UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 97-20
NICHOLAS J. WERLE	Served: May 23, 1997
	Docket No. CP96WP0066

DECISION AND ORDER

Administrative Law Judge Ann Z. Cook issued an initial decision in this matter after a hearing on October 25, 1996, in which she held that Respondent Nicholas J. Werle, a ticketed passenger, had bypassed security by entering the sterile area through the exit lane at a screening checkpoint at Los Angeles International Airport.[1] The law judge held that Mr. Werle had violated Section 107.20 of the Federal Aviation Regulations, 14 C.F.R. § 107.20,[2] and assessed a $1,000 civil penalty. Mr. Werle has appealed from the law judge's initial decision.

After a review of the record in this case, as well as the briefs filed by the parties, Mr. Werle's appeal is denied, and the initial decision is affirmed.

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

[2] Section 107.20 of the FAR provides as follows:

> No person may enter a sterile area without submitting to the screening of his or her person and property in accordance with the procedures being applied to control access to that area under § 108.9 or § 129.25 of this chapter.

14 C.F.R. § 107.20.

At the hearing, two security company employees identified Mr. Werle as the individual who failed to walk through the magnetometer at the checkpoint at Terminal 6 on August 3, 1994. Vanessa Denise Parker, who was the Screener-in-Charge at that checkpoint on that day, testified that she heard someone at the "point" (exit lane) calling for the checkpoint supervisor and saw a man coming around the "point" toward the sterile area. (Tr. 82.) At the time, Ms. Parker was in the sterile area at the checkpoint supervisor podium, and from there, she said, she could observe what was happening at the checkpoint and the exit lane. (Tr. 87.) She testified that she saw the face of the individual running around the checkpoint. (Tr. 92.) Ms. Parker said that she asked him to stop and go through security, but he refused and yelled out "I'm about to miss my flight. They messed up my ticket." (Tr. 83.) According to Ms. Parker, the man was not carrying anything at the time, but he had been carrying baggage when she had seen him go through the checkpoint earlier that day. (Tr. 83, 87). She testified that she looked unsuccessfully for him after he disappeared in the crowd. Later, a police officer asked her whether the individual he had detained was the person who had gone through the exit lane. At the hearing, Ms. Parker pointed to Mr. Werle as the man she had identified for the police. (Tr. 86.)

Shayla Jackson, another security company employee, testified that she had been stationed at the booth next to Ms. Parker's on the morning of August 3, 1994, and had had a full view of the checkpoint. (Tr. 99, 105.) She said that a passenger bypassed security at the exit area. She heard people at the exit area yelling for the passenger to come back and that she yelled to him about four times. (Tr. 100-101.) She testified that the passenger, who was not carrying any baggage, yelled that

Continental had messed up his ticket. (Tr. 101.) She later identified Mr. Werle as the man who had bypassed security when he was brought back by a police officer. She testified, "... I saw who ran around, and it was you." (Tr. 105.)

In her written statement, Ms. Jackson described the passenger as a man in his forties, with a medium build and medium brown hair, and wearing white or light gray pants and a white and gray striped shirt. She wrote that this incident occurred at 11:40 a.m.[3] (Respondent's Exhibit 3.)

Complainant introduced the written statement of Shawntee Hendricks, the security company employee who was stationed at the "point."[4] According to Ms. Hendricks' statement, at 11:40 a.m. on August 3, 1994, a passenger proceeded around the "point" without stopping. She wrote that she asked him to stop three times, but he kept going. She described him as 5 feet 9 inches tall, wearing gray cotton slacks or jeans, having dark brown hair and two receding hairlines.[5] She wrote that she went to look for the passenger, but was unable to find him. She

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[3] Ms. Parker also wrote that this incident occurred at 11:40 a.m. (Respondent's Exhibit 2.)

