UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of:

PHYLLIS JONES LUXEMBURG

FAA Order No. 94-18

Served: June 22, 1994

Docket No. CP93SO0105

ORDER AND DECISION

Respondent Phyllis Jones Luxemburg appeals from Chief Administrative Law Judge John J. Mathias's order[1] granting Complainant FAA's motion for decision and assessing a $1,000 civil penalty against Luxemburg for smoking in the aircraft cabin when the no-smoking signs were lit, a violation of Section 121.317(g) of the Federal Aviation Regulations, 14 C.F.R. § 121.317(g).[2] Luxemburg argues that the law judge erred by granting the FAA's motion for decision[3] before he received her reply to the motion. She also contends that the law judge erred by failing to consider mitigating

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[1] A copy of the law judge's order is attached.

[2] The Federal Aviation Regulations provide, in part, that:

> § 121.317 Passenger information.
> * * *
> (g) No person may smoke while a "No Smoking" sign is lighted or if "No Smoking" placards are posted, except that the pilot in command may authorize smoking on the flight deck except during landings and takeoffs.

[3] Although the agency attorney captioned this document "Motion for Summary Judgment," the terminology used in the Rules of Practice for such a document is "Motion for Decision." *See* 14 C.F.R. § 13.218(f). The difference is one of form rather than substance, however.

factors before he imposed the civil penalty, and as a result, the $1,000 civil penalty he imposed is too high.

The law judge did not err in granting the FAA's motion for decision when he did. However, for the reasons stated below, the civil penalty is reduced from $1,000 to $700.

The FAA alleged in the original complaint that when Luxemburg was a passenger on an American Airlines flight from Kennedy International Airport in New York to Miami, Florida, she violated two regulations--one prohibiting smoking when the no-smoking signs were lit, and the other prohibiting smoking in the lavatory.[4] The FAA requested a $2,000 civil penalty--$1,000 for each violation--under Section 901(a) of the Federal Aviation Act, 49 U.S.C. App. § 1471(a), which provides for a civil penalty not to exceed $1,000 for each such violation. In her answer to the complaint, Luxemburg admitted smoking in the cabin but denied smoking in the lavatory. As an affirmative defense, she claimed that imposing a civil penalty on her was unwarranted because she had already suffered enough during the course of her air travel. She explained that she is a senior citizen, was recently widowed, and suffers from severe anxiety and high cholesterol. She further explained that at the time of the incident, she was suffering from physical exhaustion and emotional distress for the following reasons:

(1) her flight was delayed more than 2 hours due to mechanical problems;

(2) she had to claim and load her own luggage because there were no porters;

(3) there was no time or opportunity for her to rest, to get help in moving her luggage, or to telephone the person who was to meet her at Miami International Airport;

(4) she was able to eat only an apple during her 6 hours waiting at the airport and aboard the aircraft because the airline failed to provide her with the low-cholesterol meal she had requested.

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[4] Smoking when the no-smoking signs are lit is a violation of 14 C.F.R. § 121.317(g). *See supra* note 2 for the exact language of Section 121.317(g). Smoking in the lavatory is a violation of 14 C.F.R. § 121.317(h), which provides as follows: "No person may smoke in any airplane lavatory."

(Answer, pp. 2-3; Respondent's Response to Interrogatory No. 2.) Luxemburg indicated that she had the financial ability to pay the $2,000 civil penalty sought by the FAA. (Respondent's Response to Interrogatory No. 6.)

The FAA amended the complaint by dropping the allegation that Luxemburg smoked in the lavatory and reducing the amount of the civil penalty requested to $1,000. At the same time, the FAA moved for decision on the ground that Luxemburg had admitted all of the allegations in the amended complaint. The FAA argued that a $1,000 civil penalty was warranted for the following reasons:

> In the case of Salvatore Giuffrida, FAA Order No. 92-37, (FAA Docket No. CP91EA0289), slip op. June 15, 1992, the Administrative Law Judge found and the Decisionmaker concurred that Mr. Giuffrida's smoking aboard an aircraft while the no-smoking signs were illuminated constituted a violation of section 121.317 of the Federal Aviation Regulations. Regarding sanction, the Law Judge held that this violation warranted a $1,000 civil penalty. Giuffrida, at p. 4. The Decisionmaker found that "Smoking ... poses such a serious risk to safety that ordinarily a $1,000 civil penalty is warranted." Giuffrida, at p. 5. The Decisionmaker in Giuffrida lowered the sanction because of the Respondent's inability to pay the proposed penalty. However, in our case, the Respondent has admitted that she possesses the capability to pay the $2,000 (amended to $1,000) civil penalty. The reasons that she gives for requesting a reduction have not been held to allow a reduction in the civil penalty administrative law process. *See, e.g.*, In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991).

