

UNITED STATES DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
WASHINGTON, DC

Served: August 16, 1990

FAA Order No. 90-20

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In the Matter of: )  
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PAUL DEGENHARDT )  
\_\_\_\_\_ )

Docket No. CP89CE0389

DECISION AND ORDER

Complainant Federal Aviation Administration ("Complainant") has appealed from the oral initial decision issued by Administrative Law Judge Burton S. Kolko at the conclusion of the hearing held in this matter on January 11, 1990, in Kansas City, Missouri.<sup>1/</sup> In his initial decision, the law judge held that Respondent Paul Degenhardt ("Respondent") violated section 107.21(a) of the Federal Aviation Regulations (FAR) (14 C.F.R. §107.21(a))<sup>2/</sup>, as alleged in the complaint. He

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1/ A copy of the law judge's oral initial decision is attached.

2/ Section 107.21(a) provides:

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; and

(2) When entering or in a sterile area.

14 C.F.R. §107.21(a).

also ordered that the \$1,000 civil penalty sought in the complaint be assessed, finding that this sanction was warranted. However, the law judge further stated that, because passengers are not fully aware of their responsibility to ascertain the contents of packages which are carried onboard an aircraft, he would be prepared to vacate his decision upon appropriate motion if Respondent would publish a letter in a local newspaper in order to "raise awareness" on this issue. The law judge specified that the content of any such letter would be subject to the approval of the agency attorney, and should be published within 60 days of his decision. The record does not reflect whether Respondent has prepared such a letter, referred it to the agency attorney, or obtained its publication.

On appeal, Complainant argues that the law judge has no authority under the Rules of Practice (14 C.F.R. part 13, subpart G) to render his initial decision subject to a motion to vacate, and likewise has no authority to vacate his initial decision, because his jurisdiction terminated when he issued the initial decision. Complainant also notes that the Rules do not provide for reconsideration of an initial decision. Finally, Complainant argues that if the law judge's creation of an equitable remedy as a substitute for the civil penalty in this case is allowed to stand, it will set a dangerous precedent which will undermine the deterrent effect of the agency's civil penalty authority.

The facts of this case are not in dispute. On April 14, 1989, Respondent attempted to pass through a security checkpoint into a "sterile area"<sup>3/</sup> at Kansas City International Airport with a package containing an unloaded .3240 caliber Winchester rifle. At the time, Respondent and his wife were about to board a flight to San Francisco, California, to attend their son's wedding. Respondent testified that the package was a wedding gift for his son that a friend named Mr. Christian had asked Respondent to take with him to the wedding, and that until the weapon was discovered during x-ray screening at the security checkpoint, Respondent did not know what was inside the package. Respondent said he and his wife wondered why anyone would ask them to carry such a large package with them, and he asked his friend several times what was in the package, but Mr. Christian would not tell him. Respondent got the impression that Mr. Christian was concerned about mailing the package. Respondent stated that he and Mr. Christian (both of whom served as Air Police Squadron Commanders in the Air Force) knew it was illegal to carry a firearm onto an airplane.

This incident was investigated by FAA Special Agent Richard C. McMillen, who is Manager of the FAA's Civil Aviation Security Office (CASFO) at Kansas City International Airport.

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<sup>3/</sup> A "sterile area" of an airport is "an area to which access is controlled by the inspection of persons and property in accordance with an approved security program or a security program used in accordance with §129.25 [pertaining to foreign air carriers and operators]." 14 C.F.R. §107.1(b)(5).

Mr. McMillen testified that he spoke with both Respondent and Mr. Christian after the incident, and he had no reason to question Respondent's assertion that he did not know what was in the package at the time he attempted to enter the "sterile area". However, Mr. McMillen testified that it is "inherent" in boarding an aircraft that passengers should know what they are carrying on board, for purposes of safety.

As the law judge pointed out at the hearing, I held in FAA v. Schultz, FAA Order No. 89-0005 (November 13, 1989) that intent to carry a weapon is not a required element of a violation of section 107.21(a). That section is violated so long as a respondent knew or should have known that he had a weapon on or about his person, or in his accessible property.

Id. The law judge in this case acknowledged that a passenger's duty to inquire about the content of packages received from others "is seen in terms of the greater public good and that all reasonable efforts should be made by [a] passenger to ascertain what he is carrying on an aircraft even when he knows the other party." He found, and I agree, that Respondent should have taken further steps to ascertain the contents of the package he was carrying and, accordingly, he should have known he was carrying a weapon.

