

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

**In the Matter of: SHELLEY LOUISE CONGER**

FAA Order No. 2007-8

Docket No. CP04WP0031  
DMS No. FAA-2004-20530<sup>1</sup>

Served: August 2, 2007

**DECISION AND ORDER**<sup>2</sup>

Respondent Shelley Louise Conger has appealed the written initial decision of Administrative Law Judge (ALJ) Richard C. Goodwin.<sup>3</sup> In that decision, the ALJ held that while Shelley Conger was a passenger on board an American Airlines flight, she violated 14 C.F.R. § 121.580<sup>4</sup> and 49 U.S.C. § 46318,<sup>5</sup> by assaulting a flight attendant

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<sup>1</sup> Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing through the Department of Transportation's Docket Management System (DMS). Access may be obtained through the following Internet address: <http://dms.dot.gov>.

<sup>2</sup> The Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: [http://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/pol\\_adjudication/AGC400/Civil\\_Penalty/](http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/). In addition, Thomson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the website.

<sup>3</sup> A copy of the ALJ's written decision is attached, but is not included on the FAA website.

<sup>4</sup> It is provided in 14 C.F.R. § 121.580, as follows:  
No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part.

<sup>5</sup> It is provided in 49 U.S.C. § 46318(a), as follows:  
(a) General Rule. – An individual who physically assaults or threatens to physically assault a member of the flight crew or cabin crew of a civil aircraft or any other individual on the aircraft, or takes an action that poses an imminent threat to the safety of the aircraft or other individuals on the aircraft is liable to the United States for a civil penalty of not more than \$25,000.

and interfering with the performance of members of the flight crew. The ALJ assessed a \$6,100 civil penalty against her for these violations.

On appeal, Shelley Conger argues that the ALJ's findings of fact are not supported by a preponderance of the evidence. She argues that the ALJ failed to consider the testimony presented by her witnesses and that the internal conflicts in the testimony presented by Complainant's witnesses made that evidence unreliable. As a result, she argues, the ALJ made erroneous credibility assessments in favor of Complainant's witnesses. She also argues that the \$6,100 civil penalty is grossly disproportionate to penalties assessed in similar cases, and consequently, is contrary to applicable law, precedent and public policy. After examining the entire record in this case, this appeal is denied, and the ALJ's thorough and well-reasoned initial decision is affirmed.

### **I. The Pleadings.**

Complainant alleged in the complaint that while Shelley Conger was a ticketed passenger on board American Airlines, Flight 823, on January 6, 2004, from Miami, Florida, to Los Angeles, California, she chased a flight attendant, grabbed and pulled on the belt of the flight attendant's apron, and attempted to hit the flight attendant.

Complainant alleged that Shelley Conger became verbally abusive, further disrupting the flight and the other passengers. Complainant alleged that this behavior interfered with the performance of the crewmembers' duties and "constituted a threatened physical assault and/or physical assault on a cabin crewmember." (Complaint, § I, ¶ 6.) As a result, Complainant alleged, Shelley Conger violated 14 C.F.R. § 121.580 and 49 U.S.C. § 46318. Complainant sought a \$6,100 civil penalty for these violations.

In her answer, Shelley Conger admitted only that she had been a ticketed passenger on board American Airlines Flight 823, from Miami, Florida, to Los Angeles, California, on January 6, 2004, and denied the other allegations. Her affirmative defenses included the following:

1. The flight crew was tired and understaffed.
2. The flight attendant “failed to conduct her activities and ... perform her job responsibilities and duties in a professional, competent and courteous manner, was abusive to and upset a minor child whom she [Shelley Conger] was accompanying and caring for..., and lied to her fellow flight attendants, the flight crew and law enforcement authorities about the subject incident having occurred when such incident, as described by her, never occurred.” (Answer at 4-5.)
3. The flight attendant made up the incident to retaliate against Shelley Conger for complaining to the purser about the flight attendant’s rude conduct.
4. The sanction sought by Complainant is excessive.

## **II. The Evidence**

At the hearing, American Airlines flight attendants Melanie Imel and Patricia Haas testified for Complainant. Mark Hunziker, a passenger and percipient witness, also testified for Complainant. Shelley Conger testified on her own behalf, as did her brother, Jay Conger, and his wife, Nadege Conger, who were traveling with her that day.<sup>6</sup>

Three flight attendants, including Haas and Imel, were working in first class on that flight. (Tr. 208, 222.)<sup>7</sup> Haas was the purser, which means that she was the crew

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<sup>6</sup> For clarity and brevity, in the remainder of this decision, Respondent will be referred to as Shelley Conger or Conger. Her brother and sister-in-law will be referred to by their first and last names, Jay Conger and Nadege Conger, respectively.

<sup>7</sup> The other flight attendant, Vanessa Moreno, was the galley flight attendant. The galley flight attendant gets the carts ready. According to Haas, Moreno did not have a view of the incident from the galley. (Tr. 208.) (*See also* Exhibit R-8, in which Moreno stated that she was “not involved” and had been in the galley at the time of the incident.)

coordinator and manager on the flight. (Tr. 187.) An additional three flight attendants worked in coach. Six flight attendants is the minimum number of flight attendants for this type of aircraft. (Tr. 222.)

