

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

**In the Matter of: JOSEPH D. BARBERA**

FAA Order No. 2015-4

FDMS No. FAA-2013-1083<sup>1</sup>

Served: September 9, 2015

**DECISION AND ORDER**<sup>2</sup>

**I. Introduction**

Respondent Joseph D. Barbera (“Respondent”) has appealed from the default judgment issued by Administrative Law Judge (“ALJ”) Richard C. Goodwin against Respondent on October 15, 2014. The default judgment was in the amount of \$1,100, the amount sought in the complaint.<sup>3</sup> This decision affirms the ALJ’s default judgment on the ground that Respondent has failed to show good cause for his failure to file a timely answer to the complaint.

**II. Case History**

On March 6, 2014, Complainant Federal Aviation Administration (“Complainant”) filed the complaint in this case. The complaint stated as follows:

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<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>. 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 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.

<sup>3</sup> A copy of the ALJ’s written order entering default judgment, served on October 15, 2014, is attached.

- On or about June 22, 2013, Joseph Barbera operated an ultralight vehicle at an altitude higher than 18,000 feet Mean Sea Level.
- As a result of the above, Joseph Barbera operated an ultralight in Class A airspace<sup>4</sup> without obtaining prior authorization from the ATC facility having jurisdiction over that airspace.
- As a result of the above, Joseph Barbera operated an ultralight vehicle in a manner that created a hazard to other persons or property.

The complaint further stated as follows:

- By reason of the foregoing facts and circumstances, Joseph Barbera violated the following sections of the Federal Aviation Regulations (14 C.F.R.):
  - Section 103.9, in that [Joseph Barbera] operated an ultralight vehicle in a manner that created a hazard to other persons or property.
  - Section 103.17, in that [Joseph Barbera] operated an ultralight vehicle within Class A airspace without obtaining prior authorization from the ATC facility having jurisdiction over that airspace.
- In accordance with ... [49 U.S.C. §§ 46301(a) and (d)], Joseph Barbera is liable for a civil penalty not to exceed \$11,000 for each of the violations noted.
- Under the facts and circumstances of this case, a civil penalty of \$1,100 is appropriate.

The complaint notified Respondent of the requirement to file a timely answer to the complaint, and to show good cause for any failure to file the answer on time, as follows:

### ANSWER

In accordance with Section 13.209 of the Federal Aviation Regulations, Joseph Barbera must answer this Complaint not later than thirty (30) days from the time it is served on him. Failure to file an answer within thirty (30) days without good cause shall be deemed an admission of the truth of each allegation contained in the Complaint [14 C.F.R. § 13.209(f)].

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<sup>4</sup> “Class A airspace is generally the airspace from 18,000 feet mean sea level (MSL) up to and including flight level (FL) 600, including the airspace overlying the waters within 12 nautical miles (NM) of the coast of the 48 contiguous states and Alaska.” Pilot’s Handbook of Aeronautical Knowledge, FAA-H-8083-25A, at 14-2 (2008). See 14 C.F.R. §§ 71.31 (entitled “Class A airspace”) and 71.33 (entitled “Class A airspace areas”).

On March 25, 2014, the ALJ served a procedural order on the parties in which he advised Respondent about the need to file a timely answer as follows:

[T]he Respondent must file a written Answer or motion within thirty (30) days after service of the Complaint (14 C.F.R. § 13.209(a)) .... [A] general denial is deemed a failure to file an Answer (§ 13.209(e)) .... [F]ailure to file an Answer without good cause is deemed an admission of each allegation in the Complaint (§ 13.209(f)).

Respondent had 35 days from the service date of the complaint, or until April 10, 2014, to file his answer under 14 C.F.R. §§ 13.209(a)<sup>5</sup> and 13.211(e).<sup>6</sup>

On April 18, 2014, Complainant filed a motion to deem allegations admitted and to dismiss appeal based on Respondent's failure to file an answer.

Respondent filed a memorandum dated April 19, 2014, which denied the complaint. Respondent filed a response dated April 28, 2014, to Complainant's motion to deem allegations admitted and to dismiss appeal. Respondent wrote that he "had no intentions of letting this matter rest or admit guilt by non-response." Respondent said that he had interpreted the ALJ's procedural order of March 25, 2014, to require an answer within 30 days of the procedural order rather than within 30 days from the complaint.

