U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: February 4, 1991

FAA Order No. 91-3

In the Matter of:	
DAWN M. LEWIS	Docket No. CP89SO0108

DECISION AND ORDER

Complainant has appealed from the initial decision issued by Administrative Law Judge E. Earl Thomas at the conclusion of the hearing in this matter on February 27, 1990, in Jacksonville, Florida.[1/] In his initial decision the law judge found that Respondent Dawn Lewis ("Respondent") violated Section 901(d)[2/] of the Federal Aviation Act, as amended (the

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

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

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

"Act"), 49 U.S.C. App. § 1471(d), and Section 107.21(a)[3] of the Federal Aviation Regulations (FAR), 14 C.F.R. § 107.21(a), as alleged in the complaint.[4] The law judge reduced the $2,000 civil penalty sought in the complaint to $500 because "there are times when people violate the law in an excusable situation." The law judge explained that he found two mitigating factors which, together with Respondent's financial condition, warranted the reduction of the civil penalty.

Complainant argues on appeal that the factors cited by the law judge as the basis for the reduction of the civil penalty are not mitigating factors and that insufficient evidence was presented to support a reduction for inability to pay. In her brief, Respondent attempts to refute Complainant's position

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[3] 14 C.F.R. § 107.21(a) provides, in pertinent part:

> Carriage of an explosive, incendiary, or deadly or dangerous weapon.
>
> (a) Except as provided in paragraph (b) of this subsection, no person may have an explosive, incendiary, or 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[.]

[4] The complaint, which was filed on May 1, 1989, originally cited a violation of Section 901(a)(1) of the Act. Complainant submitted a "Motion of Amendment to Complaint," dated January 16, 1990 (and received by the Hearing Docket on January 23, 1990) to change the section of the Act alleged to have been violated to Section 901(d).

and, in addition, asserts that her due process rights were violated and that, therefore, all charges against her should be dismissed.[5/]

The relevant facts of this case are not in dispute and can be summarized as follows. On May 24, 1988, Respondent and her "boss," Phil Risley, were traveling on business from Jacksonville, Florida to Ft. Lauderdale, Florida. When they arrived at the airport, Mr. Risley instructed Respondent to check them in while he parked the car because they were running late. Mr. Risley also told Respondent that they did

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5/ Respondent's allegation of a due process violation in her brief is presumably based on the law judge's comment at the hearing that, because the complaint was amended without leave of the court, the amendment amounted to "a due process violation." However, pursuant to Section 13.214(b)(1) of the Rules of Practice in these proceedings, 14 C.F.R. § 13.214(b)(1)(1990), Complainant was not required to obtain the consent of the law judge before amending the complaint because Complainant filed its amendment more than 15 days before the date of the hearing. See note 4, supra.

Respondent also requests that all of the allegations against her be dropped because Complainant filed the appeal brief on September 21, 1990, when a letter signed by the Deputy Chief Counsel, John H. Cassady, informed Respondent that the brief was due on September 11. In accordance with the written guidance in the Notice To All Persons Whose Civil Penalty Cases Were Held In Abeyance and Section 13.233(c) of the Rules of Practice, 55 Fed. Reg. 27548, 27584 (July 3, 1990) (to be codified at 14 C.F.R. § 13.233(c)), Complainant was required to perfect his appeal by filing an appeal brief no later than 50 days after August 2, 1990. See In the Matter of Hart, FAA Order No. 90-37 (November 7, 1990) at 6. Therefore, Complainant's appeal brief was due no later than September 21, 1990. Id. Respondent was not prejudiced by the typographical error in Mr. Cassady's letter that indicated that the appeal brief was due on September 11. Her request for dismissal is hereby denied.

not have time to check their baggage. Consequently, Respondent submitted both her bags and those of Mr. Risley to screening at the security checkpoint. A gun was subsequently detected in Respondent's garment bag. Although the gun was unloaded, the garment bag contained four rounds of ammunition packed in a separate compartment. The section of the garment bag that contained the gun, as well as the section that contained the ammunition, were locked.

