108 DOS 93

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,

Complainant, **DECISION**

-against-

COMBINED CONTRACT SERVICES, INC. and
WILLIAM ANSMAN,

Respondents.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on March 22 and August 3, 1993 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondents, with offices located at the American Airlines Terminal, JFK International Airport, Jamaica, New York 11430, were represented by Robert N. Swetnick, Esq., 217 Broadway, New York, New York 1007 and Christopher C. McGrath, New York Capitol Consultants, Inc., 120 Washington Avenue, Albany, New York 12210.

The complainant was represented by Timothy J. Mahar, Esq.

COMPLAINT

The complaint in the matter alleges that the respondents, licensed to engage in the business of watch, guard or patrol agency: failed to obtain Employee Statements from employees; failed to obtain fingerprints of employees; failed to submit fingerprints of employees to the complainant via registered mail within twenty four hours of employment; failed to ensure that fingerprint cards of employees were properly completed; permitted unauthorized personnel to take fingerprints of employees; and failed to maintain fingerprint cards of employees on file.

FINDINGS OF FACT

1) Notices of hearing together with copies of the complaint were served on the respondents by certified mail on March 2, 1993 (Comp. Ex. 1).

2) Combined Contract Services, Inc. (Combined) is, and at all times hereinafter mentioned was, duly licensed as a watch, guard or patrol agency with Ansman as its qualifying officer (Comp. Ex. 2).

3) On September 20, 1991, two weeks after advising the respondents of his desire to do so, License Investigator John Frederick conducted an inspection of the respondent's records. He requested to see the fingerprint cards and employee statements for all of Combined's employees, and compared what he was given or shown with a copy of Combined's payroll of 267 employees. His examination of the records disclosed that the respondents had no fingerprints for 103 of the employees listed on the payroll, had no employee statements for any of their employees, and that of the 200 fingerprint cards which he was shown 91 were unsigned by the person who had taken the fingerprints and 109 were signed by persons for whom authorization to take fingerprints had not been filed with the Department of State (Comp. Ex. 3, 4, 5 and 9).[1]

Frederick also concluded, based on the dates that the fingerprints which were on file were taken and the dates that they were submitted to the Department of State (Comp. Ex. 6), that numerous fingerprint cards had not been submitted within 24 hours of the commencement of the employment of the persons fingerprinted. He reached that conclusion, however, without making reference to any documents which would show that the employees commenced their employment on the date of fingerprinting and had not been fingerprinted in advance of such employment.

4) As a result of the inspection a notice of violation was issued to the respondents, offering the opportunity to either plead guilty and pay a fine of $10,000.00, or to plead not guilty and have further action on the matter scheduled. The respondents pled not guilty (Comp. Ex. 1).

5) Pursuant to a contract with American Airlines (American), the respondents assign employees of Combined to provide various services to American at its John F. Kennedy International Airport

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[1] Inasmuch as not all of the persons for whom fingerprint cards were produced appear on the payroll, it is evident that cards were provided for person who were no longer employed by the respondents. This would account for the number employees fingerprinted and the number not fingerprinted exceeding the number of employees on the payroll.

(JFK) terminal. Those employees serve as: skycaps, who are involved in curbside check-ins and baggage handling; baggage handlers, who handle baggage elsewhere in the terminal; wheelchair attendants; traffic agents, who direct traffic outside the terminal; positive claim agents, who check the baggage receipts of arriving passengers to assure that they have the correct bags; and pre-board screening personnel, who operate the metal detectors and baggage x-ray equipment at the boarding area.

The pre-board screening personnel are hired, trained, and operate in accordance with regulations enacted by the Federal Aviation Authority (FAA). The FAA conducts spot checks of the screening operation, and advises the screeners, the respondents, and American of its findings. It also reviews the personnel records of the screeners, including their employment applications and the required background checks, and checks on the operation of equipment and the training of the screeners.

6) According to the respondents, they fingerprint and complete employee's statements for only the pre-board screeners.

OPINION

I- The respondents contend that the Department of State lacks jurisdiction to proceed in the instant matter for several reasons: Federal preemption in the area of airline security; legislative intent not to encompass airline security functions under the provisions of General Business Law (GBL) Article 7 (the statute under which the respondents are licensed); and the designation by the New York State Legislature of the New York State Department of Transportation as the official agency of the State in matters affecting aviation under Federal laws.

