U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of	)	
	)	
PAUL DUNN,	)	TSA Docket No. 06-TSA-0068
	)	
Respondent.	)	

FINAL DECISION AND ORDER

Paul Dunn, Respondent, appeals the initial written decision of the Administrative Law Judge (ALJ). The ALJ found that Respondent violated 49 C.F.R. § 1540.109 and 49 C.F.R. § 1540.105(a)(2) and assessed a civil penalty of $5,000.00 based on aggravating factors. For the reasons discussed below, Respondent's appeal of the ALJ's findings of fact with respect to the question of whether Respondent removed his shoes is granted, but the remainder of the appeal is denied. The initial decision that Respondent violated 49 C.F.R. § 1540.105(a)(2) and 49 C.F.R. § 1540.109 and the civil penalty is upheld.

Pursuant to the Transportation Security Administration's (TSA's) rules of practice for civil penalty actions, a party may appeal only the following issues: (1) whether each finding of fact made by the ALJ is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law by the ALJ is made in accordance with applicable law, precedent, and public policy; and (3) whether the ALJ committed any prejudicial errors during the hearing that support the appeal. 49 C.F.R. § 1503.233(b).

Initial Written Decision

The initial decision was issued on December 3, 2007. The ALJ's findings of fact are summarized as follows. Respondent was a ticketed passenger arriving at San Diego International Airport at approximately 6:30 a.m. on April 15, 2005. Respondent was in a hurry because he was late for his flight. When Respondent presented himself for screening, the security officer

explained that if he did not remove his shoes, he would be referred for secondary screening in accordance with standard operating procedures. Respondent did not remove his shoes and was escorted to the staging area for secondary screening. The security officer who escorted Respondent to secondary screening asked Respondent to sit down and remove his shoes. Respondent refused to be seated, was uncooperative, and asked to speak to a supervisor. The supervisory officer explained the secondary screening process to Respondent. Respondent became agitated and upset, raised his voice and continued to be uncooperative. His actions were threatening and intimidating and distracted security officers from their duties. Respondent cursed and stated that he was leaving the screening area. The supervisory officer explained that Respondent could not leave the area without completing screening and removed Respondent's boarding pass from his accessible property. Respondent took his bag, left the screening area, and entered the sterile area of the airport without completing the screening process.

The ALJ concluded that Respondent interfered with, threatened, and intimidated screening personnel in the performance of their screening duties in violation of 49 C.F.R. § 1540.109 and entered a secure area of an airport without completing the security measures applied to control access to such an area in violation of 49 C.F.R. § 1540.105(a)(2).

Respondent's Appeal as to the Findings of Fact

Respondent filed a notice of appeal on December 17, 2007 challenging the findings of fact on the following grounds: (1) that the ALJ's finding that Respondent did not remove his shoes was not supported by the evidence presented at the hearing; (2) that the ALJ failed to find that TSA stole Respondent's boarding pass; and (3) that the ALJ's findings regarding the credibility of the TSA witnesses and the lack of credibility of the Respondent were incorrect.

Upon review of the transcript of the hearing, the written testimony of the supervisory officer reveals that Respondent removed his shoes while in the secondary screening area. Therefore, I will overrule Joint Stipulation of Fact 7 and Finding of Fact 13 that state Respondent did not remove his shoes. The reference to Respondent's refusal to take off his shoes is overruled in Finding of Fact 25. The remainder of Finding of Fact 25 is upheld.

However, the fact that Respondent removed his shoes does not in any way mitigate the ALJ's findings regarding Respondent's behavior toward the TSA security officers while the officers were attempting to perform their screening responsibilities. Interference with screening does not have to be physical interference. The U.S. Court of Appeals for the Sixth Circuit found that interference with a security officer in the performance of his duties can occur "by actively engaging the screener with loud and belligerent conduct" that inhibits the "screener's duty to both thoroughly screen passengers and to do so in an efficient manner." Rendon v. TSA, 424 F.3d 474 (6th Cir. 2005). Upon review of the record in this case, the evidence supports the ALJ's conclusion that Respondent's raised voice, use of profanity, agitation, belligerence, and non-compliant attitude was threatening and intimidating to the security officers and prevented them in the performance of their screening duties.

The issue of whether the boarding pass was stolen by TSA is not relevant to any of the allegations contained in the Complaint and has no bearing on the determination as to whether Respondent violated TSA's security regulations. TSA's rules of practice permit a party to introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. Evidence that is irrelevant, immaterial, or unduly repetitious must be excluded. 49 C.F.R. § 1503.222(b). Respondent's testimony regarding the boarding pass is irrelevant and immaterial. The allegation raised in the Complaint is that Respondent exited the screening area

and entered the sterile area of the airport without completing the screening process. Respondent testified that he did so. (Tr. Vol. I at 212). His defense appears to be that he and the supervisory officer agreed that he could leave the screening area because he was not flying. (Tr. Vol. I at 212). That assertion was contradicted by the written testimony of the supervisory officer. The question as to whether TSA could remove the boarding pass from Respondent's accessible property is superfluous.

