

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: BRIAN WALLAESA

FAA Order No. 2013-2

Docket No. CP10WP0010
FDMS No. FAA-2010-0628¹

Served: May 14, 2013

DECISION AND ORDER²

Respondent Brian Wallaesa appealed from a written initial decision³ issued by Chief Administrative Law Judge Ronnie A. Yoder (“ALJ”), finding that Wallaesa violated 14 C.F.R. §§ 121.317(f),⁴ 121.317(k),⁵ and 121.580,⁶ while he was a passenger on board a Southwest Airlines flight. Sections 121.317(f) and (k) require passenger compliance with the “Fasten Seat Belt” sign, when lighted, as well as with crewmember instructions to sit and fasten one’s seat

¹ Generally, materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at <http://www.regulations.gov>. 14 C.F.R. § 13.210(e)(1).

² The Administrator’s civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty/. See 14 C.F.R. § 13.210(e)(2). In addition, Thomson Reuters/West Publishing publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ A copy of the ALJ’s written initial decision, served on August 27, 2012, is attached.

⁴ Section 121.317(f) provides “Each passenger required by § 121.311(b) to occupy a seat ... shall fasten his or her safety belt about him or her and keep it fastened while the “Fasten Seat Belt” sign is lighted.”

⁵ Section 121.317(k) provides that “Each passenger shall comply with instructions given him or her by a crewmember regarding compliance with paragraphs (f) ... of this section.”

⁶ Section 121.580 provides “No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember’s duties aboard an aircraft being operated under this part.”

belt when the sign is on. Section 121.580, among other things, prohibits passenger interference with the performance of a crewmember's duties on board an aircraft. The ALJ held that Wallaesa violated these regulations during the last hour of the flight by leaving his seat and approaching the front of the aircraft while the "Fasten Seat Belt" sign was lighted, and by refusing to comply with the crew's instructions to sit and keep his seat belt fastened. (Initial Decision at 4 -7.) The ALJ assessed a \$3,300 civil penalty.⁷

Wallaesa's arguments on appeal include the following: (1) 49 U.S.C. § 46301(a)(5)(A) does not authorize the FAA to assess a civil penalty against a passenger; (2) Complainant improperly relied upon the sanction guidance in *FAA Compliance and Enforcement Program*, FAA Order No. 2150.3B; (3) the ALJ's finding that he violated 14 C.F.R. §§ 121.317(f) and (k) should be reversed because the FAA did not allege that he violated those regulations in the Notice of Proposed Civil Penalty (NPCP); (4) the evidence does not support the finding of a violation of 14 C.F.R. § 121.580; and (5) he should not be held accountable for his behavior because he was having a medical emergency. Based on these arguments, Wallaesa contends that no civil penalty should have been imposed.⁸

Wallaesa's appeal is denied. The preponderance of the evidence supports the ALJ's determination that Wallaesa violated 14 C.F.R. § 121.580. Further, under 49 U.S.C. § 46301(a)(5), a passenger is subject to a civil penalty for violating regulations, including the regulations involved in this case, issued under 49 U.S.C. § 44701. Wallaesa had ample notice

⁷ Complainant sought a \$5,500 civil penalty. Complainant did not appeal from the imposition of a lower civil penalty than it sought in the Complaint.

⁸ Wallaesa also argues that the FAA attorneys attempted to intimidate him into paying the \$5,500 civil penalty by amending the Notice of Proposed Civil Penalty (NPCP) and by filing a motion for a protective order. There is no support in the record to substantiate such accusations.

Any arguments raised by Wallaesa in his appeal brief but not specifically addressed in this decision have been considered, deemed not worthy of discussion, and rejected.

that the FAA was alleging that he had violated 14 C.F.R. §§ 121.317(f) and (k). Finally, Wallaesa failed to prove that he had a medical emergency that caused him to lose control of his actions on that flight.

I. History of the Case

Complainant alleged in the Complaint that on November 6, 2009, crewmembers on board Southwest Airlines Flight 3049 asked Wallaesa, a passenger, to take his seat when the “Fasten Seat Belt sign” was illuminated, but Wallaesa refused. Complainant alleged that Wallaesa’s refusal to comply with the crewmember’s instructions to sit interfered with the performance of the crewmembers’ duties. Complainant sought a \$5,500 civil penalty under the authority of 49 U.S.C. § 46301(a)(5) for the alleged violations of 14 C.F.R. §§ 121.317(f), 121.317(k), and 121.580.

At a prehearing conference, the ALJ pointed out that Complainant had not alleged specifically in the Complaint that Wallaesa failed *to fasten his seat belt* when the “Fasten Seat Belt” was on. Complainant argued that an allegation that Wallaesa did not fasten his seat belt when the “Fasten Seat Belt” sign was illuminated was implicit in the allegation in the Complaint that Wallaesa did not obey the crewmembers’ instructions *to take his seat* when the “Fasten Seat Belt” sign was illuminated.⁹ The ALJ subsequently deemed the Complaint as amended to allege that Wallaesa also failed to put on his seat belt when the “Fasten Seat Belt” sign was on, contrary to the crewmembers’ instructions. (3/2/2012 Prehearing Conf.¹⁰ Tr. 5.)

⁹ The ALJ did not agree with Complainant.

¹⁰ Prehearing conferences were held on October 18, 2011, March 2, 2012, and March 16, 2012. Citations to the prehearing conferences will be as follows: 10/18/2011 Prehearing Conf. Tr. ____; 3/2/2012 Prehearing Conf. Tr. ____; and 3/16/2012 Prehearing Conf. Tr. ____.

In his Answer, filed on September 17, 2010, Wallaesa alleged that he requested assistance from the crewmembers and that his request did not interfere with the crewmembers' performance of their duties. The ALJ later deemed the Answer as amended to include that Wallaesa: (1) admitted that he was asked to take his seat several times; (2) lacked knowledge regarding whether the "Fasten Seat Belt" sign was lighted; and (3) denied the allegation that he had refused to take his seat.¹¹ (3/2/2012 Prehearing Conf. Tr. 5.)

A hearing was held on May 22, 2012.¹² Complainant introduced several exhibits including the deposition testimony of another passenger, Jaime Tomchik (Exhibits C- 2 and C-3) and a document written by Wallaesa on November 15, 2010. In addition, two flight attendants who served on Flight 3049, Wendy Moorman and Robert Dumond, as well as FBI Agent James Mollica, who was a passenger on that flight, and FAA Aviation Safety Inspector William Driscoll testified for Complainant. Wallaesa testified on his own behalf and introduced a copy of a statement handwritten by Tomchik on November 6, 2009.

II. The Facts

On November 6, 2009, Brian Wallaesa was a passenger on board a Boeing 737-700 series aircraft operated under 14 C.F.R. Part 121 as Southwest Airlines Flight 3049 from Baltimore, Maryland, to Las Vegas, Nevada. While waiting on the boarding line, Wallaesa met Jaime

¹¹ During the prehearing telephone conference held on October 18, 2011, Wallaesa stated that he had been asked to take his seat several times. He said that he did not know if the seat belt sign was lit, and he denied that he had refused to take his seat. (10/18/11 Prehearing Conf. Tr. 50-51.) Wallaesa also admitted that during the passenger briefing prior to takeoff, passengers were advised of the regulations requiring them to comply with crewmember instructions. (10/18/11 Prehearing Conf. Tr. 49). The ALJ ruled during the March 2, 2012, prehearing telephone conference that "we will take his answer as submitted and supplemented in the previous pre-hearing responses." (3/2/12 Prehearing Conf. Tr. 5.)

¹² Citations to the hearing transcript will be Tr. ____.

Tomchik. (Tr. 134; Exhibit C-2 at 8.) Wallaesa traded places with a passenger on the flight so that he could sit in the middle seat in Row 3, next to Tomchik, who was sitting in the aisle seat.

