

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

In the Matter of: LISA GAMACHE-WORTMAN

FAA Order No. 2012-4

Docket No. CP10AL0005
FDMS No. FAA-2010-1081¹

Served: May 22, 2012

**ORDER REVERSING THE ORDER GRANTING
COMPLAINANT'S SECOND MOTION FOR DECISION
AND REMANDING TO THE
ADMINISTRATIVE LAW JUDGE**²

I. Introduction

Respondent Lisa Gamache-Wortman (“Gamache-Wortman”) failed to respond to the discovery request served by Complainant FAA (“Complainant”) and to the “Order Requiring Respondent to Answer Discovery Request or Risk Sanctions” issued by Administrative Law Judge (“ALJ”) Richard C. Goodwin. On July 8, 2011, the ALJ incongruously both dismissed Gamache-Wortman’s request for hearing and granted Complainant’s second motion for decision.³ The ALJ entered a judgment against

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) 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. 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.

³ A request for hearing is a prerequisite for a complaint (see 14 C.F.R. § 13.208(a)), which, is a prerequisite for a decision on the merits. Thus, if a request for hearing is dismissed, the ALJ should not reach a decision on the merits of the allegations in the complaint.

Gamache-Wortman in the amount of \$2,500.⁴ Gamache-Wortman appealed.

The ALJ's order is reversed because, as explained in this decision, the ALJ exceeded his authority under 14 C.F.R. § 13.220(n) by dismissing the request for hearing due to Gamache-Wortman's failure to comply with a discovery request and order. Also, Complainant failed to prove that genuine issues of material fact no longer existed, making the ALJ's granting of Complainant's second motion for decision improper under 14 C.F.R. § 13.218(e)(5).⁵

II. History of the Case

Gamache-Wortman requested a hearing by letter postmarked on November 4, 2010. Subsequently, on November 23, 2010, Complainant filed its Complaint, alleging that Gamache-Wortman knowingly offered a shipment containing undeclared hazardous materials -- two aerial flares and five 20-gauge shotgun shells -- to Alaska Airlines for air transportation from Anchorage, Alaska, to Seattle, Washington. Complainant alleged that Gamache-Wortman violated multiple sections of the Hazardous Materials Regulations (HMR)⁶ and sought a \$2,500 civil penalty.

Under Section 13.209(a) of the Rules of Practice in Civil Penalty Proceedings, 14 C.F.R. § 13.209, a respondent must file a written answer to the complaint, or may file a written motion no later than 30 days after service of the complaint. Also, under the "mailing rule," a party has an additional 5 days in which to respond to a document served

⁴ The Order Granting Complainant's Second Motion for Decision is attached.

⁵ See pages 6-7 *infra* for the full text of Sections 13.218(e)(5) and 13.220(n).

⁶ Specifically, Complainant alleged that Gamache-Wortman violated 14 C.F.R. §§ 171.2(e), 172.200(a), 172.201(d), 172.202(a)(1), 172.202(a)(2), 172.202(a)(3), 172.204(a) or (c)(1), 172.204(c)(2), 172.204(c)(3), 172.300, 172.301(a), 172.400(a), and 172.600(c)(1) and (c)(2).

by mail. 14 C.F.R. § 13.211(e).⁷ Hence, Gamache-Wortman was required to file her answer or an appropriate motion no later than December 28, 2010 (35 days after service of the complaint on November 23, 2010.)

On December 30, 2010, Complainant filed a motion for decision, or, in the alternative, a motion for summary judgment limiting the hearing to the issue of sanction. Complainant alleged in its motion that:

- it had sent the complaint to Gamache-Wortman by certified mail, that a notice pertaining to this certified letter was left at her address on November 24, 2010, and that she had not claimed the letter as of December 29, 2010;
- it had sent a copy of the complaint to Gamache-Wortman by regular mail and that this copy had not been returned; and
- Gamache-Wortman had failed to file an answer and to communicate good cause for that failure.

