UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: July 22, 1992

FAA Order No. 92-46

In the Matter of: NORA SUTTON-SAUTTER	Docket No. CP91AL0618

DECISION AND ORDER

Respondent Nora Sutton-Sautter ("Respondent") has appealed from the oral initial decision issued by Administrative Law Judge Burton S. Kolko on March 27, 1991.[1/] It was alleged in the complaint that Respondent violated Section 107.21(a) of the Federal Aviation Regulations (FAR)[2/] and Section 901(d) of the Federal Aviation Act.[3/]

1/ A copy of the law judge's initial decision is attached.

2/ 14 C.F.R. § 107.21(a)(1) (1991) provides in pertinent part as follows:

> (a) ... [N]o person may have [a] ... deadly or dangerous weapon on or about the individual's person or accessible property--
> (1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area.

3/ Section 901(d) of the Federal Aviation Act, 49 U.S.C. App. § 1471 provides in pertinent part as follows:

> ... [W]hoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or

[Footnote continues on next page]

Respondent admitted that on June 23, 1991, she attempted to enter a sterile area at the Anchorage International Airport when preparing to board an aircraft with an unloaded semiautomatic handgun in her accessible baggage. She explained at the hearing that her son had given her the gun for Christmas. She decided to take it with her on a trip to Crystal Bay where she could practice using it. The night before her trip, she testified, she put the gun very carefully in one of her suitcases, thinking to herself, "This gun's in here." The next morning, Respondent's son dropped Respondent and her luggage off at the airport entrance. When Respondent counted her bags, she found that she had too many (six bags) and decided to take one suitcase on board the aircraft with her. Respondent claims that she simply picked up the wrong bag and did not intend to bring the gun on the aircraft with her.

At the conclusion of the hearing, the law judge affirmed the $1,000 civil penalty sought in the complaint. The law judge explained that Congress specifically intended to penalize all those who mistakenly attempt to bring a weapon on board an aircraft, including businesspersons and other professionals

---

[Footnote continued from previous page]

3/ about his or her person or property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to a civil penalty of not more than $10,000 which shall be recoverable in a civil action brought in the name of the United States.

who, through simple inadvertence, get caught with a weapon at an airport.

The law judge also explained that he was bound by the precedent set by the Administrator.[4/] Under that precedent, the only factor that might warrant a reduction in the sanction was Respondent's inability to pay the civil penalty. Because Respondent had not indicated that she was in distressed financial circumstances, the law judge affirmed the $1,000 civil penalty.

In her appeal, Respondent argues that consideration of a person's ability to pay in setting the sanction is unfair because such a policy discriminates against hardworking, prudent persons.[5/] Respondent asserts that if a violator is a spendthrift or elects to live on welfare rather than to work, then the civil penalty would be reduced or eliminated entirely.

In In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991), the Administrator held that inability to pay, if proven, may justify a reduction in sanction. Contrary to Respondent's argument, the policy set forth in the Lewis case is fair

---

4/ In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991).

5/ Respondent appears to be referring to 14 C.F.R. § 13.16(a)(4). This regulation applies only to cases arising under the Hazardous Materials Transportation Act, 49 U.S.C. App. § 1471(a), and as a result, is inapplicable to this case.

because, as Complainant argues, many hardworking and prudent people cannot afford to pay a $1000 civil penalty. Moreover, whether Lewis is fair is irrelevant in this particular case. The only issue before the Administrator here is whether the $1,000 civil penalty assessed against Respondent is commensurate with her violation. Whether another person suffering from financial hardship would receive a reduced sanction for a similar violation has no bearing on this case. See In the Matter of Cronberg, FAA Order No. 92-38 (June 15, 1992).

Congress has authorized the FAA to assess a civil penalty of up to $10,000 against any individual who, while aboard or while attempting to board any aircraft, carries a concealed deadly or dangerous weapon which would be accessible during flight. See 49 U.S.C. App. § 1471(d). In previous cases involving inadvertent weapon violations, the Administrator has affirmed penalties of $1,000 for an unloaded BB gun that appeared to be operable;[6/] $2,000 where the gun was unloaded but ammunition was accessible;[7/] and $2,500 where the gun was loaded.[8/] These amounts are consistent with the guidance

---

6/ In the Matter of Trujillo, FAA Order No. 91-30 (August 2, 1991).

7/ In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991).

