

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

In the Matter of:

MICHAEL R. LARSEN

FAA Order No. 94-27

Served: September 30, 1994

Docket No. CP93NM0024

DECISION AND ORDER

Complainant has appealed from the written initial decision issued by Administrative Law Judge Ronnie A. Yoder.¹ The law judge dismissed the civil penalty action with prejudice, finding that Complainant had not established a jurisdictional basis for filing a motion to dismiss. For the reasons set forth below, the decision of the law judge is reversed.

On November 4, 1992, Complainant issued a Final Notice of Proposed Civil Penalty (FNPCP) alleging that Respondent attempted to board an aircraft as a ticketed passenger with a concealed, unloaded, .22 caliber revolver in his carry-on luggage, in violation of Section 901(d) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. App. § 1471.² The FNPCP advised Respondent that within 15 days of his receipt of the notice, he had to pay the proposed civil penalty of \$1,000 or request a hearing.³ The FNPCP was sent to Respondent on November 4, 1992, by

¹ A copy of the law judge's written initial decision is attached.

² The FNPCP alleged that the incident occurred on May 31, 1992, at a security screening checkpoint at Salt Lake City International Airport, when Respondent prepared to board a flight to San Francisco, California.

³ Section 13.16 (e)(2) of the Federal Aviation Regulations, 14 C.F.R. § 13.16(e)(2), provides:

Not later than 15 days after receipt of the final notice of proposed civil penalty, the person charged with a violation shall do one of the following--

certified mail, return-receipt requested, and was subsequently returned as "unclaimed." On December 7, 1992, Complainant again sent the FNPCP to Respondent, this time by regular mail. The second FNPCP was not returned.

By letter dated December 18, 1992, but postmarked January 7, 1993, Respondent requested a hearing. Complainant filed a motion to dismiss the request for hearing, arguing that the request was not filed within 15 days after Respondent's receipt of the FNPCP, as required by 14 C.F.R. § 13.16(e)(2).⁴ Respondent did not file a response to the motion to dismiss.

The law judge did not reach the merits of Complainant's motion in his order dismissing the FNPCP. The law judge stated in his decision that the Rules of Practice in FAA Civil Penalty Actions, 14 C.F.R. §§ 13.201-13.235, apply only to actions in which a complaint is filed.⁵ Since no complaint had been filed in this case, the law judge held that Complainant had no jurisdiction to file the motion. The law judge held further, relying on 14 C.F.R. § 13.208(a), that any complaint filed after his order of dismissal would be untimely because a complaint must be filed within 20 days after the agency attorney received the request for hearing.

(i) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing civil penalty or a compromise order shall be issued in that amount; or

(ii) Request a hearing in which case a complaint shall be filed with the hearing docket clerk.

⁴ For the text of 14 C.F.R. § 13.16(e)(2), *see* note 3 *supra*.

⁵ Section 13.201(a)(1), 14 C.F.R. § 13.201(a)(1) provides:

(a) This subpart applies to the following actions:

(1) A civil penalty action in which a complaint has been issued for an amount not exceeding \$50,000 for a violation arising under the Federal Aviation Act of 1958, as amended, (49 U.S.C. § 1471 *et seq.*), or a rule, regulation, or order issued thereunder.

Section 13.201(a)(1), does provide that Subpart G, containing the Rules of Practice in FAA Civil Penalty Actions, applies to a civil penalty action where a complaint has been issued.⁶ However, Section 13.201(a)(1) should be applied in the context of the entire subpart.⁷ Subpart G contains another rule of practice, 14 C.F.R. § 13.218(f)(2)(i), which expressly permits the agency attorney to file a motion to dismiss a request for hearing *instead of* a complaint. If the motion to dismiss is denied, the agency attorney must then file a complaint within 10 days.⁸

By expressly providing for a motion to dismiss a hearing in lieu of a complaint, the rules of practice suspend the issuance of the complaint until the law judge decides the motion. The motion to dismiss, like the complaint, serves as Complainant's response to the request for hearing. The agency attorney properly filed the motion to dismiss Respondent's request for hearing under 14 C.F.R. § 13.218(f)(2)(i).

⁶ See note 5 *supra*.

⁷ Additionally, it is necessary to interpret Subpart G and Section 13.16 together. Section 13.16 was amended and Subpart G was added to Part 13, after Congress authorized the creation of the Civil Penalty Demonstration Program in 1987. See 53 Fed. Reg. 34646 (September 7, 1988). It was certainly not intended that Section 13.16 and Subpart G were to be interpreted as if separated by an impermeable wall. Section 13.16 should not be regarded as strictly a pre-complaint rule, *see, eg.*, § 13.16(g) ("Hearing") § 13.16(h) ("Appeal"), § 13.16(k) ("Exhaustion of Administrative Remedies"). Likewise Section 13.16 uses terms, such as "FAA decisionmaker" and "agency attorney" which are only defined in Subpart G. It is only reasonable to interpret Section 13.201(a), the applicability section, not as setting forth rules that only come into play with the filing of a complaint. Instead, Section 13.201(a) should be interpreted as meaning that the procedural rules in Subpart G apply to those civil penalty proceedings initiated under Section 13.16.

