

U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of)	
)	
CHRISTOPHER HOEM,)	Docket No. 07-TSA-0011
)	
Respondent.)	

FINAL DECISION AND ORDER

Introduction

Pursuant to 49 C.F.R. §§ 1503.16(h) and 1503.233, Christopher Hoem (Respondent) appeals 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 initial decision on appeal assesses a civil penalty against Respondent in the amount of \$500.00 for violation of 49 C.F.R. § 1540.109. For the reasons stated below, the initial decision of the ALJ is affirmed.

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

¹ 49 C.F.R. § 1503.16(h) states, “Either party may appeal the administrative law judge’s initial decision to the SA 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.

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

Respondent was a ticketed passenger departing Spokane International Airport on August 10, 2006. On that day, signs were posted in the airport stating that effective immediately, passengers may not have liquids or gels at the screening checkpoint or in the cabin of the aircraft. Passengers were allowed to have prescription medicine so long as the name on the prescription matched the name on the passenger’s ticket. Aircraft operator and TSA personnel were also advising passengers of the new prohibition against liquids and gels. While conducting X-ray screening, TSA discovered prohibited gels or liquids inside Respondent’s accessible property, including a nasal spray bottle labeled “Nasonex.” TSA informed Respondent that the liquids and gels were not permitted and that he had the option of checking his bag, disposing of the liquids or gels, or surrendering the liquids and gels to TSA. Respondent loudly stated that he was taking his bag and all its contents on board the aircraft and grabbed his bag. He attempted to grab his bag from TSA officers two more times and continued to insist loudly that he was taking his bag and its contents on board the aircraft. TSA requested a Spokane International Airport law enforcement officer to assist with Respondent. The officer took Respondent’s bag to the ticket counter. Respondent informed the law enforcement officer that the Nasonex was prescribed, although it did not have a prescription label and did not bear his name.

On March 1, 2007, TSA filed a Complaint alleging that Respondent violated 49 C.F.R. 1540.109. That section of TSA’s security regulations states that, “No person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter.” Respondent filed an Answer to the Complaint stating that he was

unaware of the liquid and gel prohibition. He alleged that there were no signs posted at the airport and that TSA officers did not provide any information as to why his nasal spray was prohibited. He claimed that he informed the TSA officers that the nasal spray was prescribed. He also stated that he only reached for his bag once and that he was treated with disrespect by the TSA officers.

A hearing before the ALJ was held on June 21, 2007. Respondent was not represented by counsel. TSA presented witnesses that testified that signs were posted and personnel were advising passengers of the new prohibition. The TSA officer who searched Respondent's bag testified that prohibited liquids and gels were present in the bag and that Respondent was provided with the options for removing the liquids and gels from the checkpoint. He also testified that Respondent grabbed the bag three times and insisted loudly that he was going to take his bag and its contents on board the aircraft. Another TSA officer and TSA Screening Manager testified that Respondent attempted to grab his bag. The law enforcement officer testified that Respondent was upset and angry and that there were approximately 15 to 18 passengers waiting to enter the checkpoint in order to avoid the Respondent. The officer testified that signs were posted at the airport. Respondent testified that he was unaware of the prohibition and that the Nasonex was prescribed, but that he did not have the box that had the prescription label with him. Respondent also cross examined the TSA witnesses, introduced an exhibit, and gave a closing statement.

In the initial decision issued on August 13, 2007, the ALJ found that TSA had proved its case by a preponderance of reliable, probative, and substantial evidence. The ALJ cited an earlier case where the Court of Appeals found that a passenger's escalating loud and belligerent conduct directed at a TSA officer was found to violate 49 C.F.R. § 1540.109. Rendon v. TSA,

424 F.3d 475 (6th Cir. 2005). The ALJ found that, as in the Rendon case, Respondent's conduct hindered and interfered with the TSA officer's screening duties. The ALJ noted that Respondent raised constitutional arguments that his civil rights had been violated, including his right to free speech and his right to privacy. The ALJ determined that Respondent, an experienced flyer, voluntarily agreed to a search of his bag and his person and cited U.S. v. Davis, 482 F.2d 893 (9th Cir. 1973) and U.S. v. Aukai, 440 F.3d 1168 (9th Cir. 2006) in support of his finding. Finally, the ALJ found that the civil penalty in the amount of \$500.00 was appropriate and within TSA's sanction guidelines.