[4] Ms. Hendricks did not testify at the hearing. Mr. Werle objected to the introduction of Ms. Hendricks' statement. The law judge overruled that objection, explaining that hearsay is admissible in these proceedings. The law judge explained that a question existed regarding the weight to be assigned to Ms. Hendricks' statement because Ms. Hendricks was not available for cross-examination and the law judge could not evaluate her credibility. The law judge correctly stated further that if the information in the statement was corroborated by other evidence, then Ms. Hendricks' statement would become more important. (Tr. 28.) Nonetheless, it does not appear from the law judge's decision that she relied upon Ms. Hendricks' statement.

Mr. Werle complained in his appeal brief that Complainant failed to provide him with Ms. Hendricks' address. Agent Lara testified that Ms. Hendricks no longer works for that security company and that she had been unable to locate Ms. Hendricks. (Tr. 26.) Complainant is not obligated to locate witnesses for respondents.

[5] Ms. Jackson's and Ms. Hendricks' descriptions are consistent. Mr. Werle apparently did not dispute that this description fit him, except, as will be discussed later, that he has a mustache and that the checkpoint personnel did not mention that the person they saw had a mustache.

wrote that she identified the person found by the police officer as the individual who had gone around the "point" without stopping. (Complainant's Exhibit No. 5.)

Mr. Werle testified that he had planned to take Continental Airlines flights from Los Angeles to Denver and then from Denver to Colorado Springs. He arrived late at the airport, and after several visits to various Continental counters, he managed to change his tickets for a later flight departing at 12:20 or 12:30 p.m.

Mr. Werle denied evading security. (Tr. 142.) He stated "I went through normal security five times....I took my bag through twice and I then had a walk-through, which was easier, three times."[6] (Tr. 142.) He testified that he went through security several times so that he could go to various Continental counters until he finally got his ticket for the flight to Denver. He testified: "So if any time I was in a hurry, it was to get the original ticket, and that was . . . about 11:15 [a.m.]" (Tr. 129.) When he realized that he did not have a boarding pass for the flight from Denver to Colorado Springs, he went back to the Continental ticket counter. He testified that he had the flight coupon for the trip to Colorado Springs by 11:45 a.m. (Tr. 132.) Later, he explained, when it occurred to him that he had not gotten a first-class upgrade, he went through security again to the Continental ticket counter where the agent explained that he had indeed been booked in first class. He went back to the gate where boarding had already begun. (Tr. 133.)

The law judge rendered an oral initial decision at the hearing. She stated:

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[6] He explained that once, rather than carry the bag with him while he went to a Continental counter, he left the bag behind a Continental podium. (Tr. 128-29, 158.) He stated that another time, he left the bag sitting on a chair next to an elderly woman traveller. (Tr. 130, 158.) Mr. Werle testified that the bag weighed about 35 pounds, and contained a videocamera, a camera with a telephoto lens, a charger unit, a pair of shoes, and materials for a course that he had taught. (Tr. 157.)

> I found the testimony of Ms. Parker and Ms. Jackson to be quite credible, that on August 3, 1994, they observed an individual bypass the security screening area, they -- testified that they had an unobstructed view of the individual when he did so, shouted for him to stop several times, and then accompanied by two police officers, they attempted to locate him within the sterile area but were unable to do so....Both Ms. Jackson and Ms. Parker without hesitation identified Mr. Werle as the person who bypassed the security, both at the time that he was located at Gate 60, and in the courtoom today.

(Tr. 189). In contrast, the law judge characterized Mr. Werle's testimony regarding his final re-entry into the sterile area as "very vague." (Tr. 190.) She stated that "most of his testimony centered on other times when he had gone through...security or other events during that day." *Id.* The law judge held further that it was sufficient that Complainant had shown that Mr. Werle bypassed security and disregarded calls to return to the checkpoint. (Tr. 190-91.)

The law judge regarded the $1,000 civil penalty sought by Complainant as appropriate because: 1) Mr. Werle failed to return to the checkpoint despite several requests that he do so, and 2) all flights were delayed until the law enforcement officers detained him. (Tr. 192.) She held that Mr. Werle's anger and frustration due to his ticketing problems did not justify reducing the civil penalty. (Tr. 191.)

