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NTSB Order No. EA-5276

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 29th day of March, 2007

_____)	
APPLICATIONS OF)	
)	
JEROME OLIVIER DOWNEY)	Dockets 316-EAJA-SE-17472
and)	and 317-EAJA-SE-17473
FRANK CHARLES DESANTIS)	
)	
For an award of attorney)	
fees and expenses under the)	
Equal Access to Justice Act)	
)	
_____)	

OPINION AND ORDER

Applicants appeal from the Equal Access to Justice Act (EAJA) initial decision of Chief Administrative Law Judge William E. Fowler, Jr., served on December 20, 2005.¹ The law judge denied applicants' consolidated EAJA applications. Applicants appeal that decision, and argue that the law judge

¹ A copy of the law judge's initial decision and order is attached.

erred in not ordering additional proceedings pursuant to 49 C.F.R. § 826.36, and that the Administrator's complaint against applicants was not substantially justified. Therefore, applicants contend that awarding attorney's fees under EAJA is appropriate. The Administrator opposes applicants' arguments.² We deny applicants' appeal.

On July 13, 2005, the Administrator issued an emergency order revoking both applicants' airline transport pilot certificates. In the order, the Administrator alleged that applicants violated 14 C.F.R. §§ 91.9(a),³ 91.13(a),⁴ 91.605(b), 91.605(b)(1), and 91.605(b)(3),⁵ by operating a Challenger CL-600-1A11 aircraft on behalf of Green Aviation Management

² The Administrator filed a Petition for Leave to File Late Reply Brief, which is still pending. Applicants have not opposed this Petition, and we have determined that our granting of this Petition would not prejudice applicants. Therefore, we grant the petition and consider both parties' briefs in this Opinion, accordingly.

³ Section 91.9(a) prohibits operation of an aircraft in the absence of complying with the operating limitations specified in the approved flight manual, markings, and placards.

⁴ Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another person.

⁵ Section 91.605(b) prohibits operation of an aircraft if the aircraft's takeoff weight exceeds the weight limitation that the flight manual sets forth. In particular, subsection (b)(3) also specifies that the aircraft's takeoff weight must correspond with the elevation of the airport, the gradient of the runway the operators will use, the ambient temperature and wind component at the time of takeoff, and the runway's surface condition.

Company that exceeded the permissible weight and balance restrictions. Specifically, the Administrator alleged that applicants operated the aircraft on a flight from Westchester, New York, to Burbank, California, departing Westchester in an overweight and unbalanced condition.

After holding a hearing, the law judge dismissed the Administrator's complaint, concluding that applicants "successfully rebutted the Administrator's prima facie case." Transcript (Tr.) 746. The law judge acknowledged that the Administrator had presented, "at the very least," a prima facie case, and that she was "certainly valiantly premised and substantially justified in bringing [the] action" against applicants. Tr. 744. The law judge stated that both parties had presented "an avalanche of figures [and] statistics" with regard to whether the aircraft was overweight at the time of takeoff. Id. Ultimately, the law judge found that Applicant DeSantis, who served as first officer for the flight at issue, calculated the weight of the aircraft before applicants departed Westchester; that he considered the fuel, passengers, supplies, and crew aboard the aircraft in making these calculations; and that applicants took the necessary operational steps to ensure that the aircraft's weight was below the maximum of 41,250

pounds when it departed for Burbank. Id.⁶ Applicants filed timely applications for attorney's fees, pursuant to EAJA. In a consolidated decision on applicants' applications, the law judge denied an award of fees, holding that the Administrator was substantially justified in pursuing the charges against applicants. The law judge's decision held that the Administrator did not pursue the charges on a weak or tenuous basis, and that the testimony of the two applicants was significantly persuasive in rebutting the Administrator's case. Consolidated Initial Decision and Order Den. Applications for Att'ys Fees and Expenses at 4.

The Equal Access to Justice Act⁷ requires an award of certain attorney's fees and other specified costs that a qualified prevailing party⁸ incurs, unless the government shows that it was substantially justified in pursuing its complaint. 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992). The Supreme Court has defined the term "substantially justified" to mean that the government must show

⁶ The Administrator did not appeal the law judge's holding.

⁷ 5 U.S.C. § 504; see also 49 C.F.R. pt. 826.

⁸ When a party seeking fees under EAJA is an individual, he or she has standing to pursue such fees only if his or her net worth does not exceed \$2,000,000.00 at the time of the initiation of the adversary adjudication. 5 U.S.C. § 504(b)(1)(B).

that its position is reasonable in fact and law. Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993). Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter. Administrator v. Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (stating that Congress intended EAJA awards to dissuade the government from pursuing "weak or tenuous" cases). The Administrator must also show that her pursuit of the case at each step of the proceedings was reasonable. See Administrator v. Phillips, 7 NTSB 167, 168 (1990).