(Motion for Decision, pp. 2-3.)

The law judge waited until the 15-day deadline[5] had passed for Luxemburg to file a reply to the FAA's motion, but when no reply was received, he granted the motion and assessed a civil penalty of $1,000, stating:

> The only defenses pleaded by Respondent were that she is a senior citizen, recently widowed, suffers from severe anxiety and high cholesterol, and that she was physically exhausted and emotionally distraught at the time due to a change in flights and airports caused by mechanical problems with her original flight. There is no claim that Respondent is unable to pay the civil penalty requested in the complaint. In fact, it is noted by FAA Counsel that Respondent has admitted

[5] Luxemburg had 10 days under 14 C.F.R. § 13.218(d) to answer the motion for decision, plus an additional 5 days under 14 C.F.R. § 13.211(e) because the law judge's order was served on her by mail, or until August 6, 1993. The law judge issued his final order on August 18, 1993, one day before Luxemburg served her reply and request for extension.

> in her answers to the agency's discovery requests that she has the financial ability to pay the civil penalty and will not claim inability to pay.
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> The reasons given for Respondent's smoking are not a defense to the charges of the complaint, nor are they grounds for reducing the civil penalty. *See, e.g.*, In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991). The $1,000 civil penalty requested in the complaint is within the penalty prescribed by 49 U.S.C. App. § 1471(a)(1) for the violation charged and Respondent has not pointed to any facts nor raised any valid argument to show that it is unreasonable in this case.

(Order Granting Motion for Summary Judgment, p. 1 (August 18, 1993)).

A day after the law judge issued his order, counsel for Luxemburg called the agency attorney and obtained an assurance that the agency attorney would not oppose a motion by Luxemburg for an extension of time to file a reply to the FAA's motion.[6] Luxemburg's counsel then sent the law judge a motion for extension of time, explaining that Luxemburg's law firm had been unable to file a response before the deadline because the associate with day-to-day responsibility for this proceeding was leaving the firm shortly, and was overwhelmed trying to finalize all the matters for which he was responsible.

After receiving Luxemburg's motion, the law judge's assistant explained to Luxemburg's counsel that the law judge had no power to grant the motion for extension of time or to reopen the case because the law judge lost jurisdiction when he issued his order assessing the civil penalty. Luxemburg then filed the instant appeal from the law judge's decision.[7]

Luxemburg's first argument on appeal is that the law judge erred in granting the FAA's motion without considering her reply. This argument is without merit. The law judge waited until after Luxemburg's deadline for filing a reply had expired before he issued his order. Luxemburg failed to file either a reply or a request for extension of time

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[6] Apparently, neither side realized that the law judge had already issued an order in the case.

[7] Luxemburg also filed a letter of response to the FAA's reply brief. This letter, which constitutes an unauthorized additional brief, is stricken. The Rules of Practice do not permit parties to file additional briefs without first obtaining the Administrator's leave and showing good cause for permitting the additional brief. 14 C.F.R. § 13.233(f). No such leave of the Administrator was either requested or granted.

before the deadline, and the reasons she has given for this failure fail to establish good cause. Luxemburg did not submit her motion for extension of time until a day after the law judge issued his order, and by then it was too late. Once the law judge issued his order assessing the civil penalty, he lost jurisdiction of the case, and had no authority to reopen it. In the Matter of Barnhill, FAA Order No. 92-32 at 4 n.3 (May 5, 1992), citing In the Matter of Cato, FAA Order No. 90-33 at 4 (October 11, 1990), In the Matter of Gabbert, FAA Order No. 90-27 at 5 (October 11, 1990), and In the Matter of Degenhardt, FAA Order No. 90-20 at 6 (August 16, 1990).

Luxemburg also contests the amount of the civil penalty assessed by the law judge. Luxemburg argues that both the FAA and the law judge failed to consider certain mitigating factors, as required by 49 U.S.C. App. § 1471(a). According to Luxemburg, in determining the amount of the civil penalty, 49 U.S.C. App. § 1471(a) requires a consideration of the "circumstances, extent, and gravity of the violation committed" and the "degree of culpability, any history of prior offenses, ability to pay, ... and other such matters as justice may require." She argues that the following facts are absolutely necessary to a determination of the amount of the penalty:

1. her age;
2. her original flight was cancelled, and she was bused to a different airport to take a different flight;
3. her special meal was not delivered to the flight she took;
4. the amount of time she spent travelling;
5. her emotional and physical state;
6. the time during the flight that she smoked (*i.e.*, not during takeoff or landing);
7. the location in the aircraft where she smoked (*i.e.*, in her seat);
8. her behavior toward flight personnel and other passengers;
9. the extent of smoking;
10. the extent of danger to fellow passengers and flight personnel; and
11. the lack of prior offenses.

