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Mr. Dion Casey
Office of Chief Counsel
Transportation Security Administration
3838 N. Sam Houston Parkway E., Ste. 510
Houston, TX 77032

Via Electronic Mail

Re: Notice of Proposed Civil Penalty – Jonathan Cobb
TSA Case No. 2019M0099

Dear Mr. Casey:

This letter and the enclosures/attachments accompanying it are the materials on behalf of Jonathan Cobb in support of his objections to the proposed civil penalty in the above-referenced TSA Case that is the subject of our informal conference on July 2, 2019.

Statement of Facts

On February 25, 2019, Mr. Cobb was a ticketed passenger for UA Flight #2153 departing from George Bush Intercontinental Airport in Houston, Texas, to O'Hare International Airport in Chicago, Illinois. Not long after 4:00 p.m., Mr. Cobb presented his person and the belongings he was carrying for screening by Transportation Security Administration (TSA) personnel at Terminal C-North. After passing through the metal detector, Mr. Cobb was randomly selected for additional screening through the AIT machine. Prior to entering the AIT machine, Mr. Cobb told the Transportation Security Officer (TSO) that he was wearing a belt and that he wanted to remove it prior to entering the AIT machine. However, the TSO instructed Mr. Cobb to leave the belt on when entering the AIT machine.

The alarm on the AIT machine Mr. Cobb entered went off. The TSO told Mr. Cobb that he needed to conduct a pat-down of Mr. Cobb because of the alarm. Mr. Cobb refused and told the TSO he would not submit to a pat-down, and that he would leave and miss his flight rather than submit to a pat-down of his groin and genital area.

The background and reason for Mr. Cobb's refusal to submit to the pat-down is as follows: On January 20, 2012, Mr. Cobb was a ticketed airline passenger departing from Bradley International Airport (BDI) in Connecticut. He was selected for a pat-down during the TSA screening process. Mr. Cobb believed that the pat-down conducted by the TSA agent was excessively invasive; when searching each leg, the agent remained in contact with his genitals longer than he needed to in order to ascertain whether there were any foreign objects. This excessively intrusive process was performed twice, once from the front and once from behind. To make matters worse, Mr. Cobb made eye contact with another TSA agent who was watching the pat-down and saw the agent snickering, smirking and laughing about what Mr. Cobb was enduring and how disturbed he was by it. Mr. Cobb filed a complaint over the incident, but TSA offered only to speak with the TSA agent about his demeanor. Because of this incident, Mr. Cobb still has extreme anxiety every time he passes through an AIT machine, reminded of the public humiliation he endured at Bradley.

After Mr. Cobb refused to submit to the pat-down on February 25, 2019, he was escorted to a private screening area by the TSO. At this time, Mr. Cobb began recording the encounter. The recording, which is made a part of these submissions, captures very little video and is mostly audio. A transcript of the conversations captured during this recording is also made a part of these submissions.

The TSO requested assistance from a Supervisory TSO. The STSO also told Mr. Cobb that he needed to submit to a pat-down because of the AIT alarm. Mr. Cobb explained to the TSO and STSO that he had requested he be allowed to remove his belt before entering the AIT and he offered to pass through the AIT again to demonstrate that it would not alarm if his belt was removed. Mr. Cobb also offered to allow a full visual inspection of his person, explaining that due to the prior disturbing incident at BDI in 2012 where he was humiliated, he would not subject himself to a pat down of his groin or genital area again.

The STSO then requested the assistance of a Transportation Security Manager, who came to the area and again told Mr. Cobb he must submit to a pat-down and could not leave the security area without doing so. Mr. Cobb again explained his refusal was based on the incident at BDI in 2012 and offered to reenter the AIT with his belt removed and/or a visual inspection with clothing removed if need be. Mr. Cobb also offered to remove the pants he was wearing and to submit to AIT screening with his pajama pants on. The TSM then offered to allow Mr. Cobb to pass back through the AIT machine on the condition that if it alarmed again, Mr. Cobb would submit to a pat-down search. Mr. Cobb reiterated that he would not submit to a physical pat down of his groin or genital area, so the TSM withdrew the offer.

The TSM then summoned officers from the Houston Police Department. After their arrival, Mr. Cobb continued to refuse to allow a pat-down of his person. The police officers then escorted Mr. Cobb out of the security area and out of the terminal.

At all times during his encounter with TSA personnel and the police, Mr. Cobb was polite and composed. He did not yell or scream. He was not belligerent, confrontational or

violent. Mr. Cobb treated all the government personnel with respect and at no time made threats or demands.

Cobb Did Not Violate The Screening Regulations

The proposed civil penalty is based on alleged violations of 49 C.F.R. § 1540.105(a)(1) and § 1540.109. With respect to the former section, the Notice asserts that Mr. Cobb violated the regulation "in that you tampered or interfered with, compromised, modified, or attempted to circumvent a security system, measure, or procedure implemented under" the TSA regulations. As to § 1540.109, the Notice asserts Mr. Cobb "interfered with screening personnel in the performance of their screening duties[.]"

