UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:	FAA Order No. 95-16
JOHN D. MULHALL	Served: August 4, 1995
	Docket No. CP94NM0026

DECISION AND ORDER

Complainant appeals from the oral initial decision[1] of Administrative Law Judge Burton S. Kolko, issued after a hearing held on July 28, 1994. Respondent John D. Mulhall did not dispute any of the alleged violations of the Hazardous Materials Regulations (HMR), 49 C.F.R. § 171.1 *et. seq.*[2] Consequently, only sanction was at issue during the hearing. In assessing the civil penalty, the law judge tried to strike a balance between Respondent's liabilities and limited income on the one hand, and the seriousness of the violations on the other. With these

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

[2] On September 23, 1992, Mr. Mulhall was a ticketed passenger on Alaska Airlines. He checked a bag containing his art supplies, including turpentine, turpenoid, and white oil gesso paint. Turpentine and turpenoid are in the Flammable Liquid hazard class, and white oil gesso paint is in the Combustible Liquid hazard class. These substances cannot be shipped by air without compliance with the shipping paper, certification, marking, labeling and packaging requirements set forth in the HMR. Mr. Mulhall complied with none of these requirements. In short, this was a "hidden shipment" of hazardous substances. There is always the concern that hazardous substances such as these will give off flammable vapors which might ignite in enclosed areas, possibly causing an inflight fire. (Tr. 6.) A small spill occurred in the baggage compartment. (Tr. 7.)

considerations in mind, the law judge assessed a $750 civil penalty payable in thirty $25 installments against Mr. Mulhall.[3]

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[3] Complainant sought a $3000 civil penalty in the complaint and at the hearing. Complainant explained in the appeal brief that "[t]welve violations were alleged and deemed admitted," and Mr. Mulhall was assessed the minimum civil penalty of $250 per violation. (Complainant's Appeal Brief at 6.) Under 49 U.S.C. § 5123(a), person who violates the Hazardous Materials Regulations is liable for a civil penalty of at least $250 per violation.

It appears that Complainant calculated the violations as follows:

#	Regulation(s) Violated
#1:	49 C.F.R. §§ 172.200(a) &172.202 (requiring proper description of hazardous material on shipping papers)
#2:	49 C.F.R. § 172.202(a)(1) (requiring proper shipping name be included in hazardous material description on shipping papers)
#3:	49 C.F.R. § 172.202(a)(2) (requiring inclusion of the hazard class in hazardous material description on shipping papers)
#4:	49 C.F.R. § 172.202(a)(5)* (requiring inclusion of the total quantity of hazardous material in the description on shipping papers)
#5:	49 C.F.R. § 172.202(c) (requiring that total quantity of hazardous material appear before and/or after description on shipping papers)
#6:	49 C.F.R. § 172.204(a) or (c)(1) (requiring that the proper certification be printed on shipping papers)
#7:	49 C.F.R. § 172.204(c)(2) (requiring 2 copies of certification be provided to the aircraft operator)
#8:	49 C.F.R. § 172.300 & 172.301(a)(1) (requiring that proper shipping name be marked on package)
#9:	49 C.F.R. § 172.304(a)(1) (requiring that markings be durable, in English, and printed on or affixed to the surface of package or on a label, tag, or sign)
#10:	49 C.F.R. § 172.400(a) (requiring that package be properly labeled)
#11:	49 C.F.R. § 173.1(b) (requiring that package be properly prepared for shipment)
#12:	49 C.F.R. § 173.24(a)(2)** (pertaining to packaging)

(*See* the Addendum to this decision for the text of these regulations.)

Complainant apparently did not consider that there was a separate violation of the general introductory regulation, 49 C.F.R. § 171.2(a).

It may be wondered *as a matter of policy* whether the number of violations should be computed as Complainant appears to have done. For example, is it necessary to consider each of the shipping paper deficiencies as a separate violation to which the $250 minimum applies? Complainant alleged that there were *seven* separate shipping paper violations, including *five* violations pertaining to the description that should have appeared on the shipping papers. (*See* violations # 1-7 listed above.) Since Mr. Mulhall did not prepare any shipping papers at all, obviously, he did not include any of the required information on the shipping papers.

The law judge reduced the civil penalty to $750 based upon Mr. Mulhall's financial hardship. Consequently, resolution of the issue of the appropriate number of violations as a matter of policy does not need to be made in this decision.