Wallaesa continued to talk to Tomchik during the flight. At one point, Wallaesa tapped her shoulder and asked if he could hold her.¹³ She replied “no.” About 45 minutes into the flight, Tomchik exchanged seats with a passenger in Row 2 on the other side of the aisle. (Exhibit R-1 at 65; Tr. 18, 24.) Tomchik explained to Moorman, the flight attendant working in the “A” position (the front third of the aircraft) that she had changed her seat because Wallaesa had been making her feel uncomfortable. (Tr. 18, 59, 69; Exhibit C-2 at 15.)¹⁴

Moorman asked Wallaesa to go to the back of the aircraft to talk with the other flight attendants and her. (Tr. 29, 70.) Wallaesa told them several times that he loved Tomchik, that she was “the one for me,” and that he wanted to talk to her. (Tr. 29, 71.) Moorman told Wallaesa that Tomchik did not want to talk to him, that he needed to leave her alone, and that he should return to his seat and stay seated. (Tr. 32, 71.) Wallaesa requested that Moorman ask Tomchik again whether he could talk to her, and returned to his seat in Row 3. (Tr. 32-35.) In response to Wallaesa’s request, Moorman asked Tomchik if Wallaesa could talk to her, and Tomchik said that she did not want to talk to Wallaesa anymore. Moorman told Wallaesa that Tomchik had said again that she did not want to talk to him. (Tr. 34-35.)

About 5 to 10 minutes later, Wallaesa went to Row 2 and tried to talk to Tomchik. (Tr. 33-34, 35, 36, 73; Exhibit C-2 at 18.) Tomchik told him to “get away.” (Exhibit C-2 at 18.) Moorman instructed Wallaesa that he needed to come to the back of the aircraft with her.

¹³ Wallaesa said to Tomchik, “Please allow me the pleasure of holding something beautiful today.” (Tr. 141; Exhibit C-4 at 3; Exhibit R-1 at 64.)

¹⁴ Moorman gave Tomchick a pad of paper and asked her to write down what had occurred. Tomchik’s written statement was introduced as Exhibit R-1.

(Tr. 36.) The three flight attendants again spoke to Wallaesa. (Tr. 38.) Moorman reseated Wallaesa in Seat 18C. (Tr. 39-40, 75.)

Later, Wallaesa got up and told Dumond that he wanted to go up front and talk to Moorman. Dumond said that he would ask Moorman to come back and talk to him and that Wallaesa should stay seated. (Tr. 76.) Dumond told Moorman that Wallaesa wanted to talk to her, and Moorman said that she was busy and would go back when she could. (Tr. 76.)

Shortly afterwards, Wallaesa got up to use the rear lavatory. Instead of returning to his seat, Wallaesa walked past Row 18, heading up front. Dumond stopped him and told him to take his seat. Wallaesa returned to his seat in Row 18. (Tr. 78.)

About an hour outside of Las Vegas, the captain turned on the “Fasten Seat Belt” sign and informed the flight attendants that he wanted them to sit down and wear their seat belts because he expected the flight to experience turbulence. (Tr. 40-41, 79, 98.) Not long afterwards, while the “Fasten Seat Belt” sign was lit, Wallaesa stood up and walked quickly toward the front of the airplane.¹⁵ (Tr. 41-42, 79-80.)

Dumond, who was seated with his seat belt fastened, got up and followed Wallaesa. (Tr. 79-80.) Moorman, who was seated in the front jump seat, observed Wallaesa coming to the front of the aircraft with Dumond behind him. (Tr. 42.) The two flight attendants stopped Wallaesa before he reached the front and asked him to return to his seat. (Tr. 42, 81.) Wallaesa refused. (Tr. 42, 80-81.) The “Fasten Seat Belt” sign was illuminated at that time. (Tr. 42.) They brought Wallaesa to the front galley, and talked to him for a while. When they asked him to go back to his seat and sit down, he refused. (Tr. 43.)

¹⁵ Complainant argues, and the ALJ found, that Wallaesa’s conduct in violation of the regulations began at this point in the flight.

Moorman called the captain and explained that Wallaesa was not complying with their instructions to sit down, that the flight attendants were not in their seats, and that they needed help. The captain told Moorman to ask the FBI agent, James Mollica, who happened to be a passenger on the flight, to intervene. (Tr. 43.)

As Dumond explained, “at this point, we had a security situation, and one of the things that we are trained to do is to protect the cockpit. And, the area of the front galley is ... a clear zone, ..., and it is our job to protect that area so that no one can reach the cockpit door.” (Tr. 84.) Dumond stood in front of the cockpit door, facing the cabin. (Tr. 83.)

Mollica came up front, identified himself as “Agent Mollica” and tried to calm Wallaesa down. (Tr. 45-47, 108-109, 110.) Mollica asked Wallaesa several times to sit down with him, and Wallaesa replied each time that he did not want to sit down. (Tr. 85.) Wallaesa replied to Mollica several times that he wanted to talk to Tomchik. (Tr. 47, 108.)

Meanwhile, Moorman re-seated Tomchik, because she believed that the situation was “escalating” and that moving Tomchik to the rear of the aircraft was necessary to protect Tomchik’s safety. (Tr. 46.)

At this point in the flight, Mollica explained that he would have to handcuff Wallaesa if Wallaesa did not sit down. (Tr. 48, 85-86, 108-109.) Wallaesa stated that he did not care and wanted to talk to Tomchik. (Tr. 109.) Mollica testified that Wallaesa “had wide eyes, and he was kind of sweating a little bit. And, ... if I had to describe it, I would say he was ... in attack mode, and ... was ready to do something ... stupid.” (Tr. 111.) Mollica handcuffed him. (Tr. 48.)

The flight attendants re-seated the passengers who had been sitting in Row 3 so that Mollica and Wallaesa could sit in that row together. (Tr. 49, 86, 111.) Mollica and Wallaesa

started to walk from the front of the aircraft toward those seats. Then Wallaesa yelled that he wanted to say something to everyone on the aircraft. (Tr. 112.) Mollica grabbed Wallaesa and pulled him back to the front of the aircraft. (Tr. 112-113.) Wallaesa insisted several times that he would not sit down until he had had a chance to speak on the public address system. (Tr. 113.) Mollica told him several times that he would not be allowed to use the public address system, and that he needed to be quiet. (Tr. 113.) After about 5 minutes, Wallaesa became calm and agreed to comply. Mollica took him toward Row 3 but Wallaesa did not sit down. (Tr. 116.) Mollica physically forced Wallaesa to lie down across the seats in Row 3. (Tr. 87-88, 113, 115-116.) Later, Wallaesa indicated that he wanted to sit up, and Mollica allowed him to sit in the window seat, while Mollica sat in the middle seat. Dumond estimated that Mollica finally got Wallaesa seated about 25 to 30 minutes out from Las Vegas. (Tr. 98.)

The “Fasten Seat Belt” sign remained illuminated until the end of the flight. (Tr. 54, 88-89, 101.) TSA and FBI personnel, local law enforcement, Las Vegas police, and Southwest supervisors met the aircraft upon arrival. (Tr. 51, 89.)

Wallaesa testified that he did not know whether the “Fasten Seat Belt” sign was on when he went up front from Row 18. (Tr. 142.) He argued that when he got up to talk to Moorman, he “was seeking help from the person in charge,” and that it was appropriate for him to get out of his seat, even if the “Fasten Seat Belt” sign was on because he was “in a panic.” (Tr. 144.) His panic, he argued, constituted a “medical emergency.” (Tr. 144, 148.) He testified that he had taken medication for anxiety and depression for about 1½ years prior to this flight. (Tr. 145.)