Flight 823 was on a Boeing 767-300 ER (extended range). (Tr. 22, 23).<sup>8</sup> The Boeing 767-300 ER's first class cabin has five rows of six seats, numbered Rows 2 through 6. On the left side of the first class section are the A (window) and B (aisle) seats. Each center section row has 2 seats, identified as Seats D and G. There are two seats in each row in the right section, identified as the H (aisle) and J (window) seats. The left aisle is referred to as the AB aisle, and the right aisle is known as the HJ aisle.

Shelley Conger, a fundraiser and manager for the Children's Hospital in Los Angeles, was seated in Seat 5J, the window seat. (Tr. 297.) Her 4 ½ year old niece, Zoe, was seated next to her in Seat 5H. (Tr. 297, 375-376.) Across the HJ aisle from Zoe in Seat 5G, was Zoe's mother, Nadege Conger. (Tr. 375, 376.) Nadege Conger's 2-year old son was seated next to her in Seat 5D (Tr. 376), and across the AB aisle in Seat 5B was Jay Conger, Shelley Conger's brother, who is a university professor. (Tr. 298, 348, 376). A former Eastern Airlines flight attendant, Mark Hunziker, was seated in the window seat, Seat 5A, next to Jay Conger. (Tr. 357.)

The Congers were returning to California from Florida where they had been visiting Shelley and Jay Conger's ailing elderly parents.<sup>9</sup> Shelley Conger had bronchitis and a fever. (Tr. 295, 349.) Zoe had an ear infection, causing her to feel ill. (Tr. 350.)

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<sup>8</sup> This aircraft has 30 seats in first class and 182 seats in coach. (Tr. 85.) On this particular flight, the first class section was full, and the coach section was full or nearly full. (Tr. 85, 222.)

<sup>9</sup> Their father died shortly after this flight.

The witnesses' accounts of the encounters between Shelley Conger and Imel varied. Their descriptions of the events leading to this civil penalty action follow.

1. Shelley Conger's First Encounter in the Galley with Imel. Early in the flight, Zoe Conger needed to use the lavatory. The two lavatories for the first class section on this aircraft are located in the front left side of the cabin. To get to these lavatories from Seats 5H and 5J, Zoe, accompanied by her aunt, Shelley Conger, walked up Aisle HJ to the galley and crossed through the galley area from the right to the left sides of the aircraft. (Tr. 86, 224, 300.) The flight attendants were preparing the carts for the beverage service at the time. Shortly after Shelley and Zoe Conger returned to their seats, Zoe needed to use the lavatory again, and Shelley Conger again took her niece through the galley area to the lavatories. (Tr. 301.)

After Zoe used the lavatory the second time, they crossed through the galley area where Imel was fixing drinks on a countertop. Imel turned around and, not realizing that Zoe was there, stepped on Zoe and spilled the drinks that she was carrying on her. (Tr. 45-46, 93.) Imel testified that she told Shelley Conger "you need to go sit down,"<sup>10</sup> and Shelley Conger "kind of looked at me and ... huffed and turned around and went and sat down." (Tr. 46, 93, 94.)

Conger remembered this exchange differently. According to her, Imel said very loudly, "Would you two stop going to the bathroom." (Tr. 302-303.) Shelley Conger testified that she was startled and replied "I'm sorry. I have a sick child with me who needs to go to the bathroom." (Tr. 304.)

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<sup>10</sup> Haas also was in the galley. She heard Imel tell Shelley Conger that she must take her seat because she was interfering with the service area. (Tr. 189-190.)

After they returned to their seats, Haas spoke with Shelley Conger. Conger testified that she told Haas about what had happened in the galley, and that Imel had been “mean” and had yelled at her. Conger testified that she explained that she would need to take her sick niece to the bathroom again. (Tr. 304.)

2. Imel’s Encounter with Shelley Conger, at Seat 5H. About 3 to 5 minutes later, Imel served Shelley and Zoe Conger their drinks. Imel testified that she tried to apologize for being curt in the galley because she knew that Shelley Conger had not taken the direction to go to her seat well. (Tr. 46-47.) According to Imel, she offered this apology of her own volition; Haas did not direct her to apologize. (Tr. 94.) Imel testified that Conger did not let her finish but instead started to yell, “You ought to be sorry. We paid \$4,000 for these tickets.” (Tr. 48, 95.) Imel testified that she was alarmed, and, following her training, she walked away, up the HJ aisle toward the galley. (Tr. 50, 97.) Imel testified that Conger yelled at her to come back. (Tr. 51.)

Shelley Conger recalled this brief conversation differently. According to Conger’s account, Imel did not apologize but instead stated that the crew was short three flight attendants. Conger testified that she told Imel that she had a sick child and that they needed to be able to go to the bathroom. However, she testified, Imel “basically cut me off, gave me this very nasty, angry look, and turned her back on me and walked away very quickly.” (Tr. 307.)

