

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: March 19, 1990

FAA Order No. 90-0015

FEDERAL AVIATION ADMINISTRATION,)	
)	
Complainant,)	
)	
vs.)	Docket No. CP89GL0257
)	
BUDDE W. PLAYTER,)	
)	
Respondent.)	
)	

DECISION AND ORDER

The FAA (hereinafter referred to as "Complainant"), through its agency attorney, has appealed from the oral initial decision of Administrative Law Judge Daniel M. Head, issued at the conclusion of an evidentiary hearing held in this civil penalty action on November 28, 1989. In his oral initial decision, the law judge found that Respondent Budde W. Playter ("Respondent") did not fly under 1000 feet over a congested area, in violation of sections 91.79(a), 91.79(b), and 91.9 of the Federal Aviation Regulations (FAR) (14 C.F.R. §§ 91.79(a), 91.79(b), and 91.9), as alleged in the order of civil penalty, which served as the complaint in this proceeding. Accordingly, he reversed the order/complaint, which sought to impose a \$3,000 civil penalty, and ordered that no civil penalty be entered in this case.

Complainant's appeal is based on the law judge's failure to deem the allegations in the order/complaint admitted and affirm

the order of civil penalty, based upon Respondent's failure to file an answer to the order/complaint. Respondent has not filed a reply brief. For the reasons discussed below, Complainant's appeal is granted and the law judge's decision is reversed.

At the opening of the hearing in this matter the agency attorney noted that Respondent had failed to file an answer and moved that an order assessing civil penalty be issued pursuant to section 13.209 of the Rules of Practice in FAA Civil Penalty Actions ("Rules of Practice") (14 C.F.R. §13.209^{1/}). In response to this motion, Respondent's attorney readily admitted that he had filed no answer to the order/complaint, but asserted that he did not think one was required in light of statements he had made to the agency attorney at an informal conference (which was held after issuance of the notice of

1/ Section 13.209 of the Rules of Practice (14 C.F.R. §13.209) provides, in pertinent part:

§ 13.209 Answer

(a) Writing required. A person who receives an order of civil penalty shall file a written answer to the order, . . . not later than 30 days after service of the order of civil penalty. The answer may be in the form of a letter but must be dated and signed by the person responding to the order of civil penalty. . . .

* * * * *

(f) Failure to file an answer. A person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the order of civil penalty and an order assessing civil penalty shall be issued.

civil penalty, but prior to issuance of the order/complaint), indicating that Respondent contested the factual allegations. The law judge denied the agency attorney's motion, finding that the discussion at the informal conference during which Respondent, through his attorney, indicated that he was contesting the factual allegations in the complaint^{2/}, was sufficient to constitute an answer.

It is undisputed that Respondent did not file an answer within 30 days after service of the order/complaint, as he was required to do under section 13.209(a). Section 13.209(f) clearly states that failure to file an answer without good cause is deemed an admission of the truth of the allegations in the order of civil penalty, and that an order assessing civil penalty shall be issued. Although this is a severe penalty for failure to file an answer, the rule is clear, and does not permit exceptions. Absent good cause, "an order assessing civil penalty shall be issued". 14 C.F.R. §14.209(f) (emphasis added). Thus, unless Respondent's failure to file an answer was excused for good cause, the law judge should have granted agency attorney's motion.

Respondent's attorney's oral statements at the informal conference with respect to the allegations in the notice of

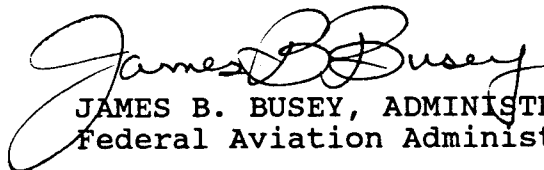
^{2/} The order/complaint had not yet been issued at the time of the informal conference. Although the record in this case does not contain a copy of the notice of civil penalty, I presume that that document contained factual allegations similar to those upon which the order/complaint was based.

civil penalty do not meet the requirements of an answer under section 13.209. An answer under section 13.209 must be in writing, and it must respond specifically to the individual allegations in the order/complaint. If Respondent's statements at the informal conference are allowed to serve as an answer to the order/complaint, then the provisions of section 13.209 requiring a written answer to the order/complaint would be rendered meaningless. Therefore, the fact that Respondent indicated at the informal conference that he contested the facts in the notice of civil penalty cannot be considered good cause for his failure to file a proper answer under section 13.209.

Respondent's attorney has not claimed that he was unaware of the applicable Rules of Practice, and hence could not have known that he was required to file a separate answer to the order/complaint. To the contrary, it is clear from the record, which contains at least two documents in which Respondent's attorney cites to the Rules of Practice, that Respondent's attorney was familiar with the applicable rules. Moreover, the order/complaint, which was sent to both Respondent and his attorney, contained an explicit statement setting forth the requirement to file an answer in accordance with section 13.209, and explaining unequivocally that a failure to do so would be deemed an admission of the allegations in that order, and an order assessing civil penalty would be issued in accordance with section 13.209(f). For these reasons, this case is not like FAA v. Metz, FAA order No. 90-0003

(Jan. 29, 1990), wherein I found that good cause had been shown for the respondent's failure to file an answer that conformed to the requirements of section 13.209.

THEREFORE, because Respondent in this case has not demonstrated good cause for his failure to file an answer, the allegations in the order/complaint are deemed admitted. The law judge's initial decision is reversed, and an order assessing a \$3,000 civil penalty shall be issued.^{3/}


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 16th day of March, 1990.

^{3/} Complainant, through its agency attorney, shall promptly prepare and issue an Order Assessing Civil Penalty, citing as authority this Decision and Order which I am issuing today. The Order Assessing Civil Penalty shall be effective upon service and shall remain in effect unless stayed by subsequent order.

Respondent may appeal this Decision and Order by petition for review in an appropriate United States Court of Appeals pursuant to section 1006 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. §1486), and section 13.235 of the Rules of Practice (14 C.F.R. §13.235) not later than 60 days after service of this Decision and Order.