UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATON ADMINISTRATION
WASHINGTON, DC

Served: Sept. 4, 1991

FAA Order No. 91-38

In the Matter of:	
WILLIAM J. ESAU	Docket No. CP90SO0105

DECISION AND ORDER

Complainant has appealed from the written initial decision issued by Administrative Law Judge E. Earl Thomas on April 5, 1991.[1/] The law judge held that Complainant failed to prove that a stun gun is a deadly or dangerous weapon, and, consequently, that Respondent William Esau ("Respondent") had violated Section 107.21(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 107.21(a)(1).[2/] Based upon consideration of the briefs and a review of the record, Complainant's appeal is granted.

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

2/ Section 107.21(a)(1) of the FAR, 14 C.F.R. § 107.21(a)(1), provides as follows:

> § 107.21 - Carriage of an explosive, incendiary, or deadly or dangerous weapon.
>
> (a) Except as provided in paragraph (b) of this section, 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[.]

On March 21, 1988, Respondent presented himself for screening at Orlando International Airport carrying a stun gun in his back pocket. The stun gun was detected during the screening process. Respondent offered to leave the stun gun with the security screener until after he returned from meeting his cousin (an arriving passenger) at a gate, but the screener rejected this offer.[3/] Respondent testified at the hearing that he had forgotten that he had the stun gun in his pocket.

Respondent testified that he carried the Nova XR-5000 stun gun for self-protection. The instruction sheet for this model, which was introduced as Joint Exhibit 1, begins with the statement, "Congratulations and welcome to the twentieth century. You now possess the world's first practical and effective defense device that does not kill or injure another." The effects of the XR-5000, as described on the instruction sheet, are as follows:

> A short blast of 1/4 to 1/2 second duration will startle an attacker, cause minor muscle contractions and have a repelling effect.
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> A moderate length blast of 1 to 4 seconds can cause an attacker, to fall to the ground and result in some mental confusion. It may make an assailant unwilling to continue an attack, but he will be able to get up almost immediately.
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> A full charge of 5 seconds can immobilize an attacker, cause disorientation, loss of balance, falling to the

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3/ The State of Florida instituted a criminal action against Respondent for carrying a concealed weapon, but subsequently entered a nolle prosequi plea on the record.

> ground and leave them weak and dazed for some minutes afterward.
>
> NOTE: Any blast lasting over 1 second is likely to cause your assailant to fall. If you do not help them down, gravity may injure them.

These instructions also include a warning that the XR-5000 discharges over 40,000 volts of electricity, and that "[w]hen firing the XR-5000 across the test probes you will hear the loud snapping sound of an electrical discharge."

Trygve C. Reeves, a security specialist employed by the FAA since September, 1990, testified that a stun gun constituted a deadly or dangerous weapon within the meaning of Section 107.21(a) because it could be used offensively to injure someone as well as defensively to prevent someone from inflicting bodily harm. He testified that he would be hesitant not to obey someone who threatened him with a stun gun because he did not know what kind of injury a stun gun could actually cause. Mr. Reeves based his testimony upon information that he had read about stun guns.

Respondent testified that this stun gun "is a mini-cattle probe" and that it does not disable anybody for more than 45 seconds. He explained that he had been informed by the Osceola Police Department that it is legal to carry a stun gun as long as it is not concealed. Respondent also introduced two mail-order descriptions of stun guns.

The law judge held that Complainant failed to introduce sufficient evidence to prove that Respondent's stun gun was a

deadly or dangerous weapon. The law judge reached this conclusion after finding that Mr. Reeves was not an expert on stun guns, that a stun gun only temporarily affects the person receiving a shock without inflicting any harm, and that a stun gun can only be used defensively.[4/] He specifically limited his decision to the facts of this case and declined to determine whether stun guns generally should be considered to be deadly or dangerous.