The FAA correctly points out that the quoted language of 49 U.S.C. App.

§ 1471(a) expressly applies, by its own terms, only to cases involving the transportation of hazardous materials.[8] This is not to say, however, that the same or similar criteria cannot be taken into account in non-hazardous materials civil penalty cases. The FAA has determined, as a matter of policy, that similar criteria should be considered in assessing civil penalties in non-hazardous materials civil penalty cases. In the Matter of Northwest Airlines, FAA Order No. 90-37 at 12 n.9 (November 7, 1990), citing 55 Fed. Reg. 25,548, at 27,569 (1990).

The FAA bore the burden of justifying the amount of the civil penalty it sought. *See* 14 C.F.R. § 13.224(a) (providing that, except in the case of an affirmative defense, the burden of proof is on the agency).[9] *See also* In the Matter of Northwest Airlines, FAA Order No. 90-37 at 7 (November 7, 1990) (indicating that the FAA bears the burden of proving, by a preponderance of the evidence, the appropriateness of the civil penalty).

The only justification the agency attorney offered the law judge for imposing the maximum civil penalty in this case was that the Administrator imposed a $1,000 civil penalty in the Giuffrida case, and, according to the agency attorney, the Giuffrida case also involved smoking when the non-smoking signs were lit. The agency attorney included the following quotation from Giuffrida: "Smoking ... poses such a serious threat to safety that ordinarily a $1,000 civil penalty is warranted."

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[8] 49 U.S.C. App. §1471(a) provides as follows:

> The amount of any such civil penalty *which relates to the transportation of hazardous materials* shall be assessed by the Secretary [of Transportation] or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(Emphasis added.)

[9] This case involving a motion for decision is to be distinguished from cases involving the failure to answer the complaint, in which all of the allegations of the complaint are deemed admitted under 14 C.F.R. § 13.209(f).

The Giuffrida case, however, actually involved smoking in the lavatory, a violation of Section 121.317(h). Indeed, the complete quotation from Giuffrida is as follows: "Smoking *in the lavatory* poses such a serious threat to safety that ordinarily a $1,000 civil penalty is warranted." (Emphasis added.) Moreover, the agency admits in its reply brief that Luxemburg's violation of Section 121.317(g), involving smoking when the non-smoking signs are lit, does not pose as great a threat to safety as smoking in the lavatory.[10] *See* Complainant's Reply Brief at 13, n.9 (noting that, according to the regulatory history, FAR Section 121.317(g) serves primarily economic and consumer protection interests; also conceding that there is a "relative absence of a safety interest in applying FAR Section 121.317(g) to this [Luxemburg's] case").[11]

As for Luxemburg's argument that stress is a mitigating factor, the law judge correctly rejected it. *See* In the Matter of Petek-Jackson, FAA Order No. 92-59 (October 16, 1992) (holding that the stress the respondent was under did not excuse her forgetting that she was carrying a gun in her purse at the security checkpoint in violation of the regulations). Travel is, by its nature, stressful. Mechanical problems, changes in flights, not getting the food one has ordered, broken telephones, and even the recent death of a loved one, difficult as these experiences may be, do not justify intentional violations of the regulations. Nor is advanced age a factor justifying waiving or reducing a civil penalty for an intentional violation of the regulations.

In summary, although most of the reasons Luxemburg has given for reducing the civil penalty are either invalid on their face or were not raised at the appropriate time due to Luxemburg's own default, the record does not support imposing a maximum civil

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[10] This is not to say that smoking in the aircraft cabin never, under any circumstances, poses a threat to safety. Depending on the circumstances of a particular case, smoking in the cabin could conceivably pose as equally grave a threat to safety as smoking in the lavatory.

[11] Reply Brief at 13, n.9.

penalty in this case. A civil penalty of $700 more closely reflects the gravity, nature, and extent of Luxemburg's violation, as reflected in the record.

Based on the foregoing, the law judge's order granting the agency's motion for decision is affirmed, but the civil penalty is reduced from $1,000 to $700.[12]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 21st day of June, 1994.

[12] 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. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).