulations provides:

Writing required. A respondent shall file a written answer to the complaint, or may file a written motion pursuant to § 13.208(d) or § 13.218(f)(1-4) of this subpart instead of filing an answer, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.

14 C.F.R. § 13.209(a). Section 13.211(e) of the Federal Aviation Regulations provides:

Additional time after service by mail. Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

14 C.F.R. § 13.211(e).

Petition for Reconsideration of Order Assessing Civil Penalty, attached as Exhibit A to Notice of Appeal.

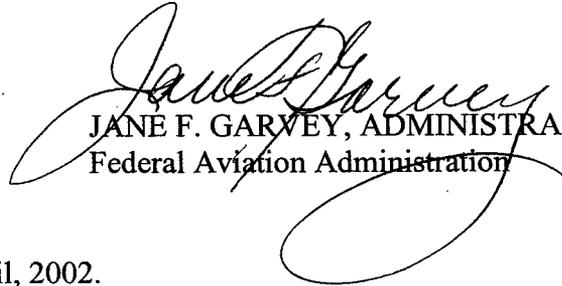
This explanation does not constitute good cause for the late-filing of the answer because the agency attorney did respond to the request for hearing by filing the complaint. Complainant filed the complaint and served it on Khan at Air Florida Express, by United States certified mail, return receipt requested, on April 11, 2000. Air Florida Express received the complaint on April 18, 2000.⁵

Air Florida Express, moreover, had ample notice of the requirement to file an answer. On the last page of the complaint, the agency attorney included a notice that 14 C.F.R. § 13.209(a) required the respondent to file a written answer or a motion to dismiss no later than 30 days after the date shown on the complaint's certificate of service. Air Florida Express also received orders from the ALJ reminding it to file an answer. The ALJ issued an initial order on May 12, 2000, explaining that Air Florida Express was required to file an answer no later than May 16, 2000, and that if it failed to do so, he would consider the complaint as admitted, rendering a hearing "fruitless." In his order scheduling hearings dated September 18, 2000, moreover, the ALJ wrote:

Those respondents ... who have not filed an answer to the FAA's complaint, something that is required in addition to the request for a hearing, must do so within two weeks of this order or there will be no hearing and an order assessing civil penalty will issue. Each paragraph in the agency's complaint must be admitted or denied Again, absent an answer, a default judgment will occur and there will be no hearing. Respondents who do not understand this or who have questions may call the number for the judge's law clerk, listed at the bottom of the Service List.

⁵ See the copy of the return receipt ("green card") attached to Complainant's reply brief.

As a result of the foregoing, Air Florida Express's appeal of the ALJ's order assessing a \$7,500 civil penalty is denied.⁶


JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of April, 2002.

⁶ Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).