On May 5, 2014, the ALJ issued an order entitled, "Order Denying Agency Motion for Decision," in which he denied Complainant's motion to deem allegations admitted and to dismiss appeal. The ALJ explained that after Complainant moved to deem the allegations of the complaint admitted, Respondent filed an answer and other documents.

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<sup>5</sup> 14 C.F.R. § 13.209(a) provides in pertinent part: "A respondent shall file a written answer to the complaint, or may file a written motion pursuant to § 13.208(d) or § 13.218(f)(1-4) of this subpart instead of filing an answer, not later than 30 days after service of the complaint."

<sup>6</sup> 14 C.F.R. § 13.211(e), the "mailing rule," provides: "Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period."

On May 6, 2014, Complainant filed a motion for reconsideration of its motion to deem allegations admitted and to dismiss appeal. Complainant argued that the late answer should not be accepted unless Respondent could demonstrate good cause for the lateness. In the same document, Complainant included a motion for decision or motion for summary judgment. In this latter motion, Complainant argued that in Respondent's answer, he did not actually deny any of the allegations in the complaint. Instead, Respondent's only response was, "I seriously question whether there is ample evidence to prove the flight violated the 18,000 ft. boundary." According to Complainant, this statement was not a denial, but was a tacit admission of the allegation, and therefore Respondent had admitted the allegations set forth in the complaint.

Further, Complainant argued, if the above-quoted language in Respondent's answer were construed to be a denial, Respondent was wrong about the lack of evidence. To show that there was evidence, Complainant submitted two exhibits – one in which Respondent admitted that he committed the violation, and another containing data showing that Respondent's ultralight aircraft flew over 20,000 feet.

According to Complainant, Respondent had not and could not deny the allegations, and Respondent's admissions should be conclusive evidence that the violations occurred and required no corroboration.

Respondent sent a letter to the ALJ on or about June 4, 2014.<sup>7</sup> This letter was a response to Complainant's motion for decision or motion for summary judgment of May 6, 2014, but it was untimely. The Rules of Practice provide that, "A party may file an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of a written motion on that party." 14 C.F.R. § 13.218(d). The "mailing rule" provides an additional 5 days: "Whenever a party has a right or a duty to act or to make any response within a prescribed period

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<sup>7</sup> The Hearing Docket never received this letter.

after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.” 14 C.F.R. § 13.211(e). Respondent’s deadline for filing a response to the motion for decision was 15 days after May 6, 2014, or May 21, 2014. Respondent, however, did not file a response until on or about June 4, 2014.

On June 12, 2014, Complainant filed a motion to strike Respondent’s response, dated on or about June 4, 2014, to Complainant’s motion for summary judgment. Complainant argued that Respondent was late in responding to Complainant’s motion for reconsideration and summary judgment and as with the late answer, Respondent had not shown good cause for the lateness. Complainant further argued in its motion to strike that Respondent should be required to show good cause why he failed to answer the complaint or in the alternative, the ALJ should grant Complainant’s summary judgment and order Respondent to comply with Complainant’s Final Notice of Proposed Civil Penalty as the final order in this case.

On July 10, 2014, the ALJ issued an order regarding Complainant’s motions in which he stated that Respondent’s communication dated on or about June 4, 2014, had not been presented to him. The ALJ warned Respondent that if he failed to comply with the rules, then he could be sanctioned in any of the following ways – allegations in the complaint could be admitted, Respondent could be precluded from introducing evidence at the hearing other than his own testimony, Respondent’s request for hearing could be dismissed, and a default judgment could be entered against Respondent.

On September 9, 2014, the ALJ issued an Order to Show Cause in which he stated that based on his review of documents in this case entered in the Federal Docket Management System (“FDMS”) and available in regulations.gov:

... Barbera has failed to Answer the Complaint; failed to respond to our Procedural Order served March 25, 2014; failed to Answer FAA’s Motion to

Deem Allegations Admitted and to Dismiss Appeal dated 18 April 2014; failed to answer FAA's Motion for Reconsideration of Denial of Motion to Deem Allegations Admitted and to Dismiss Appeal, Motion for Decision (Summary Judgment) and Motion to Extend Discovery Deadline dated 6 May 2014; failed to respond to our Amended Procedural Order served May 7, 2014; failed to answer FAA's Motion to Strike Response to Motion for Summary Judgment and Response to Respondent's Motion to Compel Discover[y] and Motion to Extend Discovery Deadline dated 12 June 2014; nor Answered FAA's Motion for Clarification to the ALJ's Order on Complainant's Motions dated 15 July 2014.