In Complainant’s post-hearing brief, Complainant argued that Wallaesa violated 14 C.F.R. §§ 121.317(f) and (k) and 121.580 starting about 45 minutes out of Las Vegas when Wallaesa refused to comply with the flight attendants’ instructions to return to his seat and fasten

his seat belt despite the fact that captain had turned on the “Fasten Seat Belt” sign. Complainant explained that it was not alleging that Wallaesa violated these regulations earlier in the flight. (Complainant’s Post-Hearing Brief at 9.) According to Complainant, Wallaesa’s conduct prior to the illumination of the “Fasten Seat Belt” sign “is relevant only to establishing the motive for his [Wallaesa’s] noncompliance during the final 45 minutes, the escalating nature of his conduct and that he both understood and was capable of complying with crewmember instructions but chose to disregard the crew’s instructions” (Complainant’s Post-Hearing Brief at 9.)

III. The Initial Decision

The ALJ explained that 14 C.F.R. §§ 121.317(f) and (k) “protect the safety of the crew and passengers and that [a] penalty may be assessed even if a passenger has good reason to stand while the ‘Fasten Seat Belt’ sign is illuminated.” (Initial Decision at 4.) He held that Wallaesa violated those regulations “by leaving his seat and approaching the front of the aircraft while the ‘Fasten Seat Belt’ sign was illuminated.” He noted that Wallaesa had not provided any evidence to substantiate his argument that he was experiencing a medical emergency, and that his contention that he needed to speak with Moorman did “not justify the risk he posed to the order and safety of the cabin.” (Initial Decision at 5.)

The ALJ wrote:

Wallaesa interfered with crewmember duties by standing after the pilot turned on the “Fasten Seat Belt” sign and refusing to sit when asked. Respondent prevented the crew from completing their duties, forced the crew to stand while the plane was in turbulent air, placing the crew and passengers at risk, and prevented the crew from accessing the entire plane by blocking the aisle. If another passenger had an emergency, the crew might have been unable to reach them. Respondent also distracted the crew by forcing them to call a law enforcement officer to subdue him.

(Initial Decision at 6.) The ALJ explained that he did not base his findings of violations upon Wallaesa's interactions with Tomchik or with the flight attendants prior to the turning on of "Fasten Seat Belt" during the last hour of the flight. (Initial Decision at 3, n. 14.)

The ALJ assessed a \$3,300 civil penalty for Wallaesa's violation of 14 C.F.R. § 121.580 based upon his analysis of decisions in previous cases involving passenger interference. (Initial Decision at 8-9.) He did not assess a separate penalty for the violations of 14 C.F.R. §§ 121.317(f) and (k).

IV. The Appeal

1. Wallaesa argues that as a passenger, he was not liable for a civil penalty under 49 U.S.C. § 46301(a)(5). He contends that the sanction authority in 49 U.S.C. § 46301(a)(5) for violations of regulations issued under specified provisions of the Federal aviation statute (including Chapter 447) only applies to "Airports, Airlines, the employees of said entities, the contractors of said entities and the employees and contractors of the FAA and Department of Transportation that oversee said entities." (Appeal Brief at 6.)

Wallaesa misreads the statute. Section 46301(a)(5)(A) of U.S. Code Title 49 provides: "An individual (except an airman serving as an airman) or a small business concern is liable to the Government for a civil penalty of not more than \$10,000 for violating ... (i) *chapter ... 447* [49 U.S.C. §§ 44701 – 44728] (except sections 44717-44723) ... or (ii) a regulation prescribed or order issued under any provision to which clause (i) applies." 49 U.S.C. § 46301(a)(5)(A)(i) - (ii) (emphasis added.) (The \$10,000 maximum penalty has been increased for inflation to \$11,000 by 14 C.F.R. § 13.305.) In particular, 49 U.S.C. § 44701 requires the Administrator "to promote safe flight of civil aircraft in air commerce by prescribing ... regulations and minimum

standards for other practices, methods, and procedures the Administrator finds necessary for safety in air commerce and national security.”

The word “individual” in Section 46301(a)(5)(A) includes passengers. The FAA has interpreted Chapter 447--and its predecessor, Chapter 601 in the Federal Aviation Act of 1958, as amended -- as authorizing the regulation of passenger conduct in the interest of safety of flight. For example, Administrator N.E. Halaby explained in 1961, in the preamble to SR 448,¹⁶ that “recent hijackings of air carrier aircraft have highlighted a necessity to provide additional controls over the conduct of passengers in order to avoid a serious threat to the safety of flights and persons aboard them.” 29 Fed. Reg. 7009 (August 4, 1961). When the FAA issued 14 C.F.R. § 121.580 in 1999, it reiterated in the preamble that certain regulations, including existing rules prohibiting interference with crewmembers (*i.e.* 14 C.F.R. § 91.11) apply to passengers on board aircraft. 64 Fed. Reg. 1076, 1077-1078 (January 7, 1999.) Section 121.580 was prescribed under the authority given to the Administrator under Chapter 447 of Title 49.

¹⁶ SR 448 provided in pertinent part: “No person shall assault, threaten, intimidate, or interfere with a crewmember in the performance of his duties aboard an aircraft being operated in air transportation[.]” 26 Fed. Reg 17009 (August 4, 1961).

SR 448 was adopted under the authority of Sections 313 and 601 of the Federal Aviation Act of 1958. Section 601 of the Federal Aviation Act of 1958 provided, “The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time ... [s]uch reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedures, as the Administration may find necessary to provide adequately for national security and safety in air commerce.” 49 U.S.C. App. § 1421(a)(6).

The Federal Aviation Act of 1958 was included in the Appendix of Title 49 U.S. Code, until it was codified in Title 49 of the U.S. Code as a result of the enactment of Public Law 103-272 (July 5, 1994), 108 Stat. 745. The codification was not intended to have any substantive effect on the existing law. (*Id.*) In particular, Section 601 of the Act was incorporated in the U.S. Code as 49 U.S.C. § 44701.

The U.S. Court of Appeals for the Fifth Circuit recognized that 49 U.S.C. App. § 1421(a)(6) provided the FAA with the statutory authority to issue 14 C.F.R. § 91.8(a)(1984) (today’s § 91.11), a regulation prohibiting any person from assaulting, threatening, intimidating or interfering with the performance of duties of a crewmember aboard an aircraft being operated. *U.S. v. Kilpatrick*, 759 F.2d 1250, 1251 (5th Cir. 1985).

64 Fed. Reg. at 1079. Hence, Wallaesa's argument that he is not subject to a civil penalty under 49 U.S.C. § 46301(a)(5)(A) for violating 14 C.F.R. § 121.580 is rejected.

Likewise, when the FAA issued regulations pertaining to the use of seat belts by passengers, and requiring passengers to comply with instructions to fasten seat belts, its goal was to increase passenger and crewmember safety on board aircraft. These regulations were issued under Section 601 of the Federal Aviation Act of 1958, as amended, which is the predecessor to today's 49 U.S.C. § 44701. (55 Fed. Reg. 7414 (March 1, 1990); 57 Fed. Reg. 42662, 42665, 42672 (September 15, 1992)). Hence, passengers who violate 14 C.F.R. § 121.317's provisions regarding compliance with the "Fasten Seat Belt" sign are subject to civil penalties under 49 U.S.C. § 46301(a)(5).

2. Wallaesa argues that Complainant based its allegation that a \$5,500 civil penalty would be an appropriate civil penalty upon guidance contained in FAA Order No. 2150.3B, which is mentioned in neither the procedural rules governing FAA civil penalty hearings (14 C.F.R. § 13.16 and 14 C.F.R. Part 13, subpart G), nor 49 U.S.C. § 46301(a)(5)(A). Consequently, he argues, "FAA Order 2150.3B has no basis in U.S. code, and therefore, any presumptions, arguments or positions based on FAA Order No. 2150.3B are invalid, and therefore, any argument made by the Complainant using the Staff Manual as a basis is an invalid statement[.]" (Appeal Brief at 5.)