*A review of the complaint in its entirety reveals that Complainant mistakenly cited 49 C.F.R. § 172.202(a)(4), rather than Section 172.202(a)(5) in the complaint.

Mr. Mulhall had been voluntarily laid off from Boeing Aircraft in June 1993, and subsequently entered college. At the time of the hearing, he was an unemployed student. Mr. Mulhall testified that his unemployment insurance payments had ended, and that he had numerous debts, including Federal income taxes. Mr. Mulhall's savings at the time of the hearing were negligible.

While Complainant does not now contest the total amount of the penalty as assessed by the law judge, Complainant does challenge the law judge's authority to set a payment schedule. Complainant also argues that the law judge erred in considering evidence of Complainant's prehearing settlement offer.

Prior to the hearing, Mr. Mulhall sent a letter, dated April 30, 1994, to the law judge, in which he admitted transporting his personal art supplies on a commercial flight from Los Angeles to Seattle. He stated further that although the agency attorney originally had proposed a $3000 civil penalty, the agency attorney had "reduced" the fine to $1440, payable in $40 monthly installments over a three-year period. Mr. Mulhall was referring to a settlement offer extended by the agency attorney. This letter was introduced at the hearing as Respondent's Exhibit 1.

On appeal, Complainant argues that the law judge improperly relied upon evidence of the settlement offer in deciding what civil penalty and payment terms to impose.

Rule 408 of the Federal Rules of Evidence prohibits the introduction of evidence of settlement offers to prove liability or damages, although evidence of settlement offers may be introduced for other purposes. Coakely & Williams v.

** Also, Complainant cited 49 C.F.R. § 173.24(a)(2) in the complaint as a regulation that was violated. Section 173.24(a) is merely an applicability section. Complainant should have cited 49 C.F.R. §§ 173.24(a)(2) *and* 173.24(b)(2).

Structural Concrete Equipment, 973 F.2d 349, 353-354 (4th Cir. 1992) (in which it was held that Rule 408 did not prohibit the admission of the settlement offer as extrinsic evidence of the intent of a release signed by the parties.) Consequently, and technically speaking, since Mr. Mulhall was trying to persuade the law judge to reduce the civil penalty, evidence of the settlement offer should not have been admitted. By apprising the law judge of the terms of the settlement offer, Mr. Mulhall had circumvented the purpose of Rule 408, which is to exclude settlement offers from evidence for the purpose of proving liability and amount of damages so as not to discourage the settlement process.

However, the issue is more complicated. Mr. Mulhall had sent the *ex parte* letter discussing the settlement offer to the law judge before the hearing, and the law judge apparently had read the letter. Thus, the law judge was faced with a second problem: what to do with an impermissible *ex parte* communication. Under these circumstances, it was not improper for the law judge to include the letter in the record. By admitting the letter, he made a record of all the information to which he had had access.

The next question to ask is whether the evidence of the settlement offer influenced the law judge's decision on the sanction. The law judge did reduce the civil penalty, but to half the amount apparently offered by the agency attorney for the purpose of settling the case. The law judge also directed that the payment of the civil penalty could be made in 30 installments, while the agency attorney had offered to allow Mr. Mulhall to pay off the civil penalty over a three-year period. Thus, while the judge's order and the settlement offer have some similarities, these similarities are not so strong as to prove that the law judge was unduly influenced

by the disclosure of the terms of the settlement offer. What seems more likely is that the law judge's order reflected his genuine concern for deterring such hidden shipments of hazardous materials in the future, as well as his recognition that Mr. Mulhall simply did not have the financial resources to pay a significant penalty in one lump sum. As the law judge explained in his decision:

> [T]he amended Hazardous Materials Transportation Act requires a minimum penalty of $250 for each violation. There is a provision in the Act, however, which takes cognizance of a Respondent's ability to pay that and in this particular instance to me it is clear from the record that as of today, this Respondent has no money . . . . As a matter of fact, I would classify him as a student. Of what, we yet do not know, but who at this point, finds himself encumbered with liabilities and very little income. This is a factor which has to be taken into account. On the other hand, . . . this kind of carriage of clearly hazardous materials is one which must be deterred . . . . So the balance has to be struck and I am going to attempt to strike it here by assessing a civil penalty of $750 payable in 30 installments of $25 each.

