

U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of)	
)	
Sky King, Inc.)	TSA Docket Nos. 10-TSA-1042 and 1054
)	
Respondent.)	

ORDER

The Transportation Security Administration (TSA) appeals an order issued by the Administrative Law Judge (ALJ) on December 30, 2010 to permit Sky King, Inc., Respondent, to show cause why its request for a hearing was three days late. As explained below, TSA's appeal is denied.

Generally, TSA's rules of practice do not permit a party to file an interlocutory appeal to the TSA Decision Maker until the Initial Decision is entered on the record. 49 C.F.R. §1503.631(a). However, an interlocutory appeal as of right is permitted without the consent of the ALJ before the Initial Decision is entered in the following circumstances: (1) a ruling or order by the ALJ barring a person from the proceedings; (2) failure of the ALJ to dismiss the proceedings in accordance with §1503.623; (3) a ruling or order by the ALJ in violation of §1503.607(b); or (4) a ruling or order by the ALJ regarding public access to a particular docket or documents.

In this case, TSA contends that the interlocutory appeal is permitted because the order is in violation of 49 C.F.R. §1503.607(b)(1)(iv) and (v). Those provisions state that the ALJ must not "adopt or follow a standard of proof or procedure contrary to that set forth in this subpart" and must not "decide issues involving the validity of a TSA regulation, order, or other requirement under the U.S. Constitution, the Administrative Procedure Act, or other law." TSA argues that the ALJ order waives or alters the application of 49 C.F.R. §1503.419(b)(2) which

provides for the automatic conversion from a Final Notice of Proposed Civil Penalty and Order into an Order Assessing Civil Penalty if a person “fails to respond to the Final Notice and Order or request a formal hearing within 15 days after receipt of that notice.”

TSA alleges that Sky King received the Final Notices and Orders in its corporate offices on October 7, 2010. Therefore, a request for hearing was due on October 22, 2010. Sky King filed its request on October 25, 2010.

TSA asserts that the rules of practice do not permit the ALJ to create or apply a good cause standard for review of untimely requests for a hearing. Yet, TSA fails to address how the ALJ order violates 49 C.F.R. §1503.607(b)(1)(iv) which states that the ALJ may not “adopt or follow a standard of proof or procedure contrary to that set forth in this subpart.” Subpart G describes the rules of practice in TSA civil penalty actions. It lists the specific powers of the ALJ, including to regulate the course of the hearing and to rule on procedural motions and requests. 49 C.F.R. §1503.607(a)(7) and (9). Further, subpart G provides the ALJ with the power to allow late filings if good cause is shown. 49 C.F.R. §§1503.611(d), 1503.617(c), 1503.619(a), 1503.621(b)(2), 1503.623, and 1503.629(c). The provision in question in this case is contained in subpart E, which describes the assessment of civil penalties by TSA. There is nothing to indicate that the ALJ order is contrary to the powers of the ALJ described in subpart G or, specifically, that the ALJ order violates 49 C.F.R. §1503.607(b)(1)(iv).

Likewise, the ALJ order does not address the validity of 49 C.F.R. §1503.419(b)(2) under the U.S. Constitution, the Administrative Procedures Act, or any other law. While TSA contends that the impact of the ALJ order will “waive or alter” the application of the automatic conversion provision, TSA does not argue and there is nothing to suggest that the ALJ has declared the provision invalid under the U.S. Constitution, the Administrative Procedures Act, or other law.

As TSA points out, the provision in question is relatively new and, unlike the majority of the rules of practice, is not based on the long standing rules used by the Federal Aviation Administration in civil penalty proceedings. Thus, there is no case precedent to inform our interpretation. However, the Federal Rules of Civil Procedure (FRCP), while not binding, may be referred to for guidance.¹ The FRCP contain many instances where a judge may waive or alter a particular requirement or deadline if good cause is shown. For example, Rule 6 states that when an act may or must be done within a specified time, the court may, for good cause, extend the time. Other examples include responses to discovery requests (Rules 26, 45), time limits for service (Rule 4), pre-trial conference schedules (Rule 16), default judgments (Rule 55) and protective orders (Rule 5). The ALJ's action is consistent with the FRCP.

TSA explains that the purpose of the provision is to reduce the time necessary for civil penalty cases. It also reduces the administrative burden on the government by eliminating the previous requirement to issue a separate Order Assessing Civil Penalty. These are positive and worthy objectives. However, TSA specifically states that "this change will not affect the procedural rights of the alleged violator; rather it will streamline the process and allow quicker resolution of cases, once a respondent has exercised, or failed to exercise those procedural rights that are available." 74 FR 36036 (July 21, 2009). In this case, since the respondent missed the deadline by only three days, the show cause order is an attempt to ascertain whether there is a good reason why the respondent failed to exercise its procedural rights, which is consistent with TSA's rationale. The ALJ did not extend the time in which to request the hearing, as TSA alleges. If the respondent fails to show good cause why it filed its request three days late, the

¹ In the Matter of Toyota Air Cargo, FAA Order No. 2004-7 at 5 (Sept. 22, 2004) and In the Matter of Delaware Skyways, LLC, FAA Order No. 2005-6 at 7 (Mar. 18, 2005).

Final Notice will automatically convert to an Order Assessing Civil Penalty and the opportunity to request a hearing is closed, consistent with the requirement of 49 C.F.R. §1503.419(b)(2).

TSA states that the rules of practice require that once a Final Notice and Order automatically converts to an Order Assessing Civil Penalty, the enforcement process is terminated, the civil penalty is final, and there is no ability by either party to request a hearing. I disagree with TSA's interpretation. Parties to civil enforcement actions should not be permitted to ignore the rules of practice and there is ample case precedent to support that premise.² However, an ALJ does have authority to consider a request for a hearing that does not strictly conform to the rules of practice if the defect is minor, good cause is shown, and due process is not impacted. *In re Phillip Delk*, Order, Mar. 4, 2011 at 2. This permits the ALJ to ensure that due process is protected and that a party is not inadvertently denied due process due to circumstances beyond his or her control. In this case, the defect was minor and the due process rights of TSA are not impacted. However, the ALJ must ascertain whether good cause exists to ignore the defect and, in this case, issued an order to do so.

Finally, TSA states that its interpretation of the rules of practice is entitled to deference. I point out that the rules of practice do not limit the TSA Decision Maker's authority to rule on interlocutory appeals, but do permit the Decision Maker to reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals. 49 C.F.R. §1503.631(e). Otherwise, the Decision Maker is authorized to affirm, modify, or reverse an initial decision, make any necessary findings, or may remand a case for any proceedings that the Decision Maker determines may be necessary. 49 C.F.R.

² See, *In re Phillip Delk*, Order, Mar. 4, 2011, *In re Paul Amara*, 2008 WL 217386 (May 9, 2008); *In re Edward Amet*, 2008 WL 73903 (June 28, 2007); *In re Lacy Maddox*, 2010 WL 697366 (Jan. 15, 2010); *In re Mahmoud Mahmoud*, 2009 WL 5910424 (Oct. 30, 2009); and *In re Jose Rajoy* 2010 WL 5018674 (Mar. 22, 2010).

§1503.657(j). In this case, TSA has failed to show that the ALJ order to show cause violated 49 C.F.R. §1503.607(b).

For the reasons stated above, TSA's interlocutory appeal is denied.

Dated: 5/4/11



Gale Rossides
Deputy Administrator