UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
TRANSPORTATION SECURITY ADMINISTRATION

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

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DECISION AND ORDER

I. INTRODUCTION

The Transportation Security Administration (TSA or Agency) filed a Complaint alleging John Brennan (Respondent) violated Transportation Security Regulations by interfering with screening personnel in the performance of their duties at Portland International Airport (PDX or Airport). TSA seeks a $1,000.00 civil penalty. Respondent denies the allegations on several grounds, including that his actions did not constitute interference but were instead symbolic speech protected by the First Amendment. Based on the evidence developed at the hearing and considering the whole record including the parties' arguments, I find the allegations proved and a $500.00 civil penalty appropriate in this matter.

II. PROCEDURE

On September 26, 2012, Respondent requested a hearing after receiving a notice of an alleged violation of Transportation Security Regulations. TSA filed a Complaint setting out its allegations on October 17, 2012. On October 22, 2012, the Acting Chief Administrative Law Judge assigned the matter to me for adjudication. Respondent, through counsel, filed an Answer on November 14, 2012 denying the allegations of interference with screeners and setting out several affirmative defenses relating to freedom of speech under the First Amendment.

The hearing took place on May 14, 2013 in Portland, Oregon. The Agency, represented by Susan Conn, Esq., offered five (5) witnesses. Respondent was represented by Robert Callahan, Esq. and testified on his own behalf. TSA introduced four (4) exhibits at the hearing,

and Respondent introduced three (3) exhibits; all exhibits were admitted. After the hearing, both parties filed proposed findings of fact, conclusions of law, and argument in support of their respective positions. Separate orders with my rulings on these are being issued simultaneously with this Decision. The record is now closed and this matter is ripe for decision.

III. FINDINGS OF FACT

1. On or about April 17, 2012, Respondent was a ticketed passenger on Alaska Airlines flight #2617 departing from the Portland International Airport (PDX) in Portland, Oregon. (Respondent's Answer at ¶ 2).

2. Respondent is a frequent traveler. (Tr. at 151).

3. On April 17, 2012, at approximately 5:30 PM, Respondent arrived at the PDX TSA "ABC" Checkpoint. (Respondent's Answer at ¶ #3).

4. There are eight lanes for screening at the ABC Checkpoint. (Tr. at 17).

5. Screening is conducted by TSA Transportation Security Officers (TSOs). (Tr. at 10-12).

6. PDX uses Advanced Imaging Technology (AIT) screening as the primary method of screening passengers. (Tr. at 18).[1]

7. PDX uses millimeter wave imaging as its primary screening tool, with a walk-through metal detector as backup for families with small children or people with medical conditions that prevent them from using the AIT screening booths. (Tr. at 18, 41).

8. Millimeter wave scanners have privacy software called "Automatic Target Recognition" (ATR) that eliminates passenger-specific images and instead indicates the location of potential threats on a generic human figure. (Tr. at 18).

9. Passengers have the option of opting out of AIT screening and being screened using a pat-down technique. (Tr. at 13, 20).

10. On April 17, 2012, Respondent chose to opt out of the Advanced Imaging Technology (AlT) screening. (Tr. at 154-55).

11. It was Respondent's "standard practice" to opt out of AIT or "non-metal detectors" screening, and he was familiar with the procedures. (Tr. at 153-54).

[1] In April of 2012, TSA used two types of AIT screening in various airports: backscatter X-ray and millimeter wave. However, PDX has never been equipped with backscatter X-ray machines. (Tr. at 20, 43)

12. When Respondent chose to opt out of the AlT screening, he was referred to TSO Steven Van Gordon for a pat-down. (Tr. at 22-23).

13. TSO Van Gordon explained the pat-down procedure to Respondent. (Tr. at 22).

14. TSO Van Gordon offered Respondent the opportunity to have the pat-down conducted in a private area but Respondent declined because he did not feel he needed privacy. (Tr. at 156).

15. While the pat-down was taking place, Respondent quietly narrated what was occurring. He does this every time he receives a pat-down, as he believes there is no prohibition against it and it provides a "degree of comfort" for him and helps him notice when the pat-down routines are inconsistent. (Tr. at 157-58).

16. TSO Van Gordon heard Respondent's recitation and found it unusual, but it did not prevent him from conducting the pat-down. (Tr. at 25, 45).

17. After the pat-down, TSO Van Gordon conducted Explosive Trace Detection (ETD) screening on the gloves he used on the pat-down. (Tr. at 26-27).

18. The ETD machine is used to detect elements that may indicate an explosive is present or the person or goods in question may have been in contact with an explosive. (Tr. at 16).

19. The ETD screening resulted in an alarm. (Tr. at 27).

20. TSO Van Gordon called for his supervisor in accordance with TSA procedures. (Tr. at 28).

21. Respondent did not personally hear the alarm, but noticed increased activity around the machine. (Tr. at 156, 159).

22. Under TSA screening procedures, an ETD alarm requires a secondary screening of the passenger and their accessible property. (Tr. at 28).

23. Supervisory Transportation Security Officer (STSO) Jerry Nichols responded to TSO Van Gordon's request for a supervisor. (Tr, at 28, 67).

24. STSO Nichols informed Respondent he had tested positive for nitrates and that additional screening was necessary. (Tr. at 29).

25. Nitrates are found in many conventional products, including fertilizer, and are also found in some common explosives. (Tr. at 47).

26. Respondent said "I guess I have to show you I'm not hiding anything" and removed all of his clothing. (Tr. at 30, 69, 162-165).

27. Respondent dropped his clothes on the floor. (TSA Ex. A (Video); Tr. at 62-63, 99).

28. No one employed by TSA ever asked or directed Respondent to remove his clothing during the pat-down. (Tr. at 167).

29. Respondent initially testified his motivation for undressing was to prove he was not carrying a bomb, and he believed the fastest way to get to his gate and continue with his trip was to show TSA personnel he did not have any explosives on his person. (Tr. at 162).

30. Respondent then stated his actions were a form of protest. (Tr. at 116, 163, 167-68).

31. Respondent further stated he was tired of being hassled, meaning he feels the screening system is inflexible and violates his constitutional right to privacy. (Tr. at 116, 163-64).

32. Respondent believes TSA "routinely see[s] people naked through the scanning machines and . . . the difference between a naked image and a naked person isn't that great . . ." He based this belief on information he had seen on websites and online blogs. (Tr. at 170).

33. It is TSA policy not to touch passengers' bare skin, but only to pat them down through clothing. (Tr. at 32).

34. Likewise, the secondary EDT screening cannot be conducted on a passenger's bare skin. (Tr. at 32).

35. TSA personnel directed Respondent to put his clothes back on at least three times and Respondent refused. (Tr. at 169).