The initial decision also contained the procedures to be followed in seeking to appeal to the TSA decision maker. TSA's procedures require that the notice of appeal be filed no later than ten days after service of the initial decision. 49 C.F.R. § 1503.233. Respondent filed a letter on September 24, 2007 appealing the initial decision. Respondent claimed that the ALJ committed prejudicial errors during the hearing that supported his appeal. Respondent noted that the witnesses presented by TSA and the TSA attorney representing the agency were TSA employees and, thus, biased in favor of the agency. He claimed that the ALJ was allied with TSA and was not objective. He stated that the TSA witnesses lied when they testified that they did not know the nasal spray was prescribed. He also claimed that he was not given sufficient time to present his testimony or sufficient guidance regarding his closing statement. He also objected to the fact that the ALJ denied his request for a post hearing conference. Respondent requested that his appeal be heard by a "third party judge."

TSA filed a motion to dismiss the appeal on October 15, 2007. In support of its motion, TSA stated that Respondent's appeal was not timely filed. TSA also noted that Respondent had the opportunity to cross examine the TSA witnesses. TSA pointed out that if Respondent

believed that the ALJ was biased, he could have moved to disqualify the ALJ. Finally, TSA noted that the rules of practice do not permit an appeal to a “third party judge.”

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 whether Respondent’s conduct at the screening checkpoint violated TSA’s regulation are supported by a preponderance of reliable, probative, and substantial evidence;
2. Whether the ALJ’s conclusions of law were made in accordance with applicable law, precedent, and public policy; and
3. Whether the ALJ committed 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.

Respondent alleges in his appeal that TSA witnesses lied during their testimony, but presents no evidence to support his claim. As TSA points out in its motion to dismiss the appeal, Respondent cross-examined these witnesses during the hearing. Respondent asked the TSA witnesses, who were under oath, whether they heard Respondent state that he needed his nasal inhaler. They testified that they did not. The ALJ is in the best position to observe the demeanor of witnesses at a hearing, and, as a result, the law judge’s credibility findings deserve deference. This is consistent with longstanding administrative practice. See, In the Matter of Nicholas J. Werle, FAA Order No. 97-20 (May 23, 1997) and In the Matter of David C. Siddall, FAA Order No. 2008-9 (October 7, 2008). In fact, the courts have stated that credibility determinations will

only be overturned if exceedingly improbable testimony has been credited. U.S. v. Broadie, 452 F.3d 875 (D.C.Cir. 2006), U.S. v. Adamson, 441 F.3d 513 (7th Cir. 2006). Upon review of the record, there is no reason to overturn the credibility determination of the ALJ that led him to find that the Respondent violated TSA's security regulations. Further, even if the witnesses had heard Respondent state that he needed his nasal inhaler, he admitted that the inhaler did not bear any type of prescription label or even his name. Thus, there was no way for the TSA officers to verify that the nasal inhaler was prescribed or belonged to him. Contrary to Respondent's unsupported claim that he was mishandled with regard to the nasal inhaler, the officers acted properly in preventing the nasal inhaler from being carried into the sterile area of the airport and providing Respondent with reasonable options as to how the nasal inhaler and other prohibited items Respondent attempted to bring with him could be dealt with.

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

Respondent does not challenge the conclusions of law reached by the ALJ and I agree that the ALJ properly applied law, precedent, and public policy in the initial decision.

Finding 3: There were no prejudicial errors during the hearing to support the appeal.

Respondent's appeal rests mainly on his contention that the ALJ committed prejudicial error during the hearing. Specifically, Respondent points out that the ALJ denied his request for the release of additional reports allegedly made by TSA personnel, limited his time to testify, failed to advise him regarding his closing statement, and denied his request for a post-hearing telephone conference. In its Motion to Dismiss, TSA notes that Respondent failed to identify what reports he wanted released and why the reports were relevant to his case. TSA argues that Respondent failed to specify what prejudicial errors were made. TSA contends that Respondent

could have moved to disqualify the ALJ in accordance with 49 C.F.R. § 1503.218(f)(6). TSA also points out that Respondent's appeal was not timely filed.

Charges of bias or prejudice against an ALJ are not viewed lightly. Upon review of the hearing transcript, there were no prejudicial errors that could support Respondent's appeal. Regarding Respondent's claim that the ALJ was biased, TSA has appointed ALJs to hear civil penalty actions in accordance with 5 U.S.C. § 3501. Respondent fails to explain why TSA's appointment of ALJs with Federal administrative law experience is a conflict of interest or is related to his charge of prejudicial error. TSA is correct that a party may file a motion to disqualify the ALJ at any time after the ALJ has been assigned to the proceeding and that Respondent could have availed himself of such a course of action. I note, however, that the motion must be made before the ALJ files an initial decision in the proceeding. 49 C.F.R. § 1503.218(f)(6).

