

SERVED: January 17, 2002

NTSB Order No. EA-4930

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of January, 2002

_____)	
TOMMY HUE NIX,)	
)	
Applicant,)	
)	Docket 273-EAJA-SE-15827
v.)	
)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Applicant has appealed from the Equal Access to Justice Act (EAJA) initial decision of Administrative Law Judge William A. Pope, II, served on July 28, 2000.¹ The law judge denied, in full, applicant's application for recovery of \$19,504.49 in EAJA fees. We deny the appeal.

In the underlying proceeding, we affirmed the law judge's finding that applicant had performed numerous (approximately 47,

¹ The initial decision is attached.

Initial Decision at 571) direct air carrier services without the requisite authority. In doing so, he also had not complied with testing, competency, or proficiency standards required for lawful Part 135 operations. Two charges – that applicant was advertising a service he was not legally authorized to perform (§ 119.5(k)), and that he permitted his son to act as pilot-in-command when he did not have the required certificate (§ 135.243(b)(1)) – were dismissed. The law judge reduced the sanction from revocation to a 120-day suspension, a decision the Administrator did not appeal.

The applicant raises two issues: whether applicant was a “prevailing party,” as that term is used in EAJA; and whether, if so, an award should issue because in bringing the complaint the Administrator was not “substantially justified.” Application of US Jet, NTSB Order No. EA-3817 (1993) at 2 (“[t]o find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory”).²

² We reject applicant’s continued argument that the Administrator’s reply to the EAJA petition should be stricken and that his application would therefore stand unopposed. The law judge addressed the timeliness of the Administrator’s reply in an order served May 4, 2000, declining to strike the reply and we see no error there. Furthermore, there is no indication that the law judge considered, nor have we considered, the materials respondent finds objectionable. In view of our finding, issues of abuse of process and their implication for EAJA recovery are
(continued...)

In Application of Grzybowski, NTSB Order No. EA-4301 (1994), we questioned whether a sanction reduction, without more, justified prevailing party status. In Application of Gilfoil, NTSB Order No. EA-3982 (1993), we found the applicant to be a prevailing party where the Administrator had sought revocation, and we upheld only a 90-day suspension. We said:

While a reduction in sanction may not typically support a conclusion that the respondent was the prevailing party, in this case the facts and circumstances warrant such a result.

Id. at 7. The Board later explained that Gilfoil was "not a case of simple sanction reduction," but that the entire litigation was understood to be only about what the sanction would be, so that when the respondent prevailed (having volunteered to have his certificate suspended), he could fairly be considered to have prevailed in the litigation as a whole. Application of Swafford and Coleman, NTSB Order No. EA-4426 (1996), at 4-5. As the law judge here recognized, this case does not rise to that level. Using sanction reduction, per se, as a standard for prevailing party status would, we think, be inconsistent with EAJA principles, and it is difficult to know where the line should be drawn.

In this case, although we also have dismissal of two charges, those charges were tangential and quite incidental to the main claims. They do not represent a "significant and

(continued...)
moot.

discrete substantive portion of the proceeding" so as to justify prevailing party status. 49 C.F.R. 826.5(a). On the basis of the pleadings before us, we decline to find applicant a prevailing party.

Applicant also claims that the Administrator was not "reasonable in law" in choosing to seek revocation of applicant's certificate. Applicant believes that revocation was too severe a sanction in the circumstances. We disagree. Thus, even had we found applicant to be a prevailing party, he would not be able to recover here.

Applicant was found to have maintained for a considerable length of time a for-hire Part 135 operation without necessary authorization, testing, competency, or proficiency reviews and approvals. While the law judge reduced the sanction based on his assessment of the applicant's motives and behavior, that is little comfort to those who, for some years, used applicant's services and were entitled to believe that they were getting a certain level of protection they were not, actually, receiving. Moreover, although the Administrator chose not to appeal the law judge's reduction of sanction, that is not to say that revocation would not have been appropriate.³ Indeed, the law judge's citation to Administrator v. Platt, NTSB Order No. EA-4012 (1993), is not compelling justification for sanction reduction,

³ The statement in our earlier decision that a 120-day suspension was not excessive was solely in response to respondent's appeal and was not intended to suggest that such a sanction was necessarily the maximum appropriate.

as it only involved four flights.

ACCORDINGLY, IT IS ORDERED THAT:

Applicant's appeal is denied.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.