Preliminarily, the ALJ did not base the \$3,300 civil penalty that he imposed upon FAA Order No. 2150.3B. Instead, he assessed a \$3,300 civil penalty based upon his analysis of sanctions imposed in past cases involving similar violations.

Further, FAA Order No. 2150.3B is a staff manual designed to provide guidance to FAA enforcement personnel in the exercise of their discretion in handling compliance and

enforcement matters. (FAA Order No. 2150.3B at 1-1.) The sanction guidance contained in Chapter 7 and Appendix B of that Order is based upon the FAA’s statutory authority, including, as applicable, 49 U.S.C. § 46301(a)(5)(A).

The Order contains guidance for FAA personnel regarding “the general policy the FAA intends to apply in selecting the types of sanction, ranges of sanction within those types, and specific sanction amounts to impose in legal enforcement actions for typical violations of the FAA’s statute and regulations.” (FAA Order No. 2150.3B at 7-1.) Where 49 U.S.C. § 46301(a)(5), as adjusted for inflation under 14 C.F.R. § 13.305(d), specifies the *maximum* civil penalty that may be assessed against an individual or small business for a violation of certain chapters of the Federal aviation statute or regulations issued thereunder, the Order provides guidance regarding whether the maximum or a lesser penalty would be appropriate for particular types of violations, taking the nature of the violation and other factors into consideration. (FAA Order No. 2150.3B at 7-9 through 7-10; Appendix B, Figure B-3.) Specifically, the sanction guidance in Appendix B sets forth the recommended sanction ranges for different types of violations.

FAA Order No. 2150.3B specifies that it is the Administrator’s policy that for an individual not serving as an airman, a maximum range civil penalty – between \$4,400 to \$11,000 – is appropriate for violations involving interference with a crewmember (*e.g.*, 14 C.F.R. § 121.580). (FAA Order No. 2150.3B at B-8 and B-28 (Figure B-3-p.))¹⁷ The \$3,300 civil penalty assessed by the ALJ was below the recommended range for a violation of 14 C.F.R. § 121.580.

¹⁷ Under the guidance set forth in FAA Order No. 2150.3B, a minimum to moderate range civil penalty – between \$550 and \$4,399 - is appropriate for a passenger who fails to fasten his seat belt while the seat belt sign is on. (FAA Order No. 2150.3B at B-8 and B-29 (Figure B-3-q.))

3. Wallaesa argues that the allegation that he violated 14 C.F.R. § 121.580 was “the only applicable charge,” because the FAA only charged him with a violation of Section 121.580 in the Notice of Proposed Civil Penalty (NPCP). (Appeal Brief at 9.) However, by letter dated April 7, 2010 (before the informal conference was held), the Regional Counsel for the Western-Pacific Region notified Wallaesa that “two violations were inadvertently omitted from the Notice of Proposed Civil Penalty.” The Regional Counsel issued an Amended Notice of Proposed Civil Penalty (ANPCP), alleging that Wallaesa also violated 14 C.F.R. §§ 121.317(f) and 121.317(k). The ANPCP did not include any additional factual allegations, and the FAA proposed a \$5,5000 civil penalty, as in the NPCP. The FAA later issued a Final Notice of Proposed Civil Penalty and a Complaint, both of which alleged the same facts and violations as the ANPCP, and proposed a \$5,500 civil penalty. Hence, Wallaesa had adequate notice regarding the allegations that he violated 14 C.F.R. §§ 121.317(f) and (k).

4. Wallaesa argues that the preponderance of the evidence does not support the finding that he violated 14 C.F.R. § 121.580. Wallaesa points to evidence that: (1) there are no assigned seats on Southwest flights, and therefore, he could switch seats to sit next to Tomchik when he got on the flight; (2) he did not contact Tomchik when he walked to the front of the aircraft (when the “Fasten Seat Belt” sign was lighted); and (3) he did not threaten the flight attendants.¹⁸

Section 121.580 prohibits interference with the performance of the duties of a crewmember. Crewmember is defined as “a person assigned to perform duty in an aircraft

¹⁸ In his appeal brief, Wallaesa wrote that Mollica testified that Wallaesa’s interactions with the flight crew and passengers were normal for a Southwest Airlines flight and therefore could not constitute a violation of Section 121.580. Wallaesa did not include a transcript citation for this alleged testimony. While it may not have been unusual for someone to ask to switch seats with another passenger on a Southwest Airlines flight, it certainly is not normal behavior on any flight for a passenger to refuse repeatedly to sit down (and fasten his seat belt), contrary to instructions of the pilot (the lighted Fasten Seat Belt sign), the flight attendants, and a law enforcement officer who was asked by the flight attendants for assistance.

during flight time.” 14 C.F.R. 1.1 (“crewmember.”) Flight attendants who are assigned to work on a flight, such as Moorman and Dumond, are crewmembers as that term is defined in 14 C.F.R. § 1.1. *Evgeniy Ignatov*, FAA Order No. 1996-6 at 11-12 (February 13, 1996). Likewise, the pilots flying the aircraft were crewmembers¹⁹ under this definition.²⁰

In *Michael Bengry*, FAA Order No. 2003-9 (September 12, 2003), the Administrator affirmed the ALJ’s finding that Bengry violated 14 C.F.R. § 91.11, in part, by interfering with the flight attendant’s performance of her duties. The Administrator wrote:

While it was indeed the chief flight attendant’s duty to handle disturbances caused by passengers, Bengry still interfered with her duties at her assigned duty station. The disturbance Bengry caused was unnecessary and willful, unlike other unavoidable or accidental problems aboard flights. When the chief flight attendant was in the back dealing with Bengry, she was unable to handle routine duties and emergencies at her assigned duty station.

Michael Bengry, FAA Order No. 2003-9 at 7.

There was ample evidence that Wallaesa failed to comply with the instructions of the crewmembers to sit down when the “Fasten Seat Belt” sign was lighted during the last 45 minutes of the flight and interfered with the performance of their duties. The evidence established that the captain turned on the “Fasten Seat Belt” sign when the aircraft was about an hour outside of Las Vegas, and that not long afterwards, Wallaesa walked toward the front of the aircraft from his seat in Row 18. Flight Attendants Moorman and Dumond, who were required to sit with their seat belts fastened due to the captain’s instructions, got up and asked Wallaesa to return to his seat. Wallaesa refused. They spent time talking to him in the front galley, trying to

¹⁹ A pilot may also be a “flight crewmember,” if he is assigned to duty on a flight. The term “flight crewmember” is defined as “a pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time.” 14 C.F.R. § 1.1 (“flight crewmember.”)

²⁰ Complainant does not argue, and the ALJ did not find, that Agent Mollica was a crewmember when he assisted the flight attendants. It is not necessary to determine as part of this appeal whether Mollica was a crewmember because the evidence clearly establishes that Wallaesa’s conduct interfered with the performance of the duties of the flight attendants and the pilots.

persuade him to sit down and fasten his seat belt. Dumond regarded this as a “security situation” and stood in front of the cockpit door, facing the cabin, so as to protect the cockpit. The flight attendants felt that it was necessary to inform the captain about Wallaesa’s noncompliance. While FBI Agent Mollica dealt with Wallaesa, Moorman, concerned about Tomchik’s safety, reseated her from Row 2 to Row 18, and reseated passengers in Row 3 so that Agent Mollica and Wallaesa could sit in that row together.