3. Shelley Conger’s Second Encounter in the Galley with Imel. As Imel walked away, Shelley Conger unbuckled her seatbelt, got out of her seat, and followed Imel up the HJ aisle to the galley. (Tr. 307.) According to Conger, she told Imel in a firm voice

that she had a sick child who needed to use the bathroom and that “I thought her customer service was very poor.” (Tr. 308.)

Imel, in contrast, recalled that when Shelly Conger caught up with her in the galley, “Conger had her finger in my face, and she was yelling I am the rudest, most unprofessional ... How dare I walk away.” (Tr. 54, 101-102.) Imel recalled that Haas tried to get between Conger and herself, and told Conger that she needed to be calm and sit down. (Tr. 54.) Imel testified that she was “alarmed,” felt her blood pressure going up, and decided to walk away. (Tr. 55.) Imel testified that she had been trained to remove herself from such a situation, and let another flight attendant handle it. (Tr. 55-56.)

4. Shelley Conger’s Encounter in the AB Aisle with Imel. Imel testified that she walked away from Conger, going through the galley from the right to the left side of the airplane, and then down the AB aisle, intending to go to the coach section to calm herself. (Tr. 57.) Shelley Conger followed her. According to Haas, Conger ran after Imel. (Tr. 196; Complainant’s Exhibit 1 at 3.) Shelley Conger denied running, but acknowledged walking quickly down the aisle after Imel. (Tr. 309.)

Conger testified that she followed Imel to get her attention:

because she hadn’t heard anything that I said, to tell her that I needed to be able to take the child to the bathroom. We had approximately five more hours on the flight and I wanted to make sure she knew that I was going to have to go to the bathroom.

(Tr. 309.)

According to Imel, as she reached Seats 5A and 5B, she felt a hand go down her back, grab her apron ties, and yank back on them, pulling her midsection backwards. (Tr. 57-60.) Imel said that she turned around. Shelley Conger, Imel said, had one hand in her

face and one hand on her apron ties. Imel said that with one hand, she was deflecting Conger's hand from her face, and with the other, she was trying to get Conger to release her apron strings. Imel testified that she said repeatedly, "Let me go." (Tr. 60-62.)

Regarding this encounter, Haas testified that she saw Shelley Conger grab the back of Imel's smock and "flip" Imel around. (Tr. 196.) She testified that she saw Conger reach out and grab Imel's smock in the shoulder blade area – not the apron strings. (Tr. 216-217.) She testified that she saw Imel put her hands up to her face and yell, "Don't touch me." (Tr. 196.)

Hunziker testified that he saw Shelley Conger chase Imel down the AB aisle. He saw Conger lunge at Imel, grab Imel's apron string in the back of her apron, and yank Imel around when they were at Seats 4B and 4C.<sup>11</sup> (Tr. 241, 253-54.) He testified that Conger was yelling at Imel, and that Imel put her hands up in the air defensively and cried "Don't touch me." (Tr. 241-245.) He stated that the yanking either spun Imel around, or that Imel turned around in response to the yanking. (Tr. 254, 260.)

Imel testified that Haas tried to separate Conger from Imel, and warned Conger that she could be arrested for what she was doing. (Tr. 62, 64-65.) Haas testified that she told Conger that she needed to sit down immediately, and that she had committed a Federal offense. (Tr. 198.) Hunziker testified that Haas got between Conger and Imel and warned Conger that if she did not stop, she would be arrested. (Tr. 245.)

Imel said that she used both her hands to force Shelley Conger to release her grip. (Tr. 65.) Imel testified that "I was never let go of by Ms. Conger at any time in that interaction until I broke her free of my body." (Tr. 123.)

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<sup>11</sup> This aircraft does not have a Seat 4C. Hunziker should have said Seat 4D.

Shelley Conger recollected the encounter with Imel in the AB aisle differently. She testified that she followed Imel down the AB aisle. She said that she got Imel's attention by saying "excuse me" loudly several times. She said that she reached out to tap Imel on the shoulder. She also said that she tapped Imel somewhere in the middle of her body. She denied grabbing or pulling Imel's apron strings or putting her finger in Imel's face. (Tr. 311-313, 336.) Shelley Conger explained that as she reached out to touch Imel, Imel turned around and put her hands up. Conger said that she did not know why Imel put her hands up, and that Imel turned around on her own accord. (Tr. 313, 335-336.) Shelley Conger testified that she did not remember actually touching Imel but that she did reach out to tap Imel. She testified that she did not strike Imel or spin her around. (Tr. 326.)

Jay and Nadege Conger testified that they did not see Shelley Conger touch Imel. Jay Conger stated that he saw his sister reach out to touch Imel, making a relatively benign motion, but that he did not see her actually touch Imel. (Tr. 353-354.) Jay Conger said that he did not know why Imel turned around, and his wife testified that she thought Imel turned around after hearing the noise that Jay Conger made. (Tr. 370, 392.)