36. Respondent stated he didn't have to put his clothes back on and that he had checked and it was not illegal. (Tr. at 70, 75).

37. STSO Nichols requested the primary Supervisory Transportation Security Officer, STSO David, to call the port police. (Tr. at 91).

38. STSO David called the Port Police and notified the TSA Oregon Coordination Center. (Tr. at 91-92).

39. STSO David closed the entire checkpoint and diverted personnel to move bins to block the public view of Respondent. (Tr. at 94, 96).

40. Port of Portland Police arrived on scene and also requested twice that Respondent put his clothes back on. (Tr. 170).

41. Respondent refused and told police his actions were not illegal. (Tr. at 112).

42. Portland Port Police arrested and removed Respondent from the screening area. (TSA Ex. A (Video); Tr. at 115).

43. The secondary screening was not conducted because the Port Police escorted Respondent away and took possession of Respondent's clothing and property. (Tr. at 60-61).

44. ABC Checkpoint reopened after being closed for approximately three minutes. (Tr. at 95).

45. A criminal complaint of indecent exposure was brought against Respondent in Oregon state court. (R. Ex. 3, Tr. at 164-65).

46. The Circuit Court of the State of Oregon for Multnomah County issued a Judgment of Acquittal on a finding of Not Guilty to a single misdemeanor charge on July 18, 2012. (R. Ex. 1; Tr. at 166-67).

47. Respondent's employer fired him from his job as a result of this incident. (Tr. at 150).

IV. DISCUSSION

The following facts of this matter are not seriously in dispute: Respondent was a ticketed passenger who began the screening process and opted out of AIT screening, as permitted under TSA regulations. A pat-down screening was performed and the ETD machine utilized as part of the pat-down screening indicated the presence of nitrates. While STSO Nichols does not remember telling Respondent that he tested positive for nitrates, TSO Van Gordon and Respondent both testified that STSO Nichols did so. Respondent then stripped his clothes off and remained naked for approximately three minutes until he was removed by Port of Portland Police. Both TSA Transportation Security Officers and Port of Portland Police Officers directed Respondent to put his clothes back on during this time and Respondent refused. Finally, there is no dispute that TSA did not conduct the secondary screening required by the ETD alarm.

A. Constitutional Issues

Respondent raises several constitutional issues:

- The Transportation Security Regulation at 49 CFR § 1540.109 is impermissibly vague and overbroad as applied to his situation.

- The TSA screening procedures at issue here violate his Fourth Amendment rights in that the search of Respondent was unwarranted and excessive under these circumstances.
- Respondent's conduct in disrobing at the TSA checkpoint is protected political speech under the First Amendment to the United States Constitution and cannot be infringed upon in this instance, even by the government. To support his position, Respondent relies significantly on a recent Fourth Circuit decision, *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013).

TSA asserts Respondent's constitutional claims are beyond the scope of an administrative law hearing. The APA and TSA regulations set forth the powers of an administrative law judge. 5 U.S.C. § 556(c) and 49 C.F.R. § 1503.607. There are also specific limitations on the powers of an ALJ when adjudicating TSA cases:

> (1) The ALJ may not:
> (i) Issue an order of contempt.
> (ii) Award costs to any party.
> (iii) Impose any sanction not specified in this subpart.
> (iv) Adopt or follow a standard of proof or procedure contrary to that set forth in this subpart.
> (v) Decide issues involving the validity of a TSA regulation, order, or other requirement under the U.S. Constitution, the Administrative Procedure Act, or other law.
> (2) If the ALJ imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right pursuant to § 1503.631(c)(3).
> (3) This section does not preclude an ALJ from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.
>
> 49 C.F.R. § 1503.607(b).

Although an administrative law judge may not opine as to the validity of agency regulation, order, or other requirement, judges may sometimes have to address constitutional questions in order to render a decision or maintain an adequate administrative record.

> Often the agency, its administrative judges or officials must confront constitutional questions. Agencies have an obligation to address constitutional challenges to their own actions in the first instance. In such cases, administrative authorities must make preliminary constitutional decisions in order to proceed. An agency must consider these constitutional questions in order to make its own decisions. Such constitutional decisions not only do not interfere with judicial review but also have beneficial consequences, such as administrative correction of constitutional error, developing a record for review and giving the court the benefit of the agency's reasoning.
>
> Charles H. Koch Jr., Administrative Law and Practice, Vol. 4, § 11:11 (3d ed.West 2010).[2]

The principal issue before me is whether Respondent's actions constituted interference with TSA screeners. While Respondent argues that the Transportation Security Regulations at 49 CFR § 1540.109 are impermissibly vague and overbroad as applied to his situation, the constitutional validity of TSA regulations is beyond the reach of an administrative law judge. 49 C.F.R. § 1503.607(b)(1)(v). Respondent also argues his actions did not interfere with the screening process. Although the constitutionality of the regulation is not before me, I must nevertheless consider Respondent's claims to the extent necessary to determine whether his actions constituted interference. I will also consider Respondent's First Amendment claims from the standpoint of whether his conduct was Constitutionally-protected symbolic speech and, if so, whether the allegation of interference is appropriate. This will create an adequate record for review and give any reviewing court the benefit of the agency's reasoning.

[2] *See McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of Judicial Conf. of U.S.*, 264 F.3d 52, 62 (D.C. Cir. 2001), *cert. denied*, 537 U.S. 821 (2002); *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1569–1570 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996).

B. Law Regarding Screening

Congress mandates the Transportation Security Administration "shall provide for the screening of all passengers and property, including . . . carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation." 49 U.S.C. § 49901(a). The purpose of such screening is "establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance." 49 U.S.C. § 44902(a)(1).