(Tr. 29-30.)[4]

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[4] Generally speaking, such considerations -- the degree of hazard involved and the respondent's ability to pay -- are appropriate under the Federal hazardous materials transportation statute. It is provided in 49 U.S.C. § 5123(c) as follows:

> (c) Penalty Considerations. In determining the amount of a civil penalty under this section, the Secretary shall consider:
> (1) the nature, circumstances, extent and gravity of the violation;
> (2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and
> (3) other matters that justice requires.

However, whether the statute permits the law judge or the Administrator to assess a civil penalty that is *less than $250 per violation in cases of financial hardship* is a separate question. The law judge apparently has interpreted Section 5123 as permitting in cases of financial hardship a civil penalty of less than $250 per violation. Complainant has not challenged the law judge's interpretation.

Section 5123(a) provides that "[a] person that knowingly violates this chapter or a regulation prescribed . . . under this chapter is liable to the United States Government for a civil penalty *of at least $250* but not more than $25,000 for each violation." 49 U.S.C. § 5123(a) (emphasis added.)

"Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." Boise Cascade Corp. v. United States Environmental Protection Agency 942 F.2d 1427, 1432 (9th Cir. 1991). In reading Section 5123(a)'s language "*civil penalty of at*

Moreover, the law judge explained at the hearing that he understood that he should not consider settlement offers. As the law judge stated:

> Normally, settlement negotiations are inadmissible for the public policy of furthering some negotiations . . . . I had already seen that letter and I have been doing this for a long time . . . settlement offers that I do become aware of, have no affect (sic) whatsoever because they are part of an entirely different process . . . which is just settlement.

(Tr. 20.)

Consequently, in light of the above, Complainant has not established that the law judge committed reversible error in admitting evidence of the prehearing settlement offer at the hearing. Indeed, as noted, he had little choice.

Complainant argues that the law judge exceeded his authority when he determined that Mr. Mulhall could pay the $750 civil penalty in 30 installments. Complainant interprets 14 C.F.R. § 13.232(a)'s language that the law judge's initial decision shall include "the amount of any civil penalty found appropriate by the administrative law judge" as precluding the law judge from setting the terms of payment. Under Complainant's reading of this regulation, the law judge can only order the payment of a penalty in one lump sum, and not direct that the penalty be payable in installments. Complainant argues further that "a reduction of the civil penalty, when warranted, is a more practical means of responding to evidence supporting an inability to pay defense." (Complainant's Appeal Brief at 17.)

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least $250," it is necessary to also consider Congress's instruction in Section 5123(c) that a violator's ability to pay and ability to continue to do business *shall* be considered. The only sensible way to interpret this language in Sections 5123(a) and (c), without rendering any of it superfluous, meaningless or inconsistent, is to read it to say that in cases of inability to pay a fine of $250 multiplied by the number of violations, a penalty of less than that amount may be assessed.

Complainant's reading of the rules of practice is too narrow. Consequently, as will be explained, it is held that the law judges may prescribe payment plans. However, for policy reasons, the law judges should use this authority on only rare occasions, such as in this case in which the respondent is an individual with severely limited financial means. In such cases, the deterrent value of the penalty will not be overly diluted by an installment payment plan. Furthermore, in cases in which the respondent's financial means are so restricted that apportioning the payment will not minimize the deterrent effect of the penalty, then the law judge should consult with the agency attorney to work out a payment schedule that will not be unduly burdensome for Complainant to administer.

Under 14 C.F.R. § 13.205(a)(9), "an administrative law judge may make findings of fact and conclusions of law, and issue an initial decision." With regard to initial decisions, 14 C.F.R. § 13.232(a) provides in pertinent part:

> (a) Contents. The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge *shall include* findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, *the amount of any civil penalty found appropriate by the administrative law judge*, and a discussion of the basis for any order issued in the proceedings.

(Emphasis added.) This regulation merely sets forth the elements that an initial decision must include. When deciding the appropriate amount of the civil penalty, the law judge must consider whether the penalty is to be paid in one lump sum or over a period of time. Even when ordering that a civil penalty may be paid in installments, the law judge is determining a total amount that must be paid.

