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

In the Matter of:	)	
	)	
THOMAS A. ZOLINE,	)	TSA Docket No. 2002WP710255
	)	
Respondent	)	

ORDER

Introduction

Respondent, Thomas A. Zoline ("Respondent"), represented by attorney Donald B. Marks, has filed this administrative appeal to the Transportation Security Administration ("TSA") Decision Maker under the provision of 49 C.F.R. § 1503.16(h).[1] The TSA Decision Maker is the Under Secretary of Transportation for Security (now designated as the Assistant Secretary of Homeland Security and Transportation Security Administrator) or "any person to whom the Under Secretary has delegated the Under Secretary's decision-making authority in a civil penalty action." 49 C.F.R. § 1503.202.[2]

Respondent is appealing a decision of an Administrative Law Judge ("ALJ") affirming TSA's finding that Respondent violated 49 C.F.R. § 1540.109 by interfering with, assaulting, threatening, or intimidating screening personnel in the performance of their screening duties. Respondent also is appealing the ALJ's affirmation of TSA's assessment of a civil penalty, in the amount of $1,100, against Respondent for this violation.

[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."

[2] By Delegation Order effective July 27, 2004, Assistant Secretary David M. Stone delegated his decision-making authority to the TSA Deputy Administrator.

Respondent filed a brief of his arguments for this appeal, to which TSA filed a brief in reply. This decision is based upon those briefs, as well as the record of the hearing before the ALJ. For reasons stated below, the decision of the ALJ is affirmed. Accordingly, Respondent's administrative appeal is denied.

Standard for Review

The regulation governing appeals from decisions of ALJs in cases involving violations of 49 C.F.R. § 1540.109 clearly establishes the standard of review. It states at 49 C.F.R. 1503.233:

(b) Issues on appeal. 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.

In this appeal, Respondent has argued that the finding of fact made by the ALJ were not supported by a preponderance of the evidence, and therefore, the ALJ's conclusion of law that Respondent violated 49 C.F.R. § 1540.109 was not supported by a preponderance of the evidence.

Synopsis of the Facts and Procedural History

On May 22, 2002, Respondent was a ticketed passenger on U.S. Airways Flight Number 68 departing from Los Angeles International Airport in Los Angeles, California. (Hearing Transcript (Tr.), 7). He presented himself and his accessible property for inspection before entering the sterile area the Terminal 1 checkpoint. (Tr., 7) As Respondent walked through the

metal detector at the checkpoint, the alarm on the metal detector sounded and Respondent was referred to a secondary screening area, in accordance with standard operating procedures. (Tr., 21-22, 80-81.)

The secondary screening was performed by Huntleigh Corporation employee Luisito Noynay (Mr. Noynay) who asked Respondent to raise his arms. (Tr.,18, 28, 83-85.) As Mr. Noynay gave Respondent instructions while he used a hand wand to conduct the secondary search, Respondent repeatedly asked, "What? What? What?" (Tr.,28, 88.) He told Mr. Noynay, "Look at me when I'm talking to you." (Tr., 30, 92.) When Mr. Noynay asked Respondent to remove his belt, Respondent began shouting and asked for Mr. Noynay's name. (Tr., 33.) Respondent continued to appear agitated as he complied with Mr. Noynay's request to remove his shoes. (Tr., 35-36.) Mr. Noynay then conducted a pat-down of Respondent and determined that the alarm had been resolved. (Tr., 37- 38, 96.) Respondent repeatedly asked Mr. Noynay for his name, and stated, "I'm gonna have your job for giving me hell." (Tr., 44.) Mr. Noynay spelled out his first and last names for Respondent and showed Respondent his identification badge hanging around his neck. (Tr., 40.) Respondent grasped the badge and moved away as if he intended to reach for something on which to write. (Tr., 41.) In accordance with standard operating procedures at airport checkpoints, Mr. Noynay summoned his supervisor because a passenger had made physical contact with him. (Tr., 43-44.) Respondent then released the badge. Following the incident, Respondent was questioned by TSA supervisors and an airport law enforcement officer.

On January 8, 2003, TSA issues a Notice of Proposed Civil Penalty Violation, advising Respondent that TSA proposed to assess a civil penalty of $1,100 for Respondent's violation of

49 C.F.R. § 1540.109.[3] On May 15, 2003, TSA issues a Final Notice of Proposed Civil Penalty assessing Respondent a civil penalty of $1,100. On June 2, 2003, Respondent submitted a request for a hearing. A hearing was held before an ALJ of the U.S. Coast Guard, The Honorable Parlen L. McKenna, in Los Angeles, California on February 27, 2004. Judge McKenna issued an oral decision at the conclusion of the hearing upholding the Final Notice of Proposed Civil Penalty.

On March 3, 2004, Respondent gave timely Notice of Appeal to the ALJ's decision, and he perfected the appeal by filing a brief of his arguments on April 15, 2004. TSA filed a timely reply brief on May 20, 2004.[4] HCAISSUES DECIDED

This final decision is based upon findings on the following issues:

1. That the ALJ's findings of fact are supported by a preponderance of reliable, probative and substantial evidence.;

2. That the evidence demonstrates that Respondent interfered with, assaulted, threatened or intimidated screening personnel, Luisito Noynay, in the performance of this screening duties; and

3. That the assessment of a civil penalty in the amount of $1,100 is appropriate.

Findings

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

[3] 49 C.F.R. § 1540.109 states: "No person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter."

