

SERVED: April 13, 2007

NTSB Order No. EA-5278

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 10th day of April, 2007

APPLICATION OF)
)
)
ROY M. MAGRUDER)
) Docket 318-EAJA-SE-17273
)
For an award of attorney)
fees and expenses under the)
Equal Access to Justice Act)
)
)

OPINION AND ORDER

Applicant appeals the written initial decision¹ of
Administrative Law Judge William A. Pope, II, served January 20,
2006, which denied applicant's request for attorney fees and
expenses under the Equal Access to Justice Act (EAJA).² The
decision, based upon briefs submitted by both parties, found

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

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

that the position of the Administrator throughout this proceeding was substantially justified and that applicant is not entitled to an EAJA award. Applicant argues that the complaint filed by the Administrator was not substantially justified, and that fees are appropriate. We deny applicant's appeal.

Background

On December 13, 2004, the Administrator issued an order of suspension, suspending applicant's private pilot certificate for 180 days. Applicant timely appealed the suspension order, which the Administrator filed as the complaint on December 27, 2004, alleging applicant violated Federal Aviation Regulations (FARs) §§ 91.13(a),³ 91.103(a),⁴ and 91.151(a)(1),⁵ as a result of a flight on July 10, 2004, in which a Cessna C-172P civil aircraft landed on U.S. Highway 1, near Marathon, Florida. The Administrator alleged applicant was the pilot-in-command (PIC) of this flight that originated at Homestead Air Reserve Base (Homestead), Florida, with an intended destination of Marathon Airport, and which terminated at a point on U.S. Highway 1, due

³ Prohibits careless or reckless operations so as to endanger the life or property of another.

⁴ Requires pilots-in-command to become familiar with all available information concerning their flight prior to takeoff.

⁵ States that no person may begin a flight in an airplane under VFR conditions unless there is enough fuel to fly to the point of intended landing and, assuming normal cruising speed, during the day, to fly after that for at least 30 minutes.

to fuel exhaustion, about 4 miles northeast of the airport. The order of suspension charged that applicant was the PIC because he knew he was the only person on board the aircraft holding a valid and current medical certificate, and that he failed to ascertain that the quantity of fuel on board was sufficient to fly to Marathon Airport and 30 minutes thereafter. An answer to the complaint was filed on December 29, 2004. Applicant admitted he did nothing with regard to ascertaining the quantity of fuel needed or on board, but affirmatively stated he had no obligation to do so. As a result of his admissions, the only issue in dispute was whether he was the PIC.

The law judge held a bifurcated hearing in Miami, Florida, on June 28, 2005, and on November 7 and 8, 2005. At its conclusion, the law judge issued an oral initial decision reversing the Administrator's order of suspension. The Administrator did not appeal the oral initial decision.

On November 21, 2005, applicant filed his application for reimbursement of attorney fees and expenses, pursuant to EAJA. On December 15, 2005, the Administrator filed her answer to the EAJA application, requesting that the application for fees and expenses be denied. On January 20, 2006, the law judge denied the application in a written initial decision and order.

Facts

Applicant was a member of the Albert Whitted Flying Club, Bay Air Flying Service, located at Albert Whitted Airport in St. Petersburg, Florida. The club sponsored a "day trip" from St. Petersburg to Key West on July 10, 2004. Some club members gathered that morning to fly three single-engine aircraft to Key West for the day, planning to return that day. The organizers of the day trip established an itinerary, on which they assigned each participant to one of the three aircraft; applicant and his wife were matched up with Mr. Ed Good, whom they did not know. Applicant and Mr. Good decided before the flight that Mr. Good would fly to Key West and applicant would fly the return leg. Neither applicant nor Mr. Good discussed who would operate the aircraft as PIC. Applicant operated the radios and navigated from the right-hand seat during the first leg of the trip.

Mr. Good asserts that he told applicant before they departed St. Petersburg that he did not hold a valid medical certificate due to his having diabetes. But, according to a letter that purported to be from applicant, a copy of which was faxed to the FAA, applicant did not learn of Mr. Good's condition until after the flight departed St. Petersburg.

Applicant and Mr. Good became lost and eventually made an unauthorized landing at Homestead. Applicant and Mr. Good chose

not to refuel at Homestead, and departed for the Florida Keys. According to Mr. Good, during the leg departing Homestead, he again operated the controls and applicant navigated and operated the radios until the flight terminated in an emergency landing on U.S. Highway 1.

