

U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of)
)
 LAURA DONEGAN-ORTIZ,) Docket No. 2003EA880481
)
 Respondent.)

**FINAL DECISION AND ORDER AND REMAND OF ISSUE TO ADMINISTRATIVE
LAW JUDGE**

Introduction

Pursuant to 49 C.F.R. §§ 1503.16(h) and 1503.233, Laura Donegan-Ortiz (Respondent) is appealing the initial decision of the Administrative Law Judge (ALJ) to the Transportation Security Administration (TSA) Decision Maker.¹ The TSA Decision Maker is the Under Secretary of Transportation for Security, now designated as the Assistant Secretary of Homeland Security, or “any person to whom the Under Secretary has delegated the Under Secretary’s decision-making authority in a civil penalty case.”² The ALJ decision under appeal assesses a civil penalty on the Respondent in the amount of \$1,100.00 for the violation of 49 C.F.R. § 1540.111(a)(1). For the reasons stated below, the decision of the ALJ is affirmed.

The issue of Respondent’s ability to pay the civil penalty raised by the Respondent on appeal is remanded to the ALJ.

¹ 49 C.F.R. § 1503.16(h) states: “Either party may appeal the administrative law judge’s initial decision to the TSA decision maker pursuant to the procedures in subpart G of this part. If a party files a notice of appeal pursuant to § 1503.233, the effectiveness of the initial decision is stayed until a final decision and order of the Under Secretary have been entered on the record. The TSA decision maker will review the record and issue a final decision and order of the Under Secretary that affirms, modifies, or reverses the initial decision. The TSA decision maker may assess a civil penalty but will not assess a civil penalty in an amount greater than that sought in the complaint.” 49 C.F.R. § 1503.233 contains the specific appeal procedures.

² 49 C.F.R. § 1503.202. By Delegation Order effective July 27, 2004, the Assistant Secretary delegated decision making authority in a civil penalty case to the TSA Deputy Administrator.

Standard of Review

The regulations governing appeals of an initial ALJ decision specify the standard of review. 49 C.F.R. § 1503.233(b) states that “a party may appeal only the following issues: (1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.”

Synopsis of the Facts and Procedural History

On June 6, 2003, Respondent was a ticketed passenger on a flight departing from LaGuardia Airport in Flushing, New York. During screening of Respondent’s accessible property prior to entering the sterile area of the airport, a loaded Marksman air pistol was discovered in a bag on Respondent’s walker. TSA issued a Final Notice of Proposed Civil Penalty on March 3, 2004, to which the Respondent responded requesting a hearing before an ALJ. On March 25, 2004, TSA served its Complaint on Respondent charging that Respondent violated 49 C.F.R. § 1540.111(a)(1) and requesting that a civil penalty of \$1,100.00 be assessed.

49 C.F.R. § 1540.111(a)(1) provides that an individual may not have a weapon, explosive, or incendiary, on or about the individual’s person or accessible property when performance has begun of the inspection of the individual’s person or accessible property before entering a sterile area. BB guns are weapons prohibited in the sterile area of the airport and in the cabin of an aircraft. 66 Fed.Reg. 7444, 7446 (Feb. 14, 2003).

TSA’s rules of practice require that an Answer be submitted not later than 30 days after service of the Complaint. 49 C.F.R. § 1503.209(a). TSA’s rules also specify that a person’s failure to file an Answer without good cause will be deemed an admission of the truth of each

allegation contained in the complaint. 49 C.F.R. § 1503.209(f). Respondent failed to file an Answer. On May 17, 2004, TSA filed a Motion to Deem the Complaint Admitted and Motion for Decision. TSA noted that Respondent received the Complaint and that Respondent was provided with a copy of TSA's Rules of Practice on two occasions. TSA moved for an initial decision from the ALJ pursuant to 49 CFR 1503.218(f)(5) which states that a motion for decision shall be granted, "If the pleadings...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."

In an Order signed June 18, 2004, the ALJ held that the failure to file an Answer constituted an admission of truth and, as such, there was no genuine issue of material fact in dispute and TSA was entitled to a decision as a matter of law. The ALJ assessed a penalty in the amount of \$1,100.00.

On July 12, 2004, Respondent requested an appeal. Respondent claimed that she did not know the weapon was in her accessible property. She also claimed that she was unable to pay the civil penalty due to financial hardship.

Findings

According to the standard of review required in an appeal, Respondent's appeal may address only the following issues:

1. Whether the ALJ's findings of fact are supported by a preponderance of reliable, probative, and substantial evidence;
2. Whether the ALJ's conclusions of law that Respondent violated 49 C.F.R. § 1540.111(a)(1) and that TSA was entitled to a decision as a matter of law were made in accordance with applicable law, precedent, and public policy; and,

3. Whether the ALJ committed a prejudicial error during the hearing that supports the appeal.

Finding 1: The ALJ's findings of fact are supported by a preponderance of reliable, probative, and substantial evidence.

The facts as alleged in the Complaint were not disputed by Respondent.

Finding 2: The ALJ's conclusions of law were made in accordance with applicable law, precedent, and public policy.