The courts, including the Ninth Circuit, have held that airport screening searches are "constitutionally reasonable administrative searches because they are 'conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings'. *United States v. Davis,* 482 F.2d 893, 908 (9th Cir.1973); *see also United States v. Hartwell,* 436 F.3d 174, 178 (3d Cir.), *cert. denied,* 549 U.S. 945 (2006); [*United States v. Marquez*, 410 F.3d 612, 6165 (9th Cir. 2005)]" *United States v. Aukai,* 497 F.3d 955, 960 (9th Cir. 2007) (parallel citations omitted). The record establishes that Respondent elected to attempt entry into the screening area of Portland International Airport when he placed his shoes, belt, jacket and accessible property on the conveyor belt and opted out of the AIT processes, thereby subjecting himself to the airport screening process. *See Aukai* at 962. TSA screeners are limited to the single administrative goal of searching for possible safety threats related to weapons or explosives. The constitutional bounds of an airport administrative search require that the individual screener's actions be no more intrusive than necessary to determine the existence or absence of weapons or explosives that could result in harm to the passengers and aircraft. *See United States v. McCarty,*

648 F.3d 820, 831 (9th Cir. 2011). The record establishes TSOs Van Gordon and Nichols clearly limited their administrative search to those concerns.[3]

In 2004, Congress further directed the TSA to "give a high priority to developing, testing, improving, and deploying" at airport screening checkpoints a new technology "that detects nonmetallic, chemical, biological, and radiological weapons, and explosives, in all forms." Intelligence Reform and Terrorism Prevention Act of 2004, 49 U.S.C. § 44925(a). In response, TSA began utilizing two separate technologies, known as backscatter X-ray and millimeter-wave. These have gradually been replacing walk-through metal detectors as the primary screening tools at most airports.

Backscatter X-ray technology generated a true image of the body of the passenger undergoing screening, and was viewed by an agent in a separate booth. Millimeter-wave technology, on the other hand, generates a "gingerbread man" figure on a screen visible to both the TSA agent and the passenger. This figure is identical for men and women. If the machine detects an unusual object, the screen will display a box around that portion of the generic figure, and the TSA agent will conduct a localized pat-down of that area to determine whether a prohibited item is present. After the passenger clears screening, the image is deleted and cannot be retrieved. (Tr. at 18-21).

TSA has promulgated regulations implementing its screening program in 49 C.F.R. Part 1540. "No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft" 49 C.F.R § 1540.107(a) Furthermore, "[n]o person may interfere with, assault, threaten, or intimidate screening personnel

[3] In his brief, Respondent states "the TSA screening procedures at issue here are a violation of his Fourth Amendment. rights in that the search of Respondent was unwarranted and excessive under these circumstances." Resp. Brief at 8. Neither the record nor his brief set forth any specific argument in this area, though.

in the performance of their screening duties under this subchapter." 49 C.F.R § 1540.109. In the preamble to the rule establishing the regulation in question, TSA stated -

> Section 1540.109 is a new requirement prohibiting any person from interfering with, assaulting, threatening, or intimidating screening personnel in the performance of their screening duties. …. The rule prohibits interference that might distract or inhibit a screener from effectively performing his or her duties. This rule is necessary to emphasize the importance to safety and security of protecting screeners from undue distractions or attempts to intimidate.
>
> A screener encountering such a situation must turn away from his or her normal duties to deal with the disruptive individual, which may affect the screening of other individuals. The disruptive individual may be attempting to discourage the screener from being as thorough as required. The screener may also need to summon a checkpoint screening supervisor and law enforcement officer, taking them away from other duties. Checkpoint disruptions potentially can be dangerous in these situations. This rule supports screeners' efforts to be thorough and helps prevent individuals from unduly interfering with the screening process. This rule is similar to 14 CFR 91.11, which prohibits interference with crewmembers aboard aircraft, and which also is essential to passenger safety and security.
>
> 67 Fed. Reg. 8340-01 (Feb. 22, 2002), *amended by* 68 Fed. Reg. 49718-01 (Aug. 19, 2003).

The preamble further states that passengers are subject to civil penalties for disruptions of the screening process. *Id.*

C. Definition and Analysis of "Interference"

Respondent claims TSA's definition of "interfere" as implied in this TSA prosecution renders 49 CFR § 1540.109 overbroad as applied to Respondent, and that in any case his actions did not constitute interference under common definitions of "interfere." TSA argues that the preamble to the rulemaking promulgating 49 CFR § 1540.109 clearly states the intent of the regulation is to prohibit distraction to screeners at the security checkpoint. The Agency's position

is that Respondent's actions created such a distraction; he refused to comply with TSO directions; and due to these factors he failed to complete the screening process.

1. Is the Regulation Overbroad?

Respondent argues the Transportation Security Regulation at 49 CFR § 1540.109 is impermissibly vague and overbroad as applied to his situation. TSA rules specifically prohibit ALJs from deciding "issues involving the validity of a TSA regulation, order, or other requirement under the U.S. Constitution, the Administrative Procedure Act, or other law." 49 C.F.R. § 1503.607(b)(1)(v). Therefore, Respondent's argument on this point is not properly before me. However, I note that at least one court of competent jurisdiction has reviewed the issue and found 49 C.F.R. § 1540.109 was neither vague nor overbroad. *Rendon v. Transp. Sec. Admin.*, 424 F 3d 475 (6th Cir. 2005).

Although the constitutionality of the regulation is not before me, I must nevertheless interpret the language of 49 C.F.R. § 1540.109 to determine whether Respondent's actions constitute interference.

2. Did Respondent's Actions Constitute Interference?

Respondent is charged with violating this regulation by "interfering" with TSA personnel in the performance of their screening duties by removing his clothes during his resolution screening, refusing to comply with the TSA screener's request to put his clothes back on, or both. Respondent argues that his actions did not constitute interference. In his brief, Respondent asserts that "interfere" is defined as:

> 1: to strike one foot against the opposite foot or ankle in walking or running - used especially of horses

> 2: to come in collision: to be in opposition: to run at cross-purposes: CLASH *interfering claims* - used with *carbon dioxide interferes with the liberation of oxygen to the tissues- H.G.Armstrong*
> 3: to enter into or take a part in the concerns of others: INTERMEDDLE, INTERPOSE, INTERVENE
> 4 obsolete : to run into another or each other: INTERSECT
> 5: to act reciprocally so as to augment, diminish, or otherwise affect one another - used of waves
> 6: to claim substantially the same invention and thus question the priority of invention between the claimants - distinguished from infringe
> 7 of a football player a: to run ahead of the ball-carrier and provide allowed blocking protection for him b: to hinder illegally an attempt of a player to *receive* a pass or make a fair catch of a punt
>
> Webster's Third New International (unabridged).

Resp. Brief at 9-10. Respondent asserts that "[f]rom the available choices of the definitions above, the second seems the most appropriate to apply in interpreting the TSA's regulation: 2: to come in collision: to be in opposition: *to run at cross-purposes:* CLASH *interfering c1aims* (emphasis added)." Resp. Brief at 10.

