

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

In the Matter of ROBERT HARRIS

FAA Order No. 2005-14

Docket No. CP03EA0001
DMS No. FAA-2003-14236¹

Served: August 17, 2005

**ORDER DISMISSING
COMPLAINANT'S APPEAL**²

On October 18, 2004, Administrative Law Judge Richard C. Goodwin issued an order dismissing the complaint filed by the Federal Aviation Administration ("FAA") in this matter with prejudice, finding that the FAA had failed to prosecute the case. The ALJ issued the order after neither party appeared at a scheduled hearing. The parties had settled the case a few weeks earlier but apparently their efforts to inform the ALJ about the settlement had failed. After the ALJ denied the FAA's motion to reopen the case, the FAA filed this appeal requesting that the Administrator: (1) reverse the ALJ's order dismissing the complaint with prejudice; (2) dismiss the request for hearing with prejudice; and (3) affirm the Order Assessing Civil Penalty and the subsequent Amended Order Assessing Civil Penalty incorporating the settlement agreement.³

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

² The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are on the Internet at the following address: <http://www.faa.gov/agc/cpwebsite>. In addition, there are two reporters of the decisions: Hawkins' Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. Finally, the decisions are available through LEXIS and Westlaw. For additional information, see the website.

³ The Amended Order Assessing Civil Penalty, dated October 15, 2004, is identical to the Order

For the reasons set forth in this decision, the FAA's appeal is dismissed as moot, and the Amended Order Assessing Civil Penalty, issued on October 15, 2004, remains in effect.

I. Chronology

On November 18, 2002, Harris sent a request for hearing to the agency attorney. The agency attorney filed a motion to dismiss the request for hearing, arguing that Harris filed his request late. The Chief Administrative Law Judge denied the motion and ordered the agency attorney to file a complaint.⁴ The agency attorney then filed the complaint on September 4, 2003.

By order dated May 24, 2004, the ALJ assigned to this matter, the Honorable Richard C. Goodwin, directed the parties to use either facsimile or express carrier to send any documents to him because delivery of mail by the U.S. Postal Service to his office was delayed due to security screening. The ALJ later notified the parties that the hearing would be held on October 14, 2004, in Chicago, Illinois.

On September 24, 2004, Harris, by his attorney, sent the ALJ a letter by regular U.S. Mail, explaining that the parties had reached an agreement that "will eliminate the need for a hearing." (Letter by Joseph M. Fagan, to the Honorable Richard C. Goodwin, dated September 24, 2004.) Counsel wrote further that "we anticipate entry of the appropriate order without the need for hearing on the issues, " and noted that he was forwarding a copy of the letter to the agency attorney "so that he can avoid bringing in

Assessing Civil Penalty dated September 30, 2004, except that the amended order directs Harris to pay the \$750 civil penalty in \$150, rather than \$250, installments. The Amended Order Assessing Civil Penalty directed Harris to start making monthly payments on November 1, 2004.

⁴ The Chief Administrative Law Judge issued his order on August 27, 2003.

witnesses that have now become unnecessary.” *Id.*⁵

On September 30, 2004, the agency attorney issued an Order assessing a \$750 civil penalty, finding that Harris had violated 14 C.F.R. §§ 121.317(f), 121.317(k) and 121.580.⁶ The Order stated: “This Order has been issued based on an agreement and settlement reached between you, through your attorney, and an FAA Representative.” The agency attorney assigned to this case sent copies of the Order Assessing Civil Penalty by regular U.S. Mail to the ALJ and to the Hearing Docket on September 30, 2004. The Hearing Docket received it on October 6, 2004.

On October 14, 2004, the ALJ appeared at the scheduled hearing location in Chicago, but neither of the parties came. After waiting one hour, the ALJ ruled that the FAA’s failure to appear constituted a failure to prosecute. He explained on the record that he had checked with his office and that neither party had filed a motion to withdraw. Consequently, he dismissed the case with prejudice. (Tr. 3-4). Four days later, the ALJ issued a written order, reiterating his oral order, dismissing the case with prejudice due to his finding that the FAA had failed to prosecute the case.

On October 20, 2004, the agency attorney filed a motion requesting that the ALJ reopen the case and dismiss Harris’s request for hearing. The ALJ denied that motion by

⁵ The record contains no evidence, however, indicating if or when the ALJ received the original letter addressed to him at the Department of Transportation, 400 Seventh St., S.W., Washington, DC 20590.

Harris’s attorney sent a copy of the letter to the Hearing Docket (located at 600 Independence Avenue, S.W., Washington, DC 20591) via facsimile on September 27, 2004. He also sent a copy of that letter through the U.S. Mail to the Hearing Docket, and the Hearing Docket received it on October 6, 2004.

