

UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
TRANSPORTATION SECURITY ADMINISTRATION

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

**RULINGS ON RESPONDENT'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Respondent filed a post-hearing brief which contained proposed findings of fact and conclusions of law. Those proposed findings and conclusions have been considered fully. If I have noted a fact or conclusion as *Accepted* in this order, I have considered it to be supported by the record but it has been incorporated in the Decision only to the extent it is relevant and material to my findings and analysis. The findings noted as *Rejected* are, in whole or in part, contrary to the facts and/or law, or immaterial to the Decision in this case.

**RESPONDENT'S PROPOSED FINDINGS OF FACT**

1. John Brennan, Respondent, is a well-educated man, a frequent airline flyer who is familiar with Transportation Security Administration (TSA) procedures in place for ticketed passengers in the ABC security screening area at Portland International Airport (PDX). [Testimony of Respondent, p. 150, lines 14-15, pages 151, lines 3 &14]

*Accepted.*

2. On April 17, 2012, Respondent, as a ticketed passenger, presented himself for screening at the ABC checkpoint at PDX. [Testimony of Respondent, page 153, line 10]

*Accepted.*

3. The purpose of the TSA screening at the Portland Airport ABC screening area is to screen for the prohibited items: explosives and weapons. [Testimony of Transportation Security Officer (TSO) David, page 103, line 6]

*Accepted.*

4. While in line, Respondent was told by a TSA official to take off some article(s) of his clothing. [Testimony of Respondent, page 153, line 10]

*Accepted.*

5. Respondent removed items of his clothing, including his shoes, belt, sweater and jacket. [Testimony of Respondent, page 153, lines 16-20]

*Accepted.*

6. As part of the screening process, passengers are given an option of not being "screened" by Advanced Imaging Technology (AIT). If a passenger "opts-out" of AIT screening then a full pat-down search of that passenger is required. [Testimony of TSO Van Gordon, page 13, lines 12-20]

*Accepted.*

7. As is his "standard practice," Respondent opted out of the AIT screening, which then required the TSO (Van Gordon) to conduct a full pat-down search of Respondent. [Testimony of Respondent, page 153, line 19, page 155, line 5] [Testimony of TSO Van Gordon, page 13, line 16]

*Accepted.*

8. Respondent stated that he did not consent to the pat-down search but believed that his comments regarding not consenting to the search were not heard by any TSO. [Testimony of Respondent, p. 156, line 22]

*Accepted.*

9. Respondent audibly "narrated" the actions of TSO Van Gordon as Van Gordon conducted the pat-down search of Respondent, as this provided a "degree of comfort" to the Respondent during the pat-down search. [Testimony of Respondent, page 157, lines 24-25]

*Accepted.*

10. TSO Van Gordon then "ETD" [explosive trace detection] tested the gloves he used to pat down Respondent. TSO Van Gordon tells every person that he pats down that he is putting the gloves into a machine that looks for particles of explosive material, testing if the gloves "picked up"

anything during the pat-down search. TSO Van Gordon tells this to everyone he pats down. "Everyone that I pat-down. Yes." [Testimony of TSO Van Gordon, page 16, lines 12-25]

*Accepted.*

11. Respondent was informed by the TSO performing the pat-down search that he was being tested for "explosives." [Testimony of Respondent, page 159, line 5] As a result of the test an alarm occurred indicating that something had been detected on the glove. [Testimony of TSO Van Gordon, page 27, lines 19- 23]

*Accepted.*

12. Respondent was informed by the TSO that he had tested positive for nitrates. [Testimony of Respondent, page 161, line 2 and 16]

*Accepted.*

13. Respondent felt that the quickest way to prove he was not carrying any explosives was to remove his clothes. His act of disrobing had an element of assisting the TSO by clarifying to them that he did not have explosives and an element of political protest of the entire search. [Testimony of Respondent, page 162-163, lines 6-25 & 1-11]

*Accepted in part and rejected in part. Respondent's testimony that assisting TSA was his intent, and that his actions were also in protest of TSA procedures is a matter of record. However, the record does not support the proposed finding as to assisting in the screening process, and this is therefore rejected. See Decision.*

14. Respondent intended to point out the absurdity of the accusation [testing positive for explosives] and to prove his innocence that he wasn't carrying explosives. [Testimony of Respondent page 162, lines 6-7]