Respondent appears to presuppose the definitions he cites are most authoritative, but other, equally legitimate definitions of the terms "interfere" and "interference" exist. In two recent decisions, separate panels of the Ninth Circuit held the terms as used in similar regulations include hindering government employees in performing their official duties and refusing to comply with instructions of government employees performing their official duties. In *United States v. Willfong*, 274 F.3d 1297 (9th Cir. 2001), the court stated, although courts have not expressly defined "interference" under the Forest Service regulation at issue there:

> Without prior interpretation, this court should apply the common meaning of a word. *See Hoff*, 22 F.3d at 223. To "interfere" is to "oppose, intervene, hinder, or prevent." WEBSTER'S NEW WORLD DICTIONARY 704 (3d College ed.1998). " **'[**I]nterfere**'** has such a clear, specific and well-known meaning as not to

> require more than" the use of the word itself in a criminal statute. *United States v. Gwyther*, 431 F.2d 1142, 1144 n. 2 (9th Cir.1970).
>
> *Id.* at 1301.

Similarly, in *United States v. Bucher*, 375 F.3d 929 (9th Cir. 2004), another panel interpreted the meaning of interference and held that regulatory interpretation should involve first looking to the plain language of the regulation and presuming "the drafters said what they meant and meant what they said." Unless a plain-language reading would lead to "absurd results," it should control. The court continued,

> The term "interfere" is unambiguous and is defined as "to oppose, intervene, hinder, or prevent." *Willfong*, 274 F.3d at 1301 (quoting WEBSTER'S NEW WORLD DICTIONARY 704 (3d College ed.1998)). Similarly, "interference" means an "act of meddling in another's affairs ... [a]n obstruction or hindrance." Black's Law Dictionary, 818 (7th ed.1999). Under these definitions, it is impossible to separate government employees from their duties under § 2.32(a)(1). One who interferes with an employee's official duties "meddles" in that employee's "affairs," thus interfering with the employee herself. Similarly, one who interferes with a government employee who is engaged in an official duty has necessarily compromised the performance of those duties.
>
> *Id.* at 932.

The *Bucher* court considered the regulatory history and stated that when the regulation in question was enacted in 1983, the National Park Service stressed "that [the provision] "is necessary to ensure that *government operations* proceed without interference."

Moreover, the Sixth Circuit has specifically considered TSA's use of the term "interfere" and held "by using the term interfere, 49 C.F.R. § 1540.109 prohibits only that conduct which poses 'an actual hindrance to the accomplishment of a specified task.' *Fair v. Galveston*, 915 F.Supp. 873, 879 (S.D.Tex.) (distinguishing the use of the term "interrupt" from the narrower term 'interferes')." *Rendon*, 424 F 3d at 480.

Accordingly, based on the plain meaning of the terms "interfere" and "interference," the interpretations of the Ninth and Sixth Circuits, and the regulatory history of 49 C.F.R. § 1540.109, the terms include actions that hinder or distract screeners in the performance of the screening process, as well as refusal to comply with directions given by screeners. TSA has not alleged, nor do I find, that Respondent's narration of the pat-down was interference. TSO Van Gordon was clearly able to continue the pat-down without being hindered or unduly distracted by Respondent's speech.

Respondent's actions in stripping and dropping his clothes on the floor and refusing to comply with TSO Nichols and TSO Van Gordon's directions, however, constituted interference with their duties. TSA screening procedures required the TSOs to conduct a secondary screening due to the ETD alarm indicating nitrates were present. By dropping his clothes on the floor, Respondent presented an actual hindrance to the accomplishment of that task. The distraction caused by Respondent's actions required STSO David to shut down the checkpoint and divert other TSOs to this incident compromised their ability to perform their screening duties.

3. Fourth Amendment Claims

Respondent argues "the TSA screening procedures at issue here are a violation of his Fourth Amendment rights in that the search of Respondent was unwarranted and excessive under these circumstances." Resp. Brief at 8. Aside from Respondent's testimony that he stated he did not consent to the screening but did not think TSA employees heard him, neither the record nor his brief set forth any specific argument on this point. I have previously analyzed the law relevant to this area in the section entitled "Law Regarding Screening." *See United States v. Aukai*, 497 F.3d 955 and *United States v. McCarty*, 648 F.3d 820.

As noted above, the constitutional bounds of an airport administrative search require that the individual screener's actions be no more intrusive than necessary to determine the existence or absence of weapons or explosives that could result in harm to the passengers and aircraft. The record establishes TSOs Van Gordon and Nichols clearly and appropriately limited their administrative search. Respondent opted out of an AIT scan and subjected himself to a pat-down. "Airport screening searches . . . do not per se violate a traveler's Fourth Amendment rights, and therefore must be analyzed for reasonableness." *Gilmore v. Gonzales*, 435 F.3d 1125, 1138 (9th Cir. 2006). The evidentiary record shows the pat-down in question was no more intrusive than necessary to determine the existence or absence of weapons or explosives. I find no merit to Respondent's assertion that the search was unwarranted and excessive.

4. First Amendment Claims

Respondent argues his conduct in disrobing at the TSA checkpoint is protected political speech under the First Amendment to the United States Constitution and cannot be infringed upon in this instance, even by the government. To support his position, Respondent relies significantly on a recent Fourth Circuit decision, *Tobey v. Jones*, 706 F.3d 379. TSA asserts Respondent's First Amendment claim is beyond the scope of an administrative law hearing.

a. Relevant Law as to First Amendment Claims

The First Amendment prohibits Congress from enacting laws "abridging the freedom of speech." U.S. Const. amend. I. "As a general rule, the First Amendment prohibits not only direct limitations on speech but also adverse government action against an individual due to her exercise of First Amendment freedoms." *Colson v. Grohman*, 174 F.3d 498, 508 (5th Cir. 1999).

A bedrock First Amendment principle is that citizens have a right to voice dissent from government policies. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs"). The Supreme Court determined in *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992), that an airport terminal is a nonpublic forum and thus subject to reasonable time, place, and manner restrictions. *See also Mocek v. City of Albuquerque*, 2013 WL 312881 (D.N.M. Jan. 14, 2013).