On appeal, Mr. Werle argues that the law judge committed error when she did not allow him to argue that Complainant had failed to follow its own procedures.[7] According to Mr. Werle, Complainant failed to issue a Notice of

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[7] Actually, the law judge did allow him to present this argument. Mr. Werle first argued in his Answer that he had not been served a Notice of Proposed Civil Penalty and requested a dismissal of the allegations against him. The law judge ruled in a pretrial order as follows:

> Further, I find that Respondent's allegations of irregularities during the investigative phase of this matter and other abuses of prosecutorial discretion, even if established, are not so egregious as would warrant dismissal of the complaint. The issue in this proceeding is whether the FAA can prove the violation it alleges. Whether the FAA complied with its internal investigative guidelines is irrelevant, unless Respondent shows that the irregularities have substantially and unjustly prejudiced him in preparing his defense.

Proposed Civil Penalty and failed to provide him with a copy of the Rules of Practice. Mr. Werle claims that if Complainant had provided him with a Notice of Proposed Civil Penalty, he would have had an opportunity to request an informal conference. Also, he argues, because he did not receive anything from the agency between October 1994, when the FAA sent the notice of investigation, and March 20, 1996, when the Final Notice of Proposed Civil Penalty was issued, he did not realize until March 1996, that Complainant intended to take civil penalty action. For this reason, he argues, he did not try to locate the individuals he had met at the airport who could verify his account.

In reply to Mr. Werle's argument pertaining to the Notice of Proposed Civil Penalty, Complainant argues in its brief:

> First, Respondent is factually incorrect when he states that no Notice of Proposed Civil Penalty was sent to him. The Notice was sent by certified mail on June 16, 1995, to Respondent's present acknowledged address. Presumably, it was unclaimed, because it was sent again by regular mail on August 25, 1995. The second time it was sent, it was not returned and Respondent is presumed by law to have received it. (See Exhibit 1.)[8]

Order Adopting Procedural Schedule, Accepting Answer, and Denying Motion to Dismiss, dated June 4, 1996. Mr. Werle brought the matter up at the hearing during his testimony, and the law judge noted that she had ruled on this issue in her June 4, 1996, order. (Tr. 140.) Mr. Werle argued further that the allegations were stale and that he had been prejudiced because he was unable to locate witnesses he needed (Tr. 140-148), but the law judge rejected this argument and affirmed her earlier order. (Tr. 147.) Nonetheless, the law judge did allow him to make a proffer for appeal purposes regarding what he wanted to introduce regarding the issue. (Tr. 152-53.)

[8] This is the first time in these proceedings that Complainant has presented a copy of the Notice of Proposed Civil Penalty. While it is peculiar that Complainant did not volunteer a copy of the Notice of Proposed Civil Penalty at the hearing, it is equally odd that the law judge simply did not ask Complainant whether it had served Mr. Werle with a Notice of Proposed Civil Penalty. Ordinarily in a case like this, the law judge should make a factual ruling regarding whether the Notice of Proposed Civil Penalty was actually served upon the respondent.

Complainant attached a copy of a Notice of Proposed Civil Penalty prepared in June 1995, to its reply brief. The Notice of Proposed Civil Penalty was addressed to Mr. Werle at the address that he has used throughout these proceedings. Across the top of the Notice of Proposed Civil Penalty appears this handwritten message: "Resent Reg. Mail 8/25/95 Nina."[9]

Mr. Werle's argument that Complainant did not follow its internal procedures is rejected. It appears that Complainant did serve the Notice of Proposed Civil Penalty by both certified and regular mail. The Notice of Proposed Civil Penalty outlined the options to request an informal conference with an FAA attorney or to submit additional information,[10] and it indicated that the Rules of Practice had been enclosed.[11]

However, in the alternative, assuming *arguendo* that Complainant did not send the Notice of Proposed Civil Penalty, Mr. Werle had actual notice of Complainant's allegations against him in a timely fashion. The Final Notice of Proposed Civil Penalty, which Mr. Werle acknowledges receiving, was issued in March 1996, approximately 19 months after the incident. Under the "stale

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[9] It would have been better practice if Complainant had accompanied this attachment with an affidavit or declaration by an appropriate agency employee regarding the steps taken to serve the Notice of Proposed Civil Penalty.