Respondent does not dispute that the gun was hers or that she intended to bring it with her on the trip. Respondent testified at the hearing that it is her usual practice to check her luggage when she travels because she carries a gun, and she knows that she is required to declare it and check it with her baggage. See 14 C.F.R. § 108.11(d). Respondent further testified that because she was running late and had "other things on [her] mind," she did not focus on the fact that the gun was in her bag when she submitted it for screening and did not even realize why the screening process stopped until the authorities arrived. The authorities detained Respondent until they verified that the gun belonged to her, that it was properly registered, and that she had her license to carry it. They also verified her employment. After approximately 30 minutes, the authorities repacked her suitcase and escorted her to baggage check-in, where she declared her gun, checked her luggage, and took the next flight to Ft. Lauderdale.

The law judge held that Respondent violated Section 901(d) of the Act and Section 107.21(a) of the FAR when she presented her bag containing the gun and ammunition at the security checkpoint. He found that two mitigating circumstances as well as Respondent's financial condition supported a reduction of the $2,000 civil penalty sought in the complaint to $500. Specifically, the law judge stated that he believed Respondent's testimony that she did not see the sign warning individuals not to bring weapons through the security checkpoint. He surmised that the sign was either turned around or not "there at all." He explained that he believed that had she seen a sign, it might have reminded her about the gun in her bag. In addition, he found that Respondent had a "legitimate business reason for carrying a weapon and a license for carrying the weapon on a routine basis." Finally, the law judge found that Respondent's financial situation warranted a reduction of the civil penalty sought by Complainant.

Based upon review of the entire record in this case, including the briefs submitted on appeal, the decision of the law judge to reduce the civil penalty in this case is reversed, and the $2,000 civil penalty sought in the complaint is reinstated.

FAA Order 2150.3A, Compliance and Enforcement Program, sets forth the agency's policy regarding sanctions in enforcement cases. In the Matter of Broyles, FAA Order No. 90-23

(September 14, 1990) at 8-9. As specified in the Enforcement Sanction Guidance Table contained in Appendix 4 of FAA Order 2150.3A, the following civil penalties are appropriate in cases involving the concealment of a deadly or dangerous weapon which would be accessible in flight in air transportation: $1,000 when the weapon is unloaded and the ammunition is not accessible; $2,000 when the weapon is unloaded and the ammunition is accessible; and $2,500 when the weapon is loaded. It is the agency policy that "there are no other mitigating or aggravating factors appropriate to consider within the[se] three categories of weapons violations . . ., and the sanction amounts are to be strictly adhered to." Broyles, FAA Order No. 90-23 at 9. Hence, the law judge's decision must be reversed to the extent that he reduced the civil penalty based upon his findings that Respondent did not observe a warning sign, that Respondent was licensed to carry the gun, and/or that she had a legitimate business purpose to do so. These factors do not justify a reduction in the $2,000 civil penalty.

In essence, the argument that Respondent did not see a warning sign to remind her that she could not take the gun on board with her in her carry-on bag is the same as arguing that the violation was inadvertent. Inadvertence has been rejected as a basis for reducing a sanction in a gun case. Broyles, supra. The agency's policy that a $2,000 civil

penalty is appropriate in cases in which a person attempts to board an aircraft with a gun in carry-on baggage and accessible ammunition is based on the presumption that the person did not intend to bring the weapon and ammunition on board. Indeed, if a person intended to bring a gun on board an aircraft in carry-on luggage, a higher sanction would be appropriate. As stated in the Enforcement Sanction Guidance Table, it is the agency policy that a civil penalty between $5,000 and $10,000 is appropriate when a person intentionally conceals a weapon.[6/]

Attempting to carry a weapon aboard a commercial flight is a serious offense even if, as in this case, the attempt is inadvertent. In the Matter of Schultz, FAA Order No. 89-0005 (November 13, 1989). As explained in that decision:

> [I]t is clear that Congress did not consider it unfair to subject individuals to civil penalties when, like Respondent, they should have known that they were carrying their personal firearms with them as they attempted to board a flight. Therefore, individuals who carry personal firearms have a duty to ensure that they do not inadvertently bring those weapons on board an aircraft.

Id., at 8-9.