*Accepted.*

15. Respondent felt disrobing was appropriate because he believed it would be expeditious in getting the screening over with and that it was within his legal right to protest his treatment. [Testimony of Respondent, page 163, lines 4-11]

*Accepted in part as Respondent's testimony and subjective belief. Rejected in part as not supported by record. See Decision.*

16. Respondent, by disrobing, presented himself for the resolution screening entirely bare skinned. [Testimony of TSO Van Gordon, page 58, lines 12-13]

*Accepted.*



17. During a pat-down search TSOs do not examine bare skin because there is no need to pat down the skin because you can see it. [Testimony of TSO Van Gordon, page 16, lines 10-11, page 32, line 12; page 58lines4-6]

*Accepted.*

18. We don't examine bare skin. [Testimony of TSO Van Gordon, page 16, lines 10-11][Testimony TSA Nichols, page 76, line 18]

*Accepted.*

19. Visual inspection of disrobed Respondent by TSO Van Gordon revealed that he had no explosives, nor weapons. [Testimony of TSO Van Gordon, page 58, lines 14-16]

*Accepted in part. Although TSO Van Gordon testified he could see Respondent was not carrying any weapons, this was not an "inspection" for purposes of TSA screening.*

20. All security screening lanes were closed by Supervisory Transportation Security Officer (STSO) Jonathan David in response to seeing Respondent standing with no clothes on. [Testimony of STSO David, page 93, lines 13-14]

*Accepted.*

21. The actions taken by the TSA in response to Respondent's disrobing were not dictated by any identified TSA policy but rather the decision of STSO David. [Testimony of STSO David, page 96, lines 6- 22]

*Rejected in part. While some actions were taken on the initiative of STSO David, the closing of screening lanes in response to a distraction is within TSA policy.*

22. There was a private screening area within 75 feet of Respondent. [Testimony of STSO David, page 100, line 23]

*Accepted.*

23. There was an option for the TSA to move Respondent to a private screening area. [Testimony of TSO David, page101, line 20]

*Rejected. Any option for TSA to move to a private screening area was foreclosed by Respondent's disrobing and the intervention of the Port of Portland Police.*

24. TSA did not move Respondent to the private screening area. [Testimony of TSO David, page 105, lines 7- 25]

*Accepted.*

25. The only other resolution screening that would have to be done because of the ETD alarm would be to clear the rest of his property. The next procedure is to clear the property. [TSO Van Gordon, page 32, lines 14-17]

*Rejected in part. While his accessible property would have to be cleared, a separate pat-down search was required but prevented by Respondent's disrobing.*

26. The sounding of the ETD alarm also required Respondent's property to be screened. [Testimony of TSO Van Gordon, page 61, line 3]

*Accepted.*

27. Respondent's property could not be released until further screening was accomplished. [Testimony of Van Gordon, page 61, lines 7-8]

*Accepted.*

28. Respondent did not interfere or block TSA access to his property or his clothing. [Testimony of TSO Nichols, page 76, lines 9-11]

*Rejected in part. Respondent did not physically block TSA from accessing his property or clothing, but dropping his clothes to the floor interfered with effective TSA access to his clothing.*

29. Respondent was not angry, belligerent or abusive to any TSA officer. He did not use profanity or vulgarity; nor did he try to assault any TSA officer. Respondent was polite and courteous. [Testimony of Respondent, page 157, lines 1-13] [Testimony of TSO Van Gordon, page 50 lines 1-25]

*Accepted.*

30. Respondent was not angry, belligerent or abusive to any Port of Portland police officer. He did not use profanity or vulgarity; nor did he try to assault any Port of Portland police officer. Respondent was polite and courteous. [Testimony of Respondent, page 157, lines 1-13] [Testimony of Port of Portland officer Cotter, page 188, lines 5-20]

*Accepted.*

31. A resolution screening of Respondent's clothing and other property was not done. The resolution screening could not be done because of the actions of the Port of Portland police who showed up at the location of Respondent's resolution search and took possession of Respondent's clothing and other property from the TSA screeners. [Testimony of TSO Van Gordon, page 60, lines 10-13] "Once we called the port police they take over the Incident." [Testimony of STSO Nichols, page 75, line 12]

