UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: May 5, 1992

FAA Order No. 92-32

In the Matter of: FLORENCE L. BARNHILL	Docket No. CP89GL0406

DECISION AND ORDER

Complainant Federal Aviation Administration ("Complainant") has appealed from the oral initial decision rendered by Administrative Law Judge Burton S. Kolko at the conclusion of the hearing held in Ann Arbor, Michigan on October 8, 1991.[1/] The law judge held that Respondent violated Section 107.21(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 107.21(a)(1).[2/] However, after inquiry into Respondent's financial circumstances, the law judge reduced the civil penalty from $2,000 to $600.

On February 15, 1989, Respondent, an off-duty Detroit police officer, arrived at the Detroit Metropolitan-Wayne

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

2/ 14 C.F.R. § 107.21 provides as follows:

> (a) Except as provided in paragraph (b) of this section, no person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property--
> (1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area ....

County Airport at about 7:45 p.m. for a USAir flight scheduled to leave at 7:50 p.m. for Dulles Airport. Respondent was planning to visit her sister in Maryland. She was carrying her gun, an unloaded .38 caliber Smith and Wesson five-shot revolver, in her suitcase. The bullets were in a separate compartment.

According to Respondent, the ticket agent at the counter told her to go straight to the gate because she was late for her flight. Respondent did not tell the ticket agent that she had a gun in her suitcase. The gun was discovered when Respondent went through the security screening checkpoint.

The dispute in this case involves not the facts, but the later history. Complainant moved for summary judgment, claiming that Respondent failed to file an answer to the complaint. (See 14 C.F.R. § 13.209, requiring the filing of a written answer within 30 days of service of the complaint.) Respondent did not respond to Complainant's motion for summary judgment. The law judge granted Complainant's motion, cancelled the hearing, and assessed a civil penalty of $2,000 against Respondent.

Eighteen days later, Respondent sent the law judge a letter asserting that she had indeed responded to Complainant's allegations through a letter she sent to the FAA security inspector who investigated her case. Respondent explained that she wrote to the inspector after she received a letter of investigation from him.

The law judge treated Respondent's letter to him as a motion for reconsideration. Granting reconsideration, he ordered Complainant to explain why there was no mention of Respondent's letter to the inspector in Complainant's motion for summary judgment. Complainant responded that it did not consider Respondent's letter to the inspector, submitted more than 6 months before the complaint was filed, to be an answer to the complaint.

The law judge disagreed. He determined that Respondent's letter to the inspector was a de facto answer. In addition, according to the law judge, Complainant's failure to mention Respondent's letter to the inspector in its motion for summary judgment was a "material misrepresentation" on the part of agency counsel. He therefore vacated his order granting Complainant's motion for summary judgment and rescheduled the hearing. At the conclusion of the hearing, the law judge reduced the civil penalty sought by Complainant from $2,000 to $600 based on Respondent's financial situation.

Complainant argues on appeal that the law judge lost jurisdiction of this case when he issued his order granting Complainant's motion for summary judgment. Complainant contends that the law judge was without authority to reopen this case.

While the law judge's concern for reaching the right result is much to be commended, he did not have authority to reopen the case after he issued his order granting summary judgment. This order completely disposed of the issues in the case and

assessed a civil penalty against Respondent. It constituted an initial decision. 14 C.F.R. § 13.232(a). See also Administrator v. Metz, FAA Order No. 90-3 at 4 (January 29, 1990), stating that "... the law judge's Order Assessing Civil Penalty, which was his initial decision in this matter ...." (Emphasis added.)

When a law judge issues an initial decision, his or her jurisdiction over a case ends. In the Matter of Cato, FAA Order No. 90-33 at 4 (October 11, 1990); In the Matter of Gabbert, FAA Order No. 90-27 at 5 (October 11, 1990); In the Matter of Degenhardt, FAA Order No. 90-20 at 6 (August 16, 1990). Cf. In the Matter of Costello, FAA Order No. 92-1 (January 9, 1992) (holding that the law judge had not issued an "initial decision" within the meaning of 14 C.F.R. § 13.232(a) where the law judge closed the hearing record without making any findings of fact or conclusions of law). The Rules of Practice do not provide for reconsideration of an initial decision by a law judge. In the Matter of Metz, FAA Order No. 90-3 at 5, n. 3. The powers of administrative law judges are enumerated in 14 C.F.R. § 13.205. Reconsideration of an initial decision is not included among them.[3/]

Assuming, arguendo, that a law judge has the power to correct or otherwise modify his or her decision within a reasonable time, that time would in any event have expired when

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3/ See Civil Aeronautics Board v. Delta, 367 U.S. 330, 334 (1961), pointing out that both administrative and judicial feelings have been opposed to the expansion of powers of reconsideration without a solid foundation in the legislative language.

the decision became an "order assessing civil penalty," i.e., when Respondent failed to file a timely appeal from the law judge's initial decision. See 14 C.F.R. § 13.232(d).