The respondents cite the provisions of 49 USC §1305[a] that

> "...no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under sub-chapter IV of this chapter to provide air transportation",

and argue that this proceeding entails the exercise of jurisdiction by the State of New York over "the security functions of an agent of a covered air carrier as it provides 'services' envisioned by §1305 under contract to said covered air carrier...." (Resp. Memorandum of Law, p. 2).

Citing Miller v Northwest Airlines, N.J. Super. A.D. 1992, 602 A.2d 785, 253 N.J. Super 618 (1992), the respondents assert that airline security respecting boarding and carry-on luggage falls within the statutory category of 'services.' They go on to argue that, pursuant to Morales v Trans World Airlines, Inc., U.S. Tex. 1992, 112 S. Ct. 2031, 119 L.Ed.2d 157 (1992), all state laws, even those which are consistent with the Federal substantive requirements, which relate to any services of any air carrier, are preempted.

It is the respondent's position that Congress and the Secretary of Transportation, acting through statute and regulations (Title 14 CFR Parts 107, 108, and 129), have fully occupied the area of security services to be provided by air carriers, including qualifications, training, background, and conduct of personnel.

In response, the complainant argues that the Federal preemption applies only to "certain identified activities of air carriers, a defined class to which respondent does not belong," (Comp. Affidavit in Opposition, p. 1), inasmuch as the respondents are merely vendors of security services to air carriers.

The complainant points out that 49 USC §1301[3] defines "air carrier" as

> "any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation....",

and asserts that the respondents do not conform to that definition as they do not provide air transportation services, and that they are trying to extend to application of §1305[a] to the services of vendors to air carriers without any statutory or judicial support.

For the proposition that the respondents are seeking too broad an application of the preemption provisions, the complainant cites Fort Halifax Packing Co., Inc. v Coyne, 107 S. Ct. 221, 482 US 1, 96 L.Ed.2d 1 (1987). In that case, Maine's Bureau of Labor standards sued an employer for failing to comply with a state statute requiring severance payments in the event of a plant closing. The employer argued that the matter was subject to preemption under the Employee Retirement Security Act of 1974 , as the state statute regulated an employee benefit plan. The Court, however, distinguished between a benefit plan and a mere benefit, going on to hold that preemption statutes are to be narrowly construed as to the subject area in which State regulation is precluded. See, also, Stern v General Electric Company, 924 F2d. 472 (2nd. Circuit, 1991).

The complainant contends that the application of GBL Article 7 to the respondents does not impede an air carrier's adherence to Federal law and regulations, since it is the carrier, and not the respondents, which is responsible for providing security.[2]

A distinction must be made between the providing of air carrier security, as regulated by the FAA, and the business of watch, guard or patrol agency, which involves

> "the furnishing, for hire or reward, of watchmen or guards or private patrolmen or other persons to protect persons or property or to prevent the theft or the unlawful taking of goods...." GBL §71[2].

The complainant is not seeking to regulate the method in which air carriers provide security. Rather, it is asserting its statutory authority to regulate the business of providing personnel to others for watch guard purposes. The fact that such regulation may have an effect on the provision of those services is irrelevant to the question of preemption. Miller v Northwest Airlines, supra.

I am persuaded that the respondent's preemption argument is in error. The Federal government has imposed a regulatory scheme on air carriers, not on independent contractors who provide personnel for the use of such carriers.[3]

Even if the regulation of such contractors was preempted, the preemption would not apply with regards to all of the employees of the respondents at JFK. The FAA regulations apply only to the security of air operations, and not to the security of baggage once it has been claimed after landing. Besides the pre-board screening personnel, the respondents also provide positive claim agents, whose job it is to assure that baggage is not taken by persons to whom it does not belong. Such responsibility clearly falls within

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[2] It should be noted that the Morales case upon which the respondents rely heavily involved restrictions imposed directly on air carriers.

[3] The respondents urge that the provisions of Title 14 CFR 108.29[b] are an assertion of jurisdiction by the FAA over independent contractors such as would establish preemption. A reading of that section shows, however, that it relates only to the actual performance of security functions, and not to the hiring practices of independent contractors. If anything, this regulation, through the very specific limitation of its scope, should be read as indicating that, with regards to such contractors, the FAA had the intent not to preempt the states with regards to anything but performance standards.

the bounds of the prevention of the theft or unlawful taking of goods, and therefore, within the provisions of GBL Article 7. Yet the respondents have stated that they only fingerprinted and took employee statements from pre-board screeners.