8/ In the Matter of Cato, FAA Order No. 90-33 (October 11, 1990); In the Matter of Broyles, FAA Order No. 90-23 (September 14, 1990); In the Matter of Schultz, FAA Order No. 89-5 (November 13, 1989).

provided the prosecutors in the Enforcement Sanction Guidance Table.[9/] In light of this precedent, $1,000 is an appropriate sanction here.

The inadvertent nature of Respondent's violation does not justify reducing the sanction below $1,000. The amount of $1,000 already takes into account Respondent's lack of intent. Indeed, had Respondent's violation been intentional, the sanction could have been higher.[10/]

Respondent also argues that she was denied justice because Complainant's counsel and the law judge lacked the authority to reduce her civil penalty. Respondent complains that the decision concerning sanction was effectively made before her hearing was even held.

Whether agency counsel had the authority to settle this case for less than $1,000 is not a matter subject to review on appeal from a decision of the law judge. If the factual

---

9/ The Enforcement Sanction Guidance Table is contained in Appendix 4 of FAA Order 2150.3A, which is entitled "Compliance and Enforcement Program" and dated December 14, 1988.

10/ Respondent claimed that she intended to take one of the bags without the gun with her on the aircraft and checked the remaining five bags, including the bag with the gun. Had she done this, Respondent would still have committed a violation of an important safety rule if she failed to inform the airline that there was a gun in the baggage before checking it. Under 14 C.F.R. § 108.11(d), no person may tender for transport an unloaded firearm in checked baggage without declaring to the airline before checking the baggage that the firearm in the baggage is unloaded.

circumstances were right, the law judge would have had the authority to reduce the civil penalty.

Respondent appears to be claiming that it is unfair for Complainant and the law judges to be bound by precedent. But the duty of Complainant and the law judges to follow precedent does not result in unfairness. On the contrary, when Complainant and the law judges follow the policies set forth in the Administrator's prior decisions, they ensure consistency and fairness in the application of the law.

Respondent also argues on appeal that the law judge erred when he reversed his order that Complainant provide her with a copy of the FAA's investigative file concerning a similar but unrelated weapons incident. In her answer, Respondent had requested a copy of the airport security report and civil complaint generated when a delegate of the Iditarod race committee accidentally attempted to take a commemorative gun through the security checkpoint. No enforcement action was initiated by Complainant in the Iditarod case. The law judge initially ordered Complainant to provide the requested materials, but later reversed that order when he granted Complainant's request for reconsideration.

Without this information, argues Respondent, she was unable to show that Complainant treats similar cases differently. Respondent argues that the only logical reason for the FAA's

refusal to take action in the Iditarod case is favoritism. She claims that the law judge erred both in denying her discovery request and in failing to consider Complainant's different treatment of similar cases.

The Rules of Practice concerning the scope of discovery provide in relevant part as follows:

> [A] party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item .... A party has not ground to object to a discovery request on the basis that the information sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

14 C.F.R. § 13.220(e). The scope of discovery permitted by that rule is broad, but not unlimited. Only matters that are not privileged and that are relevant to the subject matter of the proceeding may be discovered. Id.

Relevancy is determined by examining the issues in a case. As the Administrator has held previously, the issues in each civil penalty case are twofold: First, did the alleged violation occur? And if so, what is the appropriate penalty? See In the Matter of American Airlines, FAA Order No. 89-6 at 7 (December 21, 1989).

Whether enforcement action was taken against someone else who may have violated a safety rule is not relevant in

determining whether Respondent violated the same rule. Here, Respondent has admitted the allegations in the complaint. Thus, the law judge acted properly in denying Respondent's discovery request, limiting the hearing to the issue of sanction, and focusing on the issue of sanction and whether Respondent had the ability to pay the civil penalty.

An agency's decision not to prosecute or enforce is generally committed to the agency's discretion and should be presumed immune from review. In the Matter of [Airport Operator], FAA Order No. 91-41 at 7 (October 31, 1991), citing Heckler v. Chaney, 470 U.S. 821, 831-32 (1984). There are good reasons for this. As the majority pointed out in the United States Supreme Court decision of Heckler v. Chaney, the decision not to enforce often involves a complicated balancing of a number of factors that are peculiarly within the prosecutor's realm. 470 U.S. at 831. The prosecutor must not only assess whether a violation has occurred, but whether the agency's resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. Id. The law judge properly declined to intrude upon this decision-making process.

Respondent's appeal is denied, the law judge's decision is affirmed, and a civil penalty of $1,000 is assessed.[12/]

THOMAS C. RICHARDS, Administrator
Federal Aviation Administration

Issued this 20th day of July, 1992.

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).