Complainant has appealed from the law judge's initial decision, arguing that it proved that the stun gun is dangerous as that term is used in Section 107.21, and that the stun gun could also be used to intimidate a potential victim. Complainant requested that the case be remanded to the law judge for consideration of Respondent's inability to pay the civil penalty should the Administrator reverse the law judge's decision and determine that Respondent had violated Section 107.21. Respondent replied briefly that Complainant has failed to produce any documentary evidence that the Nova XR-5000 is either deadly or dangerous, and that Mr. Reeves' testimony, in essence, deserves little, if any, weight.

4/ Based upon the language in Joint Exhibit 1 that the stun gun will only operate properly if it is "pressed against an attacker," the law judge concluded that the stun gun can only be used defensively. This conclusion is rejected because if the stun gun is pressed against an innocent person, it could be used offensively as well.

I find that this stun gun must be considered to be a dangerous weapon because of its potentially disabling effects. The harmful effects of the XR-5000 were described in Joint Exhibit 1. Although manufacturers of stun guns may emphasize the defensive uses in their advertisements, there is no reason why this stun gun in the wrong hands could not be used offensively. In the aviation context, the end result could be disastrous. It is inconsequential that this stun gun may only temporarily disorient or otherwise affect its target. As was stated in one case in which it was held that a stun gun was a dangerous weapon within the meaning of Section 902(l) of the Federal Aviation Act, as amended, 49 U.S.C. App. § 1472(l):[5/]

> [t]he potential for devastating injury that is present during even a temporary incapacitation of key personnel aboard an aircraft in flight requires courts applying the statutory prohibition against a deadly or dangerous weapon to consider both the transitory and permanent nature of the weapon's effect.

United States v. Wallace, 800 F.2d 1509, 1513 (9th Cir. 1986), cert. denied 481 U.S. 1019 (1987).

When Section 107.21 of the FAR was amended in 1986, the FAA replaced the word "firearm", used in the original rule,

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5/ Section 902(l)(1) provides criminal penalties for boarding or attempting to board an aircraft with a concealed deadly or dangerous weapon which would be accessible in flight. 49 U.S.C. App. § 1472(l)(1).

with the term "deadly or dangerous weapon." The FAA explained in the preamble to the amendment that "[t]he effect of this amendment will be to broaden the rule to prohibit certain items at the screening point in addition to firearms. They would include such items as mace and certain knives." 51 Fed. Reg. 1350-1351 (January 10, 1986). Mace, like a stun gun, has only temporary disabling effects, and usually is considered to be a defensive weapon.

Although the law judge held that Complainant did not prove that there was a violation, he, nonetheless, found that the following mitigating factors existed: 1) that the violation appeared to be inadvertent; 2) that Respondent did not have any past violations: 3) that Respondent did not have "a great level of experience;"[6/] and 4) that Respondent's ability to absorb the $750 civil penalty was limited given his financial situation. Respondent, who was 62 years old on the date of the hearing, testified that he was unemployed and that his total monthly income consisted of $175 of interest from the proceeds from the sale of his house plus $144 in disability benefits. He testified further that he had applied for social

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6/ The law judge explained that he was considering the mitigating factors listed in FAA Order No. 2150.3A, Compliance and Enforcement Program. Section 207(b)(4) of FAA Order No. 2150.3A provides that more severe sanctions normally should be imposed upon violators with substantial experience. That factor does not appear to be relevant to this case. In any event, Respondent does not have any aviation-related experience.

security benefits, but he had not yet begun to receive any benefits.

A civil penalty of $750 is not inappropriate for a violation such as this one. However, I am mindful that Respondent has limited financial means. Accordingly, a $150 civil penalty shall be assessed.[7/]

THEREFORE, IT IS ORDERED THAT the law judge's written initial decision is reversed and Complainant's appeal is granted. Respondent is hereby assessed a civil penalty of $150.[8/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 4th day of September, 1991.

7/ Complainant's suggestion that this case be remanded for a determination of the appropriate sanction is denied, not because it would be inappropriate to do so, but rather because it is more efficient for me to make that determination in this case.

8/ Unless Respondent files 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. 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1991).