It must be understood that the fact that a person, like Respondent, holds a gun permit and has a business-related

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6/ The Enforcement Sanction Guidance Table prescribes a civil penalty of $5,000 to $10,000 plus criminal referral where there is an "[a]rtfully concealed firearm or other intent to preclude detection" of a loaded or unloaded gun. FAA Order 2150.3A, Appendix 4, Section III.

reason for carrying a gun, does not affect that person's obligation to follow the statute and regulation at issue in this civil penalty proceeding. Contrary to Respondent's argument, this does not mean that the agency holds individuals licensed to carry guns to a "higher standard" than individuals who do not have permits or legitimate reasons to carry guns. Whether or not Respondent holds a valid permit would be considered by state and federal authorities in determining whether criminal prosecution should be pursued.

The next question to consider is whether, as the law judge found, the $2,000 civil penalty appropriate in this type of case should be reduced because Respondent cannot afford to pay it. The Broyles decision was not intended to preclude, and should not be read as precluding, consideration of a respondent's financial circumstances when determining the appropriate sanction. Inability to pay was simply not an issue in Broyles. The statement in Broyles that it would be inappropriate to consider any factors as mitigating other than those incorporated in the categories of weapons offenses set forth in the Enforcement Sanction Guidance Table (i.e., loaded, unloaded, ammunition accessible or inaccessible) means that there are no other circumstances regarding the particular violation or event that would be considered. This does not include circumstances particular to the individual respondent in such cases (i.e., inability to pay, prior violation

history). Thus, financial hardship, when proven, can serve as a basis for a reduction in sanction.

In his decision, the law judge said relatively little about Respondent's ability to pay a $2,000 civil penalty. He curiously characterized the civil penalty as a "luxury" that he did not "believe" Respondent could afford. At the hearing, Respondent testified about her various financial problems. She testified that her financial problems included the following: medical expenses related to a car accident, which caused her to lose her job; a "severe" loss in rental properties due to vandalism; her son's college expenses; increased household expenses due to her son and her sister moving in with her; and $5,500 of charges made on her credit card by her sister for which Respondent was held responsible. Except for the credit card debt attributable to her sister, Respondent did not testify as to the specific amounts at issue. Respondent testified that she thought that her tax return from the previous year established her family income at "around $42,000," but that the loss of her job, which paid $27,000 per year, adversely affected that figure.[7/] Other than her

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7/ Complainant, in its appeal brief, states that Respondent's $42,000 annual income was exclusive of her $27,000 salary from her former job. Although Respondent's testimony on this issue was not entirely clear, I do not agree with Complainant's interpretation that the $27,000 annual salary was not included in the $42,000 figure.

testimony, Respondent did not provide any evidence of her financial hardship.

Once Complainant proves the violations alleged, and what sanction is appropriate for a violation(s) of that nature, the burden necessarily shifts to the respondent to prove inability to pay, if the respondent raises that as a defense, because the respondent has sole control of her financial information.[8/] In this case, Respondent's vague and uncorroborated testimony regarding her income and expenses is insufficient to prove by a preponderance of the evidence that she is unable to pay the $2,000 civil penalty. It may well be that Respondent cannot afford to pay a $2,000 civil penalty, but the evidence on the record does not support that finding. The law judge, therefore, erred in reducing the civil penalty on the basis of financial hardship.

Accordingly, the law judge's reduction of the civil penalty for Respondent's violation of Section 107.21(a) of the FAR and Section 901(d) of the Act, based on the above-mentioned

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8/ Likewise, the NTSB shifts the burden of proof to the respondent in pilot identity cases when the Administrator establishes a prima facie case against the respondent. In such cases, the burden of establishing that someone else was the pilot shifts to the respondent because the respondent is in sole possession of the information necessary to refute the Administrator's case. See Administrator v. Simonye, EA-2074 (1984) (in which the Administrator did not establish the prima facie case necessary to shift the burden to the respondent); Administrator v. Dye, 2 NTSB 1585 (1975).

mitigating factors and inability to pay, was improper.

THEREFORE, in light of the foregoing, Complainant's appeal is granted, and a civil penalty in the amount of $2,000 is hereby assessed.9/

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 1st day of February 1991.

9/ Unless Respondent files a petition for reconsideration within 30 days of service of this decision, or a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).