

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: KYLE PONSFORD

FAA Order No. 2010-3

Docket No. CP09AL0007
FDMS No. FAA-2009-0729¹

Served: April 28, 2010

**ORDER DISMISSING APPEAL
AND REMANDING CASE
TO THE ADMINISTRATIVE LAW JUDGE²**

On November 9, 2009, Administrative Law Judge Richard C. Goodwin (ALJ) issued the Order Deeming Allegations Admitted and Limiting Proceeding to Issue of Civil Penalty (“Order Deeming Allegations Admitted”) as a result of the failure of the respondent, Kyle Ponsford (“Ponsford”) to file an answer. On March 8, 2010, Ponsford appealed to the Administrator from the Order Deeming Allegations Admitted. Ponsford does not have the right to appeal to the Administrator from the Order Deeming Allegations Admitted and, therefore, this case is remanded to the ALJ for proceedings consistent with this order.

I. History of the Case.

On July 27, 2009, the FAA filed the Complaint, alleging that Ponsford, a ticketed

¹ Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. See 14 C.F.R. § 13.210(e)(1).

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: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/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.

passenger on an Alaska Airlines flight, had offered as checked baggage a bag containing a 3.53-ounce canister of Jetboil Jetpower Isobutane/Propane Fuel Mix and two 15.9-ounce canisters of Primus Power Gas 4 Season Mix. The FAA alleged that these items are classified as hazardous materials under the Hazardous Materials Regulations (HMR), and that the bag was neither accompanied by shipping papers, nor labeled or marked to indicate that it contained hazardous materials. The FAA alleged that Ponsford had violated multiple sections of the HMR and sought a \$1,000 civil penalty.³

On August 20, 2009, the ALJ issued a procedural order in which he explained that under 14 C.F.R. § 13.209, the respondent must file a written answer or motion within 30 days after service of the complaint, and that failure to file an answer without good cause is deemed an admission of the allegations in the complaint. Ponsford did not file an answer to the complaint.

On October 5, 2009, the FAA filed a motion to deem the allegations of the complaint. The FAA argued that an order deeming the allegations admitted was justified based upon Ponsford's failure to file an answer and Ponsford's admission in a letter dated July 7, 2009, that he had been a passenger on the alleged flight and had checked the bag containing fuel cells. Ponsford did not respond to this motion.

On October 22, 2009, the ALJ issued the Order to Show Cause, in which he ordered as follows:

- (1) On or before October 30, 2009, Respondent shall show cause why the relief requested in Complainant's Motion should not be granted;

³ The FAA alleged that the proper shipping name of these items is "Petroleum gas, liquefied;" that these items are forbidden on passenger aircraft, that transportation by aircraft of Jetboil Jetpower Isobutane/Propane Fuel Mix is prohibited, and that shipment by air of Primus Power Gas 4 Season Mix is limited to cargo aircraft only.

(2) On or before October 30, 2009, Respondent shall file a proper answer to the Complaint;

(3) Absent such a filing by Respondent on or before October 30, 2009, an order may be entered deeming the allegations of the Complaint admitted, and further, limiting the proceeding to the question of the amount of the civil penalty.

(Order To Show Cause at 2.)

Ponsford replied to the Order to Show Cause by letter dated October 28, 2009.⁴ He wrote that he had responded to the allegations in the complaint in previous letters, such as his letter date July 7, 2009. He wrote that he did not have time to answer each line item in the Complaint because “winter is coming fast.”

On November 9, 2009, the ALJ issued his Order Deeming Allegations Admitted. He wrote that Ponsford had failed to file an answer and had not responded to the Motion to Deem Allegations Admitted. Apparently unaware of Ponsford’s letter dated October 28, 2009, the ALJ wrote that Ponsford also had failed to respond to the Order to Show Cause. The ALJ deemed the allegations admitted by Ponsford, granted the FAA’s motion, and limited the proceeding to the issue of the appropriate amount of civil penalty to be assessed. On January 13, 2010, the ALJ scheduled this matter for hearing on June 29, 2010, in Juneau, Alaska.

Ponsford filed his appeal from the ALJ’s Order Deeming Allegations Admitted by letter dated March 8, 2010. The FAA filed its reply on March 31, arguing that the Administrator should dismiss Ponsford’s appeal because the ALJ had not yet issued an initial decision, and Ponsford was neither entitled to file an interlocutory appeal of right, nor had obtained the ALJ’s permission to file an interlocutory appeal for cause.

⁴ The Hearing Docket received the letter on November 5, 2009.

II. Analysis.

Section 13.219(a) of the Rules of Practice in Civil Penalty Proceedings, 14 C.F.R. § 13.219(a), provides: “Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record.” The ALJ has not yet issued an initial decision in this matter. Although the ALJ has deemed the allegations admitted, he has not set a civil penalty for the alleged violations. Hence, at this juncture, Ponsford’s only avenue for appealing to the Administrator, if any, would be under the rule pertaining to interlocutory appeals, 14 C.F.R. § 13.219(b)-(d).

There are two types of interlocutory appeals: interlocutory appeal of right and interlocutory appeal for cause. Section 13.219(c) permits a party to file an interlocutory appeal of right to the Administrator – before the issuance of an initial decision without first obtaining the permission of the ALJ to file the appeal – in three circumstances:

- (1) an order by the ALJ barring a person from the proceedings;
- (2) the failure of the ALJ to dismiss the proceedings with prejudice as required under 14 C.F.R. § 13.215 if the agency attorney withdraws the complaint and/or the respondent withdraws the request for hearing;
- (3) a ruling or order by the ALJ that exceeds the limitation set forth in 14 C.F.R. § 13.205, by imposing a sanction not specified in 14 C.F.R. Part 13, subpart G.

The ALJ’s Order Deeming Allegations Admitted did not bar any person from the proceedings, the FAA did not withdraw the complaint, and Ponsford did not withdraw his request for hearing. The ALJ did not impose a sanction that is not permitted under the Rules of Practice because an order deeming allegations admitted is permitted under

14 C.F.R. § 13.209(f) if a person fails to file an answer without good cause.⁵ Hence, Ponsford is not entitled to file an interlocutory appeal of right under 14 C.F.R. § 13.219(c).

A party may request permission from an ALJ to file an interlocutory appeal for cause, and an ALJ will grant such a request if “a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.” 14 C.F.R. § 13.219(b). It is not necessary to decide whether the ALJ should have granted a request to permit Ponsford to file an interlocutory appeal for cause because Ponsford never requested the ALJ’s consent.

Consequently, Ponsford’s appeal to the Administrator from the ALJ’s Order Deeming Allegations Admitted is dismissed, and the case is remanded to the ALJ for further proceedings. Before the hearing, the ALJ should consider Ponsford’s letter, dated October, 28, 2009, and determine whether in that letter Ponsford established good cause for failing to file an answer.

J. RANDOLPH BABBITT
ADMINISTRATOR
Federal Aviation Administration

[Original signed by Vicki S. Leemon]

VICKI S. LEEMON⁶
Manager, Adjudication Branch

⁵ Section 13.209(f) provides: “[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.”

⁶ 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.