UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: NOV 13 1989

FAA Order No. 89-0005

FEDERAL AVIATION ADMINISTRATION, Complainant, vs. CHARLES A. SCHULTZ, Respondent.	)

DECISION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Burton S. Kolko rendered at the conclusion of the hearing held in this proceeding on July 25, 1989.[1/] In his decision, the law judge held that Respondent violated section 107.21(a) of the Federal Aviation Regulations

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

(FAR), 14 CFR 107.21(a) [2] and section 901(d) of the Federal Aviation Act, as amended, (the "Act") 49 U.S.C. App. 1471(d),[3] as alleged in the Order of Civil Penalty which was filed as the complaint. The law judge modified in part

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2/ Section 107.21(a)(1) (1988) of the FAR provides as follows:

> 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;

14 CFR Section 107.21(a)(1).

3/ Section 901(d) of the Federal Aviation Act of 1958, as amended, provides in pertinent part:

> [W]hoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate 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 civil penalty of not more than $10,000 which shall be recoverable in a civil action brought in the name of the United States.

the Order of Civil Penalty by reducing the civil penalty set forth therein from $2500 to $2000.[4/]

In the Order of Civil Penalty, the FAA alleged specifically that on November 23, 1988, Respondent was a ticketed passenger for a Delta Airlines flight to Albuquerque, New Mexico. It was further alleged that during the x-ray inspection of Respondent's carry-on bag at the Salt Lake City International Airport, a Ruger, .357 magnum revolver, loaded with six rounds of live ammunition with one in the firing chamber was detected.

The main thrust of Respondent's testimony and argument at the hearing was that November 23, 1988, was a very hectic day for him and, as a result, he simply forgot to remove the revolver from the carry-on bag. He explained that he usually kept the revolver, as well as a change of clothes and toiletries, in that carry-on bag and that he took that bag with him everyday as he drove to and from his office. He explained that on previous occasions when he had flown, he had

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4/ The law judge based the $500 reduction of the civil penalty on the fact that Respondent had made a payment in a state criminal proceeding arising from the same circumstances. At the hearing, Respondent testified that he had paid $150 in court costs in a related state criminal proceeding which was subsequently dismissed. The law judge did not explain, as required by 14 CFR 13.232, why he reduced the civil penalty by $500 rather than $150. However, the appeal does not raise the reduction in sanction as an issue.

removed the revolver, but on this trip he neglected to do so. He testified that he did not realize that the revolver was in the bag until after the bag was detained at the x-ray machine and a second guard had come over to the machine.

The law judge held that the regulation and the statute require proof that the individual intended to submit himself and his property for inspection. He held that it was not necessary to prove that the individual had actual knowledge that he had the weapon with him. Instead, the law judge stated, a violation occurred if a person knew or should have known that the weapon was in his possession when he presented himself for inspection.[5/]

5/ The law judge stated in his decision that once it was demonstrated that the individual intended to present his person and/or property for inspection, that "...in the parlance of the respondent in this proceeding, strict liability devolves therefrom upon finding of a weapon." A careful reading of the law judge's decision, however, reveals that the law judge was not using the term "strict liability" literally. The law judge next announced that he was finding as a matter of law that it was necessary to demonstrate that an individual knew or should have known that he had a weapon in his possession. As the law judge explained, although this was not at issue, this "knew or should have known" standard would "... meet a circumstance where the evidence indicates that the weapon did not belong to the respondent, and was planted on him or in any other way found its way into his bag...."

Respondent has appealed from the law judge's initial decision, arguing:

1) that the FAA failed to establish that Respondent violated section 107.21(a)(1) of the FAR because the FAA did not prove that Respondent had knowledge of the presence of the revolver in his bag and there were no consequences from the act of carrying the revolver;

2) that it was error for the law judge to find that Respondent violated section 901(d) of the Act, 49 U.S.C. App. 1471(d), in the absence of any evidence that Respondent had knowingly attempted to bring his weapon on board the aircraft; (Respondent argues that for such an "attempt" crime, intent must be demonstrated.)

3) that the law judge erred in finding that Respondent's weapon was "concealed" because Respondent had not knowingly or intentionally concealed it from the airport security personnel; and

4) that assuming arguendo that Respondent did violate section 107.21(a)(1) of the FAR and section 901(d) of the Act, 49 U.S.C. § 1471(d), that the $2000 civil penalty is excessive.

