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

In the Matter of:	)	
	)	
John Brennan,	)	Docket No. 12-TSA-0092
	)	
Respondent.	)	

FINAL DECISION AND ORDER

Mr. John Brennan (Respondent) appeals the Initial Decision of the Administrative Law Judge (ALJ) issued on April 2, 2014 holding that Respondent violated 49 C.F.R. §1540.109 and assessing a civil penalty in the amount of $500.00.[1] For the reasons set forth below, the appeal is denied and the Initial Decision is upheld.

Summary of Initial Decision. According to the findings of fact listed in the Initial Decision, Respondent was a ticketed passenger on Alaska Airlines departing from Portland International Airport on or about April 17, 2012. At the security checkpoint, Respondent opted to undergo a pat-down instead of Advanced Imaging Technology (AIT) screening. Respondent refused an opportunity to have the pat-down conducted in a private area. A Transportation Security Officer (TSO) conducted the pat-down and then conducted Explosive Trace Detection (ETD) screening on the gloves he was wearing while performing the pat-down of Respondent. The ETD is used to detect traces of explosives. The ETD alarmed indicating the presence of explosives. The TSO notified a supervisory TSO (STSO) who informed Respondent additional screening must be conducted to resolve the ETD alarm. Respondent replied he would show the STSO he was not hiding anything and removed all of this clothing and dropped them on the floor. Respondent testified that he disrobed to prove he was not carrying a bomb, although he

[1] §1540.109 states, "No person may interfere with, assault, threaten, or intimidate screening personnel in the performance of their screening duties under this subchapter."

later testified that his actions were a protest. It is TSA's policy not to touch bare skin during either a pat-down or ETD screening. TSA personnel directed Respondent to put his clothes back on at least three times and Respondent refused. TSA personnel notified the airport police. The STSO closed the entire checkpoint and directed TSOs to move bins in an attempt to block the public view of Respondent. The airport police arrived and twice requested Respondent to get dressed. Respondent refused. Respondent was arrested and removed from the checkpoint. Screening to resolve the ETD alarm was not conducted. The checkpoint was closed for approximately three minutes while Respondent was naked. A criminal charge of indecent exposure was brought against Respondent in Oregon state court and Respondent was found not guilty. Respondent was fired from his job as a result of the incident.

TSA filed a Complaint against Respondent alleging that he interfered with screening personnel in the performance of their duties in violation of 49 C.F.R. §1540.109 and assessed a civil penalty in the amount of $1,000.00.

The Initial Decision describes the positions of each party. First, Respondent claimed that the regulation is overbroad. The ALJ held that, pursuant to TSA's rules of practice at 49 C.F.R. §1503.607(b)(1)(v), he could not rule on Respondent's contention that the regulation was overbroad. However, he noted that the U.S. Court of Appeals for the Sixth Circuit found that the regulation was neither vague nor overbroad in its decision in Rendon v. TSA, 424 F.3rd 475 (6th Cir. 2005).

Second, Respondent contended his actions did not constitute interference under certain definitions of the term. TSA stated that the regulation was promulgated to address disruptive individuals at the checkpoint and was intended to prevent distractions which would inhibit a screener from effectively performing his duties. 67 Fed. Reg. 8340-01 (Feb. 22, 2002). TSA

argued that Respondent's actions created a distraction that prevented TSA from completing the screening of the Respondent and caused the entire checkpoint to be shut down to ensure that the screening of others was not impacted. The ALJ cites two decisions by the U.S. Court of Appeals for the Ninth Circuit to support his finding that, under the plain meaning of interference and the regulatory history explaining the intent of the regulation, Respondent's actions constituted interference. The ALJ also notes that in Rendon, the Court found that the regulation prohibits conduct that poses a hindrance to the accomplishment of a specified task. Rendon at 480. After considering the testimony presented by the TSOs, the plain meaning of the term interference, legal precedent, and the regulatory history of the regulation, the ALJ determined Respondent's actions in disrobing, dropping his clothes on the floor and refusing to comply with TSO directions constituted interference in that Respondent's conduct presented an actual hindrance to the TSOs' ability to conduct secondary screening and resolve the ETD alarm. He also found that the distraction created by Respondent required the STSO to close the checkpoint and divert other TSOs from their screening duties.

Third, Respondent claimed that the screening violated his Fourth amendment rights. The ALJ provided a detailed legal analysis to demonstrate that the airport search conducted by TSA, and the screening conducted in this case, is reasonable under the Fourth amendment.

Fourth, Respondent contended his conduct constituted political speech protected by the First amendment. While TSA asserted that constitutionality is beyond the scope of an administrative law hearing, the ALJ noted that he must consider whether Respondent's actions were protected speech in order to decide whether a violation occurred. The ALJ explained that the Court in Rendon found that the regulation did not infringe on the First amendment as the regulation serves a substantial government interest and "regulates speech only in the narrow