The Supreme Court "has held that when 'speech' and 'non speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non speech element can justify incidental limitations on First Amendment freedoms" *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court has also held that public nudity in and of itself does not constitute speech. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

The Sixth Circuit in *Rendon*, 424 F 3d 475, considered how certain First Amendment concerns applied to 49 C.F.R. § 1540.109, the same regulation in question here. In that case Mr. Rendon "interfered with the screener in the performance of his duties by actively engaging the screener with loud and belligerent conduct, and, after being asked not to use profanities, by exclaiming that the screener should be in a different line of work, that he should live in a bubble, and that it was a free country in which he could say what he pleased." *Rendon* at 479. The court held that a content-neutral regulation with incidental effects on speech is valid as long as the regulation is narrowly tailored to advance a substantial government interest. The court found that 49 C.F.R. § 1040.109

> serves a substantial government interest, as its purpose is to prevent individuals from interfering with screeners in the performance of their duties, which are to both ensure that those screened are not potentially carrying weapons and to conduct the screening of passengers as efficiently as possible. Moreover, it goes without saying that this regulation (prohibiting interfering with screeners) directly and effectively advances the government's interest in ensuring that screeners are not interfered with in the performance of their screening.
>
> *Id.*

Title 49 C.F R. § 1540.109 "regulates speech only in the narrow context of when that speech can reasonably be found to have interfered with a screener in the performance of the screener's duties." *Rendon* at 480. The court found Rendon's conduct was such that "the screener needed to shut down his line and call over his supervisor. Thus, [Rendon's] conduct interfered with the screener's duty to both thoroughly screen passengers and to do so in an efficient manner." *Id.*

b. Applicability of *Tobey v. Jones*

As noted above, Respondent relies significantly on a recent Fourth Circuit decision, *Tobey v. Jones*, 706 F.3d 379, in supporting his constitutional claims. He states, "[m]ost cases that have been reported involve conduct that is violent, abusive, assaultive conduct, or such behaviors that few would dispute constitute 'interference.' However, one reported case involves the conduct of a passenger that is factually closer to Respondent's conduct." Resp. Brief at 11. For the reasons that follow, though, Respondent's reading of *Tobey* is problematic at best.

At the outset, I must note that *Tobey* was an appeal from denial of a Fed.R.Civ.P. 12(b)(6) motion to dismiss, not a decision on the merits. A court reviews motions under Rule 12(b)(6) by taking the allegations in the complaint as true and construing the facts alleged in the

complaint in the light most favorable to the plaintiff. Therefore, the facts set forth in the Fourth Circuit's decision are from the vantage point of Mr. Tobey, with all reasonable inferences drawn in his favor.

As with this case, the allegations in *Tobey* did not involve "conduct that was violent, abusive, or assaultive, or such behaviors that few would dispute constitute 'interference.'" Resp. Brief at 11. Mr. Tobey brought an action in the United States District Court for the Eastern District of Virginia against airport police and TSA agents, alleging violations of his First, Fourth, and Fourteenth Amendment Equal Protection Clause rights. The TSA agents moved to dismiss the claims, asserting qualified immunity. The district judge sustained the motion as to the Fourth and Fourteenth Amendment claims, but denied the motion for the First Amendment claim. The TSA agents appealed the denial to the Fourth Circuit Court of Appeals.

The issue before the Fourth Circuit was whether Mr. Tobey alleged a facially valid First Amendment claim, and if he did, whether qualified immunity barred such a claim because the TSA officers did not violate a clearly established constitutional right. The Fourth Circuit did not consider or make a finding on whether Mr. Tobey interfered with TSA screening. Rather, it found the facts *as alleged by Mr. Tobey* "plausibly set forth a claim that the TSA agents violated his clearly established First Amendment rights." *Tobey* at 383. The court stated this was premised on Mr. Tobey's arrest and had nothing to do with TSA regulations. *Id.* at 389.

In his brief, Respondent has put forth a reading of *Tobey* that is inconsistent with the decision as written. He states, "In that case, passenger Aaron Tobey, while in the TSA security screening process, stripped off his sweatshirt and pants revealing the text of the Fourth Amendment written on his bare chest. He then began swinging his clothing 'wildly' over his head while Mr. Tobey announced to the [TSA] his desire to 'peacefully protest' TSA screening

measures. Mr. Tobey defended his actions claiming, *inter alia,* that his conduct was protected speech under the First Amendment." Resp. Brief at 11. However, Respondent's version of events is not factual; instead, it is drawn from part of the decision which merely speculates on what evidence could potentially be developed if the case went forward to a hearing.[4]

Since the court did not have findings of fact to rely on and reviewed the case under the summary judgment standard, it stated the "question of whether Mr. Tobey's conduct was so 'bizarre' and 'disruptive' that Appellants' reaction was reasonable or whether Mr. Tobey was targeted because of the words on his chest cannot be decided at the 12(b)(6) stage." *Rendon* at 393. If, after discovery was completed, no genuine issue of material fact remained, a motion for summary judgment would then be appropriate. *Id.*

In Respondent's brief, he has recounted a hypothetical sequence of events as fact, whereas the actual decision clearly shows Mr. Tobey's version was significantly different. In his pleadings, Mr. Tobey claimed that before "proceeding through the AIT unit, [he] calmly placed his sweatpants and t-shirt on the conveyor belt, leaving him in running shorts and socks, revealing the text of the Fourth Amendment written on his chest. Agent Smith advised Mr. Tobey he need not remove his clothes. Mr. Tobey calmly responded that he wished to express his view that TSA's enhanced screening procedures were unconstitutional." *Tobey* at 384. Mr. Tobey

[4] The section in the majority opinion reads as follows:

> Whether Mr. Tobey was in fact "disruptive" is a disputed question of fact at this juncture. Appellants seem to think that removing clothing is *per se* disruptive. We beg to differ. Passengers routinely remove clothing at an airport screening station, and in fact are required to do so by TSA regulations. It is just as reasonable that Mr. Tobey calmly taking off his t-shirt and sweatpants caused no disruption at all, especially since he was never asked to put his clothes back on. And because we are reviewing the facts at the 12(b)(6) phase of litigation, we *must* view the facts in the light most favorable to Mr. Tobey. It could be perfectly true that after further factual development a court could find that Appellants acted reasonably given Mr. Tobey's conduct. Perhaps Mr. Tobey took off his shirt, twirled it around his head, and ripped off his pants with a dramatic flourish, indeed causing a great spectacle. However, we cannot, from this record at the 12(b)(6) stage, make this factual conclusion.

388-89.

asserted that at no point did he refuse to undergo the enhanced screening procedures nor did he decline to do anything requested of him. In fact, Mr. Tobey alleges he "remained quiet, composed, polite, cooperative and complied with the requests of agents and officers." *Id.* Here, however, the record is clear that although Respondent was polite and courteous, he nevertheless refused to cooperate with TSOs and refused directives from both TSA and police officers to put his clothes back on.

