

U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION
Washington, D.C.

In the Matter of:)	
)	
MARLON MATTHEWS,)	Docket No. 05TSA0004
)	
Respondent)	

FINAL DECISION

Introduction

Pursuant to 49 C.F.R. §§ 1503.16(h) and 1503.233, Marlon Matthews (Respondent) is appealing the initial decision of an 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 \$250.00 for the violation of 49 C.F.R. § 1540.111(a)(1). For the reasons stated below, the decision of the ALJ is affirmed. Accordingly, Respondent’s appeal is denied.

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)

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.

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 January 27, 2005, TSA filed a civil penalty action against Respondent, alleging that he violated 49 C.F.R. § 1540.111(a)(1) when, during the security inspection at Detroit Metropolitan Wayne County Airport prior to entering the sterile area of the airport, thirty-seven (37) rounds of 9 mm ammunition were discovered on or about his personal property.³ TSA assessed a civil penalty in the amount of \$250.00. Respondent did not file an Answer and on April 18, 2005, TSA filed a Motion to Deem the Allegations of the Complaint Admitted and Motion for Decision, arguing that Respondent had failed to properly file a timely Answer to its Complaint. On April 20, 2005, the ALJ conducted a pre-hearing conference call with the parties and Respondent, for good cause shown, was afforded additional time to file an Answer. By Order of the ALJ dated April 25, 2005, a hearing was scheduled to begin on May 25, 2005 in Detroit, Michigan.

On April 27, 2005, Respondent filed a single paragraph letter where he acknowledged receipt of the Complaint and stated, “I do not deny what happened at Metro Airport, but I want to explain my case.” On May 3, 2005, TSA filed a Motion for Decision and imposition of the civil penalty assessment. TSA argued that Respondent admitted the allegations, therefore, pursuant to 49 C.F.R. § 1503.218(f)(5), TSA is entitled to a decision in its favor as a matter of law since

³ 49 C.F.R. § 1540.111(a)(1) states 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, or before boarding an aircraft for which screening is conducted.

there was no issue of material fact.⁴ In addition, TSA argued that under 49 C.F.R. § 1540.111(a) intent or knowledge of a prohibited item is not relevant for enforcement of the regulation. The ALJ found that TSA had met its burden to show that no genuine issue of material fact exists and was entitled to a decision as a matter of law. On May 17, 2005, the ALJ issued an initial decision that assessed a civil penalty in the amount of \$250.00 for the violation of 49 C.F.R. § 1540.111(a)(1).⁵

On May 27, 2005, Respondent mailed a single paragraph letter in which he requested an appeal. Respondent stated that he did not deny what happened at Metro Airport, but wanted to explain his case. He explained that the bag in which the rounds of ammunition were found is the bag he carries for everyday use. He stated that he had placed the rounds in the bag months before the incident and forgot the rounds were there. Respondent claimed that he made a mistake and would make his best effort not to repeat it. He added that he was not working and could not afford the civil penalty.

TSA filed a Motion for the TSA Decision Maker to Dismiss the Appeal on September 27, 2005. TSA argued that although the notice of appeal was timely filed, the filing of a notice of appeal does not perfect the appeal as required in 49 C.F.R. § 1503.233(c). That provision states that a party must perfect an appeal not later than 50 days after the initial decision by filing an appeal brief with the TSA Enforcement Clerk. 49 C.F.R. § 1503.233(d)(2) provides that the TSA Decision Maker may dismiss an appeal where a party has filed a notice of appeal, but fails to perfect the appeal by the timely filing of an appeal brief.

⁴ 49 C.F.R. § 1503.218(f)(5) provides that the ALJ must grant a party's motion for decision if the record and evidence 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. The party making the motion has the burden of showing that there is no genuine issue of material fact.

⁵ The ALJ's Order Granting Motion for Decision was reissued on August 8, 2005 to remove the Sensitive Security Information disclaimer that was included in the original Order. The August 8, 2005 Order did not provide for any additional rights or extensions of time.

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 is 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.

In his appeal, Respondent has not presented argument on any of these issues. In addition, TSA raises the issue that the Respondent has not followed the procedures necessary to perfect an appeal and requests that the Decision Maker dismiss the appeal for failure to timely file an appeal brief.

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

In this case the facts are not disputed by either party. TSA alleged that during the course of the security inspection, 37 rounds of 9mm ammunition were found in Respondent's bag. Respondent admitted that the ammunition was in his accessible property presented for inspection in both his Answer and in his Notice of Appeal.