Wallaesa’s behavior made it necessary for the flight attendants to focus their attention on him. Both of the flight attendants should have been seated in their assigned sections of the aircraft and monitoring the passengers in their assigned sections from their seats. Because Wallaesa diverted their attention, they were not ready to attend to the needs of the other passengers in their assigned sections. It was the responsibility of the flight attendants to obey the instructions of the pilot as well as to maintain a calm, safe and orderly environment aboard the aircraft.²¹ *Evgeniy Ignatov*, FAA Order No. 1996-6 at 10. Under these circumstances, Wallaesa interfered with the flight attendants in the performance of their primary duty, as the ALJ explained, “to ensure safe and secure travel, which demands that the crew can always assure a safe environment and retain control of the cabin. A crew cannot appropriately fulfill these duties if a passenger improperly distracts or overburdens their attentions.”²² (Initial Decision at 5-6.)

²¹ As explained by Judge Kolko in the initial decision in *Ignatov*, “the flight attendants ... are responsible essentially for ...[e]verybody in that tube of metal that is hurtling through the air. Their primary responsibility ... is the safety of those person[s] encased in that metal capsule and for that reason, what they say, has to go... for the simple reason that law and order in an enclosed capsule at 30,000 feet just has to be maintained.” (*Evgeniy Ignatov*, Docket No. CP94GL0076, at Tr. 115-116.)

²² In *David Stout*, FAA Order No. 1998-12 at 8 (June 16, 1998), the ALJ held that the passenger who failed to fasten his seat belt despite repeated requests by the flight attendants interfered with the performance of the flight attendants duties including “retaining control as a crewmember and assuring a safe and orderly environment.”

5. Wallaesa argues that there are instances, such as a medical emergency,²³ in which a passenger's interference with the performance of a flight crewmember's duties or a passenger's getting out of his or her seat when the Fasten Seat Belt sign is lighted may be excusable.²⁴

Wallaesa's argument that he was having a medical emergency that excused his conduct on the flight constitutes an affirmative defense. "A party who asserts an affirmative defense has the burden of proving the affirmative defense." 14 C.F.R. § 13.224(c). The preponderance of the evidence in this case does not show that the disturbance caused by Wallaesa was beyond his control and therefore, excuses his undue interference with the crewmembers. His self-diagnosis of a "panic" was not substantiated by any evidence from a medical professional. The only evidence that Wallaesa had any mental health condition was his testimony that he had been taking Paxil for anxiety and depression for about 1 ½ years at the time of the flight.²⁵ (Tr. 145.) Moorman, Dumond, and Mollica testified that at no point did Wallaesa tell them that he was on medication or that he needed medical assistance. (Tr. 52, 91, 111.) Dumond testified that he did not consider Wallaesa's lack of focus on the instructions that the crew gave him to be a medical condition. (Tr. 93.) It appeared to Dumond that Wallaesa did not want to comply with the instructions to sit and that he became agitated because he was not getting what he wanted. (Tr. 85.) The evidence showed that Wallaesa had been able to obey instructions and sit quietly

²³ There was testimony about flight attendants having to spend time attending to passengers who had had heart attacks or who needed to be moved several times during a flight because of concern that they would have, or were having, allergic reactions to perfumes and deodorizers on the flight.

²⁴ He wrote that in his opinion, excusable emergencies should be listed in the regulations, and that he "has an extremely detailed proposition prepared for the FAA as to how this should be executed; this consultation is not free however." (Appeal Brief at 15.)

²⁵ Wallaesa testified that he had had a complimentary alcoholic beverage after boarding the aircraft (Tr. 134), but Moorman testified that she did not recall any complimentary alcoholic beverage service. (Tr. 59.) There was no evidence about the effects of alcohol consumption on a person taking Paxil.

and patiently during other times during the flight. Hence, the evidence does not support a finding that Wallaesa's behavior on board the flight should be excused.

V. Conclusion

In light of the foregoing, Wallaesa's appeal is denied. A \$3,300 civil penalty is assessed.²⁶

[Original signed by Michael P. Huerta]

MICHAEL P. HUERTA
ADMINISTRATOR
Federal Aviation Administration

²⁶ This order shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit or the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2009). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).

SERVED: AUGUST 27, 2012

U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, DC

RECEIVED

AUG 28 2012

IN THE MATTER OF

HEARING DOCKET

BRIAN WALLAESA

FAA DOCKET NO. CP10WP0010
(Civil Penalty Action)

FDMS NO. FAA-2010-0628

INITIAL DECISION OF THE CHIEF ADMINISTRATIVE LAW JUDGE

STATEMENT OF PROCEEDING

This proceeding arises from a complaint issued July 28, 2010, by the Federal Aviation Administration's Assistant Chief Counsel, Enforcement Division (Complainant), to Mr. Brian Wallaesa (Respondent), alleging that during Southwest Airlines flight 3049 from Baltimore, Maryland, to Las Vegas, Nevada, on November 6, 2009, when the seatbelt sign was illuminated, Respondent was asked several times by crewmembers to take his seat, but refused, and that Respondent's conduct interfered with the performance of the crewmembers' duties. Complainant states that Respondent thereby violated 14 C.F.R. §§ 121.317(f),¹ 121.317(k),² and 121.580.³ Complainant seeks a \$5,500 penalty for the section 121.580 interference claim and seeks no penalty for the section 121.317 safety belt violations; but Complainant argues that the safety belt violations should be considered as part of the "totality of the circumstances" in setting a penalty.⁴

¹ "Each passenger required by § 121.311(b) to occupy a seat or berth shall fasten his or her safety belt about him or her and keep it fastened while the 'Fasten Seat Belt' sign is lighted." 14 C.F.R. § 121.317(f) (2009).

² "Each passenger shall comply with instructions given him or her by a crewmember regarding compliance with paragraph (f) . . . of this section." 14 C.F.R. § 121.317(k) (2009).

³ "No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part." 14 C.F.R. § 121.580 (2009).

⁴ Compl't Post-Hearing Br. 19. Complainant's Notice of Proposed Civil Penalty only charged Respondent with violating 14 C.F.R. § 121.580 (Memorandum on Sanction (Nov. 15, 2011), at 1) and sought a civil penalty of \$5,500. Complainant's Amended Notice charged Respondent with violating 14 C.F.R. §§ 121.317(f) and (k) but did not raise the proposed civil penalty. *Id.* Complainant states that the "\$5,500 penalty proposed in the original Notice was based on Respondent's alleged violation of 14 C.F.R. § 121.580" (*id.*) and that "the civil penalty proposed in the Amended Notice and the Complaint was not increased as a result of the additional allegations of violations of 14 C.F.R. §§ 121.317(f) and (k)." *Id.* at 8. Complainant bears the burden of establishing each violation and demonstrating the appropriateness of the proposed civil penalty by a preponderance of reliable, probative, and substantial evidence. 14 C.F.R. §§ 13.223-24 (2009).

Respondent contends that he did not interfere with the duties of the flight crew,⁵ that he was merely seeking help from the flight crew to talk to a female passenger,⁶ and that, when told that he must sit down, he complied.⁷ At the hearing, Respondent contended that he was having a panic attack and that “everything would have been resolved” if a flight attendant had spoken with him.⁸

We instructed the parties to attempt to negotiate a settlement,⁹ but those negotiations failed;¹⁰ and a hearing was held on May 22, 2012. Post-hearing briefs were submitted by Complainant and Respondent on July 2 and July 27, 2012,¹¹ respectively, and the case is ready for decision.¹²

FINDINGS AND CONCLUSIONS

We find that Respondent failed to fasten his seat belt and failed to comply with the crew’s orders to sit down while the “Fasten Seat Belt” sign was lit and therefore interfered with the crew in the performance of their duties. We conclude that Respondent violated 14 C.F.R. §§ 121.317 (f) and (k) and 14 C.F.R. § 121.580 and that \$3,300 is the appropriate penalty.