One of the responsibilities of the ALJ is to regulate the course of the hearing in accordance with TSA's rules of practice. 49 C.F.R. § 1503.205(a)(6). The rules of practice must be followed by the parties, even if the party is appearing without an attorney. A *pro se* party is not excused from following the rules of practice. Adherence to the rules of practice is essential to preserve the integrity and fairness of a civil penalty action. In reviewing the transcript of the hearing, it is evident that the ALJ granted the Respondent considerable leeway in his cross examination of witnesses. It also appears that rather than limit Respondent in testifying, as alleged in the appeal, the ALJ attempted to ensure that Respondent would have sufficient time to testify. Respondent notified the ALJ that his testimony would be no more than ten or fifteen minutes in length, although the ALJ informed him that it could be longer. Transcript at 162. The ALJ stopped TSA from completing its case out of concern that Respondent would have

sufficient time to testify fully. Transcript at 225. Respondent began his testimony at approximately 3:53 p.m. Transcript at 227. The ALJ noted that he would like to begin cross examination at 4:30, but stated that he did not want to limit Respondent's direct testimony. Transcript at 231. In fact, the ALJ told the Respondent to take his time because of the importance of his testimony. Transcript at 232. The ALJ asked the Respondent twice whether he had anything further to add when Respondent completed his testimony. Transcript at 244. Respondent was permitted the same amount of time for a closing statement as TSA. Transcript at 264. Finally, the ALJ held the record open so that both parties could submit post hearing briefs until July 31, 2007. Transcript at 268. The transcript reveals that the ALJ accommodated Respondent as much as possible while still adhering to the rules of practice.

Respondent contends that the ALJ erred in failing to hold a telephone conference two days after the hearing to clarify what Respondent needed to do prior to the initial decision. Instead of holding a telephone conference, the ALJ issued a Post Hearing Order on June 27, 2007 confirming that the record would be held open until July 31, 2007 to allow each party to submit a brief and proposed findings of fact and conclusions of law. The ALJ has the power to dispose of procedural motions and requests. 49 C.F.R. § 1503.205(a)(8). Issuing the order did not prejudice the Respondent.

Respondent also claims that the ALJ erred in denying Respondent's requests for any additional reports regarding the incident that TSA may have, to allow Respondent to call the agency attorney as a witness regarding an offer to settle the case, and to re-do his closing argument. The ALJ issued a Post Hearing Order on June 28, 2007 explaining that Respondent had the opportunity to present his case and cross examine TSA witnesses during the hearing. The ALJ noted that Respondent could have filed a request for discovery prior to the hearing and

explained that TSA's rules of practice do not permit post hearing discovery. Respondent failed to show good cause as to why the hearing should be re-opened to permit further discovery. Regarding the second request to allow Respondent to call the agency attorney as a witness concerning a settlement offer, the ALJ noted again that the hearing was completed. He also explained that under the Federal Rules of Evidence, settlement offers are generally not admissible. Finally, the ALJ denied Respondent's request to re-do his closing argument, but noted that Respondent had the opportunity to re-state and add to his closing argument in his post-hearing brief.

I agree that Respondent had sufficient time prior to the hearing to prepare his defense and to make whatever motions or discovery requests he deemed necessary to make his case. Respondent failed to show good cause why the hearing should be re-opened to permit his discovery request or to re-do his closing argument. Respondent had the opportunity to re-state his case in a post-hearing brief which Respondent chose not to submit. And, while the Federal Rules of Evidence are not binding in TSA civil penalty actions, they may be used as guidance.³ The ALJ has the power to dispose of procedural motions and requests. 49 C.F.R. § 1503.205(a)(8). There was no prejudicial error in the ALJ's decisions regarding Respondent's post-hearing requests.

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

I find that the civil penalty ordered by the ALJ in the amount of \$500.00 is appropriate, justified, and within statutory limits.⁴

³ In the Matter of Delaware Skyways, LLC, FAA Order No. 2005-6 (March 18, 2005).

⁴ 49 U.S.C. § 46301. TSA's Sanction Guidelines are listed on its web site at www.tsa.gov.

Finding 5: Respondent's request for a new hearing by a third party judge is denied.

Respondent has not shown good cause for a re-hearing in this case. Respondent had ample opportunity to prepare his defense and make his case during his hearing and could have availed himself of the opportunity to re-state his case in a post-hearing brief. Respondent's request for a new hearing is denied.

Petition for Reconsideration 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 rules of practice for filing a petition for reconsideration.

A party may seek judicial review of this 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.

Dated: _____

11/28/2008



Gale D. Rossides
Deputy Administrator