We have previously recognized that EAJA's substantial justification test is less demanding than the Administrator's burden of proof when arguing the merits of the underlying complaint. U.S. Jet, supra, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)). In Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), the D.C. Circuit stated that the merits phase of a case is separate and distinct from the EAJA phase. As such, EAJA case law compels us to engage in an independent evaluation of the facts and circumstances that led to the Administrator's original complaint, and determine whether the Administrator was

substantially justified in pursuing the case based on those circumstances. Id. at 1087.

In this case, the Administrator does not dispute that applicants have standing to pursue this EAJA action: both applicants are qualified prevailing parties under the statute, as the net worth figure for each of them does not exceed \$2,000,000.00, and the law judge dismissed the Administrator's emergency revocation order in its entirety. Therefore, the sole issue we must resolve is whether the Administrator's pursuit of the charges was substantially justified.

The Administrator pursued the charges against applicants after receiving a "whistleblower complaint" from Mr. Robert Tidler, who served as the Director of Operations of Green Aviation Management Company at the time of the flight in question.⁹ At the hearing before the law judge, Mr. Tidler testified that Applicant DeSantis told him that the aircraft had 16,300 pounds of fuel onboard when it took off, and that such an amount would render the aircraft overweight. Tr. 330-331, 357. After his conversation with Applicant DeSantis, Mr. Tidler

⁹ We recognize that Mr. Tidler was removed as the Director of Operations at Green Aviation shortly after the flight in question. Applicants' brief indicates that, one day following his termination and replacement as the Director of Operations at Green Aviation, Mr. Tidler filed the aforementioned "whistleblower complaint." We note that this history is relevant to the credibility of Mr. Tidler's testimony.

further investigated the circumstances of the flight by reviewing the aircraft's flight log and speaking with two employees of WestAir, a fixed base operator at Westchester Airport. The WestAir employees informed Mr. Tidler that applicants had requested that the WestAir employees top off the aircraft with fuel at Westchester Airport. Tr. 334. Mr. Tidler also testified that the aircraft's crew had to place excess baggage on the aircraft in the passenger compartment, that the aircraft was carrying three cases of oil, and that four passengers¹⁰ were on board the aircraft. Tr. 332-333, 341; see also Exhibit 17. Mr. Tidler reported his concerns in succession to two different FAA Flight Standards District Offices (FSDOs): Farmingdale, New York, via a letter dated January 24, 2005, and Albany, New York, in May 2005. Based on this information, Aviation Safety Inspector Ernest Maffei of the Albany, New York FSDO investigated the flight and calculated the amount of fuel that the aircraft contained upon takeoff.¹¹ Inspector Maffei

¹⁰ Although the flight only had three passengers on board, it appears that applicants were expecting four passengers. Had four passengers been aboard the aircraft, the law judge determined that the aircraft would have been overweight. Tr. 663.

¹¹ After corresponding with applicants and Mr. Tidler, calculating the estimated weight and balance of the aircraft, and consulting with an expert on the issue of the permissible weight and balance of the aircraft, the investigators from the Farmingdale FSDO decided not to pursue an enforcement action

concluded that the aircraft exceeded the forward limit of its center of gravity, and exceeded the maximum takeoff weight.

Tr. 124, 130.

Applicants presented evidence, and both applicants testified, to dispute the Administrator's charges at the hearing. Applicant Downey testified that Applicant DeSantis calculated the weight and balance of the aircraft for the flight, and that he was confident in Applicant DeSantis's calculations, given Applicant DeSantis's considerable experience. Tr. 443-44. Applicant DeSantis testified at the hearing that he did not request that WestAir employees top off the aircraft with fuel (Tr. 615), and that applicants burned off 400 pounds of fuel before taxiing the aircraft (Tr. 622). Applicant DeSantis also testified that taxiing the aircraft

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against applicants. The record indicates that Inspector Maffei did not contact the Farmingdale FSDO to inquire about the alleged violations. While we acknowledge that this history indicates that reasonable minds could differ on the strength of the Administrator's case, we are mindful of our precedent establishing that one FSDO's decision not to pursue an enforcement action does not prevent another FSDO from disagreeing and issuing an order against a certificate holder. See Administrator v. Darby, NTSB Order No. EA-5159 at 12 (2005) (stating that one FSDO's opinion does not preclude the Administrator from reaching a different conclusion). In addition, nothing in the record indicates that Inspector Maffei believed this case to be weak or tenuous. See Administrator's Br. at 19 (stating that the Farmingdale FSDO inspectors appeared to have proceeded on incorrect evidence regarding the calculations of the weight of the aircraft).

resulted in an additional fuel burn of approximately 450 pounds. Tr. 653, 655. Mr. Tidler conceded that only 15,300 pounds of fuel could have been aboard the aircraft prior to taxi and takeoff, but that such a measurement would still cause the aircraft to be overweight, according to his calculations. Tr. 409.