Mr. Cobb submits that under the facts of this case the only possible basis for the assessment of a fine is that he "interfered with" security measures or personnel. Mr. Cobb clearly did not tamper, compromise or modify any security system or measure even under the facts set forth in the notice. Nor did he attempt to "circumvent" a security system, measure or procedure. That term means to get around by ingenuity or stratagem.[1] Mr. Cobb did not attempt to get around the pat-down so that he could proceed to the sterile area of the terminal a take his flight, but instead chose not to undergo that invasive procedure and forego the flight for which he had purchased a ticket.

It is further submitted that there was no "interference" as prohibited by the TSA regulations set forth in the Notice. First, under 49 C.F.R. § 1540.105(a)(1), the interference must be with "any security system, measure, or procedure implemented under this subchapter." The relevant system, measures or procedures are set forth in the following section, which provides that "[n]o 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 under this subchapter." 49 C.F.R. § 1540.107(a).

In this case, Mr. Cobb did not "interfere" with the TSOs' screening for access to a "sterile area"[2] because, when informed a pat-down was required to enter the sterile area, he chose not to proceed to that area and instead forfeit the flight he had purchased. Mr. Cobb did not in any way seek to affect or hinder the course or conduct of a screening a TSO was performing on him; he instead decided against entering the sterile area. Mr. Cobb was only required to "submit" to particular screening as a condition of entering the sterile area, and when he chose not to proceed because of the anxiety that would be caused by a pat-down, he was no longer subject to screening procedures. As such, he could not have "interfered" with a screening procedure.

[1] https://www.merriam-webster.com/dictionary/circumvent?src=search-dict-box
[2] "Sterile area" means "a portion of an airport defined in the airport security program that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA[.]" 49 CFR 1540.5. As such, it is the area past the TSA security screening area.

This also applies to the alleged interference under 49 C.F.R. § 1540.109. Mr. Cobb did not interfere with any TSO's "screening duties under this subchapter" because those duties only extend to persons who are seeking to enter the sterile area of an airport. Once Mr. Cobb chose not to enter the sterile area, the screening personnel were under no legal duty to conduct the pat-down they had demanded he submit to.

Second, Mr. Cobb clearly did not have an intent to interfere with any screening procedure or personnel. As the factual statement above illustrates, he was always cooperative with the TSA personnel and attempted to help them in their desire to conduct an effective screening. Mr. Cobb offered to take off his belt before entering the AIT so it would not interfere with the scan, but was told not to do so. Indeed, the TSO's decision not to accept Mr. Cobb's offer likely resulted in the demand for a pat-down search that Mr. Cobb could not, due to his prior experiences, subject himself to. He offered to re-enter the AIT without his belt, to allow a full visual inspection of his person with clothing removed if need be, and to remove the pants he was wearing and to submit to AIT screening with his pajama pants on.

Mr. Cobb's purpose here was not to avoid detection of some weapon or dangerous object, or even of some criminal contraband outside of the TSA's administrative responsibilities, but to avoid being subjected to a pat-down procedure that had previously resulted in emotional trauma. The penalties imposable under 49 C.F.R. § 1503.401 are intended to sanction those persons who mean to prevent the TSA from maintaining the safety of air travel. Mr. Cobb clearly had no such intention and his only motivation was to preserve his emotional well-being. Because he did not intend to commit the violation of interfering with TSA functions, he should not be assessed the civil penalty proposed by the Notice.

The Penalty Would Violate The Fourth Amendment

Mr. Cobb also contends that the proposed penalty may not be imposed because to do so would violate the Fourth Amendment.[3] Although Mr. Cobb was not subjected to the pat-down search the TSA personnel demanded to perform on him, there would still be a Fourth Amendment violation if he were penalized for refusing to comply with a government demand that violates the Fourth Amendment. Thus, in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016), the Court held that a person could not be held criminally liable for refusing to police to conduct a warrantless draw of his blood that violated the Fourth Amendment. Similarly, if the demand that Mr. Cobb submit to a pat-down was inconsistent with the rights protected by the Fourth Amendment, a civil fine cannot be imposed for his refusal.

In this case and under the circumstances presented, the demand that Mr. Cobb allow a pat-down was beyond the TSA's authority to conduct airport screenings under the Fourth Amendment. Although TSA airport screening of passengers and their accessible effects constitutes a "search" for purposes of the Fourth Amendment, courts have found that the

[3] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV.

screenings are constitutionally reasonable under the "administrative search" doctrine. *United States v. Hartwell*, 436 F.3d 174, 175 (3d Cir. 2006). A search is reasonable under this exception when they are justified by a significant public safety concern, they advance that concern, and they are limited to address the public safety concern. *Id.* at 179-80 (citing *Brown v. Texas*, 443 U.S. 47 (1979)).