TSA requested that the Decision Maker specifically address the issue of the boarding pass by rejecting the first sentence of Finding of Fact 29. That sentence states, "A boarding pass is nothing more than a security document that (1) allows the holder to engage in the screening process, and (2) if successful in completing the screening process, allows the holder to enter the secure area of the airport where the boarding gates are located and board the aircraft for which an airline ticket has been purchased."

In addition to the issues that may be raised on appeal, the Decision Maker has authority to raise any issue, on the Decision Maker's own initiative, that is required for proper disposition of the proceedings. In such a circumstance, the Decision Maker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. 49 C.F.R. § 1503.233(j)(1). There is no evidence to support this finding of fact in the record of this proceeding. Because the finding is not supported by evidence and is irrelevant and immaterial to the allegation that Respondent exited the screening area without completing the screening process, I will overrule Finding of Fact 29. Further, since the issue is irrelevant and

immaterial, there is no need to consider this issue further in order to dispose of the proceeding and no arguments on this issue are required.[1]

Finally, Respondent challenges the ALJ's findings regarding the credibility of the witnesses. The ALJ found the testimony of the TSA witnesses to be credible and found the testimony of the Respondent to be not credible. The ALJ is in the best position to observe the demeanor of witnesses at a hearing, and, as a result, the ALJ's credibility findings deserve great weight and are entitled to deference, consistent with longstanding administrative practice. See, In the Matter of Nicholas J. Werle, FAA Order No. 97-20 (May 23, 1997), In the Matter of Warbelow's Air Ventures, FAA Order No. 2000-3 (Feb. 3, 2000), 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). Respondent was able to question all of the TSA witnesses. Upon review of the record, there is no reason to overturn the credibility determinations of the ALJ that led him to find that the Respondent violated TSA's security regulations.

Respondent's Appeal as to Prejudicial Error

Respondent asserts that the ALJ erred in granting TSA's motions to amend the Complaint and to protect sensitive security information (SSI). TSA's rules of practice require that all pre-hearing motions be resolved seven days before the hearing. 49 C.F.R. § 1503.218(e)(2). The ALJ permitted the Respondent the opportunity to reject the motion to amend the Complaint during the hearing. The transcript is clear that Respondent did not object. Likewise, the ALJ provided the Respondent with the opportunity to object to TSA's SSI motion during the hearing.

[1] TSA also requests that the Decision Maker address several issues that it characterizes as issues of first impression. Consistent with the TSA rules of practice as discussed, I do not find it necessary to address these issues in order to dispose of the proceeding.

The transcript is clear that while Respondent disagreed that the material itself was SSI, he did not object to the motion. Given that the ALJ provided the Respondent with the opportunity to object to these pre-hearing motions at the hearing, and that Respondent was able to view all SSI material pursuant to 49 C.F.R. § 1520.11(a)(4), I find that neither of these rulings by the ALJ prejudiced the Respondent.

Respondent challenges the ALJ's decision to deny Respondent's request for a copy of a surveillance video. While TSA's rules of practice permit motions during the hearing, the ALJ denied the motion as untimely. The ALJ decision is appropriate. The TSA rules of practice stipulate that the burden of proof is on the agency, except in two instances: the proponent of a motion has the burden of proof regarding the motion and a party that has asserted an affirmative defense has the burden of proof for the affirmative defense. 49 C.F.R. § 1503.224. The Respondent had the opportunity to request the tape prior to the hearing in order to present it as evidence to support his defense. Respondent failed to do so. Contrary to Respondent's assertions, it was not incumbent upon either the ALJ or TSA to determine whether a tape existed or to enter it into evidence since, in accordance with TSA's rules of practice cited above, the burden of proof was on Respondent to support his motion.

Respondent also complains that he was not provided counsel. There is no right to assigned counsel in TSA civil penalty proceedings, consistent with both TSA and Federal Aviation Administration civil penalty rules of practice. 49 C.F.R. § 1503.204. See, In the Matter of James K. Squire, FAA Order No. 99-6 at 5-6 (August 31, 1999). The hearing transcript reveals that the ALJ questioned Respondent's decision not to be represented by counsel. However, it was up to the Respondent to determine whether he wanted representation.

Even if a party chooses not to be represented by counsel, the procedural rules must be followed during the hearing and appeal. 49 C.F.R. § 1503.16(g).

