U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of	)	
	)	
PHILLIP DELK	)	Docket No. 10-TSA-0025
	)	
Respondent.	)	

ORDER

TSA appeals a decision by the Administrative Law Judge (ALJ) issued on October 6, 2010 to deny TSA's Motion to Dismiss Respondent's request for a formal hearing. As explained below, the decision of the ALJ is reversed.

Generally, TSA's rules of practice do not permit a party to file an interlocutory appeal to the TSA Decision Maker until the initial decision has been entered on the record. A decision or order of the TSA Decision Maker on the interlocutory appeal does not constitute a final order for the purposes of judicial appellate review under 49 U.S.C. § 46110. See, 49 C.F.R. § 1503.631(a). However, an interlocutory appeal as of right is permitted without the consent of the ALJ before the initial decision is entered in the following circumstances: (1) a ruling or order by the ALJ barring a person from the proceedings; (2) failure of the ALJ to dismiss the proceedings in accordance with § 1503.623[1]; (3) a ruling or order by the ALJ in violation of § 1503.607(b); or (4) a ruling or order by the ALJ regarding public access to a particular docket or documents.

In this instance TSA asserts that the interlocutory appeal is permitted because the decision is in violation of 49 C.F.R. § 1503.607(b)(1)(v). That provision states that the ALJ may not "[d]ecide issues involving the validity of a TSA regulation, order, or other requirement under

[1] I note that there appears to be a typographical error in this paragraph of the rules of practice. The reference in the regulatory text to § 1503.215 is incorrect, since that section no longer exists. The correct reference should be § 1503.623.

the U.S. Constitution, the Administrative Procedure Act, or other law." TSA argues that the ALJ's decision to deny TSA's motion to dismiss the hearing contravenes TSA's rules of practice providing for automatic issuance of an Order Assessing Civil Penalty pursuant to 49 C.F.R. § 1503.419(b)(2) because Respondent failed to request a formal hearing consistent with the procedural requirements of 49 C.F.R. § 1503.427(c). That rule requires that a written request for a hearing must be served on the Enforcement Docket Clerk and agency counsel. Respondent failed to serve his request for a hearing on agency counsel. I agree that the ALJ decision is contrary to the rules of practice and that in this instance, the interlocutory appeal is appropriate.

The ALJ decision notes that an ALJ may allow late filings if good cause is shown and several cases are cited in support. However, the facts of this case demonstrate that good cause has not been shown. As the ALJ decision explains, Respondent notified the ALJ that he could not address TSA's motion to dismiss because he was caring for his terminally ill mother. Generally, a party may file a reply to a motion not later than ten days after service of a written motion. 49 C.F.R. § 1503.629(d). The ALJ issued a stay order and allowed Respondent ninety days to respond to TSA's motion to dismiss, submit information regarding the service of the request for hearing, and/or to provide good cause for his failure to do so. However, Respondent did not respond to the stay order and thus failed to show cause why he did not follow the rules of practice. Without any showing of good cause, TSA's motion to dismiss must be granted.

The ALJ decision contends that an ALJ may consider a request for hearing that does not strictly conform to TSA's rules of practice. I agree. Minor procedural defects may be overlooked when good cause is shown and due process is not impacted. However, without any showing of good cause as to why the rules were not followed, it is not appropriate to permit any

party, even if pro se, to simply ignore the rules of practice.[2] The rules of practice must be followed, even if a party is appearing without an attorney. "Adherence to the rules is essential to preserve the integrity and fairness of a civil penalty action."[3]

Respondent was advised in the Final Notice of Proposed Civil Penalty and Order Assessing Civil Penalty (Final Notice and Order), issued on February 9, 2010 of the procedure for requesting a formal hearing. He was also advised as to how to obtain the agency rules of practice. More important, he was advised at that time that the Final Notice and Order would automatically become an Order Assessing Civil Penalty if the rules were not followed. Furthermore, the ALJ stayed the proceedings for ninety days to provide Respondent additional time to show cause why he failed to serve his request for hearing on agency counsel. The ALJ decision notes that if Respondent "continues to sit on his rights following the Agency's issuance of a complaint, he will then be subject to summary adjudication pursuant to relevant Agency regulations." Respondent has been served with a Final Notice and Order, has been notified of the procedures that must be followed, and has been afforded additional time to provide a response. Ultimately, Respondent failed to respond to the ALJ's own order, ignored his responsibilities to follow the rules of practice without showing good cause, and, as a result, has forfeited his opportunity to a hearing as required by the rules of practice. Dismissal of the request for hearing is therefore appropriate.

The ALJ decision contends that TSA's rules of practice are contrary to public policy. This is not the case. The rules of practice are quite similar to the rules of practice used by the Federal Aviation Administration (FAA), which the decision points out serve as the basis for TSA's rules. For example, TSA's rules of practice require that "a person must serve a copy of

[2] See, In Re Paul Amara, 2008 WL 217386 (May 9, 2008); In Re Edward Amet, 2008 WL 73903 (June 28, 2007); In Re Lacy Maddox, 2010 WL 697366 (Jan. 15, 2010); In re Mahmoud Mahmoud, 2009 WL 5910424 (Oct. 30, 2009).
[3] In re Rajoy, 2010 WL 5018674 (Mar. 22, 2010).

any document filed with the Enforcement Docket on each party and the ALJ..." 49 C.F.R. § 409(h). The FAA has a similar requirement. See, 14 C.F.R. § 13.211(a). As noted, TSA's rules require that a request for hearing be served on the Docket Clerk and the agency attorney. The FAA also requires that a request for a hearing be filed in the Hearing Docket and "served on the official who issued the notice of proposed action." 14 C.F.R. § 13.35(b). The Federal Rules of Civil Procedure also require service of pleadings, motions, and briefs on all parties. Such a requirement is necessary to assure due process for all parties. While the ALJ decision seems to object to the automatic conversion of the Final Notice and Order into an Order Assessing Civil Penalty, Respondent retains the right to seek judicial review of the Order Assessing Civil Penalty as provided for by 49 U.S.C. § 46110.

I agree with the ALJ decision that "a respondent is under an obligation to follow the Agency's rules and regulations and not every deviation shall be excused." In this case, however, the Respondent did not carry out his obligation. The ALJ decision effectively negates the rules of practice without any attempt by the Respondent to show good cause why the rules of practice could not be followed or any determination by the ALJ that good cause exists.

Based on the forgoing, the ALJ decision denying TSA's motion to dismiss the request for hearing is reversed.

Dated: March 4, 2011

Gale Rossides
Deputy Administrator