This does not leave a party who believes the law judge has erred without recourse. A party has the right, under 14 C.F.R. § 13.233, to appeal the law judge's initial decision to the Administrator.

The cases cited by the law judge for the proposition that agencies have continuing authority to reconsider their orders in appropriate circumstances[4/] are directed toward the authority of the final agency decisionmaker rather than toward the authority of a law judge. Complainant asserts correctly that they are inapposite here.

In this case, Respondent failed to avail herself of her right to appeal the law judge's decision, and she neither claimed nor demonstrated good cause for this failure. Because no appeal was filed, the law judge's order granting summary judgment and assessing a civil penalty against Respondent became an order assessing civil penalty. See 14 C.F.R. § 13.233, providing that: "Unless appealed pursuant to § 13.233 ..., the initial decision issued by the administrative law judge shall be considered an order assessing civil penalty ...." (Emphasis added.) Even if Respondent's request for reconsideration were to be considered a notice of appeal to the

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4/ Placid Oil Co. v. Federal Power Commission, 483 F.2d 880 (5th Cir. 1973), aff'd sub nom. Mobil Oil Co. v. Federal Power Commission, 417 U.S. 283, 311 (1974); Bookman v. United States, 453 F.2d 1263, 1264-65 (Ct. Cl. 1972).

Administrator, Respondent did not submit it until after the time period for filing her appeal had expired.

For the above reasons, the law judge did not have the authority to reopen this case.

Complainant argues that the law judge erred in concluding that Respondent's letter to the FAA inspector was a de facto answer to the complaint. The law judge determined that Respondent's letter contained as much information as would a proper and formal answer. It made no difference, said the law judge, that Respondent sent her letter to the FAA inspector more than 6 months before the complaint was issued.

This is incorrect. The letter Respondent sent to the FAA inspector cannot be considered an answer to the complaint. After all, the letter to the inspector preceded the complaint in time. To hold otherwise would be to eliminate, in effect, the requirement in the Rules of Practice for an answer to the complaint.

The law judge's reliance on the Metz case, FAA Order No. 90-3 (January 29, 1990), is misplaced. First, the respondent in Metz submitted at least some document, if not a formal answer, during the 30-day period after the complaint was issued.[5/] Here, however, Respondent submitted no document after she was served with the complaint that can fairly be construed as an answer.

5/ Mr. Metz submitted a request for hearing in the 30-day period after the complaint was issued.

Second, the respondent in Metz was not provided with a copy of the Rules of Practice, and therefore had no notice of the answer requirements. In contrast, Respondent has never claimed that she was not provided with a copy of the Rules of Practice. Unlike the respondent in Metz, Respondent has never made or attempted to make a showing of good cause for her failure to file an answer.

Complainant contends that the law judge erred in finding that agency counsel materially misrepresented the facts in Complainant's motion for summary judgment by failing to apprise the law judge of Respondent's letter to the inspector. The law judge did in fact err. As stated above, Respondent's letter to the inspector should not be considered a de facto answer. Agency counsel's representations to the law judge that Respondent failed to file an answer were made in good faith. They were based on a reasonable interpretation of the Rules of Practice, one that is supported not only by the Rules themselves, but also by the decision in In the Matter of Metz, FAA Order No. 90-3 (January 29, 1990).

The law judge's order granting summary judgment assessed a civil penalty of $2,000. After inquiry at the hearing into Respondent's financial situation, however, the law judge reduced the proposed civil penalty from $2,000 to $600, payable in 12 monthly installments of $50.

In its appeal brief, Complainant states that it now believes that a civil penalty of only $550 is appropriate in this case. Respondent has not objected to Complainant's

proposed reduction in the civil penalty. Therefore, a civil penalty in the amount of $550, payable in 11 monthly installments of $50, is assessed.6/

BARRY LAMBERT HARRIS
Acting Administrator
Federal Aviation Administration

Issued this 4th day of May, 1992.

6/ 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) (1991).