FACTS

While queuing to board Southwest Airlines flight 3049 from Baltimore, Maryland, to Las Vegas, Nevada, on November 6, 2009, Respondent met and struck up a conversation with Jaime Tomchik (Tr. 134). Once aboard, Respondent sat in the captain-side third-row window seat and Ms. Tomchik sat in that row’s aisle seat (Compl’t Ex. 2 (Tomchik Deposition), at 9–10; Resp’t Ex. 1 (Tomchik Note); see Tr. 30-31). Respondent then traded places with a passenger in the middle seat to continue his conversation with Ms. Tomchik (Compl’t Ex. 2, at 10; Resp’t Ex. 1). Prior to departure the flight crew gave the normal preflight instructions, including instructions on the safety belt requirements (Tr. 52).

Respondent’s conversation with Ms. Tomchik lasted, on and off, through the first forty-five minutes of the flight (Compl’t Ex. 2, at 10-15; see Tr. 69). It was largely one-sided; he inquired and she parried with polite attempts to end the conversation (Compl’t Ex. 2, at 11-14). Around forty-five minutes into the flight, he asked if he could place his arm around her and if she would

⁵ Resp’t Post Hearing Br. 14.

⁶ Tr. 136.

⁷ Tr. 147.

⁸ Tr. 148.

⁹ Prehearing Conference Transcript (PHC Tr.) (Mar. 2, 2012), at 22.

¹⁰ PHC Tr. (Mar. 16, 2012), at 14-15.

¹¹ Complainant had until August 10, 2012, to reply to Respondent’s post-hearing brief but failed to do so.

¹² This decision constitutes the Judge’s findings of fact and conclusions of law, as well as the basis thereof, concerning all material issues of fact or law based on the entire record pursuant to 14 C.F.R. § 13.232(a). References to the record are intended to indicate relevant testimony and exhibits and do not necessarily represent all evidence supporting each finding. All arguments have been considered, whether or not specifically discussed, and, where not accepted, have been rejected.

let him “hold[] something beautiful today” (Tr. 141). She refused and exchanged seats with a gentleman across the aisle in the second row (Compl’t Ex. 2, at 14).

Ms. Tomchik called the front-cabin flight attendant, Wendy Moorman, and told her that she changed seats because Respondent made her uncomfortable and she did not want to speak with Respondent (Tr. 16, 18, 25). Ms. Moorman provided Ms. Tomchik with a pad and pen, and Ms. Tomchik recorded the incident’s details (Tr. 19; Resp’t Ex. 1).

After speaking to Ms. Tomchik, Ms. Moorman escorted Respondent to the rear of the aircraft to tell him what Ms. Tomchik said and to “get his side of the story” (Tr. 19–20, 70). Respondent said that he was in love with Ms. Tomchik (Tr. 29) and asked Ms. Moorman to ask Ms. Tomchik if she would be willing to speak with him (Tr. 34). Ms. Moorman told him that she would ask Ms. Tomchik, but only if Respondent agreed to sit down, which he did (Tr. 34-35). After Ms. Tomchik refused, Ms. Moorman told Respondent that Ms. Tomchik did not want to speak with him (Tr. 35).

Approximately five to ten minutes after Ms. Moorman told Respondent that Ms. Tomchik did not want to speak to him, Respondent left his seat, entered the aisle, and leaned over a passenger in order to speak with Ms. Tomchik.¹³ Ms. Moorman intervened, telling Respondent that he “need[ed] to come to the back of the aircraft . . . now” (Tr. 36), and Ms. Moorman brought Respondent to the back for a second time (Tr. 37). After speaking with a “wide-eyed” and “agitated” Respondent (Tr. 39), Ms. Moorman and the rear flight attendant, Robert Dumond, reseated him in the back of the plane and both flight attendants then returned to their normal duties (Tr. 68, 75).¹⁴

One hour from landing, the pilot lit the “Fasten Seat Belt” sign and instructed the passengers and crew to remain seated because he expected turbulence (Tr. 41; 79). During the final approach into Las Vegas, while the seat belt sign was illuminated, Respondent stood again and walked up the center aisle toward the front (Tr. 41-42; 79-80).

Mr. Dumond pursued and grabbed Respondent by the arm, telling him he must sit down (Tr. 80). Respondent insisted he would not sit down until he spoke to Ms. Moorman (Tr. 81; see Compl’t Ex. 2, 30). Mr. Dumond took Respondent to the front galley to resolve the situation (Tr. 81). Mr. Dumond stood between Respondent and the cockpit door, because “at this point [there was] a security situation” (Tr. 83).

¹³ Tr. 35-36; 73. Although both of the flight attendants who testified at the hearing were asked, neither could say whether the “Fasten Seat Belt” sign was illuminated while Respondent was moving about the cabin during this attempt to speak with Ms. Tomchik (Tr. 33, 77).

¹⁴ The facts surrounding Respondent’s interactions with Ms. Tomchik, and with the flight attendants prior to the captain’s illuminating the “Fasten Seat Belt” sign, are not directly probative with respect to Complainant’s allegations that Respondent failed to fasten his seat belt; but they are relevant to understanding the circumstances leading to Respondent’s later conduct while the sign was illuminated.

Ms. Moorman called the pilot who told her to signal an onboard FBI agent, Special Agent James Mollica, for assistance.¹⁵ Special Agent Mollica identified himself to Respondent as “Agent Mollica” (Tr. 46-47, 109) and tried to calm Respondent, but Respondent said that he would not sit down until he could “talk to Jaime” (Tr. 108). Respondent said that he loved Ms. Tomchik, that the flight crew was keeping him from her, and that he needed to use the public address system to explain his need to speak to Ms. Tomchik (Tr. 49, 113).

Special Agent Mollica reminded Respondent that Mollica was a law enforcement officer (Tr. 110) and stated that he would “finish the flight in handcuffs if [he did not] listen and sit down” (Tr. 110). Mollica felt that Respondent was “in attack mode” and “ready to do something . . . stupid” (Tr. 111), so he handcuffed Respondent (Tr. 110).

As Special Agent Mollica escorted him back to his seat, Respondent yelled that he would not sit down until he could make a statement over the plane’s PA system (Tr. 113). Respondent “bucked” backward against Mollica, requiring Mollica to “forcefully push him forward” (Tr. 114). Special Agent Mollica stated that he was ready for this kind of resistance, but that “if it was anybody else, it might have knocked them over” (Tr. 115).

Upon reaching row three, Respondent refused to sit down (Tr. 50). Agent Mollica placed Respondent in an “arm bar” (Tr. 116) and “laid him down into [row three]” (Tr. 88). Once in the row, Respondent told Mollica that “he would like to sit up, and . . . that he would be good” (Tr. 116). Mollica then seated Respondent in the window seat (Tr. 50, 88, 117), and he remained in that seat until the flight ended (Tr. 117, 137). Once the plane landed in Las Vegas, FBI agents and Las Vegas police officers, who had been notified by the captain of the flight about the situation on board (Tr. 51), met the aircraft to remove Respondent (Tr. 51, 89).

DISCUSSION

I. Violation of 14 C.F.R. §§ 121.317(f) and (k)

We find that Respondent violated 14 C.F.R. §§ 121.317(f) and (k), because he failed to fasten his seat belt when the “Fasten Seat Belt” sign was illuminated and he failed to follow crewmember instructions to wear his safety belt.

Section 121.317(f) provides that “each passenger . . . shall fasten his or her safety belt about him or her and keep it fastened while the ‘Fasten Seat Belt’ sign is lighted.” Section 121.317(k) further provides “each passenger shall comply with instructions given him or her by a crewmember regarding compliance with” the seat belt requirement.

These provisions protect the safety of the crew and passengers.¹⁶ A penalty may be assessed even if a passenger has good reason to stand while the “Fasten Seat Belt” sign is illuminated.¹⁷

¹⁵ Tr. 43. In accordance with normal procedure, Special Agent Mollica identified himself as a law enforcement officer when he boarded (Tr. 82). Although not assigned to monitor the flight, he was armed and carrying handcuffs (Tr. 105).

