

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

In the Matter of: MARK STEVEN DIAMOND

FAA Order No. 1995-10

Docket No. CP94NM0105

Served: May 10, 1995

ORDER AND DECISION

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Respondent Mark Steven Diamond has appealed from the “Order Assessing Civil Penalty” issued by Administrative Law Judge Burton S. Kolko on July 21, 1994.^[1] This case arose out of an incident in March of 1993 in which Respondent allegedly violated the hazardous materials regulations in transporting fireworks in both his checked baggage and his carry-on baggage on a flight from Manila to Seattle.^[2]

When Respondent failed to file an answer to the complaint, the law judge assessed a civil penalty of \$3,000, as requested in the complaint. Respondent has appealed, asking the Administrator to vacate the law judge’s order and grant him a “reasonable opportunity to file an answer.” (Appeal Brief at 2.)

The complaint contained a statement reminding Respondent that under Section 13.209(a) of the Rules of Practice, 14 C.F.R. § 13.209(a), he must file a written answer to the complaint within 30 days of receipt of the complaint. The complaint also advised Respondent that, under Section 13.209(f), failure to file an answer within 30 days without good cause shall be deemed an admission of the truth of each allegation contained in the complaint.

The law judge assigned to this case issued an “Order Establishing Initial Procedures,” in which he stated, “The answer to the complaint is due June 17, 1994.”^[3] Despite this reminder, Respondent failed to file an answer. On June 21, 1994, the law judge issued an order assessing a civil penalty of \$3,000, the amount requested in the complaint, on the ground that Respondent’s failure to file an answer constituted an admission of the allegations of the complaint.

Five days after the law judge issued his order assessing a civil penalty, counsel for Respondent sent

the law judge a letter explaining that Respondent's failure to file an answer was due solely to counsel's own lack of experience in this type of proceeding. Counsel asked that the default judgment be vacated and that his client be given the opportunity to file a late answer. The law judge treated the letter as a notice of appeal to the Administrator and transmitted it to the Appellate Docket.

In his appeal brief, counsel for Respondent renews his explanation that the failure to file the answer was strictly an oversight on his part occasioned by his lack of familiarity with the rules pertaining to administrative proceedings. (Appeal Brief at 2.) He also argues that the failure to file the answer did not prejudice Complainant. (*Id.*)

Respondent has failed to show good cause for his failure to file an answer. In the Matter of Cornwall, FAA Order No. 92-47 (July 22, 1992), was a case involving attorney error where the Administrator found good cause for the failure to file a timely answer. Cornwall, however, is distinguishable from the instant case in several important respects. First, the complaint in the instant case contained an explicit statement of the requirement to file an answer. In contrast, the complaint in Cornwall was silent regarding the requirement to file an answer. Second, the law judge in this case issued an order in which he specifically reminded Respondent about the deadline for filing the answer. No such reminder was given by the law judge in the Cornwall case.

As noted in Cornwall, parties may not avoid procedural default merely by claiming unfamiliarity with the rules of practice. FAA Order No. 92-47 at 6. Counsel for 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.

[\[4\]](#)

The law judge's order assessing a \$3,000 civil penalty is affirmed.

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of May, 1995.

[1] A copy of the law judge's order is attached.

[2] 49 C.F.R. Part 171 *et seq.*

[3] As Complainant points out, the answer was actually due on June 19, 1994. (Reply Brief at 8.) The complaint was served on May 20, 1994. Thirty days from May 20, 1994, is June 19, 1994. The law judge's mistake does not affect the outcome in this case, however, since Respondent did not file his answer by June 19, 1994, either.

[4] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1994).

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