

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

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

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**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

documentation that the hair product was effective as a cough suppressant, or any medical recommendation. In her testimony, could not recall the specifics as to who allegedly recommended she use the hair product medicinally. In addition to the lack of any substantive support for this claim, the ALJ points out that the hair product contains flammable chemicals, such as isobutene.

Moreover, even if she had made an attempt to introduce these items into evidence, such items had no bearing or relevance to her claim that the aerosol can of hair product was medically necessary. Respondent does not dispute the fact that she did not claim that the hair product was medicinal when it was first discovered in her carry-on bag and that she made the claim only after she had attempted to conceal it under her clothes and attempted to avoid additional screening by claiming she had a pacemaker. The fact that she did not even make the claim until after she had failed in her other attempts to avoid screening suggests that the claim was made to further evade screening. Without any evidence to support her defense, Respondent failed to meet her burden of proof. There was no error made regarding Respondent's failure to introduce the items listed above.

Respondent also claims she was prejudiced by the fact that TSA's witnesses were sequestered together prior to their testimony during the hearing and then were permitted to remain in the court after they testified. Respondent states that she was denied the same opportunity. Respondent did not present any witnesses. Each witness was sworn and deemed credible by the ALJ. Respondent had the opportunity to cross examine each witness and could have questioned whether they had discussed their testimony prior to their appearance on the witness stand during her cross examination. Respondent did not do so. The hearing transcript demonstrates that each witness provided evidence on a different aspect of the case. None of the

witnesses were recalled to testify after their own testimony was completed. There is no indication that the sequestration of the witnesses had any bearing on Respondent's case.

*Respondent's Appeal as to Findings of Fact*

Respondent next claims the ALJ erred in failing to support her assertion that the can did not contain 3.4 ounces of hair product and should not have been prohibited. Again, Respondent failed to provide any evidence at the hearing to support her claim and she maintained possession of the can until she presented it as evidence. As the Initial Decision explains, TSA's security policy prohibits containers of a size that could hold 3.4 ounces. This policy was adopted in 2006 in response to the attempt by terrorists to use liquid explosives to blow up planes bound for the U.S. Respondent's own evidence was clearly marked as a 4 ounce container. The testimony at the hearing corroborates this finding. There was no error made regarding the ALJ's finding.

Finally, Respondent contests the finding that she claimed to have a pacemaker when she alarmed the walk through metal detector (WTMD). This finding is based on the credible testimony of the officer stationed at the WTMD. It was also corroborated by the video that showed the officer's actions were consistent with the standard procedures taken if a passenger makes such a claim. Respondent complains that the lack of audio evidence should refute this finding. The ALJ's finding is based on the preponderance of the evidence contained in the record. The ALJ found the testimony of the TSA witness to be credible and found the testimony of Respondent to be not credible. The ALJ is in the best position to observe the demeanor of witnesses at a hearing and, as a result, the ALJ's credibility findings deserve great weight and are entitled to deference, consistent with longstanding administrative practice.<sup>1</sup>

*Civil Penalty*

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<sup>1</sup> *In re Paul Dunn*, 2009 WL 1638648 (June 3, 2009).

Respondent requests that the civil penalty imposed by the ALJ be dismissed. I find that the ALJ's determination is reasonable and consistent with applicable law and the TSA Sanction Guidance. As TSA points out in its reply, Respondent is subject to a civil penalty not to exceed \$11,000. 49 U.S.C. § 65301(a)(4). The Sanction Guidance provides a range of \$1,500 to \$6,000 for violation of 49 C.F.R. § 1540.105(a), which includes the artful concealment of prohibited items. The ALJ found that the aerosol can is best considered an explosive and could have resulted in devastating consequences if ignited. Further, the ALJ found that Respondent's conduct in attempting to circumvent the screening process was deliberate. I agree. Respondent was instructed that she could not bring the aerosol can into the sterile area. Despite this clear instruction, Respondent intentionally concealed the can underneath her clothing so it would not be visible, and deliberately and repeatedly misled TSA officers in order to evade screening as well as avoid responsibility for her actions. Respondent claims she is 65 years old and living on a fixed income. Respondent fails to provide any evidence of that would support her claims or support a reduction in the civil penalty amount. The request is denied.

#### *Timeliness of the Appeal*

In its reply to Respondent's appeal, TSA notes that Respondent exceeded the deadline to file and perfect her appeal and moves for dismissal on that basis. According to TSA, Respondent's appeal was filed three days late and her appeal brief was filed twenty days late. TSA's rules of practice clearly specify the filing requirements for an appeal and Respondent was provided a copy of the rules of practice with the Initial Decision. While Respondent was not represented by counsel, I agree that a *pro se* party is not excused from following the TSA rules

of practice.<sup>2</sup> However, because the appeal is denied on substantive grounds, I will not rule on this issue.

*Conclusion*

I find that the findings of fact listed in the Initial Decision are based on a preponderance of the evidence contained in the record; that the conclusions of law are in accordance with applicable law, precedent and public policy; and that there were no prejudicial errors committed during the hearing that support the appeal. Respondent's request for appeal is denied.

Any party may petition the TSA Decision Maker to reconsider or modify a Final Decision and Order. Petitions for reconsideration must be submitted not later than 30 days after service of the Final Decision and Order and must comply with the requirements described in 49 C.F.R. §1503.659. A party may petition for judicial review of a Final Decision and Order as permitted by 49 U.S.C. 46110 and described in 49 C.F.R. §1503.661.

Dated: \_\_\_\_\_

11/6/12

  
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J.W. Halinski

Deputy Administrator

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<sup>2</sup> *In re Bhirdo*, 2008 WL 5626948.

U.S. DEPARTMENT OF HOMELAND SECURITY  
TRANSPORTATION SECURITY ADMINISTRATION  
Washington, D.C.

In the Matter of:  
  
Catherine H. Klee,  
  
Respondent.

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Docket No.  
11-TSA-0062

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the attached Final Decision and Order of the Transportation Security Administration Decision-Maker has been filed this 8th day of November, 2012, with the Enforcement Docket Clerk:

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

I further certify that a copy of the attached Final Decision and Order of the Transportation Security Administration Decision-Maker has been mailed, first-class postage prepaid, this 8th day of November, 2012, to the following:

Honorable Parlen L. McKenna  
USCG Administrative Law Judge, Alameda  
U.S. Coast Guard  
Coast Guard Island, Building 54A  
Alameda, CA 94501-5100

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DATE: November 8, 2012



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