*Accepted in part. This was only one of the reasons that TSA was unable to conduct the required secondary screening. Respondent's actions also contributed.*

32. Respondent was never told that it was necessary for him to put his clothes on to continue the screening process. [Testimony of TSO Van Gordon, page 51, line 21] [Testimony of Respondent, page 169, lines 20-22]

*Rejected. While there is no evidence that anyone told Respondent to put his clothes on to complete screening, his actions prevented an effective resolution screening from being conducted.*

33. Respondent was never "ordered" to put his clothes on. [Testimony of TSO Van Gordon, page 51 line 21]

*Accepted.*

34. Respondent did not think that his being naked would distract TSA screeners. "I am aware that TSA people routinely see people naked through the scanning machines and that, in fact, the difference between a naked image and a naked person isn't that great once you get to that point." [Testimony of Respondent, page 170, lines 13-17]

*Rejected. The ATI equipment used in Portland did not use backscatter scanning. The equipment did not allow TSA screenings to routinely see naked images. Additionally, whether an action caused a distraction is determined by the totality of the evidence and not Respondent's opinion.*

35. Respondent was never told that his actions were interfering with TSA officer's duties. [Testimony of TSO Van Gordon, page 51, line 25]

*Accepted but considered irrelevant. TSA screeners do not have to warn someone that their actions are interfering with their duties.*

36. Respondent was never told by TSA that his actions were interfering with the screening process. Respondent was never told that his actions were causing TSA to be less efficient in the performance of their duties. [Testimony of Respondent, page 164, lines 17- 21]

*Accepted but considered irrelevant. TSA screeners do not have to warn someone that their actions are interfering with their duties.*

37. Respondent was never told that putting his clothes back on was necessary in order to complete his screening. In fact, putting his clothes back on was not necessary to complete the resolution screening of Respondent. [Testimony of Respondent, page 169, lines 20- 22] [Testimony of TSO Van Gordon, page 51, line 21]



*Rejected. While there is no evidence that anyone told Respondent to put his clothes on complete, his actions prevented an effective resolution screening from being conducted.*

38. Closing of the screening lines 4 & 5 was a discretionary call on the part of a TSA supervisor and not "caused" by Respondent. A "private screening room" was an available option but was not used. [Testimony of Respondent, page 156, line 2] [Testimony of TSO David, page 101, line 20]

*Accepted in part. The closing was ordered by the STSO following TSA policy and Respondent's actions were the reason for the closure. While a private area was available, any option for TSA to move to a private screening area was foreclosed by Respondent's disrobing and the intervention of the Port of Portland Police.*

39. The TSA supervisor's fear that Respondent's actions could be a distraction was not borne out by the events of the day. [Testimony of TSO David, page 106 lines 13]

*Rejected. While there is no evidence that anyone used the distraction caused by Respondent to circumvent screening, Respondent's actions constituted a distraction.*

40. If Respondent had been told that his act of disrobing constituted disorderly conduct, he would have put his clothes back on. He was never told this. [Testimony of POPPD Officer Cotter, page 116, lines 4-6]

*Accepted but considered irrelevant. The disorderly conduct charge is distinct from the allegation of interference considered in this matter.*

41. Respondent was arrested by Port of Portland police on probable cause of violating Portland City Code for indecent exposure and State of Oregon law for disorderly conduct. [Testimony of Port of Portland officer Cotter, page 119, lines 2-4]

*Accepted.*

42. Technically, the alarm was not resolved because the Port of Portland police took Respondent's property with them. [Testimony of TSO Van Gordon, pages 56-57, lines 13 and 8-9]

*Accepted in part. This was only one of the reasons that TSA was unable to conduct the required secondary screening. Respondent's actions also contributed.*

43. Respondent was prosecuted for the crime of indecent exposure in State court for the actions herein described [Charging instrument, Exhibit 3] [Testimony of Port of Portland officer Cotter, page 120, line 4]

*Accepted.*

44. Respondent's conduct was not criminal under Oregon state law. In his state court criminal prosecution for indecent exposure, state court judge the Honorable David F. Reese found by a preponderance of the evidence that Respondent's actions were political speech protected by the Oregon Constitution (Article 1, Section 8). Respondent was acquitted of the State criminal charge (indecent exposure) [Testimony. of Respondent, page 167, line 1] [Respondent's Exhibit 1: Judgment] [Testimony of Respondent, page 166, lines 22-25] [Testimony of Port of Portland officer Cotter, page 120, line 18]