In this Show Cause Order, the ALJ ordered as follows:

1. That on or before October 1, 2014, Barbera shall:
  - a. Answer FAA's Complaint; and
  - b. File a responses (sic) to all FAA's Motions; and
  - c. ... [F]ully and completely comply with all discovery requests of the FAA.
2. Further, Barbera shall answer this Order stating why the relief requested in the Agency's Motions to Strike Response to Motion for Summary Judgment should not be granted; and
3. Absent full and complete responses to paragraphs 1 and 2, Barbera may be sanctioned including, but not limited to, allegations in the Complaint may be deemed admitted; and/or Barbera may be precluded from introducing any evidence at the hearing other than his own testimony; and/or Barbera's Request for Hearing may be dismissed; and/or a Default Judgment may be entered against Barbera in the full amount of the fine requested by the Agency in its Complaint.

On or about September 26, 2014, Respondent filed the following documents: an answer to the complaint, a response to Complainant's motion to strike response to motion for summary judgment and response to Respondent's motion to compel discovery, motion for reconsideration of denial of motion to deem allegations admitted and to dismiss appeal, a response to Complainant's motion for decision, a response to Complainant's motion to extend discovery deadline, a response to Complainant's motion to deem allegations admitted and to dismiss appeal, and a response to the ALJ's order to show cause. The service lists for these documents indicate that they were sent to the ALJ, the Hearing Docket, and Complainant's counsel.

On October 2, 2014, Complainant filed a reply to Respondent's submissions. In this reply, Complainant argued that Respondent's appeal should be dismissed due to Respondent's failure to file a timely answer. Further, Complainant argued, even if there was good cause for accepting the untimely answer, Complainant's motion for decision or summary judgment should be granted because the answer filed by Respondent in April 2014 did not deny the allegation that he entered Class A airspace without an ATC clearance.

On October 15, 2014, the ALJ issued an order entering default judgment against Respondent in which the ALJ found that Respondent 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 admitted, granted Complainant's motion for judgment on the pleadings, and assessed a civil penalty of \$1,100 against Respondent, as requested in the complaint.

On October 22, 2014, Respondent sent the ALJ a response to the order entering default judgment in which Respondent asserted that he complied fully with the ALJ's order to show cause. The ALJ, however, having entered the default judgment, no longer had jurisdiction. As a result, on November 25, 2014, the ALJ referred Respondent's response to the ALJ's order to show cause to the FAA decisionmaker.

On January 7, 2015, the FAA decisionmaker construed Respondent's response to the ALJ's order entering default judgment as a notice of appeal and set a briefing schedule. The appeal is now fully briefed and ready for decision.

### **III. Discussion**

The issue in this case is whether Respondent has good cause for his failure to file an answer within the 30-day time period set by Section 13.209(a) of the Rules of Practice

(14 C.F.R. § 13.209(a)). *Cornwall*, FAA Order No. 1992-47 at 5 (July 22, 1992); *Safety Equipment and Sign*, FAA Order No. 1992-76 at 4 (December 21, 1992). Respondent, like Complainant, must know and meet procedural deadlines. *Safety Equipment & Supply*, FAA Order No. 1992-76 at 4 (December 21, 1992). Respondent in this case is *pro se*, but *pro se* respondents too must follow the Rules of Practice. *Conquest Helicopters*, FAA Order No. 1995-25 at 6 n.6 (December 19, 1995); *Global Peace Initiative*, FAA Order No. 2008-8 at 5-6 (August 21, 2008). Section 13.209(a) (14 C.F.R. § 13.209(a)) sets a 30-day deadline for filing the answer to the complaint, and Section 13.209(f) (14 C.F.R. § 13.209(f)) states that *without good cause*, a person's failure to file an answer *shall* be deemed an admission of the truth of each allegation contained in the complaint. *Atlantic World Airways*, FAA Order No. 1995-28 at 3-4 (December 19, 1995) (emphasis in the original). The FAA decisionmaker will only excuse a late answer if respondent shows good cause for the delay. *Air Florida Express*, FAA Order No. 2002-9 at 2 (April 16, 2002), citing *Stevenson*, FAA Order No. 2000-29 (December 29, 2000); *Atlantic World Airways*, FAA Order No. 1995-28 at 3-4 (December 19, 1995); *Safety Equipment & Supply*, FAA Order No. 1992-76 at 4 (December 21, 1992). A showing of good cause is mandatory. *Global Peace Initiative*, FAA Order No. 2008-8 at 5 (August 21, 2008), quoting *Atlantic World Airways*, FAA Order No. 1995-28 at 3-4 (December 19, 1995).