The services to be provided by the employees of a licensed watch, guard or patrol agency are, in fact, irrelevant so far as the requirements to obtain fingerprints and employee statements are concerned. GBL §81[2] requires that all employees of a licensee complete an "employee's statement" containing specified information about their identity and background, and GBL §81[3] requires that all such employees be fingerprinted. Division of Licensing Services v Richard Starke, 59 DOS 93; Division of Licensing Services v Task Force Security, Inc., 63 DOS 89.

Since the respondent's other jurisdictional objections are dependent on their pre-emption argument, they too must fail.

II- As discussed above, GBL §81[2] provides that licensed watch, guard or patrol agencies must obtain employee's statements from all of their employees. While the respondents contend that they did obtain such statements from their pre-board screeners, none were produced when requested by the complainant's investigator. Since in spite of the requirement of GBL §81[4] that the sets of fingerprints retained by the licensee be attached to the employee's statements the fingerprints produced by the respondents were not accompanied by employee's statements, I conclude that the respondents failed to obtain employee's statements from any of their employees.

As also discussed above, GBL §81[3] provides that licensed watch, guard or patrol agencies must fingerprint all of their employees. The evidence establishes, however, that the respondents failed to fingerprint 103 of their employees.

19 NYCRR 170.2[a] requires that fingerprint cards be signed by the person who taking the fingerprints. Of the fingerprint cards which the respondents did have, 91 were not signed by the person who had taken the fingerprints and were, therefore, incomplete in violation of GBL §81[3]. 109 of the fingerprint cards were signed, but, in violation of 19 NYCRR 170.2, by persons who had not been authorized to take fingerprints.

III- This is not a case of an isolated violation. It is clear from the evidence that it is the respondents' policy not to fingerprint and/or obtain employee's statements from any of its employees at JFK other than the pre-board screeners. While the pre-board screeners are, without doubt, in the most sensitive positions, that does not excuse the respondents' ignoring of the requirements of the statute and regulations with regards to its other employees. In addition, no explanation has been offered for

the signature violations on the fingerprint cards. Accordingly, a substantial penalty is called for.

Prior to the institution of this proceeding the respondents were served with a Notice of Violation which alleged the same charges as are at issue herein.[4] That notice offered the respondents the opportunity to resolve the matter by paying a fine of $10,000.00. The respondents chose not to pay the fine, and entered a plea of "not guilty," with the understanding that there would be further action taken on the matter. In such a circumstance, it is proper to impose a substantially higher fine after a hearing. Michael Don Vito Sr. v Jorling, App. Div. 3rd Dept., NYLJ 11/3/93, p.21. On the other hand, consideration must be given to the fact that some of the charges were dismissed. Therefore, the penalty imposed will be a fine of $10,000.00 or, should the respondents chose not to pay the fine, a three month suspension of their license.

CONCLUSIONS OF LAW

1) By failing to obtain employee statements from their employees the respondents violated GBL §81[2], 267 times (the number of employees on the respondents' payroll at the time of the inspection).

2) By failing to fingerprint 103 of their employees, the respondents violated GBL §81[3], 103 times.

3) By failing to have the fingerprint cards of 91 of their employees signed by authorized persons the respondents violated GBL §81[3], 91 times.

4) By having the fingerprint cards of 109 of their employees signed by persons who were not properly authorized to do so the respondents violated 19 NYCRR 170.2, 109 times.

5) The complainant has failed to establish by substantial evidence that the respondents failed to submit to the Department of State fingerprints of its employees within 24 hours of their employment, and that charge should be dismissed.

6) Inasmuch as the complainant has not produced any evidence that the respondents did not have in their possession any of the fingerprints which they took, and since GBL §81[4] requires that licensees retain the fingerprints that they have taken and does not encompass the failure to obtain fingerprints, the charge that the

[4] The Notice of Violation served as the complaint in this proceeding.

respondents violated that section by failing to maintain fingerprint cards on file should be dismissed.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Combined Contract Services, Inc. and William Ansman have violated General Business Law §§81[2] (267 times) and 81[4] (194 times), and 19 NYCRR 170.2 (109 times), and accordingly, pursuant to General Business Law §79, they shall pay a fine of $10,000.00 to the Department of State on or before December 31, 1993, and should they fail to pay the fine then their license to engage in the business of watch, guard or patrol agency shall be suspended for a period of three months, commencing on January 1, 1993 and terminating on March 31, 1994.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

James N. Baldwin
Executive Deputy Secretary of State