

U.S. DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

In the Matter of)	
)	
JOSE RAJOY)	Docket No. 08-TSA-0014
)	
Respondent.)	

ORDER

The Administrative Law Judge (ALJ) assigned to the above-referenced matter has requested further guidance regarding the Decision and Order of November 3, 2010 issued by the Transportation Security Administration (TSA) Decision Maker.

In that Decision and Order, the Decision Maker denied Respondent's request for reconsideration of a Final Decision and Order issued March 22, 2010 on Respondent's initial appeal. However, in the request for reconsideration, the Respondent raised a new argument regarding his ability to pay the civil penalty. That issue was remanded to the ALJ in order to permit the Respondent an opportunity to provide reliable evidence regarding his ability to pay and for the ALJ to make a determination whether any such evidence warrants modifying the civil penalty.

The ALJ requests guidance on the following issues: 1) the regulatory authority for the Decision Maker's direction; 2) which party bears the burden of proof; and 3) what type of evidence is required.

Regarding the first issue, the Decision Maker's authority as to petitions for reconsideration is clearly described in 49 C.F.R. §1503.659(g). That section states,

The TSA decision maker has sole discretion to grant or deny a petition to reconsider or modify. The TSA decision maker will grant or deny a petition to reconsider or modify within a reasonable time after receipt of the petition or receipt of the reply petition, if any. *The TSA decision maker may affirm,*

modify, or reverse the final decision and order on appeal, or may remand the case for any proceedings that the TSA decision maker determines may be necessary.

(Emphasis added.) Accordingly, the Decision Maker has regulatory authority to remand any issue for any proceedings the Decision Maker deems necessary, including obtaining additional evidence on a matter not addressed in the previous proceedings deemed relevant by the Decision Maker.

Further, there is considerable Federal Aviation Administration (FAA) precedent in accord. While not controlling, FAA civil penalty cases may provide guidance in TSA civil penalty determinations. For example, in In the Matter of Scenic Mountain Air, Inc., FAA Order No. 2001-5 (May 16, 2001) at 13-14, the FAA states, “The Administrator has held numerous times that financial hardship, when proven, may constitute grounds for reduction of an otherwise appropriate civil penalty.” See also, In the Matter of Michael John Costello, FAA Order No. 93-10 (March 25, 1993); In the Matter of Guiffrida, FAA Order No. 92-72 (December 21, 1992); In the Matter of Lewis, FAA Order No. 91-3 (February 4, 1991); In the Matter of Villamor Tabula, FAA Order No. 2010-6 (June 15, 2010); In the Matter of Blue Ridge Airlines, FAA Order No. 99-15 (December 22, 1999); and In the Matter of Larry’s Flying Service, FAA Order No. 95-17 (August 4, 1995).

Regarding the remaining issues raised by the ALJ, TSA’s rules of practice and FAA case precedent also provide guidance. TSA’s regulations state that, “A party who has asserted an affirmative defense has the burden of proving the affirmative defense.” 49 C.F.R. § 1503.639(c). In this instance Respondent would bear the burden of proving inability to pay. This interpretation is supported by FAA precedent. The FAA Administrator has held that a respondent claiming inability to pay a civil penalty has the burden to prove this affirmative

defense by the preponderance of the evidence. In the Matter of Mauna Kea Helicopters, FAA Order No. 97-16 at 20 (May 23, 1997). The FAA observed that this assignment of the burden of proof is reasonable and necessary because the Respondent has sole custody of his financial information. Lewis, FAA Order No. 91-3 at 10; see also, In the Matter of Lifeflite Medical Air Transport, d/b/a American Native Medical Air, FAA Order No. 2000-28 (December 21, 2000); and Guiffrida, FAA Order No. 92-72 (December 21, 1992).

The types of evidence necessary to prove inability to pay has also been discussed in FAA civil penalty cases. In Costello, the FAA found that the respondent had failed to provide any documentary evidence such as pay stubs, mortgage coupons, and tax returns to support his claim. FAA Order No.93-10 at 9. In Guiffrida, the FAA described the records that may establish inability to pay to include pay stubs, leases, tax returns and other such records a reasonable person would accept as reliable and probative on the issues of income and expenses. FAA Order No. 92-72 at 5.

In this case, inability to pay was not addressed in the prior proceedings. The issue is, therefore, remanded to provide Respondent the opportunity to present such evidence. The powers of the ALJ are listed in 49 C.F.R. § 1503.607. If, however, Respondent fails to respond or fails to provide evidence necessary to substantiate his claim, the civil penalty is appropriate.

So ordered.

Dated: February 17, 2012



Gale Rossides
Deputy Administrator