The airport screening at issue in this case runs afoul of the Fourth Amendment under the final criteria, in that it was not limited to the public safety purpose that justifies airport screenings. It is established that the public safety purpose is to prevent passengers from carrying weapons, explosives or other dangerous objects onto planes. Screenings are aimed at items that must be removed before boarding—not at particular individuals—and their purpose is to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings. *Pellegrino v. U.S. Transportation Security Admin.*, 896 F.3d 207, 228 (3d Cir. 2018). *See also U.S. v. McCarty*, 648 F.3d 820, 831 (9th Cir., 2011) (because TSA screeners are limited to the single administrative goal of searching for possible safety threats that could result in harm to the passengers and aircraft, the constitutional bounds of an airport administrative search require that the individual screener's actions be no more intrusive than necessary to achieve that goal).

In this case, that purpose was satisfied once Mr. Cobb declared that he would not enter the sterile area to board the plane and would leave the airport instead of submitting to a pat-down search. At that point, there was no danger that a weapon or explosive would enter the sterile area and get carried aboard an aircraft. The purpose that justified the administrative search of Mr. Cobb ended and so did the constitutional justification for conducting a pat-down or other search of him, as there was no longer a threat that he would bring a prohibited item into the sterile area.

Any assertion of authority to search Mr. Cobb after he decided, because of the prospect of enduring a pat-down search, not to enter the sterile area of the terminal would be an attempt by TSA agent's to enforce criminal laws, which is beyond their authority. An airport search remains a valid administrative search only so long as the scope of the administrative search exception is not exceeded; once a search is conducted for a criminal investigatory purpose, it can no longer be justified under an administrative search rationale. *McCarty*, 648 F.3d at 831. The TSA itself has disclaimed that screening agents have no authority to enforce criminal laws. *Pellegrino*, 896 F.3d at 828-29.

Thus, the TSOs had no authority to require Mr. Cobb submit to a pat-down once he informed them he would leave the airport rather than submit to the pat-down. Mr. Cobb cannot be sanctioned for asserting his Fourth Amendment right not to submit to the pat-down the agents demanded. The proposed penalty should be dismissed.

The Proposed Penalty Is Excessive

Mr. Cobb also contends that if any penalty is imposed, it should be reduced because the proposed amount, $2,600, is unduly harsh and excessive given the circumstances of this case.

Under 49 C.F.R. § 1503.403(b), the Office of Chief Counsel has the authority to compromise civil penalties that have been proposed by notice. *See also* 49 C.F.R. § 1503.419(a) (penalty amount may be compromised after the parties participate in an informal conference).

The TSA has issued policy to provide "agency enforcement personnel with guidance in selecting appropriate sanctions for civil penalty enforcement actions[.]"[4] That policy lists the following mitigating and aggravating factors to be considered in determining the appropriate penalty amount:

1. Significance or degree of the security risk created by the violation;
2. Nature of the violation (whether the violation was inadvertent, deliberate, or the result of gross negligence);
3. Past violation history (compliance should be the norm, this factor is considered only to assess the need for an increased sanction);
4. Violator's level of experience;
5. Attitude of violator, including the nature of any corrective action taken by the alleged violator;
6. Economic impact of the civil penalty on the violator;
7. Criminal sanctions already paid for the same incident;
8. Disciplinary action by the violator's employer for the same incident;
9. Artful concealment; and
10. Fraud and intentional falsification.

The guidance also sets forth the proposed range of penalties to be imposed upon individuals. For interference with screening that is not physical and does not involve false threats, the range is set at $2,000-$5,200. It must be pointed out that violations that are more egregious than non-physical "interference" at issue in this case include significantly lower fine amounts. For example, artful concealment of potentially dangerous substances has a low-end of $130, entering the sterile area without screening is at $660, and carrying BB or pellet guns has a low-end of $340.

When viewed in light of the mitigating/aggravating factors and the suggested penalty ranges for more serious conduct, the proposed penalty for Mr. Cobb's conduct is excessive. Mr. Cobb has no previous history of TSA violations even though he traveled by air about 160 separate times over the last three years. Indeed, his history with TSA screening is actually a mitigating factor in light of the trauma he endured during the 2012 pat-down at BDI. He did not create a security risk in this case—he removed himself from the airport taking with him any possible threat to his flight. And Mr. Cobb was at all times polite and respectful toward the TSA and law enforcement personnel. He was not loud or belligerent, did not make threats or swear and was in no way violent or physical with the TSA personnel. In fact, Mr. Cobb sought to assist the screening personnel in ruling out any threats by offering to go back through the AIT or to remove additional clothing so they could inspect him.

[4] Transportation Security Administration, "Enforcement Sanction Guidance Policy," available at https://www.tsa.gov/sites/default/files/enforcement_sanction_guidance_policy.pdf.

In light of all these circumstances, Mr. Cobb submits that any penalty be significantly reduced to reflect the non-serious nature of his actions.

Mr. Cobb also learned recently that his TSA pre-check status has been revoked, likely as a result of the February 25 incident. Given the frequency of Mr. Cobb's air travel, this has proven to be a significant burden on him. Thus, as a part of any compromise of the proposed penalty, he also requests that his TSA pre-check status be reinstated.

We look forward to discussing this matter at the informal conference scheduled for July 2. **Again, the Conference Call information is 512-302-1103, ext. 103, ID 1988.**

Very Truly Yours,

Jerri Lynn Ward, J.D.
Participating Attorney for
THE RUTHERFORD INSTITUTE