⁶ The agency attorney issued the Amended Order Assessing Civil Penalty on October 15, 2004. See note 3, *supra*.

order dated October 27, 2004.⁷ Later, the FAA filed a notice of appeal and an appeal brief,⁸ arguing that the ALJ should have construed Harris's letter as a request to withdraw the request for hearing and that under the rules of practice, the ALJ had no choice but to dismiss the proceedings.

II. Analysis

The agency attorney may issue an order assessing civil penalty in a civil penalty case if the person charged with a violation pays or agrees to pay a civil penalty for that violation. 14 C.F.R. § 13.16(d)(1). An agency attorney may issue an order assessing a civil penalty reflecting a settlement at any time,⁹ and under 14 C.F.R. § 13.215, may withdraw the complaint without the ALJ's consent any time before or during a hearing.¹⁰ If the FAA withdraws the complaint or the respondent withdraws the request for hearing and the answer due to a settlement before the scheduled hearing, then the ALJ has no choice under the regulations but to dismiss the proceedings under 14 C.F.R. § 13.215. The ALJ loses jurisdiction over the matter once the complaint is dismissed.

The ALJ dismissed the complaint because, in his opinion, the FAA had failed to prosecute the case. While this conclusion was wrong, the end result was that the ALJ

⁷ Copies of the ALJ's written orders dated October 18, 2004, and October 27, 2004, are attached to this decision (but are not available in the on-line versions of this order.)

⁸ The Hearing Docket has not received a reply brief from Harris.

⁹ The rule that permits the agency attorney to issue an order assessing a civil penalty based on an agreement of the parties, 14 C.F.R. § 13.16(d)(1) contains no time limit.

¹⁰ Section 13.215 of the Rules of Practice provides:

At any time before or during a hearing, an agency attorney may withdraw a complaint or a party may withdraw a request for hearing without the consent of the administrative law judge. If an agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge shall dismiss the proceedings under this subpart with prejudice.

14 C.F.R. § 13.215.

dismissed the complaint with prejudice just as he would have done if he had been aware of the settlement and of Harris's counsel's effective withdrawal of the request for a hearing. The basis for the ALJ's dismissal of the complaint is irrelevant at this point. Although the ALJ did not also dismiss the request for hearing, it makes no difference. The complaint cannot be refiled, and, as Harris requested, there will be no hearing.

The ALJ's Order dismissing the case with prejudice did not affect the validity of the Order Assessing Civil Penalty issued on September 30, 2004, or, its replacement, the Amended Order Assessing Civil Penalty issued on October 15, 2004, by the agency attorney. No one has questioned the propriety of those Orders issued by the agency attorney and no challenge of those Orders was before the ALJ. Harris had requested a hearing about the civil penalty proposed in the Final Notice of Proposed Civil Penalty, and that challenge disappeared once he withdrew his request for hearing and agreed to the settlement. Thus, the ALJ's Orders dismissing the complaint had no effect on the findings of violations or the penalty agreed to by the parties incorporated in the settlement orders. As a result, there is no reason for the Administrator to affirm either the Order Assessing Civil Penalty or the Amended Order Assessing Civil Penalty.¹¹

¹¹ As the ALJ's written order dated October 27, 2004, makes clear, this is not the first time that an ALJ has traveled unnecessarily to a scheduled hearing because the ALJ did not get word of a settlement. All counsel are expected to take all steps necessary to avoid sending ALJs on unnecessary hearing trips after the parties reach settlements. In particular, when settling a case, the agency attorneys should send the Hearing Docket the order assessing civil penalty reflecting the settlement and the withdrawal of the complaint. Agency attorneys also should send both documents directly to the ALJ expeditiously. Finally, if an agency attorney does not receive an order dismissing a case that has been settled, the agency attorney should contact the ALJ's office prior to the scheduled hearing date to check on the case status.

Also, all attorneys should be mindful of the fact that due to security concerns, the processing of mail delivered by the U.S. Postal Service – as opposed to delivery by a private expedited courier – to the Hearing Docket and the Office of Hearings has been, and most likely will continue to be, significantly delayed. Counsel should take those delays into consideration when deciding how to file or serve documents.

Therefore, Complainant's appeal is dismissed as moot.¹²

MARION C. BLAKEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 15th day of August, 2005.

¹² Unless Respondent files a petition for review with a Court of Appeals of the United States under 49 U.S.C. § 46110 within 60 days of service of this decision, this decision shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(d)(4) and 13.233(j)(2)(2005).