DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of	)	
	)	
JAMES C. DURKIN,	)	Docket No. 07-TSA-0071
	)	
Respondent.	)	

FINAL DECISION AND ORDER

James C. Durkin, Respondent, appeals the initial decision of the Administrative Law Judge (ALJ) issued on February 4, 2008. The ALJ found that Respondent interfered with the screening process in violation of 49 C.F.R. § 1540.109 and assessed a civil penalty of $1,500.00. As discussed below, the initial decision of the ALJ is affirmed and the appeal is denied.

The Transportation Security Administration's (TSA's) rules of practice for civil penalty actions specify that a party may appeal only the following issues: 1) whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence; 2) whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and 3) whether the ALJ committed any prejudicial errors during the hearing that support the appeal. 49 C.F.R. § 1503.233(b).

In its Complaint, TSA alleged that Respondent, an employee of Alaska Airlines, entered a passenger only screening checkpoint at Seattle-Tacoma International Airport by opening the stanchion rope and without clearing his employee badge with the travel document checker on duty, that he ignored repeated directions from several TSA personnel to clear the badge, that he was argumentative, insulting, and used profanity, and that he ignored TSA's requests to leave the checkpoint. TSA argued that his behavior created a distraction which caused them to suspend screening at the checkpoint. TSA alleged that Respondent violated 49 C.F.R. § 1540.109, which states that no person may interfere with, assault, threaten, or intimidate screening personnel in

the performance of their screening duties; and 49 C.F.R. § 1540.105(a)(1), which states that no person may tamper or interfere with, compromise, modify, attempt to circumvent, or cause a person to tamper or interfere with, compromise, modify or attempt to circumvent any security. A hearing was held. Respondent was represented by counsel and both parties presented evidence.

In the initial decision, the ALJ found that TSA failed to prove its case regarding the alleged violation of 49 C.F.R. § 1540.105(a)(1) (attempting to circumvent a security measure), but that TSA had proved its case regarding the violation of 49 C.F.R. § 1540.109 (interference with screening). The ALJ lowered the amount of the civil penalty to reflect just the penalty requested for the proven violation. Respondent appealed the initial decision.

In his "correct" appeal brief, Respondent sets forth 30 points in support of his appeal.[1] Points 1, 2, 9, and 10 address Respondent's contention that TSA did not produce a video of the incident and did not call an alleged witness to testify. Under TSA's rules of practice, a party may obtain a subpoena from the ALJ to compel the attendance of a witness at a deposition or hearing or to require the production of documents or tangible items. 49 C.F.R. § 1503.228(a). Respondent had the opportunity to obtain a subpoena for the video and to summon the witness to testify on his behalf at the hearing, but failed to do so. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. 49 C.F.R. § 1503.225.

In points 3, 4, 7, 8, 11, 12, 13, 14, 20, 21, and 22 Respondent questions the credibility of the TSA witnesses. The ALJ is in the best position to observe the demeanor of witnesses at a hearing. Therefore, an ALJ's determination regarding the credibility of witnesses is entitled to deference. This is consistent with longstanding administrative practice. See, In the Matter of Nicholas J. Werle, FAA Order No. 97-20 (May 23, 1997), In the Matter of Warbelow's Air

[1] Both Respondent and his counsel filed a Notice of Appeal and both filed an appeal brief. In Respondent's "correct" appeal brief, Respondent indicates that he is no longer represented by his counsel.

Ventures, FAA Order No. 200-3 (Feb. 3, 2000), and In the Matter of David C. Siddall, FAA Order No. 2008-9 (October 7, 2008). The Federal courts have stated that credibility determinations made by the finder of fact will be overturned only if exceedingly improbable testimony has been credited. U.S. v. Broadie, 452 F.3d 875 (D.C.Cir. 2006), U.S. V. Adamson, 441 F.3d 513 (7th Cir. 2006). Respondent was able to cross examine all of the TSA witnesses. Upon review of the record, there is no reason to overturn the determination by the ALJ that the testimony of the TSA witnesses was reliable. Point 23 addresses the credibility of the Respondent. Respondent's background is impressive and his service to the U.S. is commendable. However, deference must be given to the ALJ's determination as to the credibility of Respondent's testimony at the hearing.

Points 5 and 6 refer to alleged corporate policies and practices of a religious nature. I find these points to be irrelevant and immaterial.

Points 15, 16, 17, 18, and 19 address signs posted at the airport to indicate that the checkpoint that Respondent entered was designated for passengers only. The ALJ found that TSA personnel would have allowed Respondent to process through the checkpoint since the volume of passengers was low, and more important, held that TSA failed to prove its case regarding the charge of circumventing the screening process. Therefore, I find that these points are irrelevant and immaterial to the remaining charge regarding interference with screening.

Points 24 and 25 allege that the ALJ erred in the conduct of the hearing. The ALJ is responsible for regulating the course of the hearing in accordance with TSA's rules of practice and receiving relevant and material evidence. Respondent does not explain how the introduction of the exhibits or the order of the witnesses was prejudicial. Upon review of the transcript of the

hearing, I find that the ALJ did not commit any prejudicial error that would support Respondent's appeal.

In the remaining points 24 through 30, Respondent raises complaints about his attorney, and the conduct of security personnel at the airport. I find these points to be irrelevant and immaterial.

Finally, Respondent requests that the initial decision be vacated or that a trial be conducted by the prosecutor for the City of Seattle followed by a jury trial. Federal administrative hearings are not conducted by city prosecutors and there is no provision for a jury trial in TSA's civil penalty rules of practice.

Based on the forgoing, the initial decision of the ALJ is upheld and Respondent's appeal is denied.

Either party may petition the TSA Decision Maker to reconsider a Final Decision and Order. The TSA rules of practice for filing a Petition for Reconsideration are described at 49 C.F.R. § 1503.234. A party must file the petition with the TSA Enforcement Docket Clerk not later than 30 days after service of the TSA Decision Maker's Final Decision and Order and serve a copy on all parties. The mailing address for the Enforcement Docket Clerk is:

ALJ Docketing Center, U.S. Coast Guard
U.S. Customs House, room 412
40 South Gay Street
Baltimore, MD 21202-4022
ATTTN: Enforcement Docket Clerk

A party may seek judicial review of the Final Decision and Order as provided in 49 U.S.C. § 46110.

Dated: October 30, 2009

Keith G. Kauffman
Acting Deputy Administrator