*Rejected in Part. The judgment states only that there is a Judgment of Acquittal on Finding of Not Guilty to Count I. The reasoning of the Court is not recorded. I will accept the testimony that the court considered Respondent's actions to be political speech protected by the Oregon Constitution. But I find that the indecent exposure charge under the Portland City Code Sec 140.40.030 is not relevant to the allegation of interference with screeners.*

45. The TSA did not interview any person who actually witnessed this incident but only relied upon written reports of what occurred in assessing Respondent's actions. [Testimony of TSA Inspector Shanahan, page 139-140, all]

*Accepted in part. . Any penalty assessed is based on the record developed at the hearing and my reasoning is set out in the Decision.*

46. The TSA did not consider extant mitigating factors from its own list of mitigating factors, in assessing the amount of penalty herein, including: the disclosure of "the act" by the passenger (Respondent) and the instigation of state court criminal charges. [Testimony of TSA Inspector Shanahan, page 138, lines 2-25, page 139, line 2]

*Accepted in part. . Any penalty assessed is based on the record developed at the hearing and my reasoning is set out in the Decision.*

47. The TSA official who assessed the penalty was not neutral and detached but carried her own bias into the assessment of Respondent's conduct subject of this inquiry. "In my humble opinion I'd say that's [the fine assessed] a little low." [Testimony of TSA Inspector Shanahan, page 135, lines 4-6, page 146, line 24]

*Rejected. In its Enforcement Sanction Guidance Policy, TSA recommends a penalty of \$500.00-\$1,500.00 for cases of non-physical interference with screeners. The record shows TSI Shanahan could have assessed a sanction of \$1,500 but relied on the guidelines and assessed a moderate sanction. The record does not establish any bias that harmed Respondent. TSI Shanahan's recommendation is of minimal relevance. Any penalty assessed is based on the record developed at the hearing and my reasoning is set out in the Decision.*



48. Respondent lost his job as a direct result of this incident. [Testimony of Respondent, page 150, line 25]

*Accepted.*

49. The state of Oregon's Constitution provides that "no law shall be passed restraining the expression of opinion or the ability to speak freely on any subject whatsoever." [Oregon Constitution, Article 1, Section 8]

*Accepted.*

### **RESPONDENT'S PROPOSED CONCLUSIONS OF LAW**

A. Respondent did not assault, threaten or intimidate screening personnel in the performance of their screening duties.

*Accepted.*

B. Respondent did not "interfere" with screening personnel in the performance of their screening duties.

*Rejected. See Decision.*

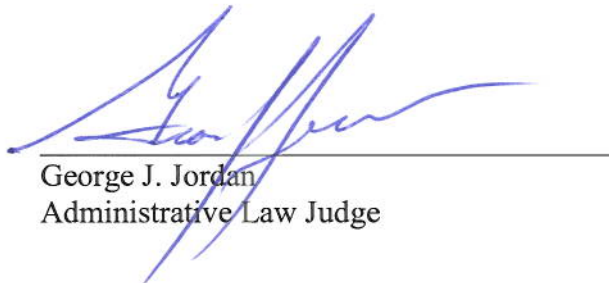
C. Respondent's conduct in disrobing at TSA screening checkpoint was conduct rising to the level of political speech (conduct as speech) and is protected by the First Amendment to the United States Constitution

*Rejected. See Decision.*

D. The proposed civil penalty amount sought by the TSA against Respondent is unreasonable under these circumstances.

*Rejected in Part. I have considered an appropriate penalty based on the record developed in the hearing.*

**IT IS SO FOUND.**

  
George J. Jordan  
Administrative Law Judge

Dated: April 2, 2014.

**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](mailto:susan.conn@tsa.dhs.gov)

Robert A. Callahan  
Northwest Law Center  
Counsel for Respondent  
By electronic mail to: [racallahan@nwlawcenter.com](mailto:racallahan@nwlawcenter.com)

ALJ Docketing Center  
By electronic mail to: [aljdocketcenter@uscg.mil](mailto:aljdocketcenter@uscg.mil)

Dated: April 2, 2014.



Tobi C. Erskine  
Paralegal Specialist to the Administrative  
Law Judge