

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

In the Matter of: DERMOT McHALE

FAA Order No. 2008-4

Docket No. CP04SO0008
FDMS No. FAA-2004-17653¹

Served: January 31, 2008

ORDER DISMISSING APPEAL²

On September 30, 2004, Administrative Law Judge Burton S. Kolko issued an Order Assessing Civil Penalty against Respondent Dermott McHale. In this order, the ALJ (1) construed McHale's failure to file an answer to the complaint as a constructive withdrawal of the request for hearing; (2) deemed all the allegations in the complaint as admitted; and (3) assessed a \$10,000 civil penalty.³ On October 12, 2004, McHale filed a notice of appeal.

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. For additional information, see <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, Thompson/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 The complaint, alleging that McHale violated 14 C.F.R. §§ 121.317(h) and (k), was filed on May 12, 2004. McHale was required under 14 C.F.R. §§ 13.209 and 13.211(e) to file an answer to the complaint within 35 days after the complaint was filed. Therefore, McHale's answer was due no later than June 16, 2004. McHale, however, did not file an answer. It should be noted that Complainant included a paragraph in the complaint, notifying McHale of his obligation under 14 C.F.R. § 13.209 to file an answer.

On July 29, 2004, Complainant filed a document entitled "Motion for Decision on the Pleadings or, in the Alternative, Motion for Hearing on Sanction Only." Complainant based its motion on McHale's failure to file an answer. McHale did not respond to this motion.

On September 15, 2004, the ALJ issued a Notice of Potential Default. The ALJ warned that unless McHale filed an Answer, he would assume that the allegations against him in the Complaint are true and a default judgment was appropriate. The ALJ ordered McHale to file an answer, in which he admitted or denied each paragraph of the complaint. The ALJ explained further, that if he did not receive the answer by September 29, 2004, he would issue an order

Under 14 C.F.R. §§ 13.233(c) and 13.211(e), McHale was required to perfect his appeal by filing an appeal brief, stating his arguments and the basis of his appeal, no later than 55 days after service of the ALJ's order.⁴ Thus, McHale was required to file his appeal brief no later than November 24, 2004. McHale, however, neither filed an appeal brief nor requested an extension of time in which to perfect his appeal.⁵ Accordingly, McHale's appeal is subject to dismissal under 14 C.F.R. § 13.233(d)(2).⁶

THEREFORE, IT IS ORDERED THAT: McHale's appeal is dismissed.

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

[Original signed by Vicki S. Leemon]

VICKI S. LEEMON⁷
Manager, Adjudication Branch

finding McHale in default. McHale ignored this warning by the ALJ and again failed to file an answer.

Consequently, the ALJ issued an order assessing a \$10,000 civil penalty on September 30, 2004. The ALJ explained in the order that he was construing McHale's silence [failure to file an answer] as a constructive withdrawal of the request for hearing and as an admission of the each allegation in the complaint, and that "[e]ither conclusion renders the hearing unnecessary."

⁴ Under 14 C.F.R. § 13.233(c), "a party shall perfect an appeal, not later than 50 days after ... service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker." The party has an additional 5 days in which to file an appeal brief from a written initial decision, under the "mailing rule" in 14 C.F.R. § 13.211(e). As a result, a party has a total of 55 days in which to file an appeal brief after the service of a written initial decision by an ALJ.

⁵ Even if the Administrator construed McHale's notice of appeal as an appeal brief, McHale would not prevail on appeal. He did not state any reasons in his notice of appeal that would warrant reversing the ALJ's order.

⁶ It is provided in 14 C.F.R. § 13.233(d)(2):

The FAA decision maker [the Administrator] may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief with the FAA decisionmaker.

⁷ 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.