5. Analysis

I fully concur with Respondent's assertion that citizens have a right to voice dissent from government policies. I recognize that AIT screening, especially backscatter X-ray imaging, has upset many people and generated both protests and lawsuits.[5] However, the Constitution protects non-disruptive speech. The courts have recognized that airports are not public forums and speech is subject to appropriate regulation in such environments. A recent case states that rather "than the 'free expression of ideas,' the primary purpose of a screening checkpoint is the facilitation of passenger safety on commercial airline flights, and the safety of buildings and the people for whom a plane can become a dangerous weapons." *Mocek v. City of Albuquerque*, 2013 WL 312881 at *53. Speech in a screening checkpoint may be subject to reasonable restrictions.

Respondent's quiet recitation of what was occurring during the pat-down was non-disruptive, did not interfere with the TSO's performance of his duties, and was therefore clearly protected. His later actions in removing his clothing and refusing to put them back on when directed to do so by screeners—thereby causing the line and entire checkpoint to be shut down—interfered with TSO Nichols' and TSO Van Gordon's duty to conduct a thorough secondary

[5] *See, e.g.*, *Redfern v. Napolitano*, 727 F.3d 77 (1st Cir. 2013); *Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2012); *Elec. Privacy Info. Ctr. v. Dept. of Homeland Sec.*, 653 F.3d 1 (D.C. Cir. 2011).

screening of Respondent and to do so in an efficient manner. The fact that Respondent was not loud or belligerent does not negate the fact that interference occurred.

Moreover, TSA is not charging Respondent with public nudity but with interference with the screening process. The governmental interest is limited to ensuring to the smooth and efficient functioning of the screening process, which is designed to prevent weapons or explosives that could result in harm to the passengers and aircraft from entering the sterile area. When Respondent deliberately removed his clothing and dropped them to the floor, he willfully frustrated this governmental interest. *See O'Brien*, 91 U.S. at 382 (1968). Interference with screening even as a protest is not protected speech; at best, Respondent's actions were a form of civil disobedience. While such acts may be valuable to bring attention to a cause, they do not protect participants from consequences of those acts, such as civil penalties.

D. Conclusion

Having considered the record, I find TSA has established by a preponderance of the evidence that Respondent violated 49 C.F.R. § 1540.109 by interfering with screening personnel in the performance of their duties at Portland International Airport. Even if his actions constituted symbolic speech, those actions disrupted the screening process and were not protected speech under the circumstances. The other Constitutional claims discussed above are without merit. Accordingly the violation alleged is found PROVED.

V. CONSIDERATION OF AN APPROPRIATE PENALTY

TSA has proved Respondent violated 49 C.F.R. § 1540.109, and is therefore entitled to a decision in its favor. TSA has proposed a civil penalty of $1,000.00. At the hearing, Respondent

presented mitigating evidence, arguing the requested amount is unwarranted in light of the facts of this case.

TSA maintains an Enforcement Sanction Guidance Policy on appropriate sanctions for civil penalty enforcement actions.[6] (TSA Ex D.) The purpose of this Policy is to provide TSA enforcement personnel with guidance in selecting appropriate penalties in civil penalty enforcement actions and to "promote consistency in enforcement of TSA regulations." (TSA Ex D at 1.) The Policy "does not restrict TSA from proposing higher penalties or penalties for violations not listed in the Sanction Guidance Table" and is meant "to assist, not replace, the exercise of judgment in determining the appropriate civil penalty in a particular case." *Id.*

Another element in determining an appropriate penalty is the "totality of the circumstances, including any aggravating and mitigating factors" present in each case. *Id.* Factors that may be considered are the significance or degree of security risk created by the violation; the nature of the violation (whether it was inadvertent, deliberate, or the result of gross negligence); past violation history, if any, which may necessitate an increased penalty; the violator's level of experience; the attitude of the violator, including the nature of any corrective action he or she has taken; the economic impact of the civil penalty on the violator; whether a criminal sanction has already been assessed for the same incident; whether the violator was disciplined by his or her employer for the same incident; and whether the violator engaged in artful concealment, fraud, and/or intentional falsification. *Id.*; *see also In re Paul Dunn*, 2009 WL 1638648 (D.O.T.) (TSA Appeal Decision 2009) (discussing enforcement guidance).

[6] This document is publicly available on TSA's website at http://www.tsa.gov/assets/pdf/enforcement_sanction_guidance_policy.pdf.

In the Enforcement Sanction Guidance Policy, TSA recommends a penalty of $500.00 - $1500.00 for cases of non-physical interference with screeners. (TSA Ex. D at 9.) The proposed penalty is in the mid-range for a violation involving interference with screeners.

TSA's rules of practice provide ALJs with the authority to assess a civil penalty. TSA's Complaint will set forth a proposed civil penalty amount, and the ALJ must issue an initial decision that includes the amount of any civil penalty found appropriate. However, the rules of practice do not require the ALJ to adopt the amount proposed by TSA in the Complaint. *See In re Hallahan*, 2010 WL 5018667 (Nov. 3, 2010) (affirming the ALJ's enhancement of the sanction beyond the amount requested by TSA, based on the particular facts and circumstances of the case).

A. TSA's Argument concerning Sanction

TSA's Enforcement Sanction Guidance Policy gives a sanction range of $500.00 to $1500.00 for cases of non-physical interference. TSA considered as aggravating factors (1) that Respondent was an experienced flier and well aware of the screening process at Portland International Airport, (2) Respondent's lack of cooperation, (3) the deliberate nature of the violation, (4) his refusal to re-dress, and (5) the significance of the security risk. TSA considered the fact that Respondent had no prior violations as a mitigating factor. Based on the aggravating factors in this case, TSA believes that the sanction recommendation of $1000.00 is reasonable.

B. Respondents Argument concerning Sanction

Respondent argues the proposed civil penalty amount sought by the TSA is unreasonable because the TSA fails to take into consideration existing mitigating factors, to wit: Respondent was non-violent, polite, non-abusive, and not profane or threatening. He stood quietly and

peacefully in exercise of his politically based opposition to TSA policies and procedures. Respondent later faced State court criminal prosecution and was acquitted of criminal charges. He also argues his actions were performed in a good faith belief that he was exercising his free speech rights as an American citizen and a citizen of the State of Oregon; and he has suffered financial and professional difficulties brought about when he was fired from his job as the result of the incident giving rise to this case.

C. Analysis

I will address each of the factors to be considered in assessing an appropriate civil penalty as follows:

1. Significance or Degree of Security Risk Created by the Violation

The purpose of screening is establishing whether a passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance. There is no evidence in this record that Respondent was carrying or attempting to introduce any prohibited item into the sterile area or onto an aircraft. However, one of the purposes for the regulation in question is to protect screeners from undue distractions. "Checkpoint disruptions potentially can be dangerous in these situations. This rule supports screeners' efforts to be thorough and helps prevent individuals from unduly interfering with the screening process." 67 Fed. Reg. 8340-01 (Feb. 22, 2002), *amended by* 68 Fed. Reg. 49718-01 (Aug. 19, 2003).