The Administrator brought an action against Mr. Good for, among other things, operating as the PIC of the flight from St. Petersburg to Homestead when he did not have a current medical certificate. The Administrator also asserted that applicant operated as PIC on the flight from Homestead to the landing on U.S. Highway 1, in violation of the regulations cited above. Mr. Good initially appealed his emergency revocation, but subsequently withdrew his appeal.

EAJA Law

Under EAJA, the Board will not award certain attorney's fees and other specified costs if the Administrator shows that she was "substantially justified" in pursuing the complaint. See 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 that its position is reasonable in both 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).

A determination of reasonableness first involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter. See 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 reasonableness of the Administrator's position is decided by review of the entire administrative record, and not only on evidence admitted at the hearing. See McCrary v. Administrator, 5 NTSB 1235 (1986).

We previously recognized the "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. It follows that the merits phase of a case is separate and distinct from the EAJA phase. Federal Election Commission v. Rose, 806 F.2d 1081, 1087 (D.C. Cir. 1986). Accordingly, we are compelled to engage in an independent evaluation of the circumstances that led to the original complaint, and then determine whether the Administrator was substantially justified in pursuing the case based on those circumstances.

Discussion

After a 3-day bifurcated hearing, applicant moved for dismissal, alleging the Administrator failed to present a *prima*

facie case. Tr. at 435. The law judge reserved his decision on the motion, electing to postpone a ruling until his initial decision, thereby allowing the evidentiary portion of the case to proceed to its conclusion. Tr. at 502. After each party closed, and after deliberation, the law judge sustained applicant's appeal and dismissed the complaint, concluding the Administrator had not proven by a preponderance of the evidence that applicant violated the cited FARs. Tr. at 510. The Administrator did not appeal that decision.

Both the Administrator and applicant make arguments about credibility determinations, and the law judge specifically acknowledges that he undertook credibility determinations at the hearing. Applicant argues that the law judge, "erred in his determination that credibility determinations needed to be made ... and if any were made, they were not material to deciding the case." Applicant's Brief (Appl. Br.) at 19. The Administrator cites Application of Petersen, NTSB Order No. EA-4490 at 6 (1996), citing Caruso v. Administrator, NTSB Order No. EA-4165 at 9 (1994), for the proposition that the Administrator is substantially justified in bringing an action to a hearing, "when key factual issues hinge on witness credibility."

The law judge stated that the, "meaning of the asterisk [in an exhibit] and the denials by both applicant and Mr. Good that

they were the pilot-in-command created factual and credibility issues that could only be resolved at a hearing," and that, "[w]hen applicant first knew that Mr. Good did not have a medical certificate ... was also a credibility issue to be determined by the judge at the hearing." (Initial Decision at 6.) We do not decide whether these are "credibility issues" the judge was required to determine for purposes of justifying the Administrator's decision to proceed to a hearing. We rely on other support for our decision.

Applicant argues that he was not the PIC, did not operate the aircraft, had no further duties as alleged, and that the Administrator was not substantially justified in bringing the enforcement action against him. The Administrator argues that evidence in the administrative record indicates that applicant had knowledge that Mr. Good lacked the certificate to act as PIC and that the flying club designated applicant as PIC. Applicant argues that the Administrator's theory was not reasonable in law, stating, "the established law is contrary to the Administrator's legal theory" (Appl. Br. at 12) and, further, that:

the mere fact that a pilot who does not hold a license at the time of a flight ... ascertains that some other person in the plane is a rated pilot does not make the other person the pilot-in-command. Rather, a pilot-in-command is the

individual who has overall responsibility for, and control of, a flight.

Id. (citing Administrator v. McCartney, 4 NTSB 925, 926 (1983), and Administrator v. Fields, 4 NTSB 512 (1982)). Applicant's reliance on McCartney is misplaced, as McCartney involved a respondent's allegation that he could not have acted as the PIC because he did not have a valid certificate, in effect the antithesis of this case.⁶

The Administrator argues that she based her actions on evidence of applicant's participation in the flight, citing evidence showing that when Mr. Good encountered clouds, applicant suggested they drop in altitude and Mr. Good did so. The Administrator noted Mr. Good's testimony that applicant was navigating, that Mr. Good heard applicant talking on the radio, and that Mr. Good and applicant discussed the fuel situation before leaving Homestead and decided together they could make it to Marathon; the Administrator also noted the law judge acknowledged this testimony in his initial decision on the merits below. We agree that this evidence reasonably showed that applicant *participated materially* in both flights on

⁶ Ironically, one of the pilots who McCartney claimed to be PIC, "did not advise respondent that his medical certificate had expired in 1977, that he had not had a biennial review, and that he was not qualified in the aircraft in question." McCartney, *supra*, at 2, n.6.