Jay Conger tried to stop his sister as she chased Imel down the AB aisle. Haas testified that the gentleman in Seat 5B (Jay Conger) got half-way out of his seat and grabbed Shelley Conger's leg while trying to get Shelley Conger away from Imel. (Tr. 197.)<sup>12</sup> Shelley Conger recalled that her brother did not grab her but instead put his hand on her leg to stop her and that he did not get out of his seat. Shelley Conger testified that her brother asked her, "What are you doing?" (Tr. 313-314.) Jay Conger testified that as

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<sup>12</sup> Hunziker, who was sitting next to Jay Conger, testified that he did not remember anyone, including Jay Conger, grabbing Shelley Conger. (Tr. 247.)

his sister approached, he put his hand out, touched her leg but did not grab it, and said “Stop.”<sup>13</sup> He recalled asking her what she was doing, and she replied that she had to ask the flight attendant something. He testified that he then told his sister that it would be a good idea for her to sit down. (Tr. 352-353.)<sup>14</sup>

5. After the Shelley Conger-Imel Encounter in the AB Aisle. After this incident, Imel went to the coach section. She testified that when she reached the mid-galley, she was shaking. The other flight attendants, she said, tried to calm her down. Imel testified that she was shaking so badly that she dropped the cup of water that a flight attendant gave her. (Tr. 68.) Haas arranged for Imel and a flight attendant in the coach section to exchange positions for the remainder of the flight. (Tr. 69-70, 202.)

Imel testified that she did not sustain any physical injuries but that she was extremely nervous throughout the remainder of the flight. She said “I was required to work in a performance and safety position and I didn’t feel like I was completely there.” (Tr. 184.) She stated that her state of mind would have affected her ability to cope with an in-flight emergency, had there been one. (Tr. 184.)

Shelley Conger returned to her seat after the encounter with Imel in the AB aisle. According to a statement written after the incident by her sister-in-law, Shelley Conger returned to her seat shaken and angry. (Tr. 394.)

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<sup>13</sup> If Jay Conger, seated in Seat 5B, reached out and touched or grabbed his sister’s leg, then during this encounter, Shelley Conger must have reached the fifth row, and Imel must have passed that row.

<sup>14</sup> He explained that he told his sister to sit down because passengers should not be walking around when the seat belt sign is lit as it was at the time. (Tr. 369, 371.) He stated that he unbuckled his seat belt and stood up after the encounter. He added that the purser later thanked him “for ... bringing the ... encounter to ... an end.” (Tr. 352.)

Haas later went to talk to Shelley Conger. According to Haas, Shelley Conger asked if she could apologize to Imel. Haas testified that she asked Shelley Conger, “Do you realize in this day and age you cannot do things like that?” (Tr. 199-200.)

Regarding this conversation, Shelley Conger testified that when Haas came to see her, Haas “apologized to me again,” and said that the crew was tired and that Imel had been on a late flight the night before. (Tr. 316.) Conger testified that Haas told her that she would most likely be interviewed by airport security when they arrived at LAX. (Tr. 317.) She testified that she asked Haas if she could apologize to Imel for getting out of her seat and following Imel. (Tr. 325.)

Haas notified the captain about the incident immediately afterwards. (Tr. 146-147, 203.) About ten minutes after the encounter with Conger in the AB aisle, Imel went up to the cockpit to see the captain, who had summoned her. (Tr. 147.) The captain asked her how she was doing and whether she wanted him to turn the flight around, land the plane, and have Conger removed. Imel responded that she did not want him to land the airplane. (Tr. 148.)

After the flight landed, the local police and the FBI interviewed Shelley Conger. (Tr. 319-322.)

### **III. The Initial Decision**

The ALJ discussed the evidence, particularly the testimony of Imel, Haas and Shelley Conger, in considerable detail in his initial decision. He explained that he had resolved factual questions in favor of Complainant because he found Imel, Haas and Hunziker to be credible witnesses, while in his judgment, the Congers’ accounts, in several respects, strained credulity.

The ALJ held that Shelley Conger violated 14 C.F.R. § 121.580 by interfering with the performance of both Imel and Haas. He noted that due to Shelley Conger’s “obstreperous and intolerable behavior,” both Imel and Haas “were called away from their assigned duties for significant periods,” and “Imel was not able to function at a level needed to effectively manage an in-flight emergency” during the remaining four hours of the flight. (Initial Decision at 10.)<sup>15</sup>

The ALJ held further that Conger violated 49 U.S.C. § 46318 because she assaulted Imel by pulling on Imel’s apron and whipping her around (an unwanted touching), and by her actions that caused Imel “to fear further harmful or offensive contact.” (Initial Decision at 11.)<sup>16</sup> “And under the circumstances – Conger yelling and waving her finger in Imel’s face while gripping her apron string – Imel’s fear was entirely reasonable.” (Initial Decision at 11.)

