

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: March 19, 1990

FAA Order No. 90-0010

FEDERAL AVIATION ADMINISTRATION,)
)
Complainant,)
)
vs.)
)
MERLIN R. WEBB,)
)
Respondent.)

Docket No. CP89WP0141

DECISION AND ORDER

The FAA (hereinafter referred to as "Complainant") has appealed from the oral initial decision of Administrative Law Judge Edward C. Burch, issued at the conclusion of the hearing held in this civil penalty action on December 5, 1989.^{1/} In his oral initial decision, the law judge held that Respondent Merlin R. Webb ("Respondent") violated section 107.21(a)(1) of the Federal Aviation Regulations (FAR) (14 C.F.R. §107.21(a)(1)), as alleged in the complaint, but he reduced the civil penalty from \$1,000 to \$100.

The facts in this case are not in dispute. On February 4, 1989, Respondent, a ticketed passenger on Southwest Flight 992 from Las Vegas, Nevada to Phoenix, Arizona, attempted to pass through a security screening checkpoint into a sterile area at McCarran International Airport in Las Vegas. At the screening

^{1/} A copy of the law judge's oral initial decision is attached to this decision.

point, airport security personnel discovered a decorative belt buckle containing an unloaded .22 caliber firearm in Respondent's carry-on luggage. No ammunition was found in Respondent's possession. Respondent stated at the hearing that he had carried the belt buckle on airplanes on previous occasions without any problem. He said he had never attempted to fire the gun or remove the gun from the belt buckle, and that he did not even know how to load it or separate it from the buckle. After the gun was discovered at the screening point, police officers were able to separate the gun from the belt buckle. Although it was not entirely clear to me from the testimony and evidence introduced at the hearing whether the gun was capable of being fired, the law judge found that the weapon could have been used. Respondent has not contested this finding.

The law judge found that, because the weapon was placed in a secured area and could have been used for an illegal purpose, there was a technical violation of the Federal Aviation Act ("the Act") and of section 107.21 of the FAR^{2/}. The only

2/ 14 C.F.R. §107.21 provides, in pertinent part:

§107.21 Carriage of an explosive, incendiary, or deadly or dangerous weapon.

(a) Except as provided in paragraph (b) of this section, no person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property --

(1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area[.]

violation alleged in the complaint was a violation of section 107.21 of the FAR. However, he found that the circumstances of this case did not warrant a \$1,000 civil penalty. The law judge, relying on section 13.16 of the FAR, which provides that any person who violates Title III, V, VI, or XII of the Act, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than \$1,000 pursuant to section 901 of the Act (49 U.S.C. app. §1471), concluded that \$1,000 was the maximum civil penalty for a violation of section 107.21(a) of the FAR. He stated that the maximum civil penalty was unwarranted in this case.

The law judge explained that the maximum penalty of \$1,000 might be appropriate in the case of "a weapon that might be used for an illegal purpose, and also if that weapon was loaded or if ammunition accompanied the weapon." In contrast, the weapon in this case was "part of a belt buckle for decorative purposes, it would have been extremely difficult to load it . . . there was no ammunition, and . . . Mr. Webb had no illegal intent." Accordingly, the law judge reduced the penalty from \$1,000 to \$100.

Complainant argues in its appeal brief that the law judge erred in reducing the sanction to \$100 because the maximum civil penalty in gun cases under the Act is \$10,000, not \$1,000, as stated by the law judge. Complainant cites section

901(d) of the Act,^{3/} which authorizes a civil penalty of up to \$10,000 for boarding or attempting to board an aircraft in air transportation with a concealed deadly or dangerous weapon which would be accessible during flight. Thus, Complainant concludes, it has the authority to impose a civil penalty of as high as \$10,000. Complainant argues that, since Respondent did not assert that he was unable to pay the \$1,000 civil penalty, the law judge's reduction was inappropriate.

For the reasons discussed below, I have determined that the law judge's reduction in the amount of civil penalty was not inappropriate. The initial decision is, therefore, affirmed.

First, it is true, as Complainant points out, that section 901(d) of the Act authorizes a civil penalty of up to \$10,000 for attempting to board an aircraft with a concealed weapon. However, Complainant did not allege in its complaint that Respondent violated section 901(d) of the Act. The only violation alleged in the complaint was of section 107.21(a)(1) of the FAR. Although the complaint asserts that Respondent is subject to a civil penalty of \$1,000 pursuant to section 901(d)

^{3/} Section 901(d) (49 U.S.C. app. §1471(d)), provides in pertinent part:

[W]however while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air operation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to civil penalty of not more than \$10,000 which shall be recoverable in a civil action brought in the name of the United States.

of the Act, Complainant failed to allege in the complaint that Respondent violated section 901(d). Only a violation of section 901(d) of the Act can support a civil penalty of up to \$10,000 pursuant to that section. On the other hand, a violation of section 107.21 of the FAR does subject the violator to a civil penalty, but the authority for that penalty is section not section 901(d), but 901(a)(1) of the Act, which authorizes a civil penalty of up to \$1,000 for "[a]ny person who violates . . . any provision of title III, IV, V, VI, VII, or XII, . . . or any rule, regulation, or order issued thereunder." (The citation of authority for part 107 of the FAR indicates that it was issued pursuant to statutory authority in titles III and IV of the Act.)

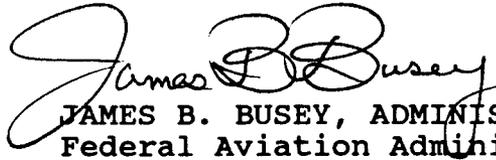
The provisions of section 901(d) of the Act and §107.21 of the FAR, although similar, are not identical. Specifically, section 901(d) of the Act prohibits carrying a "concealed" weapon, whereas section 107.21 of the FAR does not require that the weapon be concealed. Furthermore, section 901(d) of the Act covers persons aboard or attempting to board an aircraft, whereas section 107.21 of the FAR applies to anyone entering or attempting to enter a sterile area. In addition, section 107.21 of the FAR prohibits possession of an explosive or incendiary, as well as a deadly or dangerous weapon.

Complainant is bound by the complaint. Although Complainant probably could have alleged a violation of section 901(d) of the Act, it did not do so in this case. Further, Complainant did not allege concealment, an element of a

violation warranting a statutory penalty of up to \$10,000 under section 901(d). Accordingly, Complainant may not rely upon the authority of that section to seek a civil penalty of more than \$1,000.

In evaluating the law judge's reasoning in reducing the sanction from \$1,000 to \$100, I find nothing that warrants reversal or modification of his initial decision. He correctly stated that \$1,000 is the maximum civil penalty for a violation of section 107.21 of the FAR alone, and concluded that a maximum civil penalty is not warranted in this case. Given the statutory maximum of \$1,000 applicable in this case, I do not regard the law judge's reduction, in light of the mitigating factors, to be inappropriate. Although Complainant implies in its appeal brief that Respondent's inability to pay a civil penalty is the only factor which may justify the reduction in this case, Complainant has not referred to any agency policy that limits discretion.

THEREFORE, the initial decision issued by the law judge is affirmed. A civil penalty of \$100 shall be assessed.^{4/}


JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 16th day of March, 1990.

^{4/} Complainant, through its agency attorney, shall promptly prepare and issue an Order Assessing Civil Penalty, citing as authority this Decision and Order which I am issuing today. The Order Assessing Civil Penalty shall be effective upon service and shall remain in effect unless stayed by subsequent order.