[10] Even now Mr. Werle has not stated that he would have requested an informal conference if he had known about this option. At this juncture, after a hearing has been conducted, it is a moot point what might have happened if an informal conference had been conducted.

[11] There is no evidence that Mr. Werle was handicapped in these proceedings because he did not have a copy of the Rules of Practice. Hence, this case is distinguishable from In the Matter of Metz, FAA Order No. 90-3, 1990 FAA LEXIS 167 (January 29, 1990)(holding that Complainant's failure to provide Mr. Metz with a copy of the Rules of Practice constituted good cause for Mr. Metz's failure to file a timely notice of appeal/appeal brief, and for failing to file a document that satisfied the requirements for an answer. In this case, the law judge provided Mr. Werle with guidance regarding procedural matters, and Mr. Werle handled the procedural aspects of this case rather well.

complaint" rule, a respondent may move to dismiss allegations of a violation that occurred more than 2 years before the agency attorney issued a notice of proposed civil penalty. 14 C.F.R. § 13.208(d). *See also* 49 U.S.C. § 46301(d)(7)(C), which provides that "Except for good cause, a civil action involving a penalty under this paragraph may not be initiated later than 2 years after the violation occurs." Thus, if a final notice of proposed civil penalty is issued in less than 2 years after an incident, the allegations are not considered to be stale.

Also, Mr. Werle did not prove that he had sought the names of witnesses in a timely fashion after receipt of the Final Notice of Proposed Civil Penalty. While Mr. Werle testified that he had called Continental Airlines to find out who the ticket agents had been that day and for a list of the passengers, he did not state when he actually called Continental Airlines. Mr. Werle also failed to offer evidence that the names of passengers and Continental personnel would have been available to him at any time or regarding how long Continental retained such information.

Moreover, Mr. Werle did not prove that he suffered substantial prejudice. Mr. Werle explained that he had wanted the ticket agents to testify that he had had no reason to hurry and bypass security. However, the law judge did not find that Mr. Werle had bypassed security because he was late for his flight. The law judge held that it was sufficient that Complainant had proven that Mr. Werle had actually run through the exit lane and that he had not returned to the security checkpoint when the security personnel requested that he do so. (Tr. 190-91.)

Mr. Werle was aware of the FAA's investigation of this matter as early as October 1994, when he received a letter of investigation from the agency. Although a letter of investigation does not satisfy the limitation period set forth in 49 U.S.C.

§ 46301(d)(7)(C) or in 14 C.F.R. § 13.208(d), it does notify a respondent that preserving evidence may become necessary.[12]

Mr. Werle argues further that it was error for the law judge to admit Complainant's Exhibits 1, 2, and 3, photographs of the checkpoint area taken in October 1996, over his objection.[13] Mr. Werle argues that these photographs do not accurately reflect the checkpoint on August 3, 1994. This argument is rejected. The law judge admitted these photographs for illustrative purposes after hearing testimony describing the differences between the checkpoint in August 1994 and October 1996. (Tr. 16-21.) The law judge was not misled by these photographs.

Mr. Werle also argues on appeal that the law judge erred by admitting Complainant's Exhibit 4, a drawing of the checkpoint area, because it did not depict the elevator that opens into the exit area. This argument is rejected as well. Mr. Werle did not object to the introduction of this exhibit at the hearing. (Tr. 22). Also, Mr. Werle included the elevator in his drawing of the checkpoint. (Respondent's Exhibit 4.) Finally, whether there is an elevator in that area is irrelevant in light of the multiple identifications of Mr. Werle by eyewitnesses and the absence of any evidence indicating that the person who ran through the exit lane escaped via the elevator.