Regarding the sanction, the ALJ assessed a \$1,100 civil penalty for the violation of Section 121.580 and \$5,000 for the statutory violation. (Initial Decision at 12-13.) He

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<sup>15</sup> The ALJ wrote:

In this connection it is important to note that flight attendants are not waiters. A flight attendant’s primary responsibility is to assure the safety and security of passengers. Attendants must always be fully ready to deal with matters which pose a risk to the safety and security of flight, such as turbulence, rapid cabin decompression or worse. If a flight attendant has to fend off an attack from an irate passenger, and additionally deal with the aftermath of such a trying situation, he or she is not in a position to attend to those paramount duties.  
(Initial Decision at 10-11.)

<sup>16</sup> The Administrator has held that the term “assault” as used in 14 C.F.R. § 91.11, includes the intentional torts of assault and battery. In the Matter of Bengry, FAA Order No. 2003-9 at 5 (September 12, 2003); In the Matter of Mayer, FAA Order No. 1997-12 at 9 (February 20, 1997); In the Matter of Ignatov, FAA Order No. 1996-6 at 8-9 (February 6, 1996).

Section 121.580 is substantively identical to Section 91.11, except that Section 121.580 applies only to prohibited actions of passengers on board Part 121 air carriers. (*See* 64 Fed. Reg. 1076 (January 7, 1999) (in which the FAA explained that the agency was adding a provision mirroring Section 91.11 to Part 121 of the Federal Aviation Regulations.)

held that Shelley Conger's illness and that of her niece, as well as the strain that Conger was under due to her parents' declining health, neither excused nor mitigated her conduct in the post-September 11, 2001, environment. (Initial Decision at 12.)

#### **IV. Discussion**

A. The Preponderance of the Evidence Supports the ALJ's Determination that Shelley Conger Violated 14 C.F.R. § 121.580 and 49 U.S.C. § 46318.

On appeal, Conger argues that the ALJ erred when he found that Complainant proved that she violated 14 C.F.R. § 121.580 and 49 U.S.C. § 46318 by the preponderance of the evidence. In particular, Conger argues that the ALJ's credibility assessments in favor of Complainant's witnesses were inappropriate, the ALJ failed to consider the testimony given by Jay and Nadege Conger, and the ALJ failed to consider the internal conflicts in testimony presented by Complainant's witnesses. As will be explained further below, these arguments are rejected.

An ALJ's credibility findings will not be overturned lightly on appeal. In the Matter of Warbelow's Air Ventures, FAA Order No. 2000-3 at 12 (February 3, 2000). While an agency is not bound inextricably by an ALJ's credibility findings, those findings are entitled to special deference when the agency reviews the ALJ's factual findings to determine whether they are supported by a preponderance of the evidence. *I.e.*, In the Matter of Park, FAA Order No. 1992-3 at 8 (January 9, 1992). The ALJ's credibility assessments deserve great weight and are entitled to deference because the ALJ is able to observe the demeanor of the witnesses at a hearing. In the Matter of Warbelow's Air Ventures, FAA Order No. 2000-14 at 3 (June 8, 2000) (denying

reconsideration of FAA Order No. 2000-3); In the Matter of Werle, FAA Order No. 1997-20 at 11 (May 23, 1997).<sup>17</sup>

In this case, the ALJ based his credibility assessments in large part upon his assessments of the witnesses' demeanor at the hearing, as well as upon his evaluation of the reasonableness of their testimony. The ALJ found that Imel, Haas and Hunziker had trustworthy demeanors, and their descriptions of the incidents were sincere. (Initial Decision at 6.) Moreover, in his estimation, Imel and Haas "displayed candor" because "they did not necessarily cast their own behavior in the best light." (Initial Decision at 6.) Both, he wrote, had acknowledged that the first-class section was poorly designed. Also, Imel admitted that she had spilled the drinks and stepped on Zoe Conger and may have been curt with Shelley Conger during their first encounter in the galley. (Initial Decision at 6.) The ALJ wrote that he "saw no attempt [by Imel] to exaggerate or embroider events or results." (Initial Decision at 6.) The ALJ also found that the "evocative nature" of Imel's testimony that she dropped the cup of water handed to her by a coach flight attendant "suggests strongly that it occurred as described and, by extension, that the incident which led to it also occurred as Complainant has depicted it." (Initial Decision at 9, n.10.)

In contrast, the ALJ concluded "that Conger's testimony, and that of her supporting witnesses, simply strained credulity." (Initial Decision at 7.) He wrote that he was not convinced by Shelley Conger's attempts to characterize her behavior as benign. (Initial Decision at 7.) He found some of her testimony unbelievable, insincere and contradicted by Complainant's credible and percipient witnesses. He rejected Shelley

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<sup>17</sup> In contrast, the Administrator, on appeal, only reviews a dry transcript, and the other written documents (including the initial decision) contained in the administrative record.

Conger's explanation that she followed Imel down the AB aisle because she wanted to tell Imel *for a fourth time* that her niece was sick and would need to use the lavatory. (Initial Decision at 8-9.)<sup>18</sup> The ALJ also found that "the credibility of Shelley Conger's testimony was undermined further by her obvious insincerity" when she testified that she had not heard Haas say that she had violated any Federal regulation (and yet she did not ask why she would probably be interviewed by airport security upon landing). (Initial Decision at 9.)