On February 9, 2011, the ALJ issued an Order to Show Cause, directing Gamache-Wortman to explain why the relief requested in Complainant's motion should not be granted, and to file an answer to the complaint on or before February 25, 2011. On March 7, 2011, Complainant filed a document entitled "Renewed Motion for Decision" because Gamache-Wortman had not yet filed an answer to the complaint and because, according to Complainant, no genuine issues of fact existed.

On March 21, 2011, the Hearing Docket received an 8-page, handwritten letter entitled "Answer" from Gamache-Wortman. The attachments to her answer included two Alaska Air Cargo air waybills, dated May 14, 2009, at 18:51, for shipment 027-71326603. However, one of these air waybills indicated that the shipment consisted of

⁷ Complainant summarized the requirement to file an answer within 30 days at the end of the complaint. The ALJ in the procedural order, dated December 13, 2010, also summarized the requirement to file an answer.

14 pieces, and the other indicated that there had been 16 pieces. Another attachment indicated that Lisa M. Gamache received the 16-piece shipment on May 19, 2009. In her answer, Gamache-Wortman wrote that she did not knowingly ship any dangerous goods, and that the Alaska Airlines representative helped her stack the boxes on the pallet and told her that the pallet would be okay to ship. She wrote that to her knowledge, the 14-piece shipment that she offered did not include any ammunition. She explained further that she had not filed her answer on time because she is busy caring for her three sons and her disabled husband and that she has had difficulty understanding the documents sent to her. She noted further that her husband and she are unemployed and rely upon disability payments and food stamps.

On March 23, 2011, the ALJ issued an order finding that Gamache-Wortman's submission constituted an answer, and that she had demonstrated good cause for her failure to file it in a timely fashion. The ALJ denied Complainant's motions for decision.

On March 30, 2011, Complainant sent Gamache-Wortman a discovery request, including 16 interrogatories, and five related requests for production, as well as two requests for admission pertaining to other names that Gamache-Wortman may have used.⁸ After not receiving a response from her, the agency attorney sent her a letter explaining that he had extended her deadline to comply with the discovery requests until May 12, 2011, but if he did not receive her response by then, he would file a motion to compel and request that the ALJ preclude her from introducing evidence at the hearing. Gamache-Wortman did not respond to Complainant's discovery requests.

⁸ The next day, the ALJ issued an amended procedural order, to the effect that discovery shall be concluded on or before August 1, 2011, and setting the hearing date for August 15-17, 2011.

On May 13, 2011, Complainant filed its “Motion to Deem Admitted Complainant’s Requests for Admissions and Motion to Compel Discovery.” Complainant requested that the ALJ deem the requests for admissions as admitted unless the ALJ found that Gamache-Wortman’s failure to respond was due to circumstances beyond her control. Further, Complainant requested that the ALJ issue an order compelling Gamache-Wortman to comply with her discovery obligation or face sanctions. Gamache-Wortman did not respond to this motion.

On June 8, 2011, the ALJ ordered that Gamache-Wortman respond to the discovery requests and warned about the potential consequences of failure to comply with this order, as follows:

Ms. Gamache-Wortman, the Respondent, ... is hereby required to completely and separately answer truthfully each and every request contained in Complainant’s Initial Discovery Request by June 20, 2011 (mailing date). Should Respondent fail to respond fully by that date, I will entertain a request by Complainant for sanctions against Respondent. Such sanctions may include, but not be limited to: 1) all matters unanswered or incompletely answered may be deemed admitted; 2) Respondent may be precluded from introducing any evidence at the hearing other than its own testimony; and/or 3) a Default Judgment may be entered against Respondent in the amount of the fine requested by the Complainant in its Complaint.

(Order Requiring Respondent to Answer Discovery Request or Risk Sanctions, dated June 8, 2011, at 2.) Gamache-Wortman did not respond to this order.

Complainant filed a “renewed” motion for decision on June 24, 2011, arguing that Gamache-Wortman “should be precluded from presenting evidence, her pleadings should be stricken, and Complainant’s Motion for Decision should be granted.” Gamache-Wortman did not respond to the motion. On July 8, 2011, the ALJ granted the motion, finding that Gamache-Wortman had “repeatedly failed in her pretrial responsibilities to

Complainant and to this Court.” Accordingly, the ALJ dismissed Gamache-Wortman’s request for hearing with prejudice and entered a judgment for \$2,500.