¹⁶ See *DiGenova*, FAA Docket No. CP07WP0007, FDMS No. FAA-2007-27919, at 3 (June 25, 2008).

Although the complaint did not specifically allege that Respondent failed to fasten his seat belt while the “Fasten Seat Belt” sign was illuminated,¹⁸ during a pre-hearing conference we ordered that the complaint be deemed amended to include that allegation,¹⁹ since Respondent knew that failure to fasten his seat belt was at issue and he was not prejudiced by the amendment. To support the charged § 121.317(f) and (k) violations, Complainant notes that the flight attendants issued specific instructions to Respondent²⁰ and that Respondent made a knowing choice to disregard the crew’s instructions to sit down and fasten his seat belt when the sign was illuminated.²¹

Respondent acknowledges that the “Fasten Seat Belt” sign means that passengers “must be seated with . . . seatbelt[s] fastened while the sign is lit.”²² Respondent stated that he did not know whether the sign was lit when he got up to speak with Ms. Moorman;²³ Respondent argues, however, that he was having a medical emergency and such an emergency made it appropriate to stand up and attempt to speak with Ms. Moorman regardless of whether the sign was lit.²⁴ Accordingly, Respondent argues that he did not violate either provision.

We conclude that Respondent violated §§ 121.317(f) and (k) by leaving his seat and approaching the front of the aircraft while the “Fasten Seat Belt” sign was illuminated. Respondent provides no evidence to support his argument that he was experiencing a medical emergency; and his assertion that he needed to speak with Ms. Moorman does not justify the risk he posed to the order and safety of the cabin.

II. Violation of 14 C.F.R. § 121.580

By standing after being instructed by the crew to sit and after the “Fasten Seat Belt” light came on, Respondent interfered with the crew in the course of their duties.

Under 14 C.F.R. § 121.580, “no person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft.” The crew’s primary duty is to ensure safe and secure travel,²⁵ which demands that the crew can always

¹⁷ *Id.* (assessing a civil penalty when a passenger stood because she urgently needed to use the restroom, but reducing the proposed \$1,500 penalty to \$300 where the respondent did not ignore or actively challenge crewmember instructions).

¹⁸ Complaint ¶ II.4; PHC Tr. (Oct. 18, 2011), at 9-11.

¹⁹ PHC Tr. (Mar. 2, 2012), at 5.

²⁰ Compl’t Post-Hearing Br. 11, n.4.

²¹ Compl’t Post-Hearing Br. 11.

²² Tr. 143.

²³ *Id.*

²⁴ Tr. 143-44.

²⁵ *See, e.g., Conger*, FAA Order No. 2007-8, FDMS No. FAA-2004-20530, at 21-22 (Aug. 2, 2007).

assure a safe environment and retain control of the cabin.²⁶ A crew cannot appropriately fulfill these duties if a passenger improperly distracts or overburdens their attentions.²⁷

Complainant argues that Respondent, through his escalating misbehavior, interfered with the crew's duties by improperly distracting them during the turbulent approach into Las Vegas.²⁸

Respondent counters that he did not interfere with the flight attendants' duties because he did not threaten the crew.²⁹ Respondent argues that he needed to speak with Ms. Moorman and that the flight attendants needed to help him.³⁰

We conclude that Respondent interfered with crewmember duties by standing after the pilot turned on the "Fasten Seat Belt" sign and refusing to sit when asked. Respondent prevented the crew from completing their duties,³¹ forced the crew to stand while the plane was in turbulent air, placing the crew and passengers at risk, and prevented the crew from accessing the entire plane by blocking the aisle.³² If another passenger had an emergency, the crew might have been unable to reach them.³³ Respondent also distracted the crew by forcing them to call a law enforcement officer to subdue him.³⁴

²⁶ See Stout, FAA Order No. 98-12, at 8 (June 16, 1998).

²⁷ See, e.g., Cox, FAA Docket No. CP10GL0005, FDMS No. FAA-2010-0623, at 4 (Oct. 14, 2011) ("if a flight attendant has to deal with an antagonistic, hostile passenger and suffers consequences such as intimidation and personal distress, he or she is compromised in attending to such critically important duties"); Aylyarov, FAA Docket No. CP05SO0056, FDMS No. FAA-2005-23017, at 4 (Nov. 2, 2006) (a passenger interferes with crewmember duties if that passenger's conduct creates in the flight attendant a "nervous and flustered state resulting from [the] confrontation [and has] distracted him from his duties [because the attendant] likely would not have been fully engaged in the event of flight difficulties such as turbulence, or in case of emergency").

²⁸ Compl't Post-Hearing Br. 9, 16-17.

²⁹ Resp't Post Hearing Br. 13.

³⁰ Tr. 148. Respondent's contention at the hearing that he was suffering a medical emergency (Tr. 144) asserts an unpled and previously undisclosed affirmative defense. Since Respondent did not timely assert such a defense and offered no expert testimony, diagnosis, or other evidence to support his contention, he has provided no basis for considering such a defense. See 14 C.F.R. § 13.224(c) (2009).

³¹ See, e.g., Conger, supra note 25, at 6, n.15 ("Flight attendants are not waiters. A flight attendant's primary responsibility is to assure the safety and security of passengers. Attendants must always be fully ready to deal with matters which pose a risk to the safety and security of flight, such as turbulence, rapid cabin decompression or worse.") (quoting Initial Decision at 10-11); Tahaira, FAA Docket No. CP09NM0006, FDMS No. FAA-2009-0273, at 4-9, 11, 19-20, 21 n.14 (Mar. 17, 2010) (finding interference with crewmember duties when a passenger stood while the "Fasten Seat Belt" sign was illuminated, repeatedly changed seats, and refused instructions to remain seated and stay out of the exit row).

³² Tr. 79, 90-91.

³³ Tr. 91.

³⁴ Tr. 130; see Stout, supra note 26, at 6.

While the crew owes each passenger a duty of care, Respondent's right to care does not supersede the other passengers' right to an effective flight crew.³⁵ We conclude that Respondent violated § 121.580 by interfering with crewmembers in the course of their duties.

III. Penalty

Complainant proposes no penalty for the section 121.317(f) and (k) violations,³⁶ so we assess no penalty for those violations. Complainant seeks a \$5,500 penalty for the section 121.580 violation and, after considering all relevant factors,³⁷ we assess a \$3,300 penalty for that violation.³⁸

An individual who violates the safety regulations is subject to a penalty of up to \$11,000 for each violation,³⁹ depending on the nature, gravity, circumstances, and intent underlying the type

³⁵ See, e.g., Aylyarov, *supra* note 27, at 5 n.2 (Respondent Aylyarov "appears to believe that, as an airline customer or client, his wants are paramount and require due accommodation . . . [and] fundamentally misconstrues the crew-passenger relationship. A metal tube hurtling through space is not at that moment primarily a service business. Its principal mission is to maintain safety and security for all participants. . . . Other considerations, however desirable, must give way.").

