

Before the
U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of:)
)
Catherine H. Klee,) Docket No. 11-TSA-0062
)
Respondent.)

FINAL DECISION AND ORDER

Respondent Catherine H. Klee appeals the April 5, 2012 Initial Decision of the Administrative Law Judge (ALJ) in the above-referenced matter. In his Initial Decision, the ALJ found that Respondent violated 49 C.F.R. §1540.105(a) by intentionally and willfully attempting to circumvent the security screening process in order to bring a prohibited aerosol can of hair product into the sterile area of the airport and on board an aircraft. For the reasons set forth below, the Initial Decision is upheld.

On June 15, 2011, TSA issued a Final Notice of Violation and Civil Penalty Assessment Order to Respondent. Respondent requested a formal hearing. A hearing was held on January 26, 2012. In the Initial Decision, the ALJ found that based on a preponderance of the evidence presented during the hearing, Respondent violated TSA's regulations by intentionally concealing an aerosol can of hair product in her pants in order to circumvent security screening after she had been told she could not bring the can into the sterile area. According to the Transportation Security Administration's (TSA's) rules of practice for civil penalty actions, a party may appeal only the following issues: (1) whether each finding of fact made by the ALJ is supported by a preponderance of reliable, probative, and substantial evidence; (2) whether each conclusion of law by the ALJ 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. § 1503.657(b). In her appeal, Respondent asserts that the ALJ erred:

- 1) by not permitting her to introduce into evidence a tube of toothpaste, a bottle of vinegar, and a stick of butter to support her defense that the prohibited aerosol can was medically necessary;
- 2) in finding that the prohibited aerosol can contained more than 3.4 ounces of hair product
- 3) by failing to sequester the witnesses; and
- 4) by finding that Respondent stated she had a pacemaker.

Respondent also objects to the use of the term “smuggling” by TSA’s counsel during closing arguments to describe Respondent’s conduct. The ALJ did not use this term in the Initial Decision to describe Respondent’s conduct. Therefore, this claim is not relevant to the appeal. Finally, Respondent requests that the monetary penalty be dismissed. TSA filed a response to Respondent’s appeal on August 9, 2012 refuting Respondent’s claims.

Respondent’s Appeal as to Prejudicial Error

Respondent claims she was denied the ability to support her defense that the hair product was medicinal and used as a nebulizing inhaler because she was not allowed to show the non-traditional uses of the items listed above. In the Initial Decision, the ALJ explains that Respondent never requested that the items be admitted as evidence and that fact is substantiated by the transcript of the hearing. Respondent bears the burden of proving any affirmative defense. 49 CFR § 1503.639(c). It is Respondent’s responsibility to present her case. The ALJ cannot consider items that were not presented into evidence and the ALJ reasonably found that Respondent had not supported her assertion that she inhaled the hair product to suppress a cough. As explained in the Initial Decision, she failed to produce any witnesses, any supporting