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

The ALJ made the following conclusions of law:

1. Respondent violated 49 C.F.R. § 1540.111(a)(1).
2. 49 C.F.R. § 1540.111(a)(1) does not contemplate or require knowledge or intent a factor in order to determine whether an individual is in violation of that section.
3. TSA met its burden to show that no genuine issue of material fact exists, given that all inferences must be considered in the light most favorable to the non-moving party and was entitled to a decision as a matter of law.

Respondent does not dispute any of these conclusions and I agree that the ALJ's conclusions are based on applicable law, precedent, and public policy. As the ALJ observes, 49 C.F.R. § 1540.111(a)(1) prohibits the carriage of weapons, explosives, and incendiaries by an individual on or about the individual's person or accessible property when performance has begun of the inspection of the person or accessible property before entering the sterile area of an airport, or before boarding an aircraft. TSA's Interpretive Rule lists ammunition as an explosive that passengers may not carry "as accessible property or on their person through passenger screening checkpoints or into airport sterile areas and the cabins of a passenger aircraft."⁶ A passenger may place small arms ammunition for personal use in checked baggage, but only if securely packed in fiber, wood, or metal boxes, or other packaging specifically designed to carry small amounts of ammunition as required by the Department of Transportation.⁷

Further, as the ALJ points out, the rule 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 aircraft or have knowledge that a prohibited item is on his person or in his accessible property. I note, too, that Respondent states the ammunition was placed in the bag months before it was discovered and that the bag was used

⁶ 68 Fed. Reg. 7444, 7446 (Feb. 14, 2003).

⁷ See 49 C.F.R. § 175.10(a)(5).

everyday. These facts demonstrate that Respondent had an opportunity to discover and remove the ammunition prior to entering the security checkpoint.

Finally, the ALJ granted TSA's motion for decision based on his conclusion that TSA had met its burden to show that no genuine issue of material fact exists as to the issues presented in this case. TSA's regulations permit a party to make a motion for decision regarding all or any part of the proceedings, at any time before the ALJ has issued an initial decision in the proceedings.⁸ The rules specify that the ALJ must grant a motion for decision if the record and evidence show that there is no genuine issue of material fact. Respondent admitted that the ammunition was in his accessible property when the security inspection was initiated. Assessing the evidence in the light most favorable to the non-moving party, the ALJ correctly applied the relevant regulation and followed applicable legal precedent in reaching his conclusion.⁹

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.

Finding 4: The assessment of a civil penalty in the amount of \$250.00 is appropriate.

I find that the civil penalty initially assessed by TSA, and upheld by the ALJ in this proceeding is appropriate, justified, and within statutory limits.¹⁰

Finding 5: TSA's motion to dismiss the appeal for failure to perfect the appeal is moot.

TSA filed a motion to dismiss the appeal for failure to perfect the appeal as specified in 49 C.F.R. § 1503.233(d). That section states that a party must perfect an appeal by filing an appeal brief not later than 50 days after the ALJ decision, unless otherwise agreed to by the

⁸ 49 C.F.R. § 1503.218(f)(5).

⁹ See *Anderson et.al. v. Liberty Lobby, Inc., et.al.*, 477 U.S. 242, 247-249 (1986) and *Matsushita Electric Industrial Co., Ltd, et.al., v. Zenith Radio Corp. et.al.*, 475 U.S. 574, 585-587 (1986).

¹⁰ 49 U.S.C. § 46301. \$250.00 is the lowest civil penalty imposed by TSA according to the TSA Sanction Guidelines published on TSA's web site at www.tsa.gov.

parties. TSA points out that there has been no such agreement by the parties. The rule states that the TSA Decision Maker may dismiss an appeal, upon motion of any other party, where a party has filed an appeal but fails to perfect the appeal by timely filing an appeal brief. Respondent was provided with a copy of the appeal procedures with the ALJ decision. While the Respondent has not timely filed a formal appeal brief, he chose to include an explanation of his actions with his request for appeal that serves the same purpose. In his explanation, Respondent admits that the violation occurred, states that he had opportunity to discover the ammunition prior to entering the checkpoint, and requests to be relieved from the civil penalty imposed in the decision. Respondent does not object to the initial decision. Respondent's explanation clearly shows that there is no basis for an appeal and thus, it is not necessary to rule on TSA's motion.

Conclusion

For the reasons stated above, Respondent's appeal to overturn the decision of the ALJ is denied.

Dated: 2/28/2006

_____/signed/_____

Robert Jamison
Deputy Administrator