In her appeal brief, Conger surmises that "the entire episode to which Ms. Imel has testified – the altercation, the grabbing, the spinning, and shouting, screaming and yelling – was manufactured by Ms. Imel in the interests of her self-preservation." (Appeal Brief at 27.) Conger argues that Imel fabricated this story because American Airlines had disciplined her for a past difficulty that she had with a passenger and she did not want to get in trouble again.<sup>19</sup>

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<sup>18</sup> The ALJ wrote:

Conger's explanation for following Imel down the AB aisle – that she only wanted to explain yet again her niece's situation – simply is not believable. She had already, by her own testimony, informed Ms. Imel of her niece's difficulty on three occasions just minutes earlier: after Imel ordered the two of them to sit (Tr. 303; I.D., p. 6), when Imel returned a few minutes later to serve them drinks (Tr. 306-07; I.D., p. 6), and when she reached Imel in the front galley (Tr. 307-08; I.D., p. 6). To suggest that she was hurrying to catch Ms. Imel now to remind the flight attendant yet a fourth time of her niece's situation (Tr. 309-10, 335) is incredible. Such a motive makes little sense under the circumstances. It could not reasonably be suggested that Conger had to tell Imel four times within the space of a few moments about the same situation. It must be concluded that this portion of Conger's testimony was not forthcoming. The testimony, further, calls into question the trustworthiness of the remainder of Respondent's testimony. (Initial Decision at 8-9.)

<sup>19</sup> American put Imel on probation for 2 years starting in July 2001 for contacting a passenger's wife about her husband's rude behavior while he was on board a flight. Also, the husband of a passenger wrote a letter to the Department of Transportation complaining that Imel had scolded his child, who had been bouncing up and down on his seat during a flight. (Tr. 175-176.)

It seems highly unlikely, however, in light of the short time frame in which the encounters on this flight occurred, that Imel would have deliberately and with premeditation “overreacted,” as Shelley Conger described it. It is far more likely that, as the ALJ found, Imel spun around and cried out “Let go of me” because Conger had grabbed her. Regardless of any desire on Imel’s part to avoid trouble with her employer, the far-fetched allegation that Imel had acted dramatically so as to make others believe that she had been assaulted by Conger is mere conjecture, and as such, does not constitute substantial evidence. (*See In the Matter of Braden’s Balloons Aloft, Inc.*, FAA Order No. 2004-6 at 16 (September 22, 2004), *aff’d*, No. 04-9608, 2005 WL 3541078 (10<sup>th</sup> Cir. December 28, 2005) (in which the Administrator held that the unsupported suggestion that the mechanic/owner of another balloon repair shop, a “hostile competitor,” tampered with the balloon did not constitute substantial evidence under 14 C.F.R. § 13.223.) As the ALJ noted, it is unlikely that Conger would have pursued Imel up one aisle and then down another just to have a calm conversation about whether her niece could use the bathroom, especially, if as Shelley Conger claimed, she had already told Imel this three times.<sup>20</sup>

Conger suggests in her brief that Hunziker may have testified in favor of Imel and Haas because Haas and he had worked for Eastern Airlines years earlier and because the flight attendants gave him some bottles of alcohol at the end of the flight. (Appeal Brief

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<sup>20</sup> Conger argues on appeal that “to engage a flight attendant in normal conversation and come to some understanding as to the conditions under which a sick passenger in need could use a lavatory could hardly constitute assault, threat, intimidation or interference.” (Appeal Brief at 28.) Be that as it may, that is not what the witnesses whom the ALJ considered credible saw or experienced.

at 28.)<sup>21</sup> This argument is hardly compelling. Haas testified that she had only a distant memory of him from when they both worked at Eastern, and Hunziker denied having received anything from the crew at the end of the flight. (Tr. 235-236, 263).<sup>22</sup>

Conger argues that Haas could not have seen Conger grab Imel because Conger was between Imel and Haas. (Appeal Brief at 30.) This is not a persuasive argument, because even with Conger standing between Imel and Haas, Haas would have been able to see Conger reach up and grab Imel on her upper back. Haas insisted that she was able to see Conger reach out and grab Imel's smock in the shoulder blade area. She said that she saw Conger's hands higher up on Imel's back than the apron strings. (Tr. 216-217).<sup>23</sup>

In her brief, Conger argues that the ALJ failed to consider the supporting testimony of Nadege and Jay Conger. However, a review of the initial decision reveals that the ALJ did consider the testimony of Shelley Conger's brother and sister-in-law, but did not find it to be credible or persuasive.<sup>24</sup> The ALJ did not discuss their testimony in

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<sup>21</sup> Nadege Conger testified that she saw Hunziker talking with the flight attendants in the galley and that they gave him a plastic bag with glass bottles in it. (Tr. 384.) It may be wondered how she was able to discern what was in the plastic bag from her seat in Row 5. (Tr. 383.) She also said that Hunziker was in the galley for at least an hour (Tr. 384), while Haas said that he had been there only for a "short while." (Tr. 235.) Hence, Conger is wrong when she wrote in her brief that it was "uncontroverted that Mr. Hunziker spent a considerable amount of time after the alleged incident in the galley ...." (Appeal Brief at 31.)