context of when that speech is reasonably found to have interfered with a screener in the performance of the screener's duties." Rendon at 480. Respondent relied upon a recent case decided in the U.S. Court of Appeals for the Fourth Circuit to support his First amendment claim. In that case, Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013), the Court refused to dismiss a First amendment suit brought by Mr. Tobey who was arrested by airport police after he removed his shirt during screening to display the text of the Fourth amendment he had written on his chest. However, the ALJ explained that the case was not decided on its merits, but was an appeal of a denial of a motion to dismiss. In making its decision, the ALJ pointed out that the Court construed the facts in the light most favorable to the plaintiff and did not consider or make a finding on whether Mr. Tobey's actions in removing his shirt constituted interference with screening. The ALJ found that Respondent's reading of the case was inconsistent with the actual decision. The ALJ cited the U.S. Supreme Court decision in Int'l Soc. For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672,679 (1992), which held that an airport terminal is a nonpublic forum and speech is subject to reasonable time, place, and manner restrictions, to support his decision. He also noted that another recent case, Mocek v. City of Albuquerque, 2013 WL 312881 (2013), held that speech in a screening checkpoint may be subject to reasonable restrictions because "the primary purpose of a screening checkpoint is the facilitation of passenger safety on commercial airline flights, and the safety of building and the people for whom a plane can become a dangerous weapon." Mocek at 53. The ALJ found that even if his action constituted protected speech, Respondent's actions disrupted screening and were not protected under those circumstances.

The ALJ concluded that in removing his clothing and refusing to put them back on when directed to do so, Respondent caused the line and the checkpoint to be shut down and interfered

with the TSOs' duty to conduct a thorough secondary screening of Respondent and to do so in an efficient manner. As a result, Respondent violated the regulation.

Finally, the ALJ lowered the amount of the civil penalty to $500.00 due to Respondent's job loss. Neither party addresses the amount of the civil penalty in their appeal documents.

Respondent's Appeal. In his appeal, Respondent contests the ALJ's determination that his actions interfered with the screening process. Respondent argues that his nudity made the TSA personnel uncomfortable, but did not interfere with the screening process. Respondent states that bare skin is not a hindrance to screening and actually reduces the effort needed to conduct screening. Respondent claims that once his clothes were dropped on the floor, they could have been inspected for explosives. Respondent explains that his nudity was not illegal and that the TSA personnel were more concerned about protecting the public from nudity than on completing screening.

In its reply brief, TSA points out that the findings of fact described in the Initial Decision were not contested by Respondent. TSA argues that Respondent's statements that bare skin facilitates screening are not supported by evidence in the record. TSA explains that the testimony of the TSOs demonstrated that they could not complete screening once Respondent removed his clothing and dropped them on the floor. TSA also contends that the conclusions of law were made in accordance with applicable law, precedent and public policy. TSA notes that the definition of screening was supported by relevant case law as well as the explanation of the regulation contained in the regulatory history. TSA argues that Respondent's statements regarding the legality of nudity in Oregon have no relevance, since Respondent was charged with interference with screening.

TSA's rules of practice in a civil penalty case state that a party may appeal an Initial Decision to the TSA Decision Maker. 49 C.F.R. §1503.657(a). However, a party may appeal only the following issues: 1) whether each finding of fact is supported by a preponderance of the 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. §1503.657(b).

After review of the record on appeal, I find that the findings of fact are supported by a preponderance of the evidence. Respondent proposes additional findings of fact in his appeal submission; however, none of these findings contradict or challenge the findings in the Initial Decision. In fact, in his submission Respondent says the finding that he "dropped his clothes on the floor is not a disputed fact." Respondent argues that the presence of bare skin is not a hindrance to screening and even reduces the burden of screening. That argument is not supported by the record. The testimony at the hearing revealed that TSA policy does not permit screening on bare skin. Based on the testimony of the TSOs, the ALJ found that disrobing and dropping his clothes on the floor presented such a distraction that the TSOs could not complete screening to resolve the ETD signal of explosives in an efficient manner.

In addition, there is nothing in the record to support Respondent's claim that the clothes he dropped on the floor were available for further screening. Respondent did not present his clothing for screening as accessible property. Respondent removed his clothing and dropped them on the floor after the ETD alarm and then refused to get dressed after repeated requests to do so by screening personnel and law enforcement officers. Such behavior is not indicative of cooperation or compliance with the screening process. In fact, the ALJ found that Respondent's "preparations indicate this was a planned event. Even if he decided to strip only after the ETD

indicated the presence of nitrates, it was still an intentional act." The ALJ concluded that the violation was deliberate and even if Respondent considered it to be a protest, the facts demonstrate that his actions interfered with the screening process. I concur with the ALJ's assessment.

Respondent also argues that TSA was concerned with his nudity, which he states is legal in Oregon, and not on carrying out its screening responsibilities. I agree with TSA that Respondent's arguments regarding the legality of the nudity are not relevant. As the ALJ points out, in Rendon, the Court found that loud, belligerent conduct interfered with the screening process. In that case, the conduct was legal, but the Court found that it was not protected speech and did in fact disrupt with the screening process.

Further, there is no evidence to support Respondent's contention that the reason the checkpoint was closed was to protect the public from his nudity. I agree with the ALJ's assessment of the record that Respondent's conduct created such a distraction that TSOs had to be diverted from their screening duties. In other words, TSOs were not able to conduct screening in an efficient manner on other passengers present at the checkpoint.

Respondent does not challenge the ALJ's analysis of case law or the regulatory history. I find that the Initial Decision is in accordance with applicable law, precedent, and public policy. Respondent does not present any issues evidencing that prejudicial errors were committed at the hearing to support his appeal.

Based on the foregoing, Respondent's appeal is denied and the Initial Decision is upheld. A party may petition the TSA Decision Maker to reconsider or modify a Final Decision and Order as described in 49 C.F.R. §1503.659 or make seek judicial review as stated in 49 C.F.R. §1503.661.

Dated: September 18, 2014

Melvin L. Carraway
Deputy Administrator