July 10, 2004, even though the law judge did not find that it *established* he was PIC.

Applicant describes the Administrator's theory of the case as follows: "that if two persons are in the aircraft and only one meets the legal qualifications to be pilot-in-command, that person is the pilot-in-command, and that when Mr. Magruder found out that Mr. Good didn't have a medical certificate, it 'implicitly' shifted the burden to him to be pilot-in-command." Appl. Br. at 14. Applicant argues that this is an incorrect legal theory and is not the law.

The Administrator essentially argues that, if applicant, "was told during the first flight that Mr. Good was a diabetic and did not possess a valid medical certificate" (Administrator's Reply at 7), then that fact significantly altered the circumstances of the case:

[The fact that applicant learned that Mr. Good did not have a medical certificate] placed the burden of being the PIC for the second flight upon applicant. He now knew that he was the only individual that could have legally operated the aircraft as PIC and by getting back into the aircraft at Homestead ARB he assumed the responsibility of being the PIC for the second flight.

Id. We note *dicta* in another case addressing the PIC issue:

[Respondent] in effect argues ... that a non-student pilot who, with full knowledge that a student pilot can not [sic] carry a passenger, flies with a student pilot has implicitly accepted

PIC responsibility for the flight. Although we *find considerable merit in respondent's argument*, we need not determine in this case whether it is enough, for purposes of deciding who was the PIC, that [the other pilot] knew that respondent could not be PIC under the applicable regulations.

Harris v. Rajaratnam, NTSB Order No. EA-3497 at 8 (1992)

(emphasis added). Although not determinative in Rajaratnam, we found merit in the argument the Administrator now posits.

Adding further complexity to the determination of who is PIC under a given set of circumstances, Rajaratnam took another turn, as we granted Rajaratnam's appeal based on the other pilot's statement that, as the senior pilot, he would have taken over command from Rajaratnam in an emergency situation:

[W]hile respondent may have been the pilot in charge of the physical management of the aircraft, [the other pilot] was the pilot who possessed the ultimate responsibility for the safety of the operation. His conceded service in that role made him the PIC as that term is defined in the FAR.

Id. at 8.

The Administrator argues that applicant's knowledge at the beginning of the second flight differed from the beginning of the first flight, and this acted to impute a responsibility to him to assume the duties of the PIC for the second flight. In support of this argument, the Administrator refers to the letter purportedly written by applicant saying that Mr. Good told applicant about Mr. Good's medical condition during the first

flight. The law judge agreed that, "[t]here was enough evidence available to the Administrator prior to the hearing to show, arguably, that the Applicant had assumed ultimate responsibility and control of the leg of the flight from Homestead ... to the forced landing, and was the pilot-in-command." (Initial Decision at 7.) The law judge did not allow the letter to be admitted into evidence, however, due to its questionable authenticity. We acknowledge that the authenticity of this evidence is debatable, but, although applicant argues it was error for the law judge to use the letter as a basis for denial of EAJA fees because it was not in evidence, we have considered it as part of the entire administrative record in order to determine whether the Administrator was substantially justified in pursuing the enforcement action.

Determining who is PIC in a given a set of circumstances is not necessarily an easy task. The evidence on which the Administrator proceeded reasonably showed that applicant participated materially in both flights that day, and the record shows that the law judge carefully considered the evidence of both applicant's and Mr. Good's conduct and involvement in the flights.

Applicant has not presented a credible argument for reversing the law judge's decision. Overall, we find that the

Administrator was substantially justified in charging applicant with violating the applicable FARs. The Administrator's allegations were reasonable in fact and in law, and she had sufficient, reliable evidence to pursue the charges against applicant. We do not find that applicant is entitled to an award of attorney fees under EAJA.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and
2. The law judge's decision denying the application for attorney fees and expenses is affirmed.

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