Here, the effect of Respondent's actions was that an entire checkpoint was shut down. While this shutdown was only for a few minutes, port police, airport operations personnel, and TSA personnel deployed as a result of Respondent's actions. Accordingly, I find Respondent's actions created a moderate security risk.

2. The Nature of the Violation

Respondent asserts he was both assisting TSA by removing his clothes and also doing it in protest. There is a fundamental inconsistency in these positions. However, Respondent testified he had checked whether Oregon law applied at the checkpoint and stated that his actions were legal under Oregon law. His 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 act of dropping his clothes to the floor prevented the TSOs from conducting a required secondary screening for explosives.

Respondent made statements to TSOs and police that his actions were a protest. Based on Respondent's testimony and evidence, I find his violation was deliberate. Although Respondent considered it a protest, his actions did interfere with the screening process and he did not comply with subsequent directions from the TSOs.

3. Past Violation History

Respondent has no prior history of violations.

4. The Violator's Level of Experience

Respondent admits to being an experienced traveler who was generally familiar with airport screening procedures, including those at Portland International Airport.

5. The Attitude of the Violator

During the incident Respondent was non-violent, polite, non-abusive, not profane or threatening. However, he refused to follow the directions of TSA personnel.

6. Whether a Criminal Sanction has Already Been Assessed for the Same Incident

Respondent was charged with misdemeanor indecent exposure but acquitted. I note the elements of the criminal charge under Oregon law are significantly different than the elements of a violation of 49 C.F.R. § 1540.109. Respondent did not receive any criminal sanctions related to this incident.

7. Whether the Violator was Disciplined by his or her Employer for the Same Incident

This factor is significant to this case. Respondent testified he was fired by his employer as a result of this incident and, as of the date of the hearing, remained unemployed. TSA's proposed penalty did not take this fact into account.

8. Whether the Violator Engaged in Artful Concealment, Fraud, and/or Intentional Falsification

There is also no evidence Respondent engaged in artful concealment, fraud, or intentional falsification. Thus, none of these factors weighs into the determination of an appropriate sanction.

9. The Economic Impact of the Civil Penalty on the Violator

Financial hardship, when proven, may constitute grounds for reducing an otherwise appropriate civil penalty. The person who claims financial hardship bears the burden of proof and unsworn and unsubstantiated statements by an alleged violator are insufficient evidence of inability to pay. *See In re Donegan-Ortiz*, 2008 WL 2173909 (May 9, 2008). While Respondent testified that he has lost his job as a result of this incident, he has not introduced any testimonial or documentary evidence of financial hardship aside from his testimony that he had not yet secured a new job. Accordingly, I will not speculate on Respondent's financial condition as grounds for reducing a civil penalty.

D. Conclusion

The sanction proposed by TSA of $1000.00 is in the mid-range of the Agency's guidelines for recommended penalties, however, TSA did not consider the fact Respondent was fired by his employer. I consider this a mitigating factor. However, Respondent did cause a major, albeit brief, disruption to general screening at the ABC checkpoint and a potential security risk. Although he held a good-faith belief that his actions constituted a form of protest, he nevertheless refused to comply with directions of TSA personnel and interfered with TSA personnel in the performance of their screening functions. Absent any mitigating factors, I might concur with the Agency, but in light of Respondent's job loss I consider a sanction at the lower end of the penalty scale to be adequate in this matter. Thus, I have determined that a civil penalty in the amount of $500.00 is appropriate.

ORDER

WHEREFORE:

IT IS HEREBY ORDERED, after consideration of this record, that a violation of 49 C.F.R. § 1540.109 is found **PROVED** and a civil penalty in the amount of five hundred and dollars ($500.00) is **ASSESSED.**

IT IS SO ORDERED.

JORDAN.GEORGE.J.1193117437

Digitally signed by JORDAN.GEORGE.J.1193117437
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Date: 2014.04.02 11:17:18 -07'00'

George J. Jordan
Administrative Law Judge

Done and dated April 2, 2014 at
Seattle, Washington.

APPENDIX A: APPEAL RIGHTS

49 C.F.R. § 1503.657 Appeal from initial decision.

(a) *Notice of appeal*. Either party may appeal the initial decision, and any decision not previously appealed pursuant to § 1503.631, by filing a notice of appeal with the Enforcement Docket Clerk. A party must file the notice of appeal with USCG ALJ Docketing Center, ATTN: Enforcement Docket Clerk, 40 S. Gay Street, Room 412, Baltimore, Maryland 21202–4022. A party must file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and must serve a copy of the notice of appeal on each party. Upon filing of a notice of appeal, the effectiveness of the initial decision is stayed until a final decision and order of the TSA decision maker have been entered on the record.

(b) *Issues on appeal*. 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.

(3) Whether the ALJ committed any prejudicial errors during the hearing that support the appeal.

(c) *Perfecting an appeal*. Unless otherwise agreed by the parties, a party must perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the Enforcement Docket Clerk.

(1) Extension of time by agreement of the parties. The parties may agree to extend the time for perfecting the appeal with the consent of the TSA decision maker. If the TSA decision maker grants an extension of time to perfect the appeal, the Enforcement Docket Clerk will serve a letter confirming the extension of time on each party.

(2) Written motion for extension. If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the Enforcement Docket Clerk and must serve a copy of the motion on each party. The TSA decision maker may grant an extension if good cause for the extension is shown in the motion.

(d) *Appeal briefs*. A party must file the appeal brief with the Enforcement Docket Clerk and must serve a copy of the appeal brief on each party.

(1) In the appeal brief, a party must set forth, in detail, the party's specific Transportation Security Administration, DHS § 1503.657 objections to the initial decision or rulings, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the

appeal. If, for the appeal, the party relies on evidence contained in the record for the appeal, the party must specifically refer in the appeal brief to the pertinent evidence contained in the transcript.

(2) The TSA decision maker may dismiss an appeal, on the TSA decision maker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief.

(e) *Reply brief*. Unless otherwise agreed by the parties, any party may file a reply brief not later than 35 days after the appeal brief has been served on that party. The party filing the reply brief must serve a copy of the reply brief on each party. If the party relies on evidence contained in the record for the reply, the party must specifically refer to the pertinent evidence contained in the transcript in the reply brief.