<sup>22</sup> Conger also referred to Haas's "proclivity to support one of her flight attendants, especially when she was herself remiss in the performance of duties as 'in-flight manager,' failing to intercede when she overheard Ms. Imel's display of rudeness to two passengers, one of whom was a sick child." (Appeal Brief at 29.) However, Imel and Haas did not know each other before this flight (Tr. 183), and to say that Haas was remiss in the performance of her duties is clearly an exaggeration, if not simply wrong.

<sup>23</sup> Imel testified that Shelley Conger tugged at her apron strings that went around her waist, and pulled her backwards. It is understandable why Haas, whose view was blocked by Conger's body, would have been unable to see Conger pull back on those strings.

<sup>24</sup> On page 7 of the initial decision, the ALJ wrote that he had reached the conclusion that "Conger's testimony, *and that of her supporting witnesses*, simply strained credulity." (Emphasis

as much detail as he did Shelley Conger's and Imel's testimony, but he was not obligated to do so.

Shelley Conger also argues that there were so many discrepancies in the testimony of Complainant's witnesses, that the ALJ should not have considered their testimony as credible. However, the discrepancies were only minor and not relevant to the central issues in this case.<sup>25</sup> The Administrator has held in the past that minor inconsistencies do not justify disturbing an ALJ's credibility determination. In the Matter of Houtenbos, FAA Order No. 2002-24 at 12-13 (November 22, 2002); In the Matter of Werle, FAA Order No. 1997-20 at 11 (May 23, 1997); In the Matter of Ignatov, FAA Order No. 1996-6 at 13 (February 13, 1996).

In light of the above, the Administrator will not reverse the ALJ's credibility assessments and factual findings. Conger has not presented any compelling reason to disturb the ALJ's assessment of the witnesses' demeanor and testimony, or his factual findings and legal conclusions about the violations.

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added.) On page 8, the ALJ wrote that Jay and Nadege Conger agreed with Shelley Conger that she had been walking quickly – not running – to catch up with Imel as Imel walked down the AB aisle. The ALJ also referred to Jay Conger's testimony that he had seen Imel put her hands up, that Haas had told Shelley Conger to "take ten" after her encounter with Imel, and that Jay Conger had encouraged his sister to take her seat. (Initial Decision at 8.) The ALJ also discussed Nadege Conger's testimony and her written statement about Shelley Conger's demeanor when she returned to her seat after the encounter with Imel in the AB aisle. (Initial Decision at 9.)

<sup>25</sup> Conger alleges that there were inconsistencies in Complainant's witnesses' testimony regarding such minor issues as the following:

- whether a flight attendant said that the sick child had to use the coach lavatory;
- whether the coach lavatory is right behind first class;
- whether Haas and Imel knew that Zoe was sick;
- whether Imel had wanted the captain to turn the flight around and land; and
- whether Imel was wearing dangling earrings during this flight.

B. The Civil Penalty is Appropriate.

Conger argues that “notwithstanding Respondent’s belief that the acts complained of did not occur” (Appeal Brief at 34), the \$6,100 civil penalty is excessive and contrary to applicable precedent. Conger points to case law in which Complainant alleged that a passenger had assaulted a crewmember and/or had interfered with the performance of a crewmember’s duties.

All of the cases cited by Conger are distinguishable and do not support her argument that the \$6,100 civil penalty is excessive in light of precedent. In two of the cases, In the Matter of Kuhling, FAA Order No. 2003-3 (May 6, 2003) and In the Matter of Dorfman, FAA Order No. 1999-16 (December 22, 1999), the Administrator held that Complainant failed to prove the alleged violations, and as a result, assessed no civil penalties.

Conger also points to other cases in which the Administrator found violations of either 14 C.F.R. § 121.580 or the substantively similar regulation, 14 C.F.R. § 91.11,<sup>26</sup> in which lower civil penalties were imposed. In In the Matter of Ignatov, FAA Order No. 1996-6 (February 13, 1996) the Administrator affirmed the ALJ’s decision finding two violations of Section 91.11,<sup>27</sup> and assessing a \$1,750 civil penalty. Under 49 U.S.C. § 46301(a), the maximum civil penalty for a violation of Section 91.11, at the time of the events leading to that case, was \$1,000. In In the Matter of Stevenson, FAA Order No. 2000-29, the Administrator affirmed the \$3,300 civil penalty assessed by the ALJ against

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<sup>26</sup> See n.16, *supra*.

<sup>27</sup> The ALJ assessed a \$1,000 civil penalty for Ignatov’s assault of the flight attendant (including stepping hard on her foot) and a \$750 civil penalty for interfering with the duties of the flight attendant by yelling at her and calling her names. In the Matter of Ignatov, FAA Order No. 1996-6 at 5.