Upon consideration of the issue on appeal and the entire record in this case, I find that the law judge's offer to vacate his initial decision was improper. To the extent that the law judge's initial decision goes beyond making findings of fact and conclusions of law with regard to the alleged violation

before him, he exceeded his authority. Congress has vested the Administrator of the FAA with the authority to redress violations of the FAR by the assessment of civil penalties (see, 49 U.S.C. App. §1471 and §1475). The law judge's role in hearing this civil penalty action was simply to determine whether there was a violation of the FAR, and whether the civil penalty sought in the complaint was justified.

While I recognize that the law judge was well-intentioned,<sup>4/</sup> in light of his unequivocal findings that a violation occurred and that the civil penalty sought in this case was warranted, I cannot uphold his action. The Rules of Practice, which enumerate the powers of an administrative law judge, specify that a law judge may make findings of fact and conclusions of law and issue an initial decision (see, 14 C.F.R. §13.205(a)(9)), but they do not empower a law judge to condition the assessment of a civil penalty on subsequent remedial conduct by the respondent. The rule prescribing the content of a law judge's initial decision states that the initial decision shall include, among other things, an explanation of any exercise of the law judge's discretion and the amount of any civil penalty found appropriate (see, 14 C.F.R. §13.232(a)). The Rules clearly do not contemplate that

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<sup>4/</sup> Respondent expressed some concern that this violation would remain a matter of record "in the computer" and cause him problems in connection with future airline travel. However, the law judge assured him that there would be no such record, stating that if he were to vacate the initial decision, Respondent would not be "convicted of anything."

the law judge may fashion an entirely different remedy for a violation in place of a civil penalty. Similarly, the Rules of Practice do not authorize the law judge to "vacate" a finding of violation, or otherwise dismiss a complaint, upon a showing of subsequent remedial conduct.

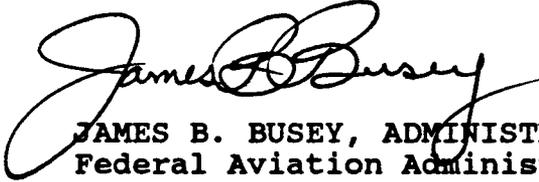
Even assuming that this novel remedy fashioned by the law judge was otherwise acceptable, the fact is that a law judge loses jurisdiction over a case upon the issuance of the initial decision, and thereafter has no authority to entertain a motion to vacate. Pursuant to 14 C.F.R. §13.232(d), the initial decision becomes an order assessing civil penalty unless it is appealed to the Administrator.<sup>5/</sup> Similarly, the Administrative Procedure Act (APA) also provides that, absent an appeal, the initial decision becomes the agency decision "without further proceedings." 5 U.S.C. §557(b). Neither the Rules of Practice nor the APA provides any intermediate step between the initial decision and an appeal to the agency which would allow the law judge to alter his initial decision. Under the Rules of Practice, only the Administrator may reverse or modify an initial decision. See, 14 C.F.R. §13.233.

THEREFORE, for the reasons discussed above, Complainant's appeal is granted. The initial decision issued by the law judge is affirmed to the extent that it finds a violation and

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<sup>5/</sup> Although the language of 14 C.F.R. §13.232(d) was changed as a result of the agency's re-promulgation of its procedural rules during the pendency of this case (see, 55 Fed. Reg. 27548 (July 3, 1990)), the meaning of that section has remained substantially the same.

upholds the agency's assessment of a \$1,000 civil penalty, and it is reversed to the extent that it provides Respondent with an opportunity to move that the initial decision be vacated.<sup>6/</sup> A civil penalty of \$1,000 is hereby assessed.<sup>7/</sup>



JAMES B. BUSEY, ADMINISTRATOR  
Federal Aviation Administration

Issued this 16th day of August, 1990.

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<sup>6/</sup> I have also considered whether any changes made in the Rules of Practice during the pendency of this case may have affected the result in this case, and have concluded that no change in the Rules is pertinent to this case. If Respondent believes that changes in the rules would have affected the outcome of this case, he may file a petition for reconsideration of this decision and order, pursuant to 14 C.F.R. §13.234. Such a petition for reconsideration must include a particularized showing of harm, citing the specific rule change (or changes) and its relevance to the challenged findings or conclusions. See, 55 Fed. Reg. 15110, 15125 (April 20, 1990). Although the filing of a petition for reconsideration does not normally stay the effectiveness of the Administrator's decision and order, under these circumstances, if Respondent files such a petition I will stay the effectiveness of this decision and order pending disposition of the petition.

<sup>7/</sup> Unless Respondent files a petition for reconsideration within 30 days of service of this decision (as described in footnote 6 above), or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. §1486), this decision shall be considered an order assessing civil penalty. See, 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. §§13.16(b)(4) and 13.233(j)(2)).