³⁶ In its post-hearing brief, Complainant argues that a \$1,500 penalty "is appropriate" for each of the violations of §§ 121.317(f) and (k), but only "if the ALJ determines that Respondent did not violate section 121.580." Compl't Post-Hearing Br. 21. Since we find that Respondent did violate section 121.580, that argument is moot, and Complainant provides no basis for apportioning any value to the § 121.317 violations. Complainant's "proposed sanction of \$5,500 relates back to the original section 121.580 violation stated in the Notice . . . [and] was not increased as a result of the additional allegations of violations of 14 C.F.R. §§ 121.317(f) and 121.317(k)." Memorandum on Sanction (Nov 15, 2010), at 8. Since the two additional charges did not increase the total penalty sought, and Complainant repeatedly asserted that no penalty was sought for those violations (*Id.*; Tr. 156; PHC Tr. (Mar. 2, 2012), at 26–27), no penalty can be assessed for them. 14 C.F.R. § 13.208(c) ("A complaint shall set forth . . . the proposed civil penalty in sufficient detail to provide notice of any . . . proposed civil penalty."); Lambton Doors, FAA Docket No. CP00SO0013, FDMS No. FAA-2000-7454, Initial Decision of Chief Administrative Law Judge, at 12-13 (May 7, 2004) ("Since the complaint seeks \$36,000, that constitutes the upper limit for any penalty assessable in this proceeding."); Airways Freight Corp., FAA Docket No. CP99SO0023, FDMS No. FAA-2009-5817, Initial Decision of Acting Chief Administrative Law Judge at 16 (Dec. 29, 2000) ("Since the complaint seeks \$60,000, that constitutes the upper limit for any penalty assessable in this proceeding."); Alphin Aircraft, Inc., FAA Docket No. CP93EA0324, Oral Decision, at 241:12-17 (Jan. 20, 1995) ("The level of penalty . . . is limited to the amount asked for by the FAA in its complaint. Any other result . . . raises serious due process questions."), respondent's appeal dismissed as untimely *sub nom.* Alphin Aviation, FAA Ord. No. 1995-15, at 1 (July 19, 1995).

³⁷ "An appropriate civil penalty must reflect the totality of the circumstances surrounding the violations. The FAA has determined that it will consider a variety of factors when determining an appropriate civil penalty, including: (1) the nature and circumstances of the violation; (2) the extent and gravity of the violation; (3) the person's degree of culpability; (4) the person's history of prior violations, if any; (5) the person's ability to pay the civil penalty; (6) the effect on the person's ability to stay in business; and (7) other matters as justice may require." Folsom's Air Service, FAA Order No. 2008-11, FDMS No. FAA-2004-17277 at 4 (Nov. 6, 2008).

³⁸ Respondent refused to raise ability to pay as an issue in setting the penalty and declined to provide personal financial data, so we have not considered ability to pay. PHC Tr. (Mar. 16, 2012), at 12–14; *see* PHC Tr. (Mar. 2, 2012), at 46.

³⁹ 49 U.S.C. 46301(a)(5)(A) (2006) (setting penalty liability up to a maximum \$10,000, but adjusted to \$11,000 for inflation by 14 C.F.R. § 13.305). Complainant bears the burden of demonstrating the appropriateness of the proposed penalty. *See* 14 C.F.R. § 13.224 (2009).

of charges pled.⁴⁰ When a section 121.580 violation rests on both interference and assault, higher penalties have been assessed.⁴¹ Thus, in *Salcido*,⁴² a deranged passenger who struck a flight attendant, broke a passenger seat video screen, chewed on credit cards and trash, and refused to obey the crew due to a psychotic condition was penalized the maximum \$11,000. Similarly, in *Schwager*,⁴³ a passenger who assaulted a flight attendant and tried to enter the cockpit was penalized the maximum proposed penalty of \$5,000; and, in *Franklin*,⁴⁴ a passenger who threw a wine glass at a crewmember was penalized \$5,000.

For section 121.580 interference violations that do not include an assault, more moderate penalties have been applied. Thus, in *Bonilla*,⁴⁵ a passenger who refused to sit down, cursed at a crew member, and cornered a crewmember between himself and the cockpit was assessed a \$3,300 penalty. Similarly, in *Cullen*,⁴⁶ a passenger who refused to stow a pet dog in a carrier case and thus caused the flight to return to the gate prior to departure was penalized \$4,400.

Relying on *Salcido*, *Schwager*, and *Franklin*, Complainant argues that Respondent's behavior deserves a \$5,500 penalty because it created an escalating distraction equivalent to those incidents where passengers both interfered with and assaulted crewmembers. Respondent does not argue the appropriate level of penalty, except to deny any violation at all.⁴⁷

The interference here does not constitute an assault, and in nature and circumstance it was less threatening than the behavior in *Salcido*, *Schwager*, or *Franklin*, which involved assault and interference.⁴⁸ Respondent's behavior is more akin to the nonviolent interference cases, particularly the *Bonilla* case.⁴⁹ In both *Bonilla* and the instant case, the passenger spurned the

⁴⁰ See *supra* note 31.

⁴¹ See, e.g., *Franklin*, FAA Docket No. CP07GL0006, FDMS No. FAA-2007-29194 (Aug. 29, 2008); *Salcido*, FAA Docket No. CP08SO0003, FDMS No. FAA-2008-0234 (Aug. 1, 2008); *Schwager*, FAA Docket No. CP06SW0010, FDMS No. FAA-2006-24718 (May 23, 2008).

⁴² *Supra* note 41, at 1-2, 6, 8.

⁴³ *Supra* note 41, at 7.

⁴⁴ *Supra* note 41, at 6-8.

⁴⁵ FAA Docket No. CP03NM0002, FDMS No. FAA-2003-14239, at 2-4 (Apr. 21, 2005).

⁴⁶ FAA Docket No. CP05NM0002, FDMS No. FAA-2005-20311, at 2, 3 (Mar. 28, 2006).

⁴⁷ Respondent alleges that the FAA stated that he might be denied a pilot license and was seeking to bully him into paying a \$5,500 penalty to make "this . . . all go away." Resp't Post Hearing Br. 10. We find no evidence of such bullying in the record. We note, however, that his conduct on the plane and in this proceeding may raise questions in connection with any pilot license application.

⁴⁸ Respondent's "buck[ing]" against Special Agent Mollica's grasp does not equate with the assaults in those cases, and it does not fall under § 121.580 since Special Agent Mollica was not a crewmember. Compl't Post-Hearing Br. 15; see 14 C.F.R. § 121.580 (2009).

⁴⁹ *Bonilla*, *supra* note 45.

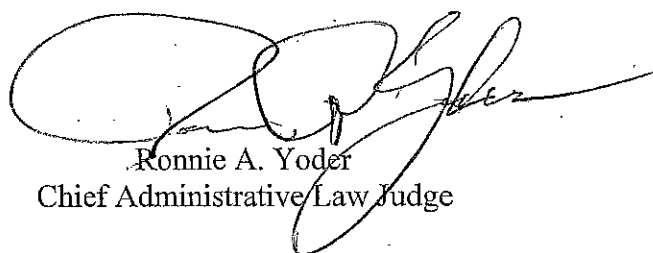
crew's authority and monopolized their time. In each, the passenger was disruptive, but despite their disruptiveness, neither Respondent nor Bonilla assaulted the crew.⁵⁰

Because of the circumstances, gravity, and nature of Respondent's behavior, we conclude that \$3,300 is the appropriate penalty here. It will temper Respondent's serious but nonviolent risk, will serve as a deterrent, and will serve the interests of justice. It is a significant penalty that incorporates due consideration for the nature and gravity of Respondent's behavior and fulfills the statutory purpose.

CONCLUSION

We conclude that Respondent violated §§ 121.317(f) and (k) and § 121.580 of the Federal Aviation Regulations and assess a penalty of \$3,300.

SO ORDERED



Ronnie A. Yoder
Chief Administrative Law Judge

Attachment — Service List

Note: This decision may be appealed to the FAA Administrator. Notice of appeal must conform to 14 C.F.R. §§ 13.210, 13.211, and 13.233, requiring that notice be filed within 10 days (plus an additional five days if mailed) from this decision's service date, and that the notice is followed by a brief or memorandum within 50 days (plus an additional five days if mailed) from this decision's service date. That memorandum or brief must be filed in the FAA Hearing Docket using the appropriate address listed in § 13.210(a). The appellant must send a copy of the notice and the memorandum or brief to opposing counsel. Filing notice of appeal with the judge is not sufficient. If neither party seeks review, this decision becomes final.

⁵⁰ Id. at 3.