In contending that the Board should grant attorney's fees to applicants under EAJA, applicants argue that the law judge erred in not ordering additional proceedings regarding EAJA fees pursuant to 49 C.F.R. § 826.36, and that the Administrator's investigation into the allegations was neither objective nor complete. In response, the Administrator argues that the law judge's failure to provide applicants with further proceedings is not reversible error, and that the Administrator was justified in pursuing certificate action against applicants, based on information that Inspector Maffei obtained from Mr. Tidler, the WestAir employees, and applicants.

In addition, applicants argue that the law judge erred in denying their application for attorney's fees because the Administrator's investigation into the alleged violations was not objective or complete.¹² After a careful review of the

¹² Applicants also argue that the law judge erred in not specifically addressing their motion for further proceedings

record, we conclude that the Administrator's enforcement action against applicants was substantially justified, because it was reasonable in fact and law. First, the Administrator's action was factually reasonable, given the information that the Administrator gathered from Mr. Tidler, from employees at WestAir, and from the applicants themselves. As the law judge stated in his initial decision, the evidence in this case consisted of an assortment of numerical data regarding the weight and balance of the aircraft in question. After

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under 49 C.F.R. § 826.36. Section 826.36(a) states that law judges will ordinarily make determinations of whether an EAJA award is appropriate based on the written record of the case. In our review of the record, we have interpreted the law judge's decision denying applicants' EAJA application for fees as a de facto denial of applicants' motion for further proceedings. We find that applicants have not demonstrated that such proceedings are necessary for a full and fair resolution of the issues. Section 826.36 allows considerable latitude to the law judges, and we have previously held that law judges have significant discretion with regard to such procedural issues. Administrator v. Moore, 5 NTSB 335 n.5 (1985) (EAJA case recognizing that law judges have discretion with regard to whether to hold hearing). Applicants' brief does not specify why an additional hearing or further discovery is necessary for full and fair resolution of the issues, and does not state how such further proceedings would assist the law judge or the Board in resolving the issues. Such a general, wide-sweeping argument for additional proceedings does not satisfy the requirements of 49 C.F.R. § 826.36(b), which requires that requests for additional proceedings, "specifically identify the information sought or the disputed issues and ... explain why the additional proceedings are necessary to resolve the issues," nor does it provide a basis for awarding fees under EAJA. Applicants' argument that the law judge erred procedurally in not ordering additional proceedings does not fulfill this standard.

evaluating statements demonstrating that applicants had topped off the aircraft with fuel before leaving Westchester, and that four passengers, several pounds of luggage, and other heavy items were aboard the aircraft, it was not unreasonable for the Administrator to calculate the weight of the aircraft and conclude that the aircraft was overweight. See supra n.10; see also Administrator's Reply to Applicants' Br. at 5 n.2; Tr. 31, 34, 124, 130 (testimony from Inspector Maffei regarding his calculations of the weight of the aircraft and forward limit of the aircraft's center of gravity). Indeed, Applicant DeSantis testified that, when calculating the weight of the aircraft, he assumed that he and Applicant Downey had burned off 450 pounds of fuel in taxiing prior to departing, but then admitted that this figure was merely an estimate. Tr. 656. Overall, based on the record, it was not unreasonable for the Administrator to believe that her case against applicants was factually sound at each step of the underlying proceeding.

The law judge also made several key credibility findings in the underlying case. For example, the law judge made determinations against the Administrator with regard to whether Applicant DeSantis told Mr. Tidler that the aircraft departed with 16,300 pounds of fuel, whether Applicant DeSantis requested that WestAir top off the aircraft with fuel before the flight,

and whether Mr. Tidler left the aircraft with 5,200 pounds of fuel on board the previous day. In addition, the inspectors at the Farmingdale FSDO recognized that the calculations regarding the weight and center of gravity of the aircraft depended upon credibility. Deposition of Anthony Mauro at 17 (stating that, after meeting with Mr. Tidler and Applicant Downey, the inspectors discussed the evidence and stated, "Well, one of them is lying, one of them is telling the truth."). Such credibility issues and findings concerning critical facts in this case indicate that awarding EAJA fees would be inappropriate, as we have previously held that the Administrator is substantially justified, "when key factual issues hinge on witness credibility." Chandler v. Administrator, NTSB Order No. EA-4802 (1999) (citing Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994), and Martin v. Administrator, NTSB Order No. EA-4280 at 8 (1994)).

In addition, the Administrator has established that her enforcement action against respondent was reasonable in law. As explained at notes 3, 4, and 5, supra, the Federal Aviation Regulations prohibit operation of an aircraft where the aircraft exceeds the weight and balance restrictions in the applicable flight manual. Based on the information that the Administrator gathered during the course of her investigation, it was

reasonable for the Administrator to believe that applicants' aircraft exceeded the maximum takeoff weight of 41,250 pounds. Therefore, it was not unreasonable for the Administrator to charge applicants with the regulatory violations described above.

In summary, we find that the Administrator was substantially justified in charging applicants with violations of the Federal Aviation Regulations.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicants' appeal is denied; and
2. The law judge's decision, denying applicants' EAJA applications, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.