⁸ Section 13.218(f)(2)(i), 14 C.F.R. § 13.218(f)(2)(i), provides in relevant part:

(i) An agency attorney may file a motion to dismiss a request for a hearing instead of filing a complaint. If the motion to dismiss is not granted, the agency shall file the complaint and serve a copy of the complaint on each party not later than 10 days after service of the administrative law judge's ruling or order on the motion to dismiss. If the motion to dismiss is granted and the proceedings are terminated without a hearing, the respondent may file an appeal pursuant to § 13.233 of this subpart.

Another section of the rules of practice, 14 C.F.R. § 13.208(a), provides that when the agency attorney files a motion to dismiss a request for hearing under Section 13.218(f)(2)(i), instead of a complaint, he or she must do so within 20 days after receipt by the agency attorney of the request for hearing.⁹ The agency attorney in this case timely filed the motion to dismiss on January 14, 1993, two days after receipt of Respondent's request for hearing.

Complainant's motion to dismiss the request for hearing, therefore, should have been decided by the law judge. The motion need not be remanded to the law judge for a decision, however. The issue of whether Respondent's request for hearing should be dismissed for untimeliness is properly before the Administrator on appeal.

The 15-day limitation for filing a request for hearing began to run from the date of Respondent's receipt of the FNPCP. Respondent dated his typewritten request for hearing "12/18/92," by hand, next to his signature. Therefore, Respondent must have received the FNPCP by December 18, 1992, at the latest. After adding two additional days to the computation of the 15-day limitations period under 14 C.F.R. § 13.212(c),¹⁰ Respondent's request for hearing was due on or before January 4, 1993.¹¹

⁹ Section 13.208(a), 14 C.F.R. § 13.208(a), provides in relevant part:

(a) Filing. The agency attorney shall file the original and one copy of the complaint with the hearing docket clerk, or may file a written motion pursuant to § 13.218(f)(2)(i) of this subpart instead of filing a complaint, not later than 20 days after receipt by the agency attorney of a request for hearing.

¹⁰ Section 13.212(c), 14 C.F.R. § 13.212(c), provides:

(c) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

¹¹ Complainant correctly argues in its appeal brief that Section 13.211(e), 14 C.F.R. § 13.211(e), "the mailing rule," which provides 5 additional days for parties to respond after

Respondent's request for hearing did not contain a certificate of service,¹² so the January 7, 1993, postmark date on the envelope that contained the request, is the service date.¹³ The request for hearing was therefore untimely, and must be dismissed unless good cause is shown for excusing the untimeliness. See In the Matter of Langton, FAA Order 93-12 at 6 (March 25, 1993) (holding that an untimely request for hearing will only be excused for good cause).¹⁴

When deciding whether good cause exists for excusing untimeliness the focus should be on the reason why the document was filed late. Langton at 7. Respondent had ample opportunity to explain why he did not serve his request for hearing until January 7, 1993, and why his request for hearing should be accepted under such circumstances. Respondent chose not to respond to Complainant's motion to dismiss or appeal brief, which were served on him at the new address he

service by mail, is not applicable in this case. The response time for filing a request for hearing does not run from the date of service by mail of the FNP CP but from the date of receipt of the FNP CP by Respondent. Therefore, the rationale for providing 5 additional days to respond, to compensate for mail delivery, does not exist.

¹² Section 13.211(c), 14 C.F.R. § 13.211(c), provides in relevant part that: "a certificate of service shall consist of a statement, dated and signed by the person filing the document, that the document was personally delivered or mailed to each party on a specific date."

¹³ Section 13.211(d), 14 C.F.R. § 13.211(d), provides:

(d) *Date of Service*. The date of service shall be the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

¹⁴ In Langton at 7, the Administrator upheld the assessment of a \$12,750 civil penalty against an individual respondent, without a hearing, after finding that the delay by respondent's attorney in filing the request for hearing did not constitute good cause for untimeliness. In In the Matter of Strohl, FAA Order 94-6 at 7 (March 6, 1994), good cause for excusing an untimely request for hearing was found due to the unusual and confusing circumstances of that case, which included the existence of two parallel civil penalty actions with virtually identical documents. No such unusual or confusing circumstances are present in the record of this case.

provided in his request for hearing.¹⁵ The record does not show good cause for excusing Respondent's untimely request for hearing. Therefore, Respondent's request for hearing must be denied.

Ordinarily, Respondent would become subject to the full \$1,000 civil penalty sought in the FNPCP after dismissal of his request for hearing. However, in keeping with the rationale of In the Matter of Grant, FAA Order No. 94-5 at 7 (March 10, 1994), the civil penalty will be reduced to \$500.

Accordingly, the decision of the law judge is reversed and Complainant's motion to dismiss Respondent's request for hearing is granted. A \$500 civil penalty is assessed.¹⁶



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 30th day of September, 1994.

¹⁵ After Respondent gave a new return address in his request for hearing, Complainant and the law judge mailed all documents to him at the new address, including the motion to dismiss, the law judge's order, and the appeal brief. The record does not show that any documents mailed by Complainant or the law judge to Respondent at his new address were returned.

¹⁶ 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. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).