

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

In the Matter of:)
)
 RODOLFO PENA,) Docket No. 05-TSA-0044
)
 Respondent)

FINAL DECISION AND ORDER

Introduction

Pursuant to 49 C.F.R. §§1503.16(h) and 1503.233, Rodolfo Pena (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 initial decision under appeal assesses a civil penalty on the Respondent in the amount of \$1,500.00 for violation of 49 C.F.R. § 1540.111(c)(2)(i),(iii), and (iv). For the reasons stated below, the decision of the ALJ is affirmed. Accordingly, TSA’s Amended Motion to Dismiss Appeal is granted and Respondent’s appeal is denied.

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 49 C.F.R. § 1503.233, the effectiveness of the initial decision is stayed until a final decision and order of the Administrator have been entered on the record. The TSA decision maker will review the record and issue a final decision and order of the Administrator 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.”

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. The title of Deputy Administrator was changed to Deputy Assistant Secretary.

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 March 16, 2005, TSA served Respondent with a Notice of Violation alleging that on or about May 21, 2004, at Miami International Airport, TSA discovered three (3) unloaded, undeclared, and improperly packaged firearms in Respondent’s checked baggage in violation of 49 C.F.R. § 1540.111(c)(2)(i), (iii), and (iv). The firearms were identified in the record as: (1) PW Arms Redmond WA Bulg, 9MM, 1241 Tokarev, Serial Number NK 29 2004; (2) Smith and Wesson 9MM, Model 915, Serial Number VKM9324; and (3) Marlin .22 Caliber, Serial Number MD 10925. TSA proposed a civil penalty in the amount of \$1,500.00. On May 12, 2005, TSA conducted an informal conference with Respondent; however the matter was not resolved. TSA sent a Final Notice of Violation to Respondent on July 18, 2005. Respondent submitted a request for a hearing before an ALJ on July 28, 2005. On August 17, 2005, TSA filed a formal complaint which was received by Respondent on August 19, 2005. Respondent did not file an Answer as required by 49 C.F.R. 1503.209.³ On November 2, 2005, TSA filed a Motion to Deem the Allegations of the Complaint Admitted. TSA explained that Respondent was required

³ 49 C.F.R. § 1503.209(a) states that a “respondent must file a written answer to the complaint, or may file a written motion pursuant to § 1503.218(f)(1)-(4) instead of filing an answer, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.”

to file an answer within 30 days of receipt of the complaint and noted that 49 C.F.R. § 1503.209(f) provides that a “person’s failure to file an answer without good cause will be deemed an admission of truth of each allegation contained in the complaint.”

The ALJ granted TSA’s motion and issued an initial decision on November 4, 2005 assessing a civil penalty in the amount of \$1,500.00. In the order, the ALJ noted that the three firearms discovered by TSA were undeclared and were not transported in a locked, hard sided container as required by 49 C.F.R. § 1540.111(c)(2)(i)-(iv). The ALJ also observed that firearms are prohibited items in accordance with TSA Interpretive Rule No. 31.⁴ The ALJ found that, in accordance with 49 C.F.R. § 1503.209(f), since Respondent neither filed an Answer nor provided good cause as to why the Answer was not filed, the allegations in the Complaint were deemed admitted. The ALJ concluded that, pursuant to 49 C.F.R. § 1503.218(f)(5), a motion for decision must be granted “if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing 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.” Because each allegation was deemed admitted, the ALJ found no genuine issue of material fact and granted TSA’s motion as a matter of law.

On November 22, 2005, Respondent requested an appeal of the ALJ decision. Respondent stated that he did not know he was required to file an Answer prior to the ALJ hearing and that he was expecting to have a formal hearing. He also noted that Hurricane Wilma had disrupted mail service in southern Florida. TSA filed a Motion to Dismiss Appeal on December 6, 2005. In its Motion, TSA argued that Respondent had failed to file the appeal within 10 days after service of the ALJ initial decision as required in 49 C.F.R. §§ 1503.233(a) and 1503.211(d) and had not properly served all parties as required by 49 C.F.R. § 1503.233(a).

⁴ 68 Fed.Reg. 7442-7448 (Feb. 14, 2003).