Finally, Respondent questions the ALJ's authority to increase the civil penalty. In the original Complaint, TSA proposed a civil penalty in the amount of $1,000.00. TSA later amended the Complaint to increase the civil penalty to $2,500.00. In the initial written decision, the ALJ ordered a civil penalty of $5,000.00, of which $3,000 was assessed for violation of 49 C.F.R. § 1540.109 and $2,000 was assessed for violation of 49 C.F.R. § 1540.105(a)(2). Errata to Initial Decision and Order (Dec. 18, 2007). According to 49 U.S.C. § 46301, an individual may be assessed a civil penalty up to $10,000 per violation. TSA has issued guidance, available on its web site at www.tsa.gov, regarding the appropriate sanction for civil penalty enforcement actions. The guidance provides a range for violation of 49 C.F.R. § 1540.109 (interference with screening) as follows:

Physical contact - $1,500-$5,000
Non-physical contact - $500-$1,500
False Threats - $1,000-$2,000

The range provided for violation of 49 C.F.R. § 1540.105(a)(2) (entering or being present within a secured area, AOA, SIDA, or sterile area without complying with the systems, measures, or procedures being applied to control access to such areas) is $1,000-$3,000.

The guidance is meant to assist, not replace, the exercise of prosecutorial judgment in determining the appropriate civil penalty in a particular case. The guidance also discusses aggravating and mitigating factors that should be considered when assessing a civil penalty. These factors include, significance of the security risk created by the violation, nature of the violation (whether inadvertent, deliberate, or the result of gross negligence), past violation history, alleged violator's level of experience, and attitude of the alleged violator.

Under TSA's rules of practice, the ALJ has the authority to assess a civil penalty. The Complaint issued by TSA sets forth a proposed civil penalty amount, 49 C.F.R. § 1503.208(c), and the ALJ must issue an initial decision that contains the amount of any civil penalty found appropriate. 49 C.F.R. § 1503.232(a). The rules of practice do not require the ALJ to adopt the amount proposed in the Complaint. The TSA Decision Maker may review the penalty ordered by the ALJ to determine whether it is consistent with applicable law, precedent, and public policy. The TSA Decision Maker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the Decision Maker determines may be necessary. 49 C.F.R. § 1503.233(j). Thus, the Decision Maker may affirm, modify, or reverse the civil penalty or remand the issue of the civil penalty. The Decision Maker may also assess a civil penalty, but will not assess a civil penalty in an amount greater than that sought in the Complaint. 49 C.F.R. § 1503.16(h).

In this case, the ALJ has assessed a civil penalty for 49 C.F.R. § 1540.109 (interference with screening personnel in the performance of their duties) that is greater than the amount proposed in the Complaint and is above the sanction guidance. In the initial decision, the ALJ described the aggravating factors he relied upon when setting the civil penalty. He explained that the violation was deliberate. Respondent knew he was late for his flight and purposefully bullied TSA personnel in an attempt to expedite the screening process. After initially admitting his culpability, he subsequently denied any wrongdoing, relentlessly harassed TSA counsel, and sought to increase the expenditure of government resources in an attempt to get the Complaint dismissed. The ALJ stated that the Respondent's attitude was such that a higher penalty was warranted to make sure that Respondent did not repeat such conduct in the future. The ALJ also

noted that there were no mitigating factors that would support a lesser penalty. (Initial Decision and Order, Dec. 3, 2007).

The ALJ has provided a sufficient basis for the civil penalty amount and his determination is consistent with current law and policy.[2] I would add that the severity of the violation would also justify the penalty. Accordingly, there was no prejudicial error that would support an appeal of the initial decision regarding the amount of the civil penalty.

Conclusion

Based on the forgoing, Respondent's appeal of the ALJ's findings of fact regarding whether Respondent removed his shoes is granted, but the remainder of the appeal is denied. The initial decision finding that Respondent violated 49 C.F.R. § 1540.105(a)(2) and 49 C.F.R. § 1540.109 is upheld. The civil penalty ordered by the ALJ is upheld.

Either party may petition the TSA Decision Maker to reconsider or modify a Final Decision and Order. The rules of practice for filing a Petition for Reconsideration are described at 49 C.F.R. § 1503.234. 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 serve a copy of the petition on all parties. The mailing address for the Enforcement Docket Clerk is:

ALJ Docketing Center, U.S. Coast Guard
U.S. Customs House, Room 412
40 South Gay Street
Baltimore, MD 21202-4022
ATTN: Enforcement Docket Clerk

[2] The civil penalty imposed for the violation of 49 C.F.R. § 1540.105(a)(2) was within the sanction guidelines.

A party may seek judicial review of the Final Decision and Order as provided in 49 U.S.C. § 46110.

Dated: 6/3/2009

Keith G. Kauffman
Acting Deputy Administrator