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[12] *See* the preamble to the republication of the final Rules of Practice, in which the agency stated that it believes that "the notice provided in a letter of investigation reduces the chance that the respondent is prejudiced by delay, especially where legal enforcement action is initiated within 2 years." 55 Fed. Reg. 27548, 27556 (July 3, 1990).

[13] Actually, Mr. Werle objected to the introduction of Complainant's Exhibit 1, but he later withdrew that objection. (Tr. 14-16.) Mr. Werle did not object to the introduction of Complainant's Exhibits 2 and 3. (Tr. 19, 21).

Mr. Werle argues further that the law judge should not have credited the testimony and statements introduced by Complainant identifying him as the person who ran through the exit lane. The witnesses were unreliable, he argued, because:

- He was the only person brought back by the law enforcement officer and as a result, the confrontation between the witnesses and Mr. Werle was unduly suggestive.[14]

- None of the witnesses described the man they saw as having a mustache. Mr. Werle testified that he had a mustache at the time of this incident.

- Ms. Hendricks wrote in her statement that he was detained at Gate 63, while FAA Agent Lara testified that he was found at Gate 60.

- The witnesses did not know how many alarms had occurred that morning.

- There was no videotape evidence confirming the identification by the security personnel of Mr. Werle as the person who went through the exit lane into the sterile area.[15]

The law judge held that Ms. Jackson and Ms. Parker were "quite credible." (Tr. 189). Regarding the discrepancies in the testimony, she explained:

> The variations -- or variances, rather -- in their accounts are those which would normally be expected...when you have different people observing or participating in an event and rendering very brief, unedited statements.
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> The...misidentification of gates, the absence of a mustache in the description that they gave in their written reports...of the individual who bypassed security -- I don't find to be substantial flaws. It doesn't undermine, in my mind, the unequivocal identification which they made of Mr. Werle.

(Tr. 190.)

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[14] He argues: "There is good ... reason for police lineups It forestalls common misidentifications that occur when only one person is present to be observed by [a] witness and therefore the witness is predisposed to assume the person before them is the culprit." (Respondent's Appeal Brief at 4.)

[15] This is a red herring because there were no videocameras at that checkpoint at the time.

A law judge is in the best position to observe the demeanor of witnesses at a hearing, and, as a result, the law judge's credibility findings deserve special deference. In the Matter of Hereth, FAA Order No. 95-26, 1995 FAA LEXIS 315, at *15 (December 19, 1995); In the Matter of Carroll, FAA Order No. 90-21, 1990 FAA LEXIS 158, at *15 (August 16, 1990). As the law judge found, the inconsistencies regarding the number of the gate at which Mr. Werle was detained were minor and do not undermine the reliability of the identification. Likewise, the eyewitnesses' failure to notice Mr. Werle's mustache does not render their identification of him unreliable. It is to not surprising that the eyewitnesses did not recall all of the facial features of the man running through the exit lane. That the witnesses could not recall how many alarms went off that morning is also immaterial. A law judge's credibility findings will not be disturbed on review based simply upon minor inconsistencies in the evidence. In the Matter of Park, FAA Order No. 92-3, 1992 FAA LEXIS 288, at *10-11 (January 9, 1992).