The FAA filed a reply brief. The FAA argues in its reply brief as follows:

1) that section 901(d) the Act, 49 U.S.C. App. 1471(d), does not require knowledge of concealment or intent to conceal a dangerous weapon;

2) that it was not error for the law judge to find that Respondent violated section 107.21(a)(1) of the FAR;

3) that Respondent was not charged with committing an attempt crime; and

4) that the $2000 was warranted in law and justified in fact and, therefore, should not be further reduced.6/

Prior to 1984 when sections 901 and 902 of the Act were amended, 49 U.S.C. App. 1471 and 1472, a person who boarded or attempted to board an aircraft while carrying a concealed deadly or dangerous weapon which either was or would have been available to him during flight could have been criminally prosecuted under section 902(l)(1) of the Act. See, e.g., United States v. Flum, 518 F.2d 39 (8th Cir.), cert. denied, 423 U.S. 1018 (1975). The former Section 902(l)(1) provided that such person shall be fined $1000 or less, or imprisoned not to exceed 1 year, or both. Alternatively, such person could have been subject to a civil penalty not exceeding $1000 for each violation of section 107.21(a) of the FAR pursuant to former section 901(a)(1) of the Act. See, e.g., United States v. Gutierrez, 624 F. Supp. 759 (E.D.N.Y. 1985).

6/ Respondent submitted a Request to File Supplemental Brief, pursuant to 14 CFR §13.233(f), "to respond to the misstatements of law and fact alleged in the Complainant/Appellee's Reply Brief." FAA counsel opposes this request.

Respondent's request is denied. Section §13.233(f) provides that the FAA decisionmaker may grant leave to file an additional brief if the requesting party demonstrates good cause for allowing additional argument on the appeal. Respondent has failed to demonstrate good cause.

Congress amended these sections of the Act in 1984 to provide for more stringent sanctions for individuals who boarded or attempted to board an aircraft with a concealed deadly or dangerous weapon which would be available to them during a flight. Hence, in the case of a misdemeanor, the maximum criminal penalty was raised to $10,000, or no more than 1 year in jail, or both, 49 U.S.C. App. 1472(l)(1), and the maximum civil penalty was increased to $10,000 per violation, 49 U.S.C. App. 1471(d).

From the legislative history to these amendments, it is clear that Congress contemplated that the new civil penalty section pertaining to dangerous and deadly weapons, section 901(d), 49 U.S.C. App. 1471(d), could be used to fine an individual who, like Respondent, lacked the conscious intent to bring such a weapon on board an aircraft. In the Senate Report to the proposed Aircraft Sabotage Act (from which was derived Title II, Chapt. XX, Part 13 of the Crime Control Act, P.L. 98-473, which amended Sections 901 and 902 of the Federal Aviation Act as explained above), the Senate Committee on the Judiciary reported:

> It should be noted that, taken together subsections 4(a) [subsequently Section 901(d) of the Act] and 4(c) [subsequently section 902(l) of the Act] of the bill increase the range of punishments available for a person who boards or attempts to board an aircraft with a firearm or other dangerous weapon. At the lower end of the spectrum is a civil penalty of up to $10,000. A civil penalty of some amount could be appropriate, for example, for a businessman who has a firearm in his briefcase but,

> in spite of signs clearly reminding him to do so, forgets to declare it and turn it over to the airline for shipment as is required by 18 U.S.C. 922(e). At the opposite end of the scale is a criminal penalty of up to 5 years' imprisonment and a $25,000 fine for a person who willfully or recklessly carries a weapon aboard a plane. Such a penalty would be appropriate if the person, for example, displayed the weapon in the course of an altercation with a fellow passenger or with a flight attendant. In between is a criminal misdemeanor penalty of a $10,000 fine and one year's imprisonment which might be an appropriate level of punishment for a person's second offense of "forgetting" to transfer his personal firearm to the flight crew for shipment with him or for a person who consciously decides to carry a firearm with him in the cabin of a plane with no intention of using it but merely to see if he is clever enough to defeat the airport security system.

S. Rep. No. 619, 98th Cong., 2d Sess. 6-7 (1984), reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3687-3688 (emphasis added). For that matter, as this excerpt reveals, Congress even contemplated that a criminal penalty might be appropriate under certain circumstances in which the individual inadvertently left his firearm in a piece of carry-on luggage.

In light of this expression of Congressional intent, I am compelled to find that the law judge was correct in holding that Respondent violated section 901(d) of the Act, 49 U.S.C. 1471(d), despite Respondent's argued lack of intent to bring the firearm with him on the aircraft. From the examples set forth in the Senate Report, it 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.

Respondent argues that he has been penalized for violating an "attempt" offense and that such crimes require a showing of specific intent. From this he concludes that the FAA was required to demonstrate that Respondent had intended to attempt to board the aircraft and that he had intended to attempt to bring his gun with him. This reasoning is fallacious, not only because of the above-mentioned legislative history, but also because section 901(d), 49 U.S.C. 1471(d), is not a criminal statute. Furthermore, the word "attempting" as used in that section only modifies the verb "to board."