Gamache-Wortman appealed from the ALJ’s order, arguing that:

- she was not responsible for the shipment because Alaska Airlines Cargo had told her that the shipment was okay;
- she had told the agency attorney that she had mental health issues, was unemployable, and could not afford any civil penalty; and
- she had no additional documents to send to the agency attorney.

In its reply brief, Complainant argued that Gamache-Wortman had had her chance to argue about the merits and to prove financial hardship, but had failed to do so.

III. Discussion

The Rules of Practice in Civil Penalty Proceedings do not specify that an ALJ may dismiss a respondent’s request for hearing as a sanction for a respondent’s failure to respond to a discovery order or order to compel. Section 13.220(n) of the Rules of Practice in Civil Penalty Proceedings, 14 C.F.R. § 13.220(n), provides as follows:

Failure to comply with a discovery order or order to compel. If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to extent of the party’s failure to comply with a discovery order or motion to compel, may:

- (1) Strike that portion of a party’s pleadings;
- (2) Preclude prehearing or discovery motions by that party;
- (3) Preclude admission of that portion of a party’s evidence at the hearing; or
- (4) Preclude that portion of the testimony of that party’s witnesses at the hearing.

In cases in which a party fails to respond to a request for admissions, the ALJ may deem that failure as an admission of the truth of the statement contained in each request under

certain circumstances⁹ 14 C.F.R. § 13.220(l)(1) but is not authorized to dismiss the request for hearing.

If the respondent admits sufficient facts such that no genuine issue of fact remains, then under 14 C.F.R. § 13.218(e)(5), the ALJ may grant a motion for decision. Specifically, Section 13.218(e)(5) provides:

Motion for decision. A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

In this case, there were only two requests for admission (to which Gamache-Wortman failed to respond.) Complainant requested that Gamache-Wartman admit that she had also gone by the names Lisa Stedman and Lisa Rantala. The ALJ could have deemed these statements as admitted under Section 13.220 due to Gamache-Wortman's failure to respond to the requests for admissions. However, these were not facts mentioned in the complaint, and therefore, these admissions did not prove any material facts necessary to prove that Gamache-Wortman had violated the HMR, as alleged.

Further, in her answer,¹⁰ Gamache-Wortman denied knowingly offering hazardous materials to Alaska Airlines in her shipment of "household goods," (Answer, ¶

⁹Section 13.220(l)(1) provides:

Time. A party's failure to respond to a request for admission ... not later than 30 days after service of the request, is deemed an admission of the truth of the statement or statements contained in the request for admission. The administrative law judge may determine that a failure to respond to a request for admission is not deemed an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party's attorney.

1) and specifically stated that to her knowledge there was no ammunition in any of the 14 pieces that she offered to Alaska Airlines (Answer, ¶ 5). She did not admit the critical allegation in the complaint that the shipment included aerial flares and a box containing five 20-gauge shotgun shells. In Section II, paragraph 3 of the Complaint, the Complainant alleged: “This shipment consisted, in part, of two Orion Skyblazer Red Aerial Flares and a box containing five 20-gauge shotgun shells.” Gamache-Wortman wrote in her Answer that she was “without sufficient knowledge” to admit or deny that allegation, and explained as follows:

I singed (sic) for 14 peices (sic) of cargo and went thru (sic) the shipment extensively. Beleiving (sic) that there was No Dangerous Cargo in my 14 peices. Then there was 16 pieces (sic) in Seatle (sic), how or who’s (sic) other 2 peices (sic) of cargo may there have been and did it contain the shotgun shells and ariel (sic) flares?

(Answer, ¶ 3.)

Complainant had the burden of proving that there was no genuine issue of material fact under 14 C.F.R. § 13.218(e)(5). In the absence of an admission by Gamache-Wortman that she had offered boxes containing the alleged hazardous materials for shipment or a discovery sanction deeming such facts admitted, Complainant failed to prove that a genuine issue of material fact did not exist. Consequently, the ALJ should not have granted Complainant’s second motion for decision.¹¹

¹⁰ The ALJ did not strike the answer when he dismissed the request for hearing under 14 C.F.R. § 13.220(n). Hence, the answer was still valid. There would have been no reason to strike the answer because Gamache-Wortman attached documents regarding the confusion over how many boxes she offered for shipment.

