

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

In the Matter of: JOSEPH D. BARBERA

FAA Order No. 2015-1

FDMS No. FAA-2013-1083¹

Served: January 7, 2015

ORDER CONSTRUING DOCUMENT AS NOTICE OF APPEAL

AND SETTING BRIEFING SCHEDULE²

On September 9, 2014, Administrative Law Judge (“ALJ”) Richard C. Goodwin issued an “Order to Show Cause” directing Respondent Joseph D. Barbera (“Respondent”) to answer, on or before October 1, 2014, the complaint, motions, and discovery requests of Complainant Federal Aviation Administration (“Complainant”). The ALJ warned Respondent that without full, complete, and timely responses, a default judgment could be entered against him.

The ALJ issued an “Order Entering Default Judgment Against Respondent” on October 15, 2014. The ALJ wrote in the order that according to pleadings filed in the Federal Docket Management System, Respondent had failed to answer the complaint, the ALJ’s procedural order, Complainant’s motions, and the ALJ’s show cause order. The ALJ dismissed Respondent’s request for hearing with prejudice, deemed all the allegations in the complaint

¹ Materials filed in the FAA Hearing Docket (except for materials in security cases or materials under seal) are also available for viewing at the following Internet address: www.regulations.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: 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 Publishing 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.

admitted, granted Complainant's motion for decision, and assessed Respondent the \$1,100 civil penalty sought in the complaint.

Respondent subsequently sent the ALJ a document entitled "Response to Order Entering Default Judgment." The postmark date on the envelope is October 22, 2014. In this document, Respondent advised the ALJ that he had indeed met the deadline specified in the order to show cause. Respondent also submitted United States Postal Service ("USPS") tracking numbers to show that he had met the deadline.

Once the ALJ issued the default judgment, he lost jurisdiction over the case and did not have authority to reconsider or vacate the default judgment. *Keller*, FAA Order No. 2011-2 at 6 (January 11, 2011). As a result, in a document captioned "Order of Referral" and served on November 25, 2014, the ALJ referred Respondent's "Response to Order Entering Default Judgment" to the FAA decisionmaker for consideration as a notice of appeal.

On December 16, 2014, Complainant filed a motion captioned "Complainant's Motion to Affirm Dismissal" in which Complainant asks the FAA decisionmaker to affirm the ALJ's "Order Entering Default Judgment" on the grounds that Respondent failed to file a timely answer and there is no genuine issue of fact. In the motion, Complainant argues that Respondent's "Response to Order Entering Default Judgment" is not a notice of appeal and should not be construed as such. Complainant contends that if the FAA decisionmaker does treat the "Response to Order Entering Default Judgment" as a notice of appeal, then the FAA decisionmaker should set a schedule for briefing from both parties.

On December 26, 2014, Respondent filed a document captioned "Response to Order to Complainant's Motion to Affirm Dismissal." In this document, Respondent pointed out that he had provided tracking numbers that proved that he did respond on time, contrary to the ALJ's

finding. Respondent disagrees with Complainant that there are no genuine issues of material fact, but he agrees completely with Complainant that a briefing schedule should be set.

Respondent's "Response to Order Entering Default Judgment" is hereby construed as a notice of appeal. Under 14 C.F.R. § 13.233(a), a party must file a notice of appeal no later than 10 days after service of the written initial decision on the parties.³ Under 14 C.F.R. § 13.211(e), the "mailing rule," Respondent had 5 additional days to file a notice of appeal.⁴ The ALJ served his "Order Entering Default Judgment" on October 15, 2014. Accordingly, Respondent's notice of appeal was due to be filed no later than October 30, 2014. Respondent's "Response to Order Entering Default Judgment" bears a postmark of October 22, 2014, and thus was timely as a notice of appeal.

In addition, under 14 C.F.R. § 13.233(c), a party must perfect an appeal by filing an appeal brief with the FAA decisionmaker no later than 50 days after service of a written initial decision on the party.⁵ Under 14 C.F.R. § 13.211(e), the mailing rule, a respondent has 5 additional days to file an appeal brief after service by mail.

Respondent is granted 50 days, plus an additional 5 days under the mailing rule, from the service date of this order, to file an appeal brief. After that, Complainant is granted 35 days, plus

³ 14 C.F.R. § 13.233(a) provides that "[a] party shall file the notice of appeal not later than 10 days after entry of an oral initial decision on the record or service of the written initial decision on the parties"

⁴ 14 C.F.R. § 13.211(e), the mailing rule, provides that "[w]henever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, 5 days shall be added to the prescribed period."

⁵ 14 C.F.R. § 13.233(c) provides that "a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker."

an additional 5 days under the mailing rule, to file a reply brief, starting from the date that Respondent serves the appeal brief on Complainant.⁶

MICHAEL P. HUERTA, ADMINISTRATOR
Federal Aviation Administration

Original signed by Vicki S. Leemon

VICKI S. LEEMON⁷
Manager, Adjudication Branch

⁶ 14 C.F.R. § 13.233(e) provides that “any party may file a reply brief with the FAA decisionmaker not later than 35 days after the appeal brief has been served on that party.”

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.