Mr. Werle's argument that the witnesses' identification of him is unreliable because he was not part of a line-up when he was identified is also not compelling. In general, it is true that showing only one "suspect" to a witness may be suggestive, but that does not necessarily render the identification unreliable. To determine the reliability of the identification, the totality of the circumstances must be considered.[16] The identification of Mr. Werle in this case by the eyewitnesses was sufficiently reliable even if he was the only "suspect" pointed out by the officers.[17]

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[16] Even in the criminal law context, an identification as a result of a show-up involving only one suspect, as opposed to a lineup, may be found to be reliable depending upon the totality of the circumstances. *E.g.,* U.S. v. Funches, 84 F.3d 249, 255 (7th Cir. 1996); Robinson v. Clarke, 939 F.2d 573, 575-576 (8th Cir. 1991). In determining the reliability of such an out-of-court identification, the courts will consider the following factors: 1) the witness' opportunity to view the criminal when the crime was being committed; 2) the witness' degree

Mr. Werle's argument that the law judge committed prejudicial error by hurrying the proceeding also is without merit. He argues that the law judge was upset by the length of his cross-examination, that she failed to inform him that the proceeding could be continued to the next day so that he could present additional witnesses, and that she only allowed 30 minutes for lunch and 30 minutes for closing argument. A law judge has the authority to regulate the course of a hearing, 14 C.F.R. § 13.205(a)(6), and the law judge's conduct of this hearing was fair and reasonable. Mr. Werle did not indicate at the hearing that he had any additional evidence, and the law judge did not unfairly restrict Mr. Werle's cross-examination of witnesses. The time allowed for lunch and closing argument also was reasonable.

Finally, the $1,000 civil penalty assessed by the law judge is affirmed. Mr. Werle deliberately evaded the security screening process by running through the exit lane, and ignored requests to return to the checkpoint. Law enforcement and checkpoint personnel chased after him, taking them away from their usual security-related responsibilities. Until Mr. Werle was located by the officers, all

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of attention; 3) the accuracy of the witness' description of the criminal; 4) the witness' degree of certainty when identifying the criminal at the show-up; and 5) the time between the crime and the confrontation. U.S. v. Funches, at 255.

[17] That is so for the following reasons. First, the witnesses had an unobstructed view of, and focused upon, the person who ran through the exit lane. Second, Ms. Parker recognized the person who had run through the exit lane as someone who had gone through the metal detector at the checkpoint at least once before carrying a bag. (Tr. 83-84.) Third, Mr. Werle was identified by the witnesses within about one hour after the incident at the airport. (*See* Tr. 135 and Respondent's Exhibit 3 at 2 regarding the time that Mr. Werle was detained by the law enforcement officer and identified by the checkpoint personnel.) Fourth, Ms. Parker and Ms. Jackson were unequivocal in their testimony at the hearing that Mr. Werle was the person whom they saw evading security. Fifth, prior to identifying Mr. Werle, Ms. Parker had been asked whether she could identify someone sitting at gate 64, and after she looked at that person, she said that he was not the one whom she had seen running through the exit lane. (Respondent's Exhibit 3 at 2.) Ms. Parker was not unduly influenced by the suggestiveness of an earlier request to identify a single suspect.

outgoing flights were delayed.[18] Mr. Werle's failure to return and submit to screening, the search for him, and the delaying of flights while the search was underway constituted aggravating factors, justifying the $1,000 civil penalty.[19]

Based on the foregoing, Mr. Werle's appeal is denied, and the law judge's oral initial decision is affirmed. A $1,000 civil penalty is assessed.[20]

BARRY L. VALENTINE
Acting Administrator
Federal Aviation Administration

Issued this 22nd day of May, 1997.

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[18] As Special Agent Lara explained, to maintain the integrity of the sterile area, it is necessary that all persons entering the sterile area undergo security screening. If a person submits to the screening process, and subsequently leaves the sterile area, that person must undergo screening again before re-entering the sterile area. Once a person enters the public area, that person at least theoretically has access to weapons that are forbidden in the sterile area. It is for that reason that under Section 107.20 passengers re-entering the sterile must re-submit to screening procedures.

[19] The penalty assessed in this case is consistent with the $1,000 civil penalty imposed in In the Matter of Hoedl, FAA Order No. 92-58 (October 16, 1992), in which a passenger did not follow screening procedures, in violation of 14 C.F.R. § 107.20.

[20] 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) (1996).