

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: PATRICK J. GALLAGHER

FAA Order No. 2007-7

Docket No. CP05NM0009
DMS No. FAA-2005-20781¹

Served: August 1, 2007

DECISION AND ORDER²

Administrative Law Judge (ALJ) Isaac D. Benkin granted Complainant Federal Aviation Administration's (FAA's) motion for decision after Respondent Patrick J. Gallagher (Gallagher) failed to file a timely answer.³ As requested in the complaint, the ALJ assessed Gallagher a civil penalty of \$1,875 for various violations of the hazardous materials regulations.⁴ Gallagher has appealed, arguing that he had good

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 (DOT's) Docket Management System (DMS) at the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. In addition, Thomson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ A copy of the ALJ's order is attached. (The ALJ's order is not attached to the electronic versions of this decision nor is it included on the FAA Web site.)

⁴ Specifically, the FAA alleged that Gallagher violated the following provisions containing requirements for hazardous materials: 49 C.F.R. § 171.2(a) (proper classification, description, packaging, marking, labeling, and proper condition for shipment); § 172.200(a) (proper description of hazardous material on shipping paper); § 172.202 (certain items to be included in shipping description); § 172.300 (proper markings); § 172.301(a) (markings on non-bulk packaging); § 172.304(a)(1) (additional marking requirements); § 172.400(a) (labeling); § 172.600(c) (emergency response information); § 173.1(b) (proper preparation of hazardous material); and § 173.22(a) (proper classification and description of hazardous material).

cause for his failure to file a timely answer. This decision remands this case to the ALJ for further proceedings.

I. Facts

Gallagher has admitted that on May 24, 2004, at Missoula, Montana International Airport, he checked a bag on a Delta/Skywest Airlines passenger-carrying flight. The complaint alleged that during the screening of Gallagher's checked bag, screeners found in the bag two cardboard boxes, each containing 10 metal cans, and that each metal can contained about 100 CCI No. 11 Magnum Percussion Caps (for a total of about 2,000 caps). Gallagher has admitted that the bag contained two boxes of percussion caps that he used in hunting.

The FAA alleges that the hazardous materials regulations classify the percussion caps as an explosive hazardous material. The FAA also alleges that the percussion caps were not properly classed, described, packaged, marked, labeled, and in condition for shipment, and that the required emergency response information was absent. Gallagher admits that he did not mark or label the bag according to the hazardous materials regulations and that no shipping papers or emergency response information accompanied the bag.

II. Case History

On April 12, 2005, Gallagher filed a motion to dismiss the complaint, arguing that he was unaware that the regulations prohibited percussion caps in his checked bag, because he had flown with percussion caps in his checked bags before. On June 15, 2005, the FAA filed a "Motion for Judgment on the Pleadings," arguing that the ALJ should resolve the case in its favor because Gallagher had failed to file an answer to the

complaint as well as discovery responses.

The ALJ ruled on both motions in an order dated September 21, 2005.⁵ The ALJ denied Gallagher's motion on the ground that under the case law, the FAA did not have to prove a willful intent to violate the regulations. The ALJ denied the FAA's motion as well, on the ground that the rules permitted Gallagher to file a motion to dismiss in lieu of an answer and Gallagher's time for filing an answer did not begin to run until the disposition of the motion to dismiss. The ALJ ordered Gallagher to file his answer and his response to the FAA's discovery requests within 10 days.

On October 12, 2005, the FAA filed a "Renewal of Motion for Decision." In this motion, the FAA argued that the ALJ should grant its motion because Gallagher had not complied with the ALJ's order to answer the complaint and file his discovery responses within 10 days, for 21 days had passed and Gallagher had not yet done so.

On October 14, 2005, Gallagher's newly retained counsel filed the following: (1) a notice of appearance; (2) a "Motion for Relief from Discovery Sanctions and Time Limitations on Filing of Answer"; (3) an answer; and (4) responses to the FAA's request for admissions, interrogatories, and requests for production. In his motion, Gallagher argued that he had good cause for the untimeliness because he had been out of town and had placed a hold on his mail beginning September 22, 2005, and did not pick up his mail until he returned on October 6, 2005, which, he believed, was after the deadline set by the ALJ for filing the answer and discovery responses.

⁵ The words "Served September 21, 2005," appear at the top of the ALJ's order, but it is undisputed that the postmarks on the envelopes stated "September 22, 2005."

In an order served on October 25, 2005,⁶ the ALJ noted that in his earlier order, he had directed Gallagher to file an answer to the complaint and to respond to the FAA's discovery requests not later than October 3, 2005,⁷ but Gallagher had not done so. The ALJ cited the rule providing that a person's failure to file an answer without good cause is an admission of the truth of each complaint allegation.⁸ Because Gallagher had not shown good cause for the failure to answer the complaint, the law judge wrote, he must deem the complaint allegations true, including the allegation that a civil penalty of \$1,875 was appropriate. Thus, the ALJ granted the FAA's motion for decision.

However, when the ALJ issued his order of October 25, 2005, he apparently had not yet received Gallagher's filing of October 14, 2005, because he did not mention the October 14 filings, and he stated that Gallagher had not shown "*any* cause" for his failure to answer the complaint." (Emphasis in original). In fact, Gallagher had argued in his October 14, 2005, filing that his stopping of his mail and his failure to receive the ALJ's order until October 6, 2005, constituted good cause.

On appeal, Gallagher argues that he showed good cause for his failure to file the answer and discovery responses on time. Gallagher argues, as he did in his motion for

⁶ Although the order is dated October 25, 2004, it is clear from the context and undisputed that the ALJ actually served the order on October 25, 2005.

⁷ Actually, the September 22, 2005, order had directed Gallagher to respond within 10 days. The ALJ had not specified October 3, 2005. As discussed below, the answer and responses to discovery were due on October 7, 2005, because of the "mailing rule," 14 C.F.R. § 13.211(e). Still, the ALJ's finding that Gallagher had failed to respond by the deadline was correct.

⁸ The ALJ cited 14 C.F.R. § 13.219(f) (regarding interlocutory appeals) when he apparently meant § 13.209(f). This appears to be simply a typographical error. Section 13.209(f) provides as follows:

(f) *Failure to file answer.* 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.

relief from his untimeliness filed with the ALJ, that he had good cause for the untimeliness because he placed a hold on his mail beginning September 22, 2005, and he did not pick up his mail until he returned on October 6, 2005.

III. Analysis

When the ALJ issued his order disposing of this case on October 25, 2005, he had received the FAA's renewal of its motion for decision filed on October 12, 2005, but he apparently had not yet received Gallagher's motion, answer, and discovery responses filed on October 14, 2005. Consequently, the ALJ's order was not based on a consideration of the complete record. Without a complete record, the ALJ was unable to issue a fully informed decision. As a result, this decision vacates the ALJ's order of October 25, 2005. In addition, this case is remanded to the ALJ to consider the complete record in ruling on the parties' motions and to conduct any further proceedings that are necessary.

[Original signed by Marion C. Blakey]

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration