

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

**In the Matter of: GERALD W. KELLER**

FAA Order No. 2011-2

Docket No. CP06GL0007  
FDMS No. FAA-2006-25869<sup>1</sup>

Served: January 11, 2011

**ORDER GRANTING THE FAA TIME TO FILE A REPLY BRIEF**<sup>2</sup>

**I. Introduction**

This unusual appeal involves two civil penalty actions brought serially against the respondent, Gerald Keller, based upon his allegedly disruptive conduct while a passenger on board an Air Tran flight before takeoff on December 18, 2005. Prior to any hearing, the ALJ struck the FAA's amended complaint. Subsequently, the ALJ granted the agency's request to withdraw its original complaint without prejudice. In a motion to vacate, Keller requested that the ALJ vacate the order of dismissal, arguing that ALJ's dismissal of the proceedings without prejudice after the FAA withdrew the complaint was contrary to the Rules of Practice. The ALJ never ruled upon Keller's motion to vacate.

The FAA later initiated a second action against Keller. When Keller failed to respond to the Final Notice of Proposed Civil Penalty (FNPCP), the FAA issued an Order

---

<sup>1</sup> 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).

<sup>2</sup> 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](http://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.

Assessing Civil Penalty (OACP). Keller now asks the Administrator to review the ALJ's dismissal of the first complaint without prejudice as well as the issuance of the OACP in the second action.

As explained below, Keller's motion to vacate filed on July 30, 2007, is construed as a timely notice of appeal of the ALJ's July 24, 2007, order dismissing the case without prejudice and as an appeal brief. The FAA is granted 35 days from the date of the issuance of this order in which to file a reply brief.

## **II. Background**

The FAA filed its original complaint in the first civil penalty action on September 22, 2006, alleging a violation of 49 U.S.C. § 46318<sup>3</sup> and seeking a \$2,500 civil penalty. The FAA alleged that Keller appeared to be under the influence of alcohol, pushed other passengers as he walked down the aircraft aisle during the boarding process, and engaged in "verbal altercations" with other passengers once he reached his seat.

Subsequently, the FAA filed an amended complaint, alleging that Keller's actions not only disturbed other passengers but also interfered with the performance of the duties of the crewmembers in violation of 14 C.F.R. § 121.580.<sup>4</sup> Specifically, the agency added

---

<sup>3</sup> Section 46318 provides in pertinent part as follows:

An individual who physically assaults or threatens to physically assault a member of the flight crew or cabin crew of a civil aircraft or any other individual on the aircraft, or takes any action that poses imminent threat to the safety of the aircraft or other individuals on the aircraft is liable to the United States Government for a civil penalty of not more than \$25,000.

<sup>4</sup> Section 121.580 provides:

No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part.

the allegations that Keller's conduct had been so disruptive that the captain had to deviate from his duties to speak to Keller and that the aircraft crew "deemed it necessary to have the local authorities remove" Keller from the flight.

Under 14 C.F.R. § 13.214(b), the FAA is permitted to amend a complaint without the ALJ's consent as long as it files the amendment no later than 15 days before the scheduled hearing date. In this case, however, although the ALJ had not yet scheduled a hearing, he struck the amended complaint because, he wrote, "[i]t seems fundamentally unfair to allow the FAA to take an ongoing proceeding based on some very specific allegations and turn it into a vehicle for charging the Respondent with entirely different violations." (Order Denying Motion For Summary Judgment And Striking "Amended To Complaint," dated July 3, 2007, at 2-3.) The ALJ wrote that the FAA could initiate another proceeding and allege violations of 49 U.S.C. § 46318, 14 C.F.R. § 121.580, or both. (*Id.*, at 3.)

Subsequently, the agency sought to withdraw its original complaint without prejudice and, on July 24, 2007, the ALJ granted the FAA's motion to withdraw the original complaint without prejudice.<sup>5</sup> In so doing, the ALJ disregarded the provision in the Rules of Practice, specifically, 14 C.F.R. § 13.215, that if the agency attorney withdraws the complaint, the ALJ shall dismiss the proceedings *with* prejudice. The ALJ wrote that an enforcement agency has the inherent right to withdraw a complaint without prejudice and "start anew" as long as the applicable statute of limitations has not run. (Order Granting Motion To Dismiss Complaint Without Prejudice, dated July 24, 2007.)

---

<sup>5</sup> The phrase "without prejudice" means that there has been no adjudication of the claim on the merits, and therefore, in a subsequent action, an order of dismissal has no *res judicata* effect. Sager v. Hunter Corp., 665 F. Supp. 575, 580 (N.D. Ill. 1986).

Keller filed a motion (“motion to vacate”) on July 30, 2007, in which he requested that the ALJ vacate his July 24, 2007, order and dismiss the case *with* prejudice.<sup>6</sup> Keller argued in the motion to vacate that the ALJ’s order was contrary to 14 C.F.R. § 13.215, and consequently, was “illegally void.” The ALJ neither ruled on Keller’s motion to vacate nor forwarded it to the Administrator for consideration as an appeal.

The FAA initiated the second case by sending another Notice of Proposed Civil Penalty (NPCP) alleging violations of both 49 U.S.C. § 46318 and 14 C.F.R. § 121.580 on August 21, 2007,<sup>7</sup> and another FNPCP on March 26, 2008. After receiving no response to the FNPCP, the FAA issued an order (OACP) assessing a \$2,500 civil penalty against Keller on February 8, 2010, for violations of both 49 U.S.C. § 46318 and 14 C.F.R. § 121.580.

On February 26, 2010, Keller filed a document entitled “Notice of Appeal And/Or Request for Extension of Time to Appeal.” In this document, Keller appealed from the ALJ’s failure to enter a ruling on the motion to vacate (in the first case). In addition, Keller appealed from the OACP (in the second case) because, he argued, the FAA was “estopped from asserting a second enforcement action based on prejudicial error committed by the administrative law judge.”

---

<sup>6</sup> “A judgment dismissing a case ‘with prejudice’ bars a later suit on the same cause of action.” Foxx v. Dalton, 46 F. Supp. 2d. 1268, 1273 (M.D. Fla. 1999). A voluntary dismissal with prejudice constitutes a final adjudication on the merits for *res judicata* purposes on claims that were raised or could have been raised in the original lawsuit. NBN Broadcasting Inc., v. Sheridan Broadcasting Networks, Inc., 105 F.3d 72, 78 (2d Cir. 1997). Under the doctrine of *res judicata*, a subsequent lawsuit between the same parties on the same cause of action is barred. To determine whether the earlier and subsequent cases involve the same cause of action, the courts will look to see if the cases involve a common nucleus of operative facts, or in other words, if the underlying facts of the two cases are “related in time, space, origin, or motivation,” if “they form a convenient trial unit” and if their treatment as a unit conforms to the parties’ expectations.” Waldman v. Village of Kiryas Joel, 207 F.3d 105, 108 (2d Cir. 2000).

<sup>7</sup> Section 13.16(f) provides that “[a] civil penalty action is initiated by sending a notice of proposed civil penalty to the person charged with a violation ....” 14 C.F.R. § 13.16(f).

The FAA subsequently filed its Motion to Dismiss Respondent's Notice of Appeal And/Or Request for Extension of Time to Appeal ("motion to dismiss"). The FAA wrote that Keller's appeal is either an untimely appeal of the ALJ's July 24, 2007, order dismissing the proceedings without prejudice (in the first action) or an untimely appeal of the FNPCP dated March 26, 2008, (in the second action). Keller did not reply to the FAA's motion to dismiss.

On March 11, 2010, Keller filed a document entitled "Petition for Review and Dismissal of Order Assessing Civil Penalty with Prejudice and/or Appellant's Brief." In this document, Keller requested that the Administrator dismiss the OACP for the following reasons. He argued that the OACP was a nullity because (1) the FAA was estopped under 14 C.F.R. §13.215 from instituting a second enforcement action based on the same facts alleged in the withdrawn complaint, and (2) a hearing had not been held despite his request for hearing dated September 5, 2007 in the original action. The agency did not file any reply.

### **III. Discussion**

The Administrator must untangle this peculiar web of motions, orders, allegations and cases, to bring this matter back within the framework of the Rules of Practice.

1. Keller's Motion to Vacate dated July 30, 2007. In his motion to vacate, Keller requested that the ALJ reconsider his order dismissing the complaint *without* prejudice and replace it with an order of dismissal *with* prejudice. However, the Rules of Practice do not provide for such a motion for reconsideration of an initial decision by an ALJ.<sup>8</sup>

---

<sup>8</sup> Instead, the Rules of Practice provide:

Unless appealed pursuant to § 13.233 of this subpart, the initial decision issued by the administrative law judge shall be considered an order assessing civil penalty if the

The Administrator has held in past cases that the ALJ lacks jurisdiction over a proceeding once the initial decision has been issued.<sup>9</sup> Hence, the Administrator has held, an ALJ does not have the authority to rule upon a motion to vacate an initial decision.

Degenhardt, FAA Order No. 1990-16 at 6 (August 16, 1990) (“the fact is that a law judge loses jurisdiction over a case upon the issuance of the initial decision, and thereafter has no authority to entertain a motion to vacate.”) A party, however, is not without recourse. The Rules of Practice, specifically 14 C.F.R. § 13.233, provide for an appeal from an initial decision to the Administrator as long as the party files a notice of appeal no later than 10 days after the issuance of the initial decision and perfects that appeal by filing an appeal brief.

In this case, the ALJ should have forwarded the motion to vacate to the Administrator for consideration as a notice of appeal, as other ALJs have done in similar situations in the past.<sup>10</sup> Despite the significant passage of time, the Administrator now

---

administrative law judge finds that an alleged violation occurred and determines that a civil penalty, ... is warranted.

14. C.F.R. § 13.232(d).

<sup>9</sup> *E.g.*, Harris, FAA Order No. 2005-14 (August 17, 2009) (ALJ lost jurisdiction over the matter once he issued an order dismissing the complaint with prejudice); Luxemburg, FAA Order No. 1994-18 (June 21, 1994) (“Once the ALJ issued his order assessing the civil penalty, he lost jurisdiction of the case, and had no authority to re-open it”); Barnhill, FAA Order No. 1992-32 (May 5, 1992) (holding that “[w]hen a law judge issues an initial decision, his or her jurisdiction over a case ends”); Eaddy, FAA Order No. 1992-32 (May 4, 1991) (ALJ had no jurisdiction to entertain a request for rehearing).

<sup>10</sup> *E.g.*, Gordon Air Services, FAA Order No. 1997-24 (July 1, 1997) (in which the ALJ had construed the respondent’s “Motion for Rehearing/Reconsideration” as a notice of appeal and forwarded it to the Administrator for consideration as an appeal from the initial decision); Perez, FAA Order No. 1994-23 (June 27 1994) (in which the ALJ forwarded a letter filed after the ALJ dismissed the proceedings and assessed a civil penalty to the Administrator for consideration as an appeal).

construes Keller's motion to vacate as a notice of appeal from the ALJ's July 24, 2007, order dismissing the proceedings without prejudice.<sup>11</sup>

A party filing a notice of appeal is required under Section 13.233(c) to perfect its appeal by filing an appeal brief. The Administrator may dismiss a notice of appeal if the appellant fails to perfect its appeal by filing an appeal brief. 14 C.F.R. § 13.233(d)(2). The Administrator, in past cases, has construed notices of appeal as appeal briefs – thereby, in essence, saving otherwise unperfected appeals from dismissal under Section 13.233(d)(2)<sup>12</sup> – when the notice of appeal contained sufficient detail to explain the basis of the appellant's appeal, satisfying the requirements for appeal briefs under 14 C.F.R. § 13.233(d)(1).<sup>13</sup> In this case, the motion to vacate is construed as an appeal brief, as well as a notice of appeal, because it sets forth Keller's argument that the ALJ should have dismissed the proceedings with prejudice under 14 C.F.R. § 13.215.<sup>14</sup>

Under 14 C.F.R. 13.233(e), any party may file a reply brief within 35 days after service upon that party of the appeal brief. In this instance, the FAA will be granted 35

---

<sup>11</sup> Continental Airlines, FAA Order No. 1991-11 (April 11, 1991) (in which the respondent's motion to vacate default judgments entered by the ALJ were construed as an appeal brief); see Wine Country Helicopters, Inc., FAA Order No. 2008-12 (December 15, 2008) (in which the respondent's motion requesting that an OACP be set aside was construed as a notice of appeal), *appeal dismissed*, FAA Order No. 2008-13 (December 19, 2008).

<sup>12</sup> Section 13.233(d)(2) provides: "The FAA decisionmaker may dismiss an appeal on the FAA decisionmaker's own initiative ... 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."

<sup>13</sup> See Lewis, FAA Order No. 2005-7 (April 11, 2005), in which a letter addressed to the Hearing Docket clerk, which had been construed as a notice of appeal, was also construed as an appeal brief because it was sufficiently detailed to explain the basis of the appeal).

<sup>14</sup> On July 19, 2007, the ALJ denied Keller's motion to reconsider the denial of Keller's motion for summary judgment. To the extent that Keller may have intended to appeal from that order in his July 24, 2007 motion to vacate, that appeal is dismissed. The July 19, 2007, denial of the motion for reconsideration does not constitute an initial decision in this matter, and, consequently, the issues related to summary judgment are not properly on appeal before the Administrator.

days to file a reply brief from the date of the issuance of this order construing the motion to vacate as an appeal brief

2. Keller's Notice of Appeal dated February 26, 2010. Keller asserted that he filed his Notice of Appeal under 14 C.F.R. § 13.219(c), which is the rule permitting interlocutory appeals of right. Section 13.219(c) provides a party with an interlocutory appeal of right to the Administrator *before the issuance of an initial decision* if the ALJ fails to dismiss a case in accordance with Section 13.215. Keller filed the Notice of Appeal on February 26, 2010, long after the ALJ issued the initial decision in this matter on July 24, 2007. Hence, to the extent that this document represents an interlocutory appeal of the ALJ's initial decision, it is dismissed.

Further, in this document Keller argued that he was appealing from the ALJ's *failure* to rule upon the July 30, 2007, motion to vacate, as well as from the order assessing a civil penalty which, he asserts, he received on or about February 12, 2010. The Rules of Practice do not provide for review of an ALJ's failure to take an action. At this point, there is no need to rule on Keller's notice of appeal to the extent that he is appealing from the ALJ's *failure* to rule upon the motion to vacate, because the Administrator has construed the motion to vacate as a notice of appeal and appeal brief. Hence, Keller will get the review that he seeks of the ALJ's order of dismissal without prejudice. For this reason, as a notice of appeal from the ALJ's failure to rule upon the July 30, 2007, motion to vacate, the notice of appeal is dismissed.

Regarding his appeal in this document from the OACP, Keller seeks reversal of the OACP because, he argues, the FAA failed to give proper notice and opportunity for

hearing.<sup>15</sup> The Rules of Practice do not provide for direct review by the Administrator of an order assessing civil penalty issued by FAA counsel under 14 C.F.R. § 13.16(d)(2).<sup>16</sup> Hence, the Administrator will not consider Keller's argument that the FAA did not provide adequate due process when it issued the OACP.

For these reasons, Keller's Notice of Appeal dated February 26, 2010, is dismissed.

3. Keller's Petition for Review and Dismissal of Order Assessing Civil Penalty with Prejudice and/or Appellant's Brief dated March 11, 2010. Keller purportedly filed this document under "Sections 13.219, 13.233 and/or 13.234." It is not an interlocutory appeal under Section 13.219 of the ALJ's initial decision, for the same reason that the Notice of Appeal is not an interlocutory appeal of right – it was filed after the ALJ issued the initial decision. As an appeal brief, the document is dismissed because the Notice of Appeal dated February 26, 2010, was dismissed. Further, as a petition to reconsider or modify under 14 C.F.R. § 13.234, it is premature because the Administrator has not yet issued a final decision and order under 14 C.F.R. § 13.233.

IT IS HEREBY ORDERED THAT:

(1) Keller's motion to vacate is construed as a notice of appeal from the ALJ's order dismissing the original action without prejudice, and as an appeal brief.

---

<sup>15</sup> He also argues that the FAA misrepresented material facts and that the findings of fact are not supported by a preponderance of the reliable, probative and substantial evidence. Considering that the ALJ did not make any findings of fact, that argument is frivolous and merits no further attention.

<sup>16</sup> "An order assessing civil penalty may be issued if a person charged with a violation does not request a hearing under paragraph (g)(2)(ii) of this section [14 C.F.R. § 13.16(g)(2)(ii)] within 15 days after receipt of a final notice of proposed civil penalty." 14 C.F.R. § 13.16(d)(2).

(2) The FAA may file a reply brief within 35 days from the issuance of this order that addresses the issues raised in Keller's appeal, *i.e.*, did the ALJ have the authority to dismiss the proceedings without prejudice, and if not, should the Administrator dismiss the proceedings with prejudice.

(3) Keller's Notice of Appeal dated February 26, 2010, and his Petition for Review and Dismissal of Order Assessing Civil Penalty with Prejudice and/or Appellant's Brief dated March 11, 2010, are dismissed.

(4) After receiving any reply brief from the agency attorney, the Administrator will request additional briefing only if the Administrator deems additional briefing necessary. Once briefing is completed, the Administrator will issue a decision resolving Keller's appeal under 14 C.F.R. § 13.233(j)(2). Keller may not file any further briefs or motions unless requested by the Administrator.

[Original signed by J. Randolph Babbitt]

J. RANDOLPH BABBITT  
ADMINISTRATOR  
Federal Aviation Administration