Stevenson for violations of Section 121.580, as well as a violation of Section 121.575.<sup>28</sup>

At the time of the events resulting in that enforcement action, the maximum civil penalty for each of those violations was \$1,100 under 49 U.S.C. § 46301(a), as adjusted for inflation by 14 C.F.R. § 13.305(d)).<sup>29</sup> These cases<sup>30</sup> are distinguishable regarding the civil penalty assessed because they did not involve violations of 49 U.S.C. § 46318.<sup>31</sup>

This is significant because the maximum civil penalty for a violation of 49 U.S.C. § 46318 is \$25,000. The Administrator has the authority to assess substantially more significant civil penalties for a violation of 49 U.S.C. § 46318, than for similar violations of 14 C.F.R. §§ 91.11 or 121.580. The Conger case is the first case before the Administrator on appeal involving a finding of a violation of 49 U.S.C. § 46318.<sup>32</sup>

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<sup>28</sup> In this case, it was found that Stevenson violated 14 C.F.R. § 121.575 by drinking an alcoholic beverage not served to him by a flight crewmember. It was found further that Stevenson violated 14 C.F.R. § 121.580 by (1) threatening and intimidating a flight attendant, and (2) interfering with the performance of the captain's duties.

<sup>29</sup> The FAA's Civil Monetary Penalty Inflation Adjustment regulations went into effect on January 21, 1997. *See* 61 Fed. Reg. 67445 (December 20, 1996).

<sup>30</sup> Conger also referred to In the Matter of Gotbetter, FAA Order No. 2000-17 (August 11, 2000) as supporting her argument that the sanction imposed against her is too high. In Gotbetter, the ALJ assessed a \$500 civil penalty against Gotbetter for assaulting the flight attendant, by gripping her shoulder and yelling at her. The Administrator did not address the appropriateness of the sanction in her decision on appeal.

<sup>31</sup> The Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century amended Chapter 463 of Title 49 of the U.S. Code to add a new Section 46318. (*See* Title V, § 511(a) of P.L. 106-181). This statute was enacted on April 5, 2000. The factual circumstances leading to the Ignatov, Stevenson and Gotbetter cases occurred before that statute was enacted.

<sup>32</sup> In another case involving three violations of 14 C.F.R. § 91.11(a) in which a \$3,300 civil penalty was assessed, the Administrator wrote as follows:

In fact, had these violations occurred more recently, Bengry likely would have been assessed a much higher penalty. Under current law [referring to 49 U.S.C. § 46318], passengers who assault or interfere with crewmembers are subject to a civil penalty of up to \$25,000 per violation.

In the Matter of Bengry, FAA Order No. 2003-9 at 10 (September 12, 2003).

In light of the factual circumstances of this case and the Administrator’s increased sanction authority under the Federal aviation statute, the \$6,100 civil penalty assessed by the ALJ is justified. As the ALJ explained, Conger’s “conduct was unreasonable and outrageous in itself” and “removed two flight attendants from their primary responsibilities.” (Initial Decision at 11.) Both Imel and Haas were forced to deal with Conger’s threatening behavior, as she pursued Imel through the first class cabin. Under no circumstances is it appropriate for a passenger to assault a flight attendant by grabbing and yanking on that flight attendant’s clothing. After Imel was able to get away from Conger, Haas reassigned Imel to work in the coach section to keep her away from Conger. Imel was quite shook up after the incident with Conger and felt that she would not have been able to handle an in-flight emergency had one occurred at some point during the remainder of the flight. Moreover, as the ALJ wrote:

[T]he invasive, truculent, and fundamentally disrespectful character of her behavior significantly threatened the flight attendants’ authority, and by doing so, undermined the integrity of a process primarily designed to ensure safe and secure travel for passengers and crew. ... A flight attendant who is required to juggle critical safety as well as service responsibilities in a metal tube hurtling through the air at 30,000 feet must be free from passenger misconduct. Against this background, Ms. Conger’s behavior merits a significant sanction. Indeed, Complainant had substantial cause to suggest a higher penalty, which I might well have assessed had it been pled.<sup>33</sup>

(Initial Decision at 11.) The ALJ quite aptly explained further:

We live in a safety- and security-attuned environment. On account of the aircraft hijackings leading to the loss of over 3,000 lives in 2001, that environment may not be more sensitive than aboard operating aircraft. In such an atmosphere it is imperative that airline passengers refrain from interfering with the crew’s responsibilities – much less assaulting any of their number – regardless of their

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<sup>33</sup> An ALJ may not assess a civil penalty that is higher than the penalty sought in the complaint. 14 C.F.R. § 13.16(j).

personal circumstances. The authority of the crew must be fully respected. Nothing less can be tolerated.

(Initial Decision at 12.)<sup>34</sup>

## V. Conclusion

In light of the foregoing, Conger's appeal is denied, and the initial decision is affirmed. A \$6,100 civil penalty is assessed.<sup>35</sup>

[Original signed by Marion C. Blakey]

MARION C. BLAKEY, ADMINISTRATOR  
Federal Aviation Administration

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<sup>34</sup> All other arguments presented on appeal by Conger not discussed specifically in this decision have been considered and rejected.

<sup>35</sup> This decision shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2007). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).