TSA explained that Hurricane Wilma landed in southern Florida on October 24, 2005 and that the U.S. Postal Service resumed mail delivery in the Miami, Florida area on October 26, 2005. Thus, TSA concluded the hurricane could not have affected the delivery of the initial decision, which was not sent until November 4, 2005. On March 2, 2006, TSA submitted an Amended Motion to Dismiss Appeal, noting that Respondent failed to perfect his appeal within 50 days after entry of the initial decision of the ALJ as required by 49 C.F.R. § 1503.233(c).

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 regarding Respondent's failure to declare and properly package 3 firearms in his checked baggage are supported by a preponderance of reliable, probative, and substantial evidence;
2. Whether the ALJ's conclusions of law that there was no genuine issue of material fact and that, therefore, TSA's motion for decision must be granted was 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 does not present argument on any of these issues and thus, the appeal is denied. Moreover, the civil penalty assessed by the ALJ is appropriate. Respondent failed to file his appeal in a timely manner, to serve all of the parties, and to perfect his appeal as required by TSA regulations. In addition, Respondent's request for a hearing before the TSA decision maker is denied.

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

Since Respondent failed to file an Answer or show good cause why he could not respond to the complaint, the allegations in the TSA complaint were correctly deemed admitted by the ALJ in accordance with TSA regulations. Accordingly, TSA met its burden to show that there were no genuine issues of material fact in this case. Further, Respondent failed to avail himself of additional opportunities to challenge the allegations in his appeal by failing to perfect his appeal as required by TSA regulations. I concur with the initial decision that all of the allegations contained in the complaint are deemed an admission of truth.⁵

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

The ALJ concluded, as a matter of law, that TSA was entitled to a motion for decision as provided for in 49 C.F.R. § 1503.218(f)(5). I find that the initial decision is in accordance with TSA regulations and that TSA met its burden to show that there was no genuine issue of material fact. Assessing the evidence in the light most favorable to the Respondent, the ALJ correctly applied the relevant regulation and followed applicable legal precedent in reach his conclusion.

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 which would support Respondent's appeal.

Finding 4: The assessment of a civil penalty in the amount of \$1,500.00 is appropriate.

⁵ The initial decision states that the improperly declared and packaged firearms were found in Respondent's accessible property. The Complaint and all of TSA's pleadings allege that the firearms were found in Respondent's checked baggage and the initial decision correctly cites the regulatory provision that applies to checked baggage. I find that the allegations contained in the complaint are deemed an admission of truth and that the undeclared and incorrectly packaged firearms were discovered in Respondent's checked baggage. Further, the reference to accessible property in the initial decision is a clerical error that has no bearing on the outcome of either the initial decision or the final decision and order. While unloaded, properly declared and packaged firearms are allowed in checked baggage, no firearms are permitted in accessible property in accordance with 49 C.F.R. § 1540.111(a).

I find that the civil penalty assessed by the ALJ is appropriate, justified, and within statutory limits.⁶ In fact, the amount represents the lowest suggested assessment for each firearm discovered during the inspection of Respondent's checked baggage according to the TSA Sanction Guidelines.⁷

Finding 5: Respondent failed to file his appeal in a timely manner and to perfect his appeal as required by TSA regulations.

While Respondent claims that his appeal could not be timely filed due to Hurricane Wilma, I find that Respondent had sufficient time to meet the regulatory requirements to file no later than 10 days after service of the initial decision and to serve all parties.⁸ Even if the appeal were to be considered timely filed, Respondent had sufficient time to perfect his appeal within 50 days after service of the initial decision as specified in 49 C.F.R. § 1503.233(c). TSA regulations permit the decision maker to dismiss an appeal, upon motion of any party, "where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief."⁹ Therefore, I grant TSA's Amended Motion to Dismiss Appeal.

Finding 6: Respondent's request for a hearing before the TSA decision maker is denied.

Pursuant to TSA regulations, the TSA decision maker has sole discretion to permit oral argument on appeal.¹⁰ Based on my review of the record, oral argument is not required in this case.

⁶ 49 U.S.C. § 46301.

⁷ The TSA Sanction Guidelines are published on its website at www.tsa.gov.

⁸ 49 C.F.R. § 1503.233(a).

⁹ 49 C.F.R. § 1503.233(d)(2).

¹⁰ 49 C.F.R. § 1503.233(h).

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 contains 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 initial decision of the ALJ is affirmed. Accordingly, TSA's Amended Motion to Dismiss Appeal is granted and Respondent's appeal is denied.

Date: May 30, 2006

_____/Signed/_____
Robert D. Jamison
Deputy Assistant Secretary