

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

In the Matter of:)
)
 ORLANDO INTERNATIONAL) Docket No. 06-TSA-0014
 AIRPORT (MCO))
)
 OPERATED AND MANAGED)
 BY THE GREATER ORLANDO)
 AVIATION AUTHORITY)
 (GOAA),)
)
 Respondent)

**ORDER GRANTING JOINT SETTLEMENT MOTION AND DENYING MOTION TO
VACATE INITIAL DECISION**

Introduction

Pursuant to 49 C.F.R. §§1503.16(h) and 1503.233, the Greater Orlando Aviation Authority (GOAA), the Operator and Manager of the Orlando International Airport (MCO), Respondent, appealed 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 assessed a civil penalty on the Respondent in the amount of eight thousand dollars

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.

(\$8,000.00) for violation of 49 C.F.R. § 1542.303(b) and 49 C.F.R. § 1542.5(b). On February 22, 2007, Respondent and TSA filed a Joint Settlement Motion to withdraw GOAA's appeal and to vacate the ALJ decision. For the reasons set forth below, the Motion to Withdraw GOAA's Appeal is granted and the Motion to Vacate is denied.

Synopsis of the Facts and Procedural History

On February 14, 2006, TSA filed a Complaint alleging that Respondent failed to report two security incidents at MCO in violation of 49 C.F.R. § 1542.303(b) and 49 C.F.R. § 1542.5(b) and assessing a civil penalty in the amount of \$8,000.00.³ Respondent failed to file an Answer by March 22, 2006, as required by 49 C.F.R. § 1503.209(a). TSA filed a Motion to Deem the Allegations Admitted on March 31, 2006 pursuant to 49 C.F.R. § 1503.209(f), which states 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. The ALJ determined that Respondent did not demonstrate good cause for its failure to file a timely Answer to the Complaint and issued an Order on July 5, 2006 granting TSA's Motion and assessing a civil penalty in the amount of \$8,000.00. Respondent filed a Notice of Appeal to the TSA Decision Maker on July 18, 2006 and perfected its appeal by filing a brief on August 24, 2006.

On February 22, 2007, the parties filed a Joint Settlement Motion to Withdraw GOAA's Appeal and Vacate the ALJ Order of July 5, 2006. In the Joint Settlement Motion, the parties agreed on an outline of security incidents and reporting procedures to be included in the MCO Security Program.⁴ Upon inclusion of the new provisions in the MCO Security Program, the parties also agreed to settle without payment of any civil penalty. Joint Settlement Motion at Enclosures. The parties request that the TSA Decision Maker approve the withdrawal of the

³ The Security Directive at issue is Sensitive Security Information subject to the provisions of 49 C.F.R. part 1520.

⁴ The outline and reporting procedures included in the MCO Security Program are Sensitive Security Information subject to the provisions of 49 C.F.R. part 1520.

Appeal by the Respondent, vacate the July 5, 2006 Order of the ALJ, and dismiss the TSA Complaint.

Findings

The TSA Decision Maker approves the parties' requests to dismiss the TSA Complaint and to Withdraw the Appeal by Respondent. TSA's rules of practice in civil penalty actions provide that the ALJ obtains jurisdiction over a civil penalty action when a person requests a hearing and TSA files a formal complaint. 49 C.F.R. §§ 1503.16(g) and 1503.201(a)(1). Thus, when TSA withdraws a complaint, the jurisdiction of the ALJ is removed and the initial decision has no legal basis. The Decision Maker notes that TSA's rules of practice are based on the rules of practice of the Federal Aviation Administration (FAA). While not binding on TSA, the FAA has also interpreted its rules to hold that when a complaint is withdrawn the basis for the initial decision has no force and effect in law. *See, In the Matter of Griffin*, FAA Order No. 92-9 (February 6, 1992) and *In the Matter of Sonico, Inc.*, FAA Order No. 2000-24 (December 21, 2000).⁵

The parties' request to vacate the ALJ initial decision is denied. Granting the Motion to vacate the initial decision would be contrary to Federal precedent. The U.S. Supreme Court has held that "mootness by reason of settlement does not justify vacatur of a judgment under review." *U. S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 28 (1994). In a unanimous decision in that case, the Court found that, "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur. The judgment is not unreviewable, but simply unreviewed by his own choice." *Id.*, at

⁵ The National Transportation Safety Board (NTSB) has held that when the FAA withdraws a complaint filed with the Board, the foundation for an initial decision issued previously is removed and that any appeal from that initial decision becomes moot. *Administrator v. Nicolai*, 7 NTSB 822 (1991).

25. The Court explained that Congress prescribed a primary route, by appeal as of right and certiorari, through which parties may seek relief from the legal consequences of judicial judgments. “To allow a party who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would – quite apart from any considerations of fairness to the parties – disturb the orderly operation of the federal judicial system.” *Id.*, at 27.

While the Court did not state that vacatur could never be granted, it explained that it is “petitioner’s burden as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur.” *Id.*, at 26. Respondent has made no such showing in this case to warrant vacatur of the initial decision.

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 Motions to Dismiss the Complaint and to Withdraw the Appeal are granted and the Motion to Vacate the ALJ decision is denied.

Dated: 6/28/2007

Gale Rossides
Acting Deputy Assistant Secretary