(1) Extension of time by agreement of the parties. The parties may agree to extend the time for filing a reply brief with the consent of the TSA decision maker. If the TSA decision maker grants an extension of time to file the reply brief, the Enforcement Docket Clerk will serve a letter confirming the extension of time on each party.

(2) Written motion for extension. If the parties do not agree to an extension of time for filing a reply brief, a party desiring an extension of time may file a written motion for an extension and will serve a copy of the motion on each party. The TSA decision maker may grant an extension if good cause for the extension is shown in the motion.

(f) *Other briefs*. The TSA decision maker may allow any person to submit an amicus curiae brief in an appeal of an initial decision. A party may not file more than one appeal brief or reply brief. A party may petition the TSA decision maker, in writing, for leave to file an additional brief and must serve a copy of the petition on each party. The party may not file the additional brief with the petition. The TSA decision maker may grant leave to file an additional brief if the party demonstrates good cause for allowing additional argument on the appeal. The TSA decision maker will allow a reasonable time for the party to file the additional brief.

(g) *Number of copies*. A party must file the original appeal brief or the original reply brief, and two copies of the brief, with the Enforcement Docket Clerk.

(h) *Oral argument*. The TSA decision maker has sole discretion to permit oral argument on the appeal. On the TSA decision maker's own initiative or upon written motion by any party, the TSA decision maker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(i) *Waiver of objections on appeal*. If a party fails to object to any alleged error regarding the proceedings in an appeal or a reply brief, the party waives any objection to the alleged error. The TSA decision maker is not required to consider any objection in an appeal brief or any argument in the reply brief if a party's objection is based on evidence contained in the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

(j) *The TSA decision maker's decision on appeal*. The TSA decision maker will review the briefs on appeal and the oral argument, if any, to determine if the ALJ committed prejudicial error in the proceedings or that the initial decision should be affirmed, modified, or reversed. The TSA decision maker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the TSA decision maker determines may be necessary.

(1) The TSA decision maker may raise any issue, on the TSA decision maker's own initiative, that is required for proper disposition of the proceedings. The TSA decision maker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the TSA decision maker requires the consideration of additional testimony or evidence, the TSA decision maker will remand the case to the ALJ for further proceedings and an initial decision related to that issue. If the TSA decision maker raises an issue that is solely an issue of law, or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, the TSA decision maker need not remand the case to the ALJ for further proceedings but has the discretion to do so.

(2) The TSA decision maker will issue the final decision and order of the Administrator on appeal in writing and will serve a copy of the decision and order on each party. Unless a petition for review is filed pursuant to § 1503.659, a final decision and order of the Administrator will be considered an order assessing civil penalty if the TSA decision maker finds that an alleged violation occurred and a civil penalty is warranted.

(3) A final decision and order of the Administrator after appeal is binding precedent in any other civil penalty action unless appealed and reversed by a court of competent jurisdiction.

(4) The TSA decision maker will determine whether the decision and order of the TSA decision maker, with the ALJ's initial decision or order attached, may be released to the public, either in whole or in redacted form. In making this determination, the TSA decision maker will consider whether disclosure of any of the information in the decision and order would be detrimental to transportation security, would not be in the public interest, or should not otherwise be required to be made available to the public.

§ 1503.659 Petition to reconsider or modify a final decision and order of the TSA decision maker on appeal.

(a) *General*. Any party may petition the TSA decision maker to reconsider or modify a final decision and order issued by the TSA decision maker on appeal from an initial decision. A party must file a petition to reconsider or modify not later than 30 days after service of the TSA decision maker's final decision and order on appeal and must serve a copy of the petition on each party. The TSA decision maker will not reconsider or modify an initial decision and order issued by an ALJ that has not been appealed by any party to the TSA decision maker and filed with the Enforcement Docket Clerk.

(b) *Form and number of copies.* A party must file in writing a petition to reconsider or modify. The party must file the original petition with the Enforcement Docket Clerk and must serve a copy of the petition on each party.

(c) *Contents.* A party must state briefly and specifically the alleged errors in the final decision and order on appeal, the relief sought by the party, and the grounds that support the petition to reconsider or modify.

(1) If the petition is based, in whole or in part, on allegations regarding the consequences of the TSA decision maker's decision, the party must describe and support those allegations.
(2) If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party must set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. The party must explain, in detail, why the new material was not discovered through due diligence prior to the hearing.

(d) *Repetitious and frivolous petitions.* The TSA decision maker will not consider repetitious or frivolous petitions. The TSA decision maker may summarily dismiss repetitious or frivolous petitions to reconsider or modify.

(e) Reply petitions. Any other party may reply to a petition to reconsider or modify, not later than 30 days after service of the petition on that party, by filing a reply with the Enforcement Docket Clerk. A party must serve a copy of the reply on each party.

(f) *Effect of filing petition*. Unless otherwise ordered by the TSA decision maker, filing a petition pursuant to this section will stay the effective date of the TSA decision maker's final decision and order on appeal.

(g) *The TSA decision maker's decision on petition.* 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.

§ 1503.661 Judicial review of a final order.

For violations of a TSA requirement, a party may petition for review of a final order of the Administrator only to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia pursuant to 49 U.S.C. 46110. A party seeking judicial review of a final order must file a petition for review not later than 60 days after the final order has been served on the party.

APPENDIX B: WITNESSES AND EXHIBITS

Witnesses:

Steve Van Gordon	For TSA
Jerry Nichols	For TSA
Jonathan David	For TSA
Brian Cotter	For TSA
Marsha Shanahan	For TSA
John Brennan	For Respondent

Exhibits:

TSA Ex. A	Video of the incident
TSA Ex. B	*In re Michael Rendon*, 2004 WL 2526015 (TSA Decision Maker 2004)
TSA Ex. C	49 C.F.R § 1541.109
TSA Ex. D	TSA Enforcement Sanction Guidance Policy
R Ex. 1	Judgment of Acquittal, Circuit Court of the State of Oregon for Multnomah County
R Ex. 2	Photograph of Respondent during the incident
R Ex. 3	Charging document – Indecent Exposure

CERTIFICATE OF SERVICE

I hereby certify that I have transmitted the above document to the following persons, as indicated:

Susan Conn
Field Counsel – Seattle
Transportation Security Administration
By electronic mail to: susan.conn@tsa.dhs.gov

Robert A. Callahan
Northwest Law Center
Counsel for Respondent
By electronic mail to: racallahan@nwlawcenter.com

ALJ Docketing Center
By electronic mail to: aljdocketcenter@uscg.mil

Dated: April 2, 2014.

_____

Tobi C. Erskine
Paralegal Specialist to the Administrative Law Judge