[4] A party appealing the decision of the ALJ must file with TSA a notice of appeal within 10 days after entry into the record of the ALJ's oral decision. 49 C.F.R. § 1503.233(a). The appeal must be perfected within 50 days after entry into the record of the ALJ's oral decision. 49 C.F.R. § 1503.233(c). The opposing party must file a reply brief no later than 35 days after the appeal brief is served on the party. 49 C.F.R. § 1503.233(e). In this case, Respondent must have filed the notice of appeal by March 8, 2004 and the appeal brief by April 17, 2004. TSA must have filed the reply brief no later than May 20, 2004. In this appeal, all filing were timely.

The parties jointly stipulated to a number of facts prior to the hearing. Of the facts not stipulated and argued at the hearing, the ALJ made the following findings of fact:

1. "Respondent heard the instructions during the screening process, including instructions given to him by Mr. Noynay in the screening area." The record shows that Respondent and Mr. Noynay were in very close proximity to one another and Respondent eventually obeyed every instruction, indicating that he could hear and understand Mr. Noynay. Respondent's argument that he had trouble hearing or understanding Mr. Noynay's instructions is not persuasive.

"Respondent was uncooperative and belligerent toward the screener." This finding is supported by testimony of several witnesses to the incident. Respondent's argument that his apparent exasperation with the screening process was the result of his difficulty in understanding Mr. Noynay's instructions is not persuasive. The record itself counters the argument with ample evidence that Respondent did indeed follow Mr. Noynay's instructions. The evidence shows that his behavior, specifically his repetition of the question "What?" and his demand that Mr. Noynay look at him, was not a function of his misunderstanding, but was purposefully disruptive behavior.

3. "Respondent threatened to ensure the screener would be fired." Although Respondent argued that he merely "stated" that he would have the screener fired, the evidence from the records shows that the statement could reasonably be construed as a threat. It is irrelevant that the statement could not threaten Mr. Noynay because Respondent has no control over Mr. Noynay's employment, as Respondent has argued. A statement couched as a threat, however empty, remains a threat. At the very least, the statement is further demonstrated of Respondent's belligerence toward Mr. Noynay and the screening process.

4. "At some point prior to leaving the checkpoint, Respondent grabbed the screener's identification badge until the screener called for a supervisor." This finding is supported by evidence in the record. The ALJ reasonably rejected Respondent's argument that the action by Mr. Noynay of showing his identification badge to Respondent invited Respondent to touch the badge. There is no evidence in the record indicating that Mr. Noynay's intent on showing the badge was to invite Respondent to touch it, nor is it reasonable to assume that such an action would have appeared to be an invitation to touch it.

5. "When the Respondent made physical contact with the screener's identification badge, that touching was unwanted and unauthorized." This conclusion is reasonable based upon testimony of witnesses. The evidence shows that Respondent not only held onto the badge, but he also moved away from Mr. Noynay while holding the badge. This tugging of the badge, which Mr. Noynay wore around his neck, forced Mr. Noynay to move with the Respondent. It is entirely reasonable to conclude that such an action by the Respondent would be neither wanted nor authorized.

6. "As a result of Respondent's actions, Lori Charles, TSA; Susan Buneo, TSA: a law enforcement officer; Lori Hazan, TSA; Mr. Noynay, Huntleigh screener; Clarice Houston; Huntleigh supervisor, were required to respond to this situation." The record shows that the aforementioned employees responded to the situation, and their response was in accordance with standard operating procedures.

7. "Mr. Noynay's English was clearly sufficient for him to convey satisfactory instructions to the Respondent." While the record indicates that Mr. Noynay speaks English with a foreign accent, Respondent eventually complied with all of his instructions, indicating that Mr. Noynay could be understood.

A claim proven by a preponderance of the evidence is one where the party with the burden of proof provides evidence that is more likely true than not and, when balanced against opposing evidence, tips the scales in favor of that party. Blossom v. CSX Transportation, 13 F.3d 1477, 1480 (11th Cir. 1994). Substantial evidence is defined by the Supreme Court as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938).

I find that all of the ALJ's finding of fact are supported by a preponderance of reliable, probative, and substantial evidence. Mr. Noynay's account of the incident demonstrates that he was attempting to preform his screening duties as required, despite Respondent's lack of cooperation. Three other witnesses to the incident testified to Respondent's belligerent behavior toward Mr. Noynay. Furthermore, the record is clear that Respondent grasped Mr. Noynay's identification badge without permission to do so.

Finding 2: Respondent interfered with, assaulted, threatened, or intimidated screening personnel, Luisito Noynay, in the performance of his screening duties in violation of 49 C.F.R. § 1540.109.

The evidence in the record clearly demonstrates that Respondent interfered with Mr. Noynay's efforts to conduct his screening duties. While Respondent engaged in belligerent and disruptive behavior, he delayed Mr. Noynay from completing the secondary screening of Respondent. The evidence in the record is equally clear in showing that Respondent threatened Mr. Noynay by stating that he would try to have him fired from his job. Finally, Respondent assaulted Mr. Noynay by grabbing his identification badge and then using it to pull Mr. Noynay away from his position. Any and all of these actions are in violation of 49 C.F.R. § 1540.109.

Finding 3: The assessment of a civil penalty in the amount of $1,100 is appropriate.

Pursuant to 49 U.S.C. 46301[5], Respondent is subject to a civil penalty not to exceed $1,100 for each violation of a TSA regulation. Although 49 C.F.R. § 1503.233(j) gives the TSA Decision Maker the authority to "affirm, modify, or reverse" the initial decision of an ALJ, including reduction in the civil penalty assessment, I find that the penalty initially assessed by TSA, and upheld by the ALJ in this proceeding, is appropriate and justified.

Conclusion

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

Carol DiBattiste

Deputy Administrator

[5] "A person is liable to the United States Government for a civil penalty of not more than $1,100 for violating...chapter 449... of this title." 49 U.S.C. 46301(a).