Under Sections 13.209(a)<sup>8</sup> and 13.211(e) of the Rules of Practice (14 C.F.R. §§ 13.209 and 13.211(e)) ,<sup>9</sup> Respondent had 30 days (plus 5 days) from the service date of the complaint, or

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<sup>8</sup> 14 C.F.R. § 13.209(a) provides in pertinent part: "A respondent shall file a written answer to the complaint, or may file a written motion pursuant to § 13.208(d) or § 13.218(f)(1-4) of this subpart instead of filing an answer, not later than 30 days after service of the complaint."

<sup>9</sup> 14 C.F.R. § 13.211(e), the "mailing rule," provides: "Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period."



until April 10, 2014, to file his answer, but Respondent failed to file his answer by the deadline. Complainant asserts that a letter from Respondent that was postmarked 13 days after the deadline, on April 23, 2014, can be construed as an answer.<sup>10</sup> Also, Respondent filed an answer to the complaint on or about September 26, 2014, in response to the ALJ's order to show cause.

In an apparent attempt to show good cause for his lateness, Respondent has stated that he interpreted the ALJ's procedural order of March 25, 2014, to require an answer from him within 30 days of *the procedural order*, which was incorrect. Rather, Respondent was required to answer the complaint within 30 days of service of *the complaint*. The complaint contained an explicit statement of the requirement to file an answer within 30 days of service of *the complaint*. Likewise, the ALJ issued a procedural order in which he specifically reminded Respondent that he must file a written answer or motion within 30 days of service of *the complaint*. As in the *Diamond* case, "Respondent had the benefit of two specific written reminders to file the answer by the deadline, but still failed to do so. Good cause has not been shown." *Diamond*, FAA Order No. 1995-10 at 3 (May 10, 1995).

Respondent has not raised any other matter that could constitute good cause. For example, neither the ALJ nor agency counsel said or did anything that would mislead a reasonable person about the deadline. *Larry's Flying Service*, FAA Order No. 1998-4 at 2-3 (March 12, 1998). In *Warbelow's Air Ventures*, FAA Order No. 1999-4 at 4-5 (July 1, 1999), the Administrator found a marginal showing of good cause for a late-filed document, but *Warbelow's* is distinguishable in that the respondent in *Warbelow's* took steps to protect against default, which did not happen here.

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<sup>10</sup> Complainant makes this assertion in its motion for reconsideration.

The National Transportation Safety Board (NTSB) has held that unfounded mistakes regarding the calculation of a deadline do not constitute good cause for failing to submit a timely filing. *Administrator v. Rice*, NTSB Order No. EA-5667 at 2 n.8 (2013), citing *Administrator v. Zaidi*, NTSB Order No. EA-5469 (2009), in turn citing *Administrator v. Dirksen*, NTSB Order No. EA-4699 (1998); *Administrator v. Shumate*, NTSB Order No. EA-5555 at 5 (2010); *Application of Riggs for an Award of Attorney Fees and Expenses*, NTSB Order No. EA-5312 at 1 (2007); *Administrator v. Slay & Knowles*, NTSB Order No. EA-3956 (1993). The FAA decisionmaker is not bound by NTSB decisions, but may follow them if they are persuasive. *Gatewood*, FAA Order No. 2000-1 at 20 (February 3, 2000); *Westair Commuter Airlines*, FAA Order No. 1993-18 at 6 (June 10, 1993); *Richardson & Shimp*, FAA Order No. 1992-49 at 9 n.13 (July 22, 1992). In the instant case, Respondent made an unfounded mistake regarding the deadline for the answer, and unfounded mistakes do not constitute good cause.

#### **IV. Conclusion**

Because Respondent has failed to show good cause for the untimeliness of his answers to the complaint, this decision affirms the ALJ's default judgment, including the \$1,100 civil penalty.

[Original signed by Michael P. Huerta.]