Section 13.205(b), 14 C.F.R. § 13.205(b), sets forth the limitations on the law judge's sanction authority. Section 13.205(b) prohibits the law judges from issuing orders of contempt, awarding costs to any party, or imposing "any sanction not specified in this subpart." 14 C.F.R. § 13.205(b). In cases in which the law judge imposed a penalty not specified in Part 13, Subpart G, the Administrator has reversed the law judge. *See e.g.*, In the Matter of Cato, FAA Order No. 90-33 (October 11, 1990) (in which it was held that the Rules of Practice do not permit the law judge to condition the assessment of a civil penalty on such subsequent remedial conduct as publication of a letter in a newspaper). However, in this case, the law judge did not impose a sanction not specified in Part 13, Subpart G. A civil penalty payable in installments is still a civil penalty, and Part 13, Subpart G contemplates the imposition of civil penalties for violations of the Federal Aviation Regulations and the Hazardous Materials Regulations.

Complainant also asserts that there are policy reasons making it inappropriate for the law judge to allow Mr. Mulhall to pay the penalty in 30 payments. Complainant argues that the deterrent effect of the penalty will be reduced if the law judge permits payment of the penalty in installments. Generally speaking, this is probably true. When a penalty is divided into numerous small installment payments, the "bite" may be reduced significantly, and therefore, the deterrent value decreases. Hence, when inability to pay is not an issue, the law judge should not order that the penalty be payable in installments. However, when inability to pay has been demonstrated, as was done in this case, it is not axiomatic that the deterrent value will be diminished by the option to pay the penalty in installments. In cases of inability to pay, the law judges are more likely to assess a

much smaller civil penalty if the penalty must be paid in one lump sum, than if they can order that the penalty can be paid in numerous small installments. Also, in cases of inability to pay, the likelihood that a penalty will be collectible readily may be greater if it can be paid off in installments.

Complainant points to a decision by the National Transportation Safety Board, holding that "the imposition of a suspension in one uninterrupted period, rather than in a series of small periods, would strengthen its intended purpose of deterrence, as would the completion of the suspension period as soon after the incident as possible." Administrator v. Woodward, 2 NTSB 1256, 1258 (1975). However, the aforementioned case is inapplicable here. In Woodward, the full Board held that a 180-day suspension was necessary to protect air safety and was in the public interest in light of the respondent airline pilot's lack of care while executing a nonprecision instrument approach.[5] There was no issue in that case of financial hardship. In contrast, Mr. Mulhall proved his inability to pay the civil penalty sought by Complainant, and under 49 U.S.C. § 5123(c), ability to pay is a factor that must be considered.[6]

Complainant also argues "it is unclear whether the order on the merits is stayed until full payment of the sanction is made." (Complainant's Appeal Brief at 16.) Complainant fails to explain why it is unclear whether the merits of the order is stayed until full payment of the sanction is made in a case in which the law judge permits the respondent to pay a civil penalty in installments. If a law judge orders

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[5] The Board gave the respondent credit for a 26-day suspension that had been imposed by his company. Hence, the perspective portion of the suspension was 154 days.

[6] *See* note 4 *supra*.

that a civil penalty may be paid in installments, the order on the merits is final once the period for filing a notice of appeal expires. 14 C.F.R. § 13.232(d).[7]

Complainant "respectfully cautions the Decisionmaker against granting law judges" the power to set a payment schedule. Complainant writes, "It is not difficult to envision this power leading law judges to establish a multitude of collection schedules, at great expense to the agency to maintain." (Complainant's Appeal Brief at 16-17.) This may be true. Consequently, when a law judge is considering the imposition of an installment payment plan, the law judge should consult with the agency counsel to ensure that the payment plan that the law judge is contemplating is not unduly burdensome for Complainant to administer.

This decision is not meant to encourage law judges to establish payment plans for respondents when civil penalties are assessed. Indeed, this decision envisions the law judges assessing civil penalties that are payable in installments only in cases in which a respondent has proven that his financial circumstances are so constrained that payment of a substantial civil penalty in a lump sum is impossible. When the purposes of a civil penalty can be accomplished through the assessment of a civil penalty to be paid in one lump sum, then such a civil penalty is preferable.

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[7] Section 13.232(d) provides:

> (d) Order assessing civil penalty. Unless appealed pursuant to § 13.233 of this subpart, the initial decision issued by the administrative law judge shall be considered an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted.

14 C.F.R. § 13.232(d).

In this case, in an apparent oversight, the law judge neglected to articulate the time intervals between payments. His order is modified, therefore, to require that the $750 civil penalty be paid in 30 *monthly* installments of $25 each.

Based upon the foregoing, the law judge's oral initial decision, as modified, is affirmed.

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 4th day of August, 1995.