TSA's rules of practice require that the allegations contained in the Complaint be deemed admitted if an Answer is not timely filed. 49 C.F.R. § 1503.209(f). The rules also require the ALJ to grant a motion for decision if the record and the evidence show there is no genuine issue of material fact. 49 C.F.R. § 1503.218(f)(5). Because Respondent failed to file an Answer and failed to show good cause why the Answer was not filed, the allegations in the Complaint properly were deemed admitted and there were no genuine issues of material fact. The ALJ's decision to grant TSA's motion is in accordance with applicable law, precedent, and public policy. See, In the Matter of Playter, FAA Order No. 90-15, 1990 FAA LEXIS 163, (March 19, 1990), aff'd Playter v. FAA, 933 F.2d 1009 (6th Cir. 1991) and In the Matter of Larry's Flying Service, FAA Order No. 98-4, 1998 FAA LEXIS 350, (May 23, 1997). See, also, Anderson, et.al., v. Liberty Lobby, Inc., et.al., 477 U.S. 242, 247-249 (1986).

Respondent argues in her appeal that she did not know the weapon had been placed in her accessible property. The TSA Decision Maker has determined that 49 C.F.R. § 1540.111(a)(1) prohibits the carriage of all weapons, explosives, and incendiaries and does not require that an individual exhibit an intent to carry a prohibited item into the sterile area of the airport or on board an airplane or have knowledge that a prohibited item is in his or her accessible property.

See, In the Matter of Marlon Matthews, 2006 WL 3892309 (Feb. 28, 2006) and In the Matter of Stephen Pietrzak, 2006 WL 3892311 (Feb. 28, 2006). This is consistent with substantial and long standing legal precedent.³

Finding 3: There was no prejudicial error during the hearing to support the appeal.

While there was no hearing, the ALJ's analysis of the facts and conclusions of law do not demonstrate any prejudicial error to support Respondent's appeal.

Issue Remanded to ALJ

In her appeal, Respondent contends that the civil penalty presents a financial hardship and that she is unable to pay the amount assessed by the ALJ. The amount is within the sanction guidelines published on TSA's web site at www.tsa.gov for violation of 49 C.F.R. § 1540.111(a). The sanction guidelines promote consistency and fairness and should be followed in setting civil penalties. The Federal Aviation Administration (FAA) has held that financial hardship, when proven, may constitute grounds for reducing an otherwise appropriate civil penalty. See, In the Matter of Blue Ridge Airlines, FAA Order No. 1999-15 (Dec. 22, 1999) and In the Matter of Scenic Mountain Air, Inc. FAA Order No. 2001-5 (May 15, 2001). The FAA has also held that the person who claims financial hardship bears the burden of proof and that unsworn and unsubstantiated statements by an alleged violator are insufficient evidence of inability to pay.

³ *Hayter D. Reynolds*, 1996 FAA LEXIS 1172 (1996) (Respondent admitted having a loaded firearm in his carry-on baggage. ALJ found that lack of knowledge was not a defense); *FAA v. Schultz*, 1989 FAA LEXIS 57 (1989) (Respondent admitted having a loaded firearm in his carry-on baggage. ALJ found that intent is not a required element for violation of Federal Aviation Administration (FAA) rules prohibiting carriage of prohibited items on board an aircraft); *U.S. v. Gutierrez*, 624 F. Supp. 759 (E.D.N.Y. 1985) (Respondent unknowingly brought a firearm and ammunition concealed in a phonograph to the screening checkpoint. Court found that Congress intended that prohibition against carrying prohibited items on board an aircraft imposed strict liability regardless of the absence of fault or wrongdoing), *Corely v. FAA*, 1997 FAA LEXIS 756 (1997) (An off-duty law enforcement officer brought a canister of tear gas to the security checkpoint. ALJ found that lack of knowledge is not an affirmative defense.), *Matter of Koblick*, 1992 FAA LEXIS 276 (1992) (Respondent was not aware that a loaded firearm was in his carry on baggage because his wife had packed his bag. ALJ found that passengers have a duty to know the contents of their luggage.), *U.S. v. Flum*, 518 F.2d 39, 43-45 (8th Cir.), cert. denied, 423 U.S. 1018 (1975) (Court found that intent to conceal is not a required element to hold a passenger liable for attempting to carry a knife on board an aircraft because Congress intended to keep weapons from being taken on board airplanes).

See, In the Matter of Conquest Airlines, FAA Order No. 1994-20 (June 22, 1994), In the Matter of Giuffrida, FAA Order No. 1992-72 (Dec. 21, 1992), and In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991). The issue of Respondent's inability to pay the civil penalty and whether, if proven, the civil penalty should be modified is remanded to the ALJ.

Petition to Reconsider and Judicial Review

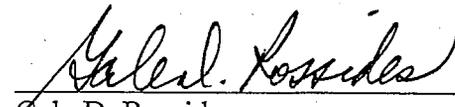
A party may petition the TSA Decision Maker to reconsider or modify a final decision and order. A party must file the petition with the TSA Enforcement Docket Clerk not later than 30 days after service of the TSA Decision Maker's Final Decision and Order and must serve a copy of the petition on all parties. 49 C.F.R. § 1503.234 describes the process for filing a petition.

A party may seek judicial review of the Final Decision and Order as provided in 49 U.S.C. 46110.

Conclusion

For the reasons stated above, the decision of the ALJ granting TSA's motion for decision is affirmed. The issue raised on appeal regarding the Respondent's claim that she is unable to pay the civil penalty is remanded to the ALJ.

Dated: May 9, 2008



Gale D. Rossides
Deputy Administrator