In a related argument, Respondent alleges that the FAA was required to prove that Respondent had knowingly concealed the weapon. Indeed, at some point, Respondent did know that he had concealed his weapon in his bag even if he may have forgotten that he had done so by the time that he presented himself at the security checkpoint. That aside, as already set forth, Congress did not consider such knowledge to be necessary. In addition, it has been held in interpreting the word "concealed" as used in the criminal penalties section, section 902, that intent to conceal does not need to be

proven. United States v. Flum, 518 F.2d at 43-45; but see United States v. Lee, 539 F.2d 606 (6th Cir. 1976). As the court wrote in Flum:

> It will be argued that the statute thus construed may operate harshly upon passengers boarding aircraft with articles which potentially are deadly or dangerous weapons. Balanced against the heavy risks to large numbers of passengers, including those who would carry such weapons on board with no evil purpose, we cannot say that the resulting effect is too severe. It requires no recitation of recent history to remind us that such risks are real, and in comparison, the statute -- broad though its reach may be -- is a reasoned response to a demonstrated need.

Flum, 518 F.2d at 45. The same could be said about the civil penalty section of the Act, section 901(d), as it is being construed in this decision.

In light of my finding that section 901(d) of the Act, 49 U.S.C. 1471(d) does not require proof of intent to bring a concealed deadly or dangerous weapon on board an aircraft, I likewise find that intent to carry such a weapon on or about an individual's person or in his accessible property is not a required element of a violation of section 107.21(a)(1) of the FAR. Hence, it is held that it was not error for the law judge to hold that Respondent violated section 107.21(a)(1) of the FAR based upon the finding that Respondent should have known that he had his gun in his carry-on bag. Although, given the facts of this case, it is not necessary to decide

whether section 107.21(a)(1) imposes strict liability, the fact that a court has interpreted it as a strict liability regulation, see United States v. Gutierrez, 624 F. Supp. 759, 761-62 (E.D.N.Y. 1985), adds support to this decision that the law judge was correct in deciding that Respondent had violated section 107.21 because Respondent should have known that he had his gun in his bag.

With regard to Respondent's argument that under the circumstances, he should not have been found to have violated section 107.21(a)(1) of the FAR because no harm resulted from his failure to remove his gun from his bag, I find that to have been simply fortuitous, and not a basis for determining whether a violation of the regulation occurred.

Finally, with regard to the sanction, it is held that the $2000 civil penalty, as modified by the law judge, should not be further reduced.[7/] The law judge did take into consideration the nature, circumstances and gravity of the violation when he determined that $2000 would be appropriate. The law judge appropriately stated:

7/ See footnote 4, supra.

> Congress had indicated that it is within the FAA's discretion to ask, and my discretion to impose, the finding of $10,000 in this kind of a circumstance. And this is just about, as far as the civil proceeding is concerned the gravest circumstance that we could have, which is the presence of a loaded weapon in a flight bag. Congress made it very clear that guns and airports don't mix, no matter how well intentioned, particularly loaded weapons, which can either accidentally discharge or, should a bag be misplaced or fall into the wrong hands, immediately you convey the presence of armed force to a person who, quite admittedly, is not the upstanding person that this respondent is.

Furthermore, in the formulation of the Enforcement Sanction Guidance Table contained in the Compliance and Enforcement Program, FAA Order 2150.3A, App. 4 (December 14, 1988), the FAA considered the nature, circumstances, extent and gravity of each general type of violation as well as the individual's prior violation history (in that the table provides recommended penalties for first-time offenders). See Exhibit C-2, Memorandum from the Chief Counsel to the Administrator and the Deputy Administrator pertaining to the Proposed Sanction Policy for Armed Ticketed Passengers and Public Awareness Campaign, dated November 7, 1988. The only relevant factor, the consideration of which might not be reflected in the law judge's stated reasoning or in the Enforcement Sanction Guidance Table, is whether Respondent has the ability to pay the penalty. However, Respondent has at no time during these proceedings argued that he lacks the ability to pay the $2000 penalty.

Furthermore, with regard to deterrence, this penalty hopefully will deter Respondent from such carelessness in the future. When it added section 901(d) of the Act in 1984, Congress obviously did not believe that the embarrassment of being caught at an airport security checkpoint with a concealed loaded firearm in one's carry-on bag was a sufficient deterrent. Additionally, if this decision is publicized, it will deter others from committing similar violations in the future.

THEREFORE, the decision and the Order Assessing Civil Penalty issued by the administrative law judge are affirmed.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 9th day of November, 1989.