¹¹ Also Section 13.224(b) provides that “Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.” 14 C.F.R. § 13.224(b).

Conclusion

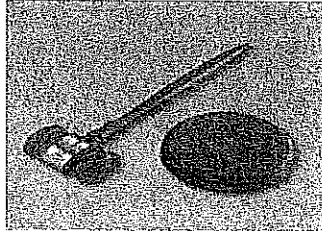
Accordingly, the ALJ's Order granting complainant's Second Motion for Decision is reversed. This matter is remanded to the ALJ for further proceedings, as appropriate.

[Original Signed by Michael Huerta]

MICHAEL HUERTA,
ACTING ADMINISTRATOR
Federal Aviation Administration

SERVED: JULY 8, 2011

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

IN THE MATTER OF

LISA GAMACHE-WORTMAN

FAA DOCKET No. CP10AL0005
(Civil Penalty Case)

DMS FAA-2010-1081

ORDER GRANTING
COMPLAINANT'S SECOND MOTION FOR DECISION

Our Order Requiring Respondent to Answer Discovery Request or Risk Sanctions ("Order Requiring Respondent to Answer"), served June 8, 2011, was issued in response to the Motion of the Federal Aviation Administration ("Complainant") to Deem Admitted Complainant's Requests for Admissions and Motion to Compel Discovery ("Motion"). The Order Requiring Respondent to Answer directed the Respondent, Lisa Gamache-Wortman, to respond to Complainant's Initial Discovery Request by June 20, 2011 (mailing date) or face sanctions. Specifically, it directed Respondent to completely and separately answer truthfully every request in Complainant's Initial Discovery Request, or risk the sanctions therein listed. Those sanctions specifically included default (Order Requiring Respondent to Answer, p. 2).

As of this date, Respondent has failed to submit any response at all.


Complainant has now filed a "2d Renewed Motion for Decision."¹ It cites its repeated attempts to obtain Respondent's compliance with pre-hearing directives. Complainant argues that Ms. Gamache-Wortman's "recalcitrant actions," as well as subsequent explicit and ample warnings for failure to comply, warrant a default judgment against her.

We agree. Respondent has been given more than sufficient time, and several opportunities, to respond to various pleadings. Ms. Gamache-Wortman was earlier warned of the risks of a failure to comply. An Order to Show Cause was issued after she failed to answer Complainant's Complaint. Rather than granting Complainant's request to issue a judgment in its favor -- the penalty spelled out by the regulations for the failure to answer a Complaint -- the Order to Show Cause gave her another chance. It directed her to file her answer, which had been due by December 28, 2010, by February 25, 2011, or risk sanctions spelled out therein. This extension was nearly two months after the original due date. Respondent nonetheless failed to respond until nineteen days after the extended deadline, and after Complainant's "Renewed Motion for Decision." Despite her proffered document's untimeliness, I accepted it as her answer.

Ms. Gamache-Wortman now has failed to respond to discovery. Further, she has not responded to the Order Requiring Respondent to Answer, which, for the second time in this proceeding, gave her a second opportunity to comply. Ms. Gamache-Wortman has repeatedly failed in her pretrial responsibilities to Complainant and to this Court. Her time now has run out. The circumstances described above warrant grant of Complainant's renewed motion.

WHEREFORE,

- 1- Complainant's 2d Motion for Decision is GRANTED;
- 2 - Respondent's Request for Hearing be and is hereby DISMISSED with prejudice; and
- 3 -. Judgment be and is hereby ENTERED as civil penalty in the amount of \$2,500.00 against Respondent as requested in Complainant's Complaint.


Richard C. Goodwin
U.S. Administrative Law Judge

Attachment – Service List

¹ The motion's full title is "2d Renewd Motion for Decision. Motion for Decision, OR in the alternative, Motion for Summary Judgment." (Caps in original).