MICHAEL P. HUERTA, ADMINISTRATOR  
Federal Aviation Administration

**SERVED: October 15, 2014**

U.S. DEPARTMENT OF TRANSPORTATION  
OFFICE OF HEARINGS  
WASHINGTON, DC

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IN THE MATTER OF

JOSEPH D. BARBERA

FAA DOCKET NO. [TO BE ASSIGNED]  
(Civil Penalty Action)

FDMS NO. FAA 2013 - 1083

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**ORDER ENTERING DEFAULT JUDGMENT AGAINST RESPONDENT**

The Docket Management System (hereinafter "DMS") reflects the following pleadings in this case:

Joseph D. Barbera (hereinafter "Barbera") filed a Request for Hearing dated 24 February 2014.

The Federal Aviation Administration (hereinafter "FAA") filed a Complaint dated 6 March 2014.

Barbera filed a Letter dated 10 March 2014 outlining dates of availability.

We served our Procedural Order on March 25, 2014.

FAA filed a Motion to Deem Allegations Admitted and to Dismiss Appeal on 18 April 2014.

We served an Order Denying Agency Motion for Decision on May 5, 2014.

FAA filed a Motion for Reconsideration of Denial of Motion to Deem Allegations Admitted and to Dismiss Appeal dated 6 May 2014. Within that motion is a Motion for Decision (Summary Judgment) and Motion to Extend Discovery Deadline.

We served an Amended Procedural Order on May 7, 2014.

FAA filed Complainant's Motion to Strike Response to Motion for Summary Judgment and Response to Respondent's Motion to Compel Discovery dated 12 June 2014. Neither of Barbera's pleadings referred to in FAA's 12 June 2014 motion is in DMS nor were they served on the court.

We served our Order on Complainant's Motions on July 10, 2014 extending discovery until October 1, 2014.

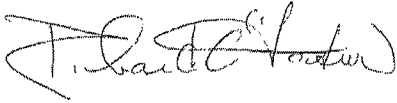
FAA filed Complainant's Motion for Clarification to the ALJ's 'Order on Complainant's Motions' dated 15 July 2014.

According to pleadings filed in DMS, Barbera has failed to Answer the Complaint; failed to respond to our Procedural Order served March 25, 2014; failed to Answer FAA's Motion to Deem Allegations Admitted and to Dismiss Appeal dated 18 April 2014; failed to Answer FAA's Motion for Reconsideration of Denial of Motion to Deem Allegations Admitted and to Dismiss Appeal, Motion for Decision (Summary Judgment) and Motion to Extend Discovery Deadline dated 6 May 2014; failed to respond to our Amended Procedural Order served May 7, 2014; failed to Answer FAA's Motion to Strike Response to Motion for Summary Judgment and Response to Respondent's Motion to Compel Discover and Motion to Extend Discovery Deadline dated 12 June 2014; nor Answer FAA's Motion for Clarification to the ALJ's Order on Complainant's Motions dated 15 July 2014.

We issued a Show Cause Order on September 9, 2014, instructing Barbera respond to pleadings on or before October 1, 2014. Barbera has failed to do so.

WHEREFORE, the Agency's Motion for Judgment on the Pleadings having been read and considered, it be and is hereby ORDERED as follows:

1. Respondent's Request for Hearing be and is hereby DISMISSED with prejudice; and
2. Respondent be and is hereby DEEMED to have admitted to all of the allegations in the Agency's Complaint; and
3. The Agency's Motion for Judgment on the Pleadings be and is hereby GRANTED; and
4. Respondent be and is hereby assessed a civil penalty in the amount of \$1,100 against Respondent as requested in Agency's Complaint.



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Richard C. Goodwin  
U.S. Administrative Law Judge

Attachment – Service List

**SERVICE LIST**

**ORIGINAL & ONE COPY**

Federal Aviation Administration  
800 Independence Avenue, S.W.  
Washington, DC 20591  
Attention: Hearing Docket Clerk, AGC-430  
Wilbur Wright Building—Suite 2W1000<sup>1</sup>

**ONE COPY**

Joseph D. Barbera, *Respondent*  
14706 N.E. Erickson Dr.  
La Center, WA 98629-4405  
TEL: NOT PROVIDED  
FAX: NOT PROVIDED

David F. Shayne, *Complainant's Counsel*  
Northwest Mountain Region, ANM-7  
Federal Aviation Administration  
1601 Lind Ave., S.W.  
Renton, WA 98057  
TEL: 425-227-1847  
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The Honorable Richard C. Goodwin, *Administrative Law Judge*  
Office of Hearings, M-20  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E. (E11-310)  
Washington, DC 20590  
TEL: 202-366-5121 Staff Assistant  
FAX: 202-366-7536

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<sup>1</sup> Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430.