

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

[AIR CARRIER]

FAA Order No. 96-19

Served: June 4, 1996

Docket No. CP94**0140

DECISION AND ORDER

Complainant has appealed from [the administrative law judge's] oral initial decision rendered after an evidentiary hearing on December 15, 1994.¹ The law judge held that [the air carrier] violated 14 C.F.R. § 108.5(a)² by failing to carry out Section XIII.E.2(4) of its Approved Air Carrier Standard Security Program (ACSSP), when one of its contract security employees did not detect a test object during a monthly screening system operator test. Relying upon past civil penalty cases involving test object failures, the law judge rejected the \$10,000 civil penalty sought by Complainant in this case and instead imposed a civil penalty of \$1,000.

¹ An excerpt from the hearing transcript setting forth the law judge's oral initial decision is attached.

² Section 108.5(a)(1) of the Federal Aviation Regulations (FAR) provides:

Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:

- (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

Complainant on appeal argues that the law judge was in error when he reduced the civil penalty.

On June 15, 1993, an FAA special agent, with the assistance of another FAA employee, conducted a screening system operator test at [the air carrier's] domestic checkpoint at * * * by presenting a handbag containing an FAA-approved test object for x-ray screening. An FAA employee carrying the test object in her purse walked through the magnetometer at the checkpoint, while the FAA special agent observed from a distance. The [air carrier's] contract employee screener, who was looking at and talking to an associate before, during, and after the test, did not notice the test object on the x-ray screen during the test, and did not stop the FAA employee after her handbag went through the x-ray device. The manager for [the air carrier's] contract security company at that airport was then informed about the test object test and outcome, and the handbag was run through the x-ray device again. On this second trial, the test object was visible on the x-ray screen. The FAA special agent then tested the x-ray machine and determined that the equipment was operating according to standards.

At the time of the test, there was little traffic at the checkpoint. The FAA employee who carried the test object in her purse testified that she was the only person at the screening checkpoint at that time and that she did not see any other items coming out of the x-ray machine before or after her purse. (Tr. 28.) The screener had only been on duty at that position for about 10 minutes when the test was performed.

According to the screener's training records, the screener had received initial and recurrent training regarding detection of this type of test object. [The air

carrier's] contract security company notified the FAA by letter dated 2 days after the incident that the screener had taken and passed 600 proficiency tests since she was first certified in December 1991. (Respondent's Exhibit 1.) The security company noted further that after the incident, the screener received retraining at that checkpoint as well as counseling regarding the rules and regulations applicable during x-ray machine screening. (*Id.*)

The law judge held that "a preponderance of the evidence clearly shows that the test object was properly presented, should have been visible on the screen at the time, should have been recognized by the screener had she not been distracted and looking away from the x-ray machine." (Tr. 99.) He found that the "[the air carrier's] security system employees, contractors or agents" failed to detect the test object. (Tr. 100.) Moreover, he held that Section XIII.E.2 of [the air carrier's] ACSSP "requires that [the air carrier], acting through its employees, contractors and agents who perform screening functions shall detect each FAA-approved test object during each screening system operator test conducted by the FAA." (Tr. 100.) As a result, he held, [the air carrier] violated 14 C.F.R. § 108.5(a)(1) by failing to carry out that section of its ACSSP. (Tr. 100.)

Relying on Compliance/Enforcement Bulletin No. 92-3, agency counsel argued at the hearing that the appropriate civil penalty in this matter should be \$10,000. (*See* Complainant's Exhibit 4, Compliance/Enforcement Bulletin No. 92-3, dated July 21, 1992, *in* Compliance and Enforcement Program, FAA Order No. 2150.3A, Change 13, Appendix 1, pages 115-117.) In Compliance/Enforcement Bulletin No. 92-3, former FAA Administrator Thomas C. Richards replaced the agency's original test object sanction policy established in 1988. Under the original

policy, the sole factor in determining whether to assess either a \$1,000 or \$10,000 civil penalty was the carrier's prior success rate at detecting test objects at that checkpoint. The original policy provided for a \$1,000 civil penalty for an initial test object test failure at a particular checkpoint.³

In Compliance/Enforcement Bulletin No. 92-3, Administrator Richards explained the rationale for changing the original policy as follows:

Since the FAA began strong enforcement action for these cases, the aggregate detection rate among carriers has improved substantially. The industry has enhanced significantly its screener training and adopted an aggressive self-testing campaign. However, the rate of detecting test objects during FAA screening point evaluations has not improved significantly since 1990.

This bulletin establishes a new enforcement policy for these cases in an effort to further improve the detection rate. Under this policy, the FAA will place greater emphasis on identifying the causes of an apparent failure and the remedial action needed to improve compliance. . . . This policy is designed to encourage further improvements to the screening system and attain the ultimate goal of 100 percent detection.

Each failure to detect a test object will result in either administrative action or civil penalty action. The previous failures to detect test objects at specific checkpoints will be among the significant factors considered in deciding which type of enforcement action to use and determining the appropriate amount of any civil penalty, but will not be solely determinative of the sanction. The type of action, as well as any civil penalty amount, *will*

³ The history of the FAA's sanction policy for test object cases was described as follows in Compliance/Enforcement Bulletin No. 92-3:

In March 1988, the FAA adopted a strict civil penalty enforcement policy for air carriers' failure to detect simulated weapons, explosive devices, and other test objects during FAA screening checkpoint evaluations. Under this policy, each failure to detect a test object resulted in a civil penalty of \$1,000 or \$10,000, depending solely upon the carrier's previous success in detecting test objects at that screening checkpoint. On December 14, 1988, the Sanction Guidance Table in Appendix 4 of this order was adopted. It provided for a civil penalty in the maximum range (\$7,500 to \$10,000 for the largest air carriers) for failure to detect a test object.

FAA Order No. 2150.3A, Change 13, Appendix 1, page 115. See In the Matter of Delta Air Lines Inc., FAA Order No. 92-13 at 3-4, n.5, and at 8 (February 21, 1992), and In the Matter of Continental Airlines, FAA Order No. 90-18 at 14, n.7 (August 22, 1990) for descriptions of the former sanction policy in test object cases.

be determined only after consideration of all mitigating and aggravating circumstances surrounding the failure.

FAA Order No 2150.3A, Change 13, Appendix 1, pages 115-116 (emphasis added.)

The Compliance/Enforcement Bulletin provided further in pertinent part as follows:

5. If a civil penalty is determined to be the appropriate sanction, the amount of the penalty should be based largely on an assessment of the nature and causes of the failure to detect the test object and the prior enforcement history of the responsible carrier at the checkpoint. . . .

a. A civil penalty in at least the moderate range generally is appropriate. The civil penalty may be in the minimum range or the maximum range if unusual mitigating or aggravating circumstances exist.

c. When a failure results from egregious circumstances, a civil penalty in the maximum range generally is appropriate. . . . Examples of egregious circumstances include the following:

ii. Serious neglect of duties by screener or supervisor, such as deliberate or gross lack of attention to assigned tasks.

FAA Order No. 2150.3A, Change 13, Appendix 1, pages 118-119.

The law judge rejected the agency attorney's argument that a \$10,000 civil penalty was warranted under the circumstances. The law judge noted in his decision that FAA Order No. 2150.3A is not a published regulation and concluded that as a result, it is not binding upon him. (Tr. 101.) In contrast, he explained, past decisions of the Administrator in civil penalty cases do constitute binding precedent.⁴ Under the prior case law, such as In the Matter of Continental Airlines, FAA Order No. 91-55 (December 6, 1991), the law judge noted, a \$1,000 civil penalty is appropriate for the first test object test failure, and higher amounts between

⁴ Note that all of the prior decisions by the Administrator involving test object failures were decided prior to the issuance of Compliance/Enforcement Bulletin No. 92-3.

\$7,500 and \$10,000 are appropriate for any subsequent violations in near proximity in time. (Tr. 101-102.) The law judge held that while he regarded this violation to have resulted from a "serious neglect of duty,"⁵ he had no choice under precedent but to assess a \$1,000 civil penalty.

The law judge also disagreed with the agency attorney's application of this policy, as well as with the policy itself. Looking at the Compliance/Enforcement Bulletin as a whole, the law judge opined that "I don't believe that the intent of this document was that the entire history and enforcement success of any particular carrier should be completely ignored, even if one or more of the factors in paragraph 5.c. should exist." (Tr. 102-103.) He noted further that "I don't know that that conduct [the screener's neglect of her duties while engaged in conversation] can be completely imputed to the carrier and can completely vitiate a very successful and strong endeavor to carry out a very good screening and security program." (Tr. 104.) The law judge concluded that the neglect in this case was that of the screener and not of the company which had conducted a proper training program. He said:

I believe that fining the carrier the maximum amount doesn't really hit the screener any more than if we fined the carrier in the same fashion we have in the past under the published decisions of the Administrator. And I believe that even those penalties were obviously enough to make the carrier bring some pressure on the screener, either fire them or retrain them. And I believe that this is all that the carrier can be expected to do in these cases.

(Tr. 105.) Thus, the law judge concluded, the maximum civil penalty sought by Complainant in this matter was not only unwarranted, but was not required by the

⁵ (Tr. 102.) The law judge stated the screener's conduct could not be condoned, especially because she had been on duty for only 10 minutes. Consequently, there was no issue of fatigue or blurred vision caused by looking at the screen for a long period of time. The only cause of the failure to detect the test object was the screener's turning away from the screen to talk to an associate. The law judge considered that conduct to be "absolutely inexcusable." (Tr. 104.)

current policy as set forth in the Compliance/Enforcement Bulletin. In effect, he substituted his judgment as to what constitutes an efficient deterrent for that of the agency.

On appeal, Complainant argues that it was error for the law judge to reduce the civil penalty from \$10,000 to \$1000. Complainant points to In the Matter of Northwest Airlines, Inc., FAA Order No. 90-37 (November 7, 1990) and maintains that the law judge was subject to the policy and guidance expressed in Compliance/Enforcement Bulletin No. 92-3.⁶

As Complainant correctly points out, although law judges are not agency personnel, and therefore are not bound by internal agency orders, they are nonetheless subject to agency policy. In In the Matter of Northwest Airlines, Inc., it was stated:

Order 2150.3A was "prepared to provide compliance and enforcement program and procedural guidance for all agency personnel." Order 2150.3A at page i. Because the law judges who preside over these cases are not FAA personnel, they are not expressly required by the provisions of that order to follow that guidance. Nonetheless, concerning matters of agency law and policy, administrative law judges are subject to the agency.

⁶ [The air carrier] wrote in its reply brief that "an administrative law judge is not bound by internal FAA policy or procedures or guidelines, but only to valid legal interpretations of the Federal Aviation Administration." (Reply Brief at 2). Although [the air carrier] did not provide any support for this statement, it appears that [the air carrier] is referring to similar language set forth in 49 U.S.C. § 46301(d)(5)(C) ("When conducting a hearing, under this paragraph the Board . . . is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation to be arbitrary, capricious or otherwise not according to law." *Id.* This statutory language specifically applies to the National Transportation Safety Board and its law judges, not to the Administrator and the Department of Transportation (DOT) law judges.

What the outcome would be if this language was applicable to the Administrator and the DOT law judges is not addressed in this decision since neither party has briefed the issue.

Id. at 8. If the law judge does not follow agency policy, the agency may impose that policy by reversing the law judge's decision on appeal. Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984).⁷

This case involves a change in the agency's announced sanction policy. An agency, "to avoid abuse of its discretion [must] either adhere to or explain its departure from earlier clearly articulated criteria constituting self-imposed limits on its discretion." Airport Parking Management v. NLRB, 720 F.2d 610, 615 (9th Cir. 1983). The FAA did provide a reasoned basis for its new sanction policy when it issued Compliance/Enforcement Bulletin No. 92-3.⁸ As was explained in Compliance/Enforcement Bulletin No. 92-3, the sanction policy revision was designed to bring about *further* improvements in the screening system by placing greater emphasis on investigating the causes of test object test failures and taking all mitigating and aggravating factors into account in setting the penalties. FAA Order No. 2150.3A, Change 13, Appendix 1, page 115.

[The air carrier], in its reply brief, challenges the wisdom of the new policy. It argues that there are "compelling policy reasons why the established precedent [\$1,000 civil penalty for initial test object test failure] should remain." (Reply Brief at 2.) According to [the air carrier], the maximum civil penalty of \$10,000 per

⁷ As was explained in the preamble to the Rules of Practice in Civil Penalty Actions, the Administrator, on review of a law judge's initial decision applies agency law or policy. See In the Matter of Northwest Airlines, Inc., FAA Order No. 90-37 at 9, n. 6 (November 7, 1990), quoting a portion of the preamble to the Rules of Practice in Civil Penalty Actions published at 55 Fed. Reg. 15110, 15114 (April 20, 1990).

⁸ The civil penalties provided for in that Bulletin were authorized by Congress. Congress granted the Administrator broad discretion to assess a civil penalty not exceeding \$10,000 per violation against persons operating aircraft for the transportation of passengers or property for compensation (except for an airman serving in the capacity of an airman). 49 U.S.C. § 46301(a)(2).

violation is not justified for test object test failures because presumably test objects, unlike actual weapons, lack the potential to endanger lives or property. [The air carrier's] argument is unpersuasive. When a screener fails to detect a test object during an FAA screening operator test, it is simply fortuitous that this was only a test. The screener's lack of skill or negligence or equipment problems, resulting in a failure to detect a test object, could just as easily result in a failure to detect an actual weapon.

[The air carrier] argues:

The imposition of a maximum fine for an initial violation following a long record of exemplary compliance may actually prove to be a disincentive to screening personnel, as there is no warning of any particular problem and no wake-up call such as the \$1000 civil penalty for an initial violation.

(Reply Brief at 3.) However, the new sanction guidance does not call for a \$10,000 civil penalty for each and every test object test failure, regardless of a carrier's previous history. Instead, the policy provides for penalties ranging from administrative action⁹ to civil penalties from the minimum to the maximum range, depending upon the totality of the circumstances. As for maximum penalties, the Compliance/Enforcement Bulletin No. 92-3 states, "When a failure results from egregious circumstances, a civil penalty in the maximum range generally is appropriate." FAA Order No. 2150.3A, Change 13, Appendix 1, page 118.

The law judge expressed his belief that the higher penalties provided for in the new policy may not be necessary. Complainant argues on appeal that the law judge partially based his decision on his belief that air carriers had improved their detection rate in the last two years, and there is no support for that belief in the

⁹ See FAA Order No. 2150.3A, Change 13, Appendix 1, page 117, para. 4.

record. Complainant is correct that the record does not contain any evidence to support the law judge's belief.¹⁰

The law judge also explained that the individual screener should bear some responsibility for the test failure. However, be that as it may, the air carrier remains responsible for the quality of security screening provided by its contractors, and it is up to the carrier to ensure the high quality of its screeners and security training programs.

In this case, egregious circumstances were present. The test failure was a direct result of the inexcusable inattentiveness of the screener when there was light traffic at that checkpoint and when the screener had only been at her station for 10 minutes. For this reason, the \$1,000 civil penalty assessed by the law judge in this matter cannot be affirmed. However, at the same time, the aggravating factors present here do not warrant the imposition of the maximum civil penalty of \$10,000 sought by Complainant. Under the totality of the circumstances of this case, including [the air carrier's] success rate at detecting test objects at that checkpoint before this incident and the screener's serious neglect of duties, \$7,500 is an appropriate civil penalty.

[The air carrier] argues that under Compliance/Enforcement Bulletin No. 92-3, only an administrative action is appropriate. [The air carrier] points to the screener's high success rate in detecting test weapons, and the absence of any flaws in the training records. It also claims that the screening operator displayed a "constructive attitude." [The air carrier] insists that no aggravating factors were

¹⁰ The law judge explained that it had been about two years since his office had had many test object cases. That statement is insufficient to support the law judge's conclusion that the detection of test objects had improved in the preceding two years.

present, arguing that “the screener had momentarily turned to speak to or respond to a person behind her . . . ,” and that “. . . it is only human nature to turn and respond to someone who says something to you” (Reply Brief at 4.)

Consequently, [the air carrier] argues, there was no deliberate or gross lack of attention to assigned tasks. [The air carrier] argues:

An act that affirmatively requires a lack of attention would constitute such a gross lack of attention, such as reading a magazine or wandering away from the screening mechanism. Merely turning to respond to a comment is not such behavior and should not be considered a gross lack of attention.

(Reply Brief at 5.)

Preliminarily, it should be noted that there is no evidence in the record that the screener turned to respond to another person. More importantly, contrary to [the air carrier’s] assertion, turning away from the screening checkpoint *by a screener* to chat with another person and in the process, becoming oblivious to persons going through the checkpoint, does constitute serious neglect. Screeners are at the front line of aviation security, and constant vigilance is necessary. As a result, when a screener turns away from the checkpoint and is so deeply involved in conversation as to not even notice someone walk up to and go through the checkpoint, that screener has demonstrated a gross lack of attention to duties. Gross lack of attention to duties is an example of serious neglect, and in cases involving serious neglect of duties by a screener, a civil penalty in the maximum range is generally appropriate.

After this incident, [the air carrier’s] security contractor released the screener from duty immediately and then retrained her. The law judge apparently did not consider the corrective action in this case as a factor warranting the

reduction of the civil penalty. Complainant in its appeal brief noted that the reduction of an otherwise reasonable civil penalty may be appropriate when there is sufficient evidence of swift or comprehensive corrective action, citing In the Matter of Delta Air Lines, Inc., FAA Order No. 92-5 at 6 (January 6, 1992). Nevertheless, Complainant insisted that in this case, the corrective action taken did not warrant such a reduction. [The air carrier] does not argue that the corrective action here was sufficient to warrant a reduction in a reasonable civil penalty.¹¹

The corrective action taken in this instance does not justify reducing the civil penalty below \$7,500. Simply reviewing procedures and preexisting responsibilities with employees after an incident does not justify a reduction of a reasonable civil penalty. In the Matter of Delta Air Lines, Inc., FAA Order No. 92-5 at 7 (January 15, 1992); In the Matter of [Airport Operator], FAA Order No. 91-41 at 7 (October 31, 1991). In In the Matter of [Airport Operator], FAA Order No. 91-41, an employee of the airport operator's tenant failed to challenge FAA security agents who walked through the terminal and out onto the air operations area. The Administrator held that the corrective action taken by the airport operator -- reviewing procedures with the employee and with airport tenants after the incident -- was insufficient to justify a reduction of a reasonable civil penalty. *Id.*, at 7. In In the Matter of Delta Air Lines, Inc., FAA Order No. 92-5, in contrast, the Administrator was impressed by the comprehensiveness and swiftness of the corrective action taken by the respondent. In that case, also involving unauthorized access to an air operations area gained by FAA special agents, a memorandum was

¹¹ Instead, [the air carrier] argues that the maximum civil penalty is on its face unreasonable for an initial civil penalty. (Reply Brief at 3.)

issued the day of the incident and was reviewed at all staff briefings that day.¹² The
[The carrier's]
action taken by [A] security contractor in the case at bar in releasing the
negligent screener on the day of the incident and subsequently retraining her may
have been swift, but was certainly not so comprehensive as to justify a reduction of
civil penalty.

Therefore, as explained in this decision, the law judge's decision to reduce
the civil penalty to \$1,000 is reversed, and a civil penalty of \$7,500 is hereby
assessed.¹³



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 3rd day of May, 1996.

¹² See also In the Matter of Westair Commuter Airlines, Inc., FAA Order No. 93-18 at 11-12 (June 10, 1993), in which the Administrator found that the swift and comprehensive